

Friday 14 March 2014

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.

Executive Summary (1 minute read)

AV8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd (NSWCA) - negligence - contract – proportionate liability - helicopter pilot not negligent - no breach of bailment - appeal dismissed (I B C)

Nonox Australia v Certain Underwriters at Lloyds Subscribing to Contract No CV0263CGL (NSWSC) - security for costs - public and product liability insurance policy - company to provide security for underwriters' costs (I B)

Metier3 Pty Ltd v Enwerd Pty Ltd (VSC) - contract - deed of settlement - architect entitled to payment after Certificate of Practical Completion issued by Superintendent (C)

Matthews v SPI Electricity (Ruling No 36) (VSC) – expert evidence – no limitation imposed on cross examination of opponent's expert (I B C G)

La Spina v Macdonnells Law (QCA) - judicial review - costs assessment - solicitors' costs - denial of natural justice - appeal allowed (I)



Beyfield Pty Ltd v Northbuild Construction Sunshine Coast Pty Ltd (QSC) - building contract - retention clause confined to *debts due* - contractor not entitled to retain bank guarantees (C)

Kennedy v CCB (ACT) Pty Ltd t/as Construction Control (ACTSC) - work injury damages - employer's duty of care - employee injured by plant driven by another employee - employer liable and vicariously liable (I)

Summaries with links (5 minute read)

AV8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd [2014] NSWCA 46

Court of Appeal of New South Wales

Barrett, Hoeben & Ward JJA

Negligence – economic loss - proportionate liability - contract - implied terms - appellant's helicopter damaged when it struck overhead powerline - respondent was bailee of helicopter - helicopter owner claimed damages for diminution in resale value of helicopter and loss of profits during period it could not be used or hired while under repair - ss5B, 5C & 5D *Civil Liability Act 2002* (NSW) - whether pilot negligent - held: no error in trial judge's findings about weather conditions and cloud cover which restricted movement of the aircraft - no breach of duty by pilot - pilot acted reasonably to comply with *Civil Aviation Regulations* - no breach of implied term of contract that bailee through its pilot would exercise reasonable care to comply with the civil aviation legislation - appeal dismissed.

[AV8 Air Charter Pty Ltd](#) (I B C)

Nonox Australia v Certain Underwriters at Lloyds Subscribing to Contract No CV0263CGL [2014] NSWSC 221

Supreme Court of New South Wales

McDougall J

Security for costs - corporations - public and products liability insurance - plaintiff supplied product to bus operators - operators reported problems in exhaust systems that might have arisen from impurities in product - supplier and associated companies negotiated insurance policy with first and defendant underwriters through third defendant broker - underwriters denied liability and sought security for costs pursuant to s1335 *Corporations Act 2001* (Cth) and r42.21(1)(d) *Uniform Civil Procedure Rules 2005* (NSW) - held: supplier not able to meet order for security from own means thus would not be able to meet costs if ordered to do so - ground made out for ordering security - underwriters' decision to decline liability not so manifestly irrational that it should be regarded as something done other than in good faith - insurers not in different category to other applicants for security for costs - no basis to conclude ordering security would stultify litigation - plaintiff to provide security for underwriters' costs.

[Nonox Australia](#) (I B)

**Metier3 Pty Ltd v Enwerd Pty Ltd [2014] VSC 80**

Supreme Court of Victoria

Vickery J

Building contract - deed of settlement - plaintiff was architect for redevelopment - separate question stated for determination pursuant to r47.04 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - parties entered into Architect Consultant Agreement - architect made claims for payment under agreement - after dispute, parties entered deed of settlement - defendants refused to pay final instalment - deed provided that last instalment would be paid on practical completion - held: construction of clause, when read alongside definition of *Practical Completion* in deed, meant that architect's entitlement to payment of last instalment under deed arose when a Certificate of Practical Completion duly issued in accordance with terms of deed had been issued by Superintendent.

[Metier3 Pty Ltd](#) (C)**Matthews v SPI Electricity (Ruling No 36) [2014] VSC 82**

Supreme Court of Victoria

J Forrest J

Evidence - expert witnesses - engineer produced report and gave evidence in concurrent evidence session - plaintiff's counsel sought to cross-examine engineer - SPI sought to impose conditions on questioning of engineer - ss42 & 79 *Evidence Act 2008* (Vic) - s65H *Civil Procedure Act 2010* (Vic) - O44 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - held: court not satisfied engineer's evidence in chief could be characterised as unfavourable to plaintiff's case, that engineer could be characterised as having an interest consistent with that of cross-examiner, or that engineer was sympathetic to plaintiff generally or on a particular point - court not satisfied facts would be better ascertained without use of leading questions - counsel should be permitted to cross-examine engineer without subjection to limitations.

[Matthews](#) (I B C G)**La Spina v Macdonnells Law [2014] QCA 44**

Court of Appeal of Queensland

Holmes & Muir JJA; Mullins J

Judicial review - costs agreement - solicitors' costs - natural justice - client appealed against order of requiring her to costs assessed under *Legal Profession Act 2007* (Qld) incurred by firm in representing client in matrimonial litigation - client alleged primary judge erred in not granting her an adjournment and in entering judgment under r743H *Uniform Civil Procedure Rules 1999* (Qld) when there were still issues to be determined between parties - rr742 and 743I - held: proceeding with hearing in absence of client and before time for service prescribed in the Rules had elapsed was denial of natural justice - as firm was seeking substantial judgment against client she should have been given a reasonable time within which to consider application and prepare for a hearing - appeal allowed.

[La Spina](#) (I)



Beyfield Pty Ltd v Northbuild Construction Sunshine Coast Pty Ltd [2014] QSC 12

Supreme Court of Queensland

Martin J

Building contract - subcontractor entered agreement with head contractor to carry out mechanical works for construction of building on Thursday Island - subcontractor provided head contractor with bank guarantees as security for performance of work under agreement - head contractor gave notice to subcontractor of intention to have recourse to bank guarantees alleging subcontractor had incurred additional costs as result of alleged breach of subcontract with respect to Indigenous Employment Policy and other matters - subcontractor sought declarations head contractor was not entitled to retain bank guarantees and subcontractor did not breach policy - held: s67J *Queensland Building Services Authority Act 1991* (Qld) confined operation of retention clauses to *debts due* - term of agreement relied upon by head contractor was inconsistent with s67J to extent it purported to allow access to security for purposes of satisfying claims which were not for amounts owed - head contractor could not use securities for its unliquidated claims - applicant successful.

[Beyfield Pty Ltd](#) (C)

Kennedy v CCB (ACT) Pty Ltd t/as Construction Control [2014] ACTSC 36

Supreme Court of the Australian Capital Territory

Master Harper

Work injury damages - employer's duty of care - vicarious liability - plaintiff was carpenter employed by defendant - plaintiff suffered crush injury to foot while assisting another employee plant driver when wheel of plant ran over foot - plant was hired by employer - plaintiff claimed injury arose from employer's failure to provide safe system of work and that employer was vicariously liable for negligence of driver - s100 *Civil Law (Wrongs) Act 2002* (ACT) - held: court satisfied employer failed to provide plaintiff with safe system of work and that this was a cause of his injury - court satisfied driver was negligent - driver was driving plant in course of employment - employer vicariously liable for driver's negligence - no contributory negligence judgment for plaintiff.

[Kennedy](#) (I)

Tanka

by Sadakichi Hartmann

I.

Winter? Spring? Who knows?
White buds from the plumtrees wing
And mingle with the snows.
No blue skies these flowers bring,
Yet their fragrance augurs Spring.



II.

Oh, were the white waves,
Far on the glimmering sea
That the moonshine laves,
Dream flowers drifting to me,--
I would cull them, love, for thee.

III.

Moon, somnolent, white,
Mirrored in a waveless sea,
What fickle mood of night
Urged thee from heaven to flee
And live in the dawnlit sea?

IV.

Like mist on the leas,
Fall gently, oh rain of Spring
On the orange trees
That to Ume's casement cling--
Perchance, she'll hear the love-bird sing.

V.

Though love has grown cold
The woods are bright with flowers,
Why not as of old
Go to the wildwood bowers
And dream of--bygone hours!

VI.

Tell, what name beseems
These vain and wandering days!
Like the bark of dreams
That from souls at daybreak strays
They are lost on trackless ways.



[Sadakichi Hartmann](#)

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