

Tuesday, 16 February 2016

Daily Banking A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Hamed v Elddin (NSWCA) - real property - possession - respondent entitled to exclusive possession of property - leave to appeal refused

Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd (NSWSC) - building contract - negligence - plaintiff entitled to damages in relation to defective concrete paving at container terminal

Fitness First Australia Pty Ltd v Fenshaw Pty Ltd (NSWSC) - leases and tenancies - lessor entitled to relief for plaintiff's failure to pay outgoings under leases

Director of Consumer Affairs Victoria v Mecon Insurance Pty Ltd (VSC) - declarations - contraventions of "sunsetting" *Fire Services Levy Monitor Act 2012* (Vic) - declarations granted

B J Bearings Pty Ltd v Whitehead (VSC) - preliminary discovery - alleged breached of deed poll - preliminary discovery ordered subject to confidentiality regime

Bradshaw v Griffiths (QCA) - real property - easements - road not "reasonably necessary in the interests of the effective use" of respondent's property - appeal allowed

Benchmark

Summaries With Link (Five Minute Read)

Hamed v Elddin [2016] NSWCA 9

Court of Appeal of New South Wales

Meagher & Gleeson JJA; Sackville AJA

Real property - possession - primary Judge declared respondent entitled to exclusive possession of premises - primary judge granted respondent leave to issue writ of possession - applicant and husband vacated premises after applying unsuccessfully for a stay - applicant's husband was undischarged bankrupt - applicant sought leave to appeal - whether applicant had interest in premises to exclusion of husband and bankruptcy trustees - ss58(1)(b), 60(1)(b) & 60(3)(b) *Bankruptcy Act 1966* (Cth) - ss56(1 & 56(2) *Civil Procedure Act 2005* (NSW) - ss63 & 101(2)(r) *Supreme Court Act 1970* (NSW) - held: applicant and husband had contended that each of them contributed to purchase price of premises, but there was no evidence that applicant independently contributed to purchase price - absence of evidence fatal to success of application - leave to appeal refused.

[Hamed](#)

Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd [2016] NSWSC 50

Supreme Court of New South Wales

Ball J

Building contract - negligence - plaintiff sued defendants for defective concrete paving at container terminal - first defendant cross claimed against second defendant for same damage - contractual warranties - assignment - apportionment - estoppel - estoppel by convention - ascertainment of parties to contract - damages - *Competition and Consumer Act 2010* (Cth) - *Civil Liability Act 2002* (NSW) - *Home Building Act 1989* (NSW) - *Trade Practices Act 1974* (Cth) - held: plaintiff entitled to damages from first defendant for costs in relation to replacement of pavement - second defendant liable to pay to first defendant amount which first defendant was liable to pay to plaintiff.

[Tzaneros](#)

Fitness First Australia Pty Ltd v Fenshaw Pty Ltd [2016] NSWSC 47

Supreme Court of New South Wales

Darke J

Leases and tenancies - dispute between plaintiff lessee tenant and defendant lessor as to outgoing and charges payable by tenant pursuant to two leases - competing contentions concerning construction of outgoing and charging provisions - "in respect of the Premises" - s3A *Land Tax Management Act 1956* (NSW) - held: Court construed lease in manner contended for by defendant - defendant entitled to relief for plaintiff's failure to pay outgoing under leases.

[Fitness First](#)

Director of Consumer Affairs Victoria v Mecon Insurance Pty Ltd [2016] VSC 42

Benchmark

Supreme Court of Victoria

Elliott J

Declaratory relief - plaintiff continued proceedings against defendants for contraventions of *Fire Services Levy Monitor Act 2012* (Vic) - parties provided minute of consent orders seeking declarations that defendants had contravened ss26 & 31 and order pursuant to s102 that defendants cause notice to be published acknowledging the contraventions - whether Court satisfied it was appropriate to make orders - power to make declarations - appropriateness of declarations - held: contravened Act had been "sunsetting" - declaratory relief would have no function in respect of parties' conduct, other insurers or public, but utility of declarations would be to publicly state that the Act was contravened in the manner alleged and to indicate the Court's disapproval or condemnation of contraventions - declarations made

[Director of Consumer Affairs](#)

B J Bearings Pty Ltd v Whitehead [2016] VSC 44

Supreme Court of Victoria

Hargrave J

Preliminary discovery - applicant considering suing respondents for breaches of restraints on first respondent in Deed Poll and company and assistance with breaches by company and second respondent - applicant under r32.05 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) sought preliminary discovery from respondents - reasonableness of applicant's inquiries - whether applicant's information sufficient - held: preliminary discovery ordered subject to confidentiality regime.

[B J Bearings](#)

Bradshaw v Griffiths [2016] QCA 20

Court of Appeal of Queensland

Fraser, Gotterson & Morrison JJA

Real property - easements - respondent owned property which he subdivided into two properties- appellant purchased one of the properties - respondent continued to use road (Road A) leading from his property through appellant's property by informal agreement - by informal agreement respondent constructed another road (Road D) which crossed appellant's property - appellant denied respondent permission to cross her property - respondent granted statutory right of user for Road A and Road D pursuant to s180 *Property Law Act 1974* (Qld) - appellant sought to appeal - held: in the circumstances Road D was not "reasonably necessary in the interests of the effective use" of respondent's property - preference for Road D did not meet test under s180 - appeal in allowed in relation to easement over Road D allowed

[Bradshaw](#)

[Click Here to access our Benchmark Search Engine](#)