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Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Zurich Insurance PLC UK Branch v International Energy Group Ltd (UKSC) - negligence - insurance - employee with mesothelioma - insurer's liability to indemnify employer - rule of proportionate recovery - appeal allowed

Flight Centre Ltd v Australian Competition and Consumer Commission (FCAFC) - competition - impugned conduct did not occur in market where Flight Centre and airlines supplied services in competition - appeal allowed

Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd (FCAFC) - competition - ANZ and mortgage broker did not compete in market for supply of loan arrangement services - ACCC's appeal dismissed - ANZ's cross-appeal allowed

Alameddine v Glenworth Valley Horse Riding Pty Ltd (NSWCA) - negligence - consumer law - fall from quad bike at respondents' recreational facility - respondents negligent and breached guarantee - compensation - damages

Adisan Pty Ltd v Irwin (NSWCA) - contract - loan agreement - consumer law - guarantee did not extend to cover amended loan facility - appeal dismissed

Pioneer Studios Pty Ltd v Hills (NSWCA) - workers compensation - employee injured at party at employer's premises - erroneous determination of course of employment - appeal allowed

Clayton Utz (a firm) v Dale (VSCA) - contract - partnership - *Protean Holdings* 'split' of trial -

permission to rely on privilege against self-incrimination - appeal allowed to extent of variation of orders

Bare v IBAC (VSCA) - administrative law - refusal to investigate allegation of mistreatment by police - failure to give proper consideration to appellant's human rights - appeal allowed

Coles Group Ltd v Costin (QCA) - limitation of actions - prejudice - extension of limitation to stand provided plaintiff provide undertaking not to prosecute aspect of claim

Cruise Oz Pty Ltd v AAI Ltd (QSC) - insurance contract - motor dealers insurance policy - damage or loss caused to applicant's insured vehicles in flood at trade show - insurer required to indemnify applicant

Summaries With Link (Five Minute Read)

Zurich Insurance PLC UK Branch v International Energy Group Ltd [2015] UKSC 33
Supreme Court of the United Kingdom
Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath & Lord Hodge
Negligence - insurance - employee was negligently exposed to asbestos dust by employer - employee contracted mesothelioma - before his death from mesothelioma employee sued respondent as successor in title of employer and recovered compensation - during the 27 years of employee's exposure employer had two identifiable liability insurances one of which was with Midland Assurance Ltd - appellant (Zurich) was successor to Midland - appellant maintained it was only liable to meet 22.08% of respondent's loss and defence costs because Midland only insured employer for 6/27ths of 27 year period - trial judge ordered Zurich to meet 22.08% of compensation but 100% of defence costs - Court of Appeal ordered Zurich to pay 100% of both compensation and defence costs - Zurich appealed - appeal was from Guernsey where there was no equivalent of *Compensation Act 2006,* which had reversed ruling in *Barker v Corus* [2006] UKHL 20 that each employer was only liable pro rata to period which exposure by it bore to total of all periods of exposure - held: rule of proportionate recovery established in *Barker* remained part of common law in Guernsey - Zurich's appeal allowed in respect of compensation but dismissed in relation to defence costs - trial judge's order restored.
Zurich
[From Benchmark Monday, 3 August 2015]

Flight Centre Ltd v Australian Competition and Consumer Commission [2015] FCAFC 104
Full Court of the Federal Court of Australia
Allsop CJ, Davies & Wigney JJ
Competition - Australian Competition and Consumer Commission commenced proceedings against Flight Centre alleging it contravened s45(2)(a)(ii) *Trade Practices Act 1974* (Cth) -

ACCC alleged that Flight Centre attempted to induce other airlines to make contract, arrangement, or understanding containing provision which substantially lessened competition in a market - primary judge found Flight Centre engaged in alleged conduct and that conduct occurred in market in which Flight Centre and airlines competed, being the market for supply of distribution and booking services in relation to available international passenger air travel - Flight Centre ordered to pay pecuniary penalties totalling $11 million - parties appealed and cross-appealed - whether primary judge correctly characterised supplies made by participants in market for international air passenger transportation - held: primary judge erred in finding Flight Centre and airlines competed in market for distribution and booking services - impugned conduct took place in market for supply of international passenger air travel - in this market Flight Centre acted as agent for, not in competition with, the airlines - appeal allowed - cross-appeal dismissed.

Flight

[From Benchmark Tuesday, 4 August 2015]

Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd [2015] FCAFC 103

Full Court of the Federal Court

Allsop CJ, Davies & Wigney JJ

Competition - Australian Competition and Consumer Commission commenced proceedings against ANZ alleging it contravened ss45(2)(a)(ii) & 45(2)(b)(ii) *Trade Practices Act 1974* (Cth) - ACCC alleged ANZ entered agreement with mortgage broker which contained provision substantially lessening competition in market for supply of loan arrangement services to members of public by loan providers, franchisees and brokers - primary judge found that ANZ did not participate in any market in which brokers provided loan arrangement services to potential borrowers - ACCC appealed - ANZ cross-appealed against finding refunds paid by mortgage broker to borrowers that were subject of agreement with ANZ were “rebates” within the meaning of s45A - held: ACCC failed to demonstrate any error by primary judge - appeal dismissed - cross-appeal allowed.

ACCC

[From Benchmark Wednesday, 5 August 2015]

Alameddine v Glenworth Valley Horse Riding Pty Ltd [2015] NSWCA 219

Court of Appeal of New South Wales

Macfarlan & Simpson JJA; J C Campbell AJA

Negligence - consumer law - appellant injured when she fell off quad bike she was riding at respondents’ recreational facility - appellant sued respondents for negligence and non-compliance with guarantees concerning supply of services under ss60 & 61 *Australian Consumer Law* - at time of injury appellant being led by instructor employed by respondents - primary judge found in favour of respondents - ss5B, 5F, 5K, 5L, 5M, 5N, 16 & 18(1)(a) *Civil Liability Act 2002* (NSW) - ss87M, 87ZA(1)(a), 139A, 139A(3), 139A(4) & 139A(5) *Competition and Consumer Act 2010* (Cth) - held: respondents negligent because instructor caused appellant to travel at excessive speed - injury not result of materialisation of obvious risk -

activity not dangerous recreational activity - respondents warned appellant of risks of riding quad bike but risk that materialised was not inherent in or incidental to that activity - exclusion of liability clause did not form part of contract with appellant - in any event terms of exclusion clause did not extend to respondents' negligence - respondents failed to comply with guarantee under s60 they would perform services with due care and skill - entitlement to compensation under Competition and Consumer Act did not preclude award of damages for non-economic loss calculated under s16 Civil Liability Act - appeal allowed.
Alameddine
[From Benchmark Thursday, 30 July 2015]

Adisan Pty Ltd v Irwin [2015] NSWCA 217
Court of Appeal of New South Wales
Beazley ACJ, Meagher & Gleeson JJA
Contract - guarantee and indemnity - loan agreement between appellant lender and borrower - loan agreement guaranteed by six co-guarantors including respondent - borrower failed to pay money on agreed date - terms of loan renegotiated - proposed amendments included provision of mortgage over property owned by company and guarantee from company - lender, borrower and company agreed that company's liability as guarantor limited to amount realised from sale of property - Deed of Variation executed by appellant, borrower, guarantors and company - agreement as to company's liability not disclosed in Deed or otherwise - borrower failed to pay money due - appellant required payment from guarantors - respondent contended he was discharged from liability as guarantor because of agreement to cap company's liability - primary judge found in favour of respondent - held: respondent not liable as guarantor for money not paid in accordance with original loan facility - guarantee provided for extension of its application to cover amended facility with guarantor's consent - respondent's execution of Deed not effective to extend guarantee to cover moneys due under loan contract as varied as lender, in obtaining respondent's consent by execution of Deed, did not disclose that 'proposed new loan contract' included agreement to cap company's liability - statement in Deed reasonably to be understood as representing that company agreed to guarantee whole obligations of borrower, which was a misleading representation - however respondent not likely to suffer damage from conduct as guarantee did not extend to cover amended facility - appeal dismissed.
Adison
[From Benchmark Monday, 3 August 2015]

Pioneer Studios Pty Ltd v Hills [2015] NSWCA 222
Court of Appeal of New South Wales
Workers compensation - respondent photographer attended party at employer's premises - respondent injured when she fell over a balustrade in stairwell - respondent made worker's compensation claim - Workers Compensation Commission rejected claim - deputy president allowed claim but Court set decision aside - different deputy president upheld claim - appellant appealed - s353(1) *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - whether erroneous approach to fact-finding - whether deputy president erred in reliance on subjective belief of respondent when determining course of employment - held (by majority): fact

that respondent encouraged or induced to attend party not sufficient to render it part of her employment - deputy president took incorrect approach to legal standard or criterion to be applied to determination of course of employment - course of employment depended on objective characterisation of employer's requirements and expectations - appeal allowed.
Pioneer
[From Benchmark Wednesday, 5 August 2015]

Clayton Utz (a firm) v Dale [2015] VSCA 186
Court of Appeal of Victoria
Ashley, Tate & Ferguson JJA
Contract - evidence - partnership - respondent sued firm for wrongful repudiation of partnership agreement - board of firm expelled respondent from partnership - interlocutory orders permitted respondent to 'split' his case based on rule in *Protean (Holdings) Ltd v American Home Assurance Co* [1985] VicRp 18 and to rely upon privileges against self-incrimination and exposure to penalty - firm sought leave to appeal against orders - held (by majority): appeal allowed only to extent of variation of orders - trial judge correct to order a Protean Holdings 'split' of trial but not wholly on basis of reasons given - trial judge correct to conclude privilege against self-incrimination available and respondent could rely upon it until and unless he decided to give evidence to conduct positive case in rebuttal of allegations.
Clayton
[From Benchmark Thursday, 30 July 2015]

Bare v IBAC [2015] VSCA 197
Court of Appeal of Victoria
Warren CJ, Tate & Santamaria JJA
Administrative law - human rights - employee of Office of Police Integrity (OPI) rejected appellant's application to investigate allegation of mistreatment by members of Victorian Police under s40(4)(b)(i)[2] *Police Integrity Act 2008* (Vic) (PIA) - another employee made second decision not to investigate - primary judge dismissed application for judicial review - appellant's rights under *Charter of Human Rights and Responsibilities* (Charter) - whether implied procedural right under s10(b) Charter to 'effective' investigation of claim of breach of human rights stated in section - held (by majority): delegate failed to give proper consideration to appellant's human rights - s109 PIA did not preclude judicial review - appeal allowed.
Bare
[From Benchmark Thursday, 30 July 2015]

Coles Group Ltd v Costin [2015] QCA 140
Court of Appeal of Queensland
Holmes & Gotterson JJA; Applegarth J
Limitation of actions - respondent injured her left knee on 31/705 when working for Coles - in 2009 respondent consulted lawyers who issued urgent notice of claim for damages on 3/9/09 - limitation period had expired - new lawyers sought extension of time - Coles conceded that material fact of decisive character relating to respondent's right of action not within

respondent's means of knowledge before June 2009 - other requirements of s31(2) *Limitation of Actions Act 1974* (Qld) met - whether primary judge erred in exercising discretion to grant extension exercised in respondent's favour - held: exercise of discretion miscarried in circumstances in which respondent did not undertake to avoid material prejudice to Coles arising from witnesses' having no recollection of detail of training and instruction provided to her - leave to appeal granted to correct injustice to Coles - relevant prejudice related to only one aspect of claim - unjust to prevent respondent from litigating other aspects of her claim - injustice to Coles could be addressed by respondent providing undertaking to not prosecute relevant aspect of claim - if undertaking provided order extending limitation period should stand
Coles
[From Benchmark Monday, 3 August 2015]

Cruise Oz Pty Ltd v AAI Ltd [2015] QSC 215
Supreme Court of Queensland
Carmody J
Insurance contract - motor dealers insurance policy - applicant sought declaration that on proper construction, insurance agreement executed by parties extended to cover flood damage sustained by caravans displayed at trade show - whether open for applicant to claim insurance under agreement - proper construction of "your premises" in definition of "your vehicle" in Section 3 of agreement - held: applicant successfully established Section 3 responded to its insurance claim - Section 3 was subject to perils exclusion clause which would substantially preclude recovery in respect of several insured vehicles - the Two Section Exclusion Clause prescribed Section 3 would respond to claim - respondent must indemnify applicant in respect of damage or loss caused to the applicant's insured vehicles on under Section 3 - declaration.
Cruise
[From Benchmark Friday, 31 July 2015]

Snow flakes. (45)
BY EMILY DICKINSON

I counted till they danced so
Their slippers leaped the town –
And then I took a pencil
To note the rebels down –
And then they grew so jolly
I did resign the prig –
And ten of my once stately toes
Are marshalled for a jig!

Emily Dickinson

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