

Friday, 3 November 2017

## Daily Civil Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No 2)** (FCAFC) - costs - appellant succeeded on two out of three grounds of appeal - respondents to pay 70% of appellant's costs of appeal and cross-appeal (I B C G)

**Hawcroft v Jamieson** (NSWSC) - corporations - resolution of directors of company was invalid and of no effect - declaration made (I B C G)

**Ozaltay & Anor v Atilla & Anor** (VSC) - trusts - loan - claims for transfer of property and repayment of money pursuant to alleged loan dismissed (I B C G)

**Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited** (QCA) - damages - loss of opportunity - contract - claim for loss of opportunity to acquire and develop land at profit - appellant awarded \$250,000 - appeal allowed (I B C G)

**Ryan v Simon George & Sons Pty Ltd & Anor** (QSC) - trover and detinue - possession - substantial dispute of fact - inappropriate to commence proceedings by application - declarations refused (I B C G)

**Kelly v Fairfax Media Limited** (ACTSC) - interlocutory injunction - defamation - application to restrain defendant from publishing any article identifying plaintiff, plaintiff's family or associates - balance of convenience did not favour injunction - injunction refused (I B C G)

**Manny v Strong Law** (ACTSC) - pleadings - summary judgment - Court satisfied it should strike out statement of claim against third defendant - judgment granted to third defendant (I B C G)

## Summaries With Link (Five Minute Read)

### **Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No 2) [2017] FCAFC 168**

Full Court of the Federal Court of Australia  
Middleton, Beach & Moshinsky JJ

Costs - appellant was successful on two out of three issues on appeal - appellant accepted reduction in costs was appropriate due to its lack of success on one issue which occupied a 'not insignificant' proportion of submissions - appellant sought that respondents pay 80 per cent of its costs of appeal and cross-appeal - respondent accepted it should pay applicant's costs of cross-appeal - respondents submitted departure from usual order as to costs of appeal appropriate on basis applicant did not succeed on 'severable issue that substantially increased the costs of the appeal' - s43 *Federal Court of Australia Act 1976* (Cth) - held: Court concluded respondents should pay 70 per cent appellant's costs of appeal and cross-appeal.

[Australian Competition and Consumer Commission](#) (I B C G)

### **Hawcroft v Jamieson [2017] NSWSC 1478**

Supreme Court of New South Wales  
Gleeson JA

Corporations - proceeding concerned family dispute in relation to corporate governance of company - plaintiff (Jennifer Hawcroft) appointed director of company following death of husband (Martin Hawcroft) - plaintiff was legal personal representative of Martin Hawcroft's estate entitled to be registered as holder of shares held by Martin Hawcroft - there had not yet been transfer of shares - first defendant (Michelle Hawcroft) and second defendant (John Hawcroft) were siblings of Martin Hawcroft and also Peter Hawcroft - Peter Hawcroft ceased to be shareholder and director of company - Martin Hawcroft, Michelle Hawcroft and John Hawcroft were company's directors and equal shareholders between 31 August 2011 and 30 April 2012 - present directors were Jennifer Hawcroft, Michelle Hawcroft and John Hawcroft - central issue was validity of resolution of directors in 2016 (chairperson resolution) carried by majority which appointed Michelle Hawcroft as company's chairperson with authority additional to other directors - *Duomatic* principle - whether binding agreement subject of Protocol only operative during Martin Hawcroft's lifetime - whether Protocol binding - whether contravention of Protocol - requirements for constitution's alteration under *Corporations Act 2001* (Cth) - Anshun estoppel - Sch 4, Arts 70, 85, 86 *Companies Act 1961* (NSW) - ss232, 233, 234, 236, 237 & 1072E *Corporations Act 2001* (Cth) - held: resolution was invalid and of no effect - declaration.

[View Decision](#) (I B C G)

## **Ozaltay & Anor v Atilla & Anor [2017] VSC 664**

Supreme Court of Victoria

McMillan J

Trusts - loan - proceeding concerned ownership of property registered in defendants' names - defendants were adult children of plaintiffs - plaintiffs lived in property - plaintiffs sought that defendants transfer property to them on basis of common intention constructive trust - plaintiffs also made oral application seeking to add alternative claim of resulting trust - plaintiffs also sought payment of sum of £10 000 from first defendant pursuant to alleged loan made in Cypress - second defendant did not resist constructive trust claim or transfer of her share in property - first defendant opposed plaintiffs' claims and denied interest should be transferred - held: plaintiffs' claims dismissed.

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

## **Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited [2017] QCA 254**

Court of Appeal of Queensland

Philippides & McMurdo JJA; Boddice J

Damages - loss of opportunity - appellant made contract claim for damages for loss of opportunity to acquire and develop land at profit - trial judge found appellant would have lost money from development with result there was no compensable loss - trial judge awarded nominal damages - appellant contended judge erred in finding there was no compensable loss and erred in finding appellant would have lost money - if there was compensable loss, there was contest concerning assessment of value of commercial opportunity appellant lost by respondent's breach and repudiation - held: primary judge erred in finding that 'commercial opportunity which would probably result in a loss' was worthless - prospect of development proceeding was small but if it had proceeded profitability was highly probable - opportunity had value to be quantified with regard to potential profit and also potential loss - damages to be discounted for contingences - appellant awarded \$250,000 in damages - appeal allowed.

[Principal Properties](#) (I B C G)

## **Ryan v Simon George & Sons Pty Ltd & Anor [2017] QSC 247**

Supreme Court of Queensland

Henry J

Trover and detinue - possession - applicant sought declaration of entitlement to entire beneficial interest in motor vehicle and declaration first respondent not entitled to charge and/or possession of motor vehicle - s17 *Civil Proceedings Act 2011* (Qld) - r11 *Uniform Civil Procedure Rules 1999* (Qld) - 'substantial dispute of fact' - 'possession is determinative' - whether correct to commence proceeding by application - held: there was substantial dispute of fact whether applicant owned vehicle which made it inappropriate to start proceeding by application - declarations refused.

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

## **Kelly v Fairfax Media Limited [2017] ACTSC 322**

Supreme Court of the Australian Capital Territory  
Mossop J

Interlocutory injunction - defamation - applicant sought to restrain defendant from publishing any article identifying plaintiff, plaintiff's family or associates - whether procedural deficiency concerning manner of commencement of proceedings significant - absence of pleading - 'lack of crystallisation of the issues' - potential for operation of defences to defamation - serious question to be tried - balance of convenience - r39 *Court Procedures Rules 2006 (ACT)* - held: balance of convenience did not favour granting of injunction - injunction refused.

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

## **Manny v Strong Law 2017] ACTSC 31**

Supreme Court of the Australian Capital Territory  
McWilliam AsJ

Pleadings - summary judgment - proceedings followed proceedings in Family Court of Australia involving plaintiff and former wife - first defendant was plaintiff's solicitor in Family Court proceedings - third defendant acted for plaintiff's former wife in Family Court proceedings - plaintiff alleged professional negligence, misrepresentation or misstatement of fact and non-compliance with court orders against first and third defendants, seeking compensation or damages for economic loss, mental harm and physical injuries from mental harm - third defendant sought to strike out statement of claim insofar as it related to third defendant and summary judgment - third defendant also sought declaration plaintiff was vexatious litigant under s67A *Supreme Court Act 1933 (ACT)* - whether to strike out claim - whether to grant summary judgment - whether plaintiff was vexatious litigant - held: Court satisfied it should strike out statement of claim against third defendant - judgment granted to third defendant.

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

## CRIMINAL

### Executive Summary

**Kelly v R (NSWCCA)** - criminal law - sentence appeal - contention of lack of parity between sentence, and sentence imposed on co-offender - appeal dismissed

**DPP v Woodford (VSCA)** - criminal law - child homicide - sentence appeal - sentence was not manifestly inadequate - appeal dismissed

### Summaries With Link



## **Kelly v R [2017] NSWCCA 256**

Court of Criminal Appeal of New South Wales

Basten JA; Beech-Jones & Fagan JJ

Criminal law - applicant sought leave to appeal against sentence for attempted armed robbery - applicant sentenced to 5 years and 11 months in prison with non-parole period of 3 years and 6 months - applicant contended there was lack of parity between sentence, and sentence imposed on co-offender - co-offender was sentenced to aggregate sentence of 9 years and 6 months with non-parole period of 7 years 1 month and 15 days - aggregate sentence related to offences including attempted armed robbery offence committed with applicant (common offence) - whether lack of parity demonstrated by comparison of "actual effect" of co-offender's sentence with applicant's sentence - ss97, 111, 117 & 344A *Crimes Act 1900* (NSW) - *Postiglione v The Queen* (1997) 189 CLR 295 - held: no 'justifiable sense of grievance' arising from co-offender's sentence - appeal dismissed.

[View Decision](#)

## **DPP v Woodford [2017] VSCA 312**

Court of Appeal of Victoria

Weinberg, Osborn & Priest JJA

Criminal law - child homicide - respondent pleaded guilty to child homicide contrary to s5A *Crimes Act 1958* (Vic) - respondent sentenced to 9 years and 6 months in prison with non-parole period of 6 years and 6 months - maximum penalty was 20 years in prison - Director of Public Prosecutions appealed against sentence on basis of manifest inadequacy in respect both of total effective sentence and non-parole period - held: having regard to mitigating factors Court not satisfied that sentence was manifestly inadequate - sentence was lenient but not 'wholly outside' range of reasonably available sentences - appeal dismissed.

[DPP](#)



# Benchmark

**Song: "Fear no more the heat o' the sun"**

**By:** William Shakespeare  
(from Cymbeline)

Fear no more the heat o' the sun,  
Nor the furious winter's rages;  
Thou thy worldly task hast done,  
Home art gone, and ta'en thy wages:  
Golden lads and girls all must,  
As chimney-sweepers, come to dust.

Fear no more the frown o' the great;  
Thou art past the tyrant's stroke;  
Care no more to clothe and eat;  
To thee the reed is as the oak:  
The scepter, learning, physic, must  
All follow this, and come to dust.

Fear no more the lightning flash,  
Nor the all-dreaded thunder stone;  
Fear not slander, censure rash;  
Thou hast finished joy and moan:  
All lovers young, all lovers must  
Consign to thee, and come to dust.

No exorciser harm thee!  
Nor no witchcraft charm thee!  
Ghost unlaid forbear thee!  
Nothing ill come near thee!  
Quiet consummation have;  
And renownèd be thy grave!

[https://en.wikipedia.org/wiki/William\\_Shakespeare](https://en.wikipedia.org/wiki/William_Shakespeare)

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