



Friday, 2 December 2016

Daily Composite Insurance, Banking, Construction & Government 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.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Wilmington Trust Company (Trustee) v The Ship "Houston" (FCA) - admiralty - jurisdiction - conversion - detinue - Court had jurisdiction to determine plaintiffs' action *in rem* (I B C G)

Agricultural Societies Council of NSW v Christie (NSWCA) - associations and clubs - judicial review - applicant's decision not amenable to judicial review - no reasonable apprehension of bias on part of applicant's director - appeal allowed (I B C G)

Wilkes v Bykowski (NSWSC) - real property - possession - summary judgment - defendant had no arguable defence to claim for possession - plaintiff registered proprietor granted possession of land (B)

Funtastic Ltd v Madman Film and Media Pty Ltd (VSC) - contract - independent accountant made manifest error in expert determination - declaration - dispute referred to independent accountant for re-determination (B)

Stevens v Spotless Management Services Pty Ltd (VSCA) - contract - dispute concerning amount due to applicant following termination of employment - applicant established contract - appeal allowed (I B)

Balbi v Alcoa of Australia Ltd (WASC) - costs - indemnity costs - discontinuance of third party proceeding - defendant to pay third party's costs - indemnity costs not warranted (I B C G)

Cooper & Oxley Builders Pty Ltd v Steensma (WASC) - judicial review - construction contract - two erroneous determinations under *Construction Contracts Act 2004* (WA) quashed (I B C G)

Summaries With Link (Five Minute Read)

Wilmington Trust Company (Trustee) v The Ship “Houston” [2016] FCA 1349

Federal Court of Australia

Siopis J

Admiralty - jurisdiction - conversion - detinue - plaintiffs commenced action against defendant United States of America flagged vessel with port of registry in Delaware - plaintiffs claimed relief in respect of bareboat charterparty between first plaintiff and person named on writ (TBONE) - TBONE sought various orders - sole issue remaining for determination was whether Court had jurisdiction to determine action *in rem* - ss4(2), 4(2)(a), 4(2)(a)(i), 16 & 18 *Admiralty Act 1988* (Cth) - whether plaintiffs had established *in rem* jurisdiction - held: claims for loss and damage from detention and/or conversion, and for delivery up were claims relating to possession of a ship - plaintiffs had properly invoked *in rem* jurisdiction under s16 of the Act.

[Wilmington](#) (I B C G)

Agricultural Societies Council of NSW v Christie [2016] NSWCA 331

Court of Appeal of New South Wales

Meagher, Ward & Leeming JJA

Associations and clubs - judicial review - applicant not-for-profit organisation provided services to member show societies - horse ridden by respondent horse trainer selected to undergo drug testing by applicant's director (Mr Capp) - testing revealed two prohibited substances were present - disciplinary committee constituted by Mr Capp and other directors of applicant, found respondent breached Agricultural Societies Council Rules through use of substances and imposed 12 month's suspension from competition - respondent sought to set aside or quash committee's decision - primary judge found decision amenable to judicial review - primary judge found apprehended bias by Mr Capp and quashed decision - held: primary judge erred in concluding respondent entitled to any relief, in nature of certiorari private law remedy - primary judge erred in concluding reasonable apprehension of bias or part of Mr Capp - appeal dismissed.

[Agricultural](#) (I B C G)

Wilkes v Bykowski [2016] NSWSC 1685

Supreme Court of New South Wales

Davies J

Real property - possession of land - plaintiff was registered proprietor of land - plaintiff sought summary judgment for possession of the land - defendant was in possession of land and was person with whom plaintiff had had relationship, the extent of which was in dispute - defendant

contended Family Court should decide which part was entitled to what share of property and that present proceedings were stayed by order of registrar of the Family Court with result plaintiff unable to seek summary judgment - held: Court satisfied there was no agreement for stay of proceedings - Registrar's reference to proceedings was notation only - defendant had no arguable defence to claim for possession - summary judgment granted to plaintiff.

[Wilkes](#) (B)

Funtastic Ltd v Madman Film and Media Pty Ltd [2016] VSC 708

Supreme Court of Victoria

Almond J

Contract - proceedings concerning enforceability of independent accountant's expert determination - parties had engaged independent accountant under share sale agreement's dispute resolution provisions - plaintiff sought declarations that independent accountant made 'manifest errors' and sought consequential declaratory relief - principles applicable to review of expert determination - held: independent account made manifest error in concluding it was unnecessary to consider 'Half-Year Accounts' - independent accountant's decision with respect to 'MPC Revenue item' not binding - Court unable to determine MPC Revenue issue - declaration made - MPC Revenue dispute referred to independent account for re-determination.

[Funtastic](#) (B)

Stevens v Spotless Management Services Pty Ltd [2016] VSCA 299

Court of Appeal of Victoria

Kyrou & McLeish JJA; Elliott AJA

Contract - dispute concerned amount due to applicant following termination of applicant's employment with respondent - applicant contended respondent had failed to honour subsequent oral agreement concerning employment's termination - trial judge dismissed claim - applicant challenged trial judge's findings concerning meetings - whether parties entered contract under which applicant would leave respondent's employment in return for payment of his entitlements - rejection of evidence - consideration - mistake - held: applicant succeeded in establishing contract - judgment for plaintiff - appeal allowed.

[Stevens](#) (I B)

Balbi v Alcoa of Australia Ltd [2016] WASC 388

Supreme Court of Western Australia

Le Miere J

Costs - indemnity costs - Court granted defendant's application for leave to discontinue third party proceeding - third party sought orders for payment by defendant of its costs incurred on indemnity basis - defendant accepted it should pay third party's except in respect of discovery costs concerning certain allegation - whether unreasonable rejection of *Calderbank* offer - whether special or unusual feature to justify indemnity costs - O 23 r2 *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014* (WA) - *Rules of the Supreme Court 1971* (WA) - held: third party did not make out entitlement to indemnity costs - defendant

Benchmark

ordered to pay third party's taxed costs 'without reference to limits in item 7' of scale of costs in *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014* (WASC). [Balbi](#) (I B C G)

Cooper & Oxley Builders Pty Ltd v Steensma [2016] WASC 386

Supreme Court of Western Australia

Le Miere J

Judicial review - construction contract - applicant entered construction contract with company (AM Land) which made two claims for progress payments - applicant contended it was entitled to set off its entitlement to liquidated damages and damages for rectification against amount claimed by AM Land - first adjudicator determined that AM Land's claims and applicant's asserted set off gave rise to payment dispute under *Construction Contracts Act 2004* (WA) and that he did not have jurisdiction to adjudicate more than one payment dispute - adjudicator adjudicated only dispute in respect of one of AM Land's progress claims, determining applicant liable to AM Land - AM Land sought to have dispute concerning second progress claim adjudicated - second adjudicator found applicant could not assert its set off and was liable to AM Land - applicant sought to quash both determinations - ss6, 26, 27, 31 & 32 *Construction Contracts Act 2004* (WA) - held: both first and second adjudicator erred in respect of their determinations - both determinations quashed.

[Cooper & Oxley](#) (I B C G)

CRIMINAL

Executive Summary

Brar v The Queen (VSCA) - criminal law - attempting to import commercial quantity of border controlled precursor - leave to appeal refused in respect of conviction - grounds of appeal with respect to sentence 'wholly without merit' - appeal dismissed

Roland v Tasmania (TASCCA) - criminal law - drug trafficking - appellant's appeal against conviction dismissed - Director of Public Prosecution's appeal against sentence on ground of manifest inadequacy dismissed

Summaries With Link

Brar v The Queen [2016] VSCA 281

Court of Appeal of Victoria

Redlich, Hansen & McLeish JJA

Criminal law - applicant found guilty on one charge of attempting to import commercial quantity

of border controlled precursor contrary to ss11.1(1) & 307.11 *Criminal Code* (Cth) and sentenced to 11 years in prison with 8 year non-parole period - applicant sought to appeal against conviction and sentence - whether all of applicant's conduct on which Crown relied was within extended definition of 'import' in s300.2 - whether requirements for proving attempt bore upon whether conduct constituted 'dealing' - whether Crown precluded from relying on inferential reasoning in proving fault element of intention to import by Court's majority reasoning in *Afford v The Queen* (2016) 308 FLR 1 - whether sentence manifestly excessive - held: leave to appeal refused in respect of conviction - leave to appeal granted in respect of sentence - grounds of appeal 'wholly without merit' - appeal dismissed.

[Brar](#)

Roland v Tasmania [2016] TASCCA 20

Court of Criminal Appeal of Tasmania

Blow CJ; Estcourt & Brett JJ

Criminal law - appellant appealed against conviction by jury on counts of drug trafficking - Director of Public Prosecutions appealed against sentence on ground of manifest inadequacy - meaning of 'traffick' in *Drugs and Poisons and Controlled Substances Act 1981* (Vic) - admissibility of evidence - propensity - tendency - coincidence - evidence of possession of firearms - previous acquittal - s3 *Misuse of Drugs Act 2001* (Tas) - held: appeal against conviction dismissed - sentence not manifestly inadequate - appeal against sentence dismissed.

[Roland](#)

Benchmark

The Sun's Shame (Sonnets XCII and XCIII)

By [Dante Gabriel Rossetti](#)

I
Beholding youth and hope in mockery caught
From life; and mocking pulses that remain
When the soul's death of bodily death is fain;
Honour unknown, and honour known unsought;
And penury's sedulous self-torturing thought
On gold, whose master therewith buys his bane;
And longed-for woman longing all in vain
For lonely man with love's desire distraught;
And wealth, and strength, and power, and pleasantness,
Given unto bodies of whose souls men say,
None poor and weak, slavish and foul, as they:—
Beholding these things, I behold no less
The blushing morn and blushing eve confess
The shame that loads the intolerable day.

II
As some true chief of men, bowed down with stress
Of life's disastrous eld, on blossoming youth
May gaze, and murmur with self-pity and ruth,—
"Might I thy fruitless treasure but possess,
Such blessing of mine all coming years should bless;"—
Then sends one sigh forth to the unknown goal,
And bitterly feels breathe against his soul
The hour swift-winged of nearer nothingness:—
Even so the World's grey Soul to the green World
Perchance one hour must cry: "Woe's me, for whom
Inveteracy of ill portends the doom,—
Whose heart's old fire in shadow of shame is furl'd:
While thou even as of yore art journeying,
All soulless now, yet merry with the Spring!"

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