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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)

Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) (FCAFC) - contract - employment contract - Workplace Harassment and Discrimination Policy - appeal against damages judgment and adverse costs order - appeal dismissed except in respect of partial variation of costs order (I B C G)

IA v TA (No 3) (NSWCA) - judgments and orders - motor vehicle accident - application to appeal from orders made in case management of Protective List matter - summons dismissed (I B C G)

Cisera v Cisera Holdings Pty Ltd (NSWSC) - equity - trusts and trustees - advantageous dealings - application for orders in relation to Trust Deed under s81(1) *Trustee Act 1925* (NSW) refused - summons dismissed (I B C G)

Melbourne City Investments Pty Ltd v Myer Holdings Limited (VSCA) - stay - abuse of process - applicant's securities class action against respondent permanently stayed as abuse of process - appeal dismissed (I B C G)

Alan Hickenbotham P/L v The Australian Kidney Foundation (SASC) - discovery - privilege - waiver - legal professional privilege upheld in respect of documents - challenge to maintenance of privilege failed (I B C G)

Gemini Energy and Minerals Pty Ltd v Luff (WASC) - contract - written agreement for purchase by defendant of shares in plaintiff - failure to pay amounts on dates specified in agreement - instalments payable as debts - judgment for plaintiff (I B C G)

Construction Occupations Registrar v Bates (No 2) (ACTCA) - costs - no reason to depart from usual order as to costs - respondent to pay successful appellant's costs of proceedings (I B C G)

Summaries With Link (Five Minute Read)

Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) [2017] FCAFC 102

Full Court of the Federal Court of Australia

Allsop CJ; Rares & McKerracher JJ

Contract - employment contract - primary judge found Workplace Harassment and Discrimination Policy did not form part of appellant's employment contract and, if it had, respondent did not breach contract or policy, or repudiate contract - Full Court found policy formed part of contract and that respondent had breached it - question of repudiation and damages remitted - costs of remittal hearing reserved for determination by judge determining remittal questions - appellant appealed against primary judge's award of nominal damages only and against adverse costs order - whether erroneous failure to find contractual term which required compliance with Policy was essential - whether erroneous failure to determine whether respondent repudiated contract, and erroneous failure to find breaches insufficiently serious to justify termination - appellant also contended primary judge erred in failing to find losses could 'reasonably be supposed to have been in the contemplation of the parties' when they made the contract as 'probable result of the breaches' - held: appeal dismissed except for partial variation of costs order.

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

IA v TA (No 3) [2017] NSWCA 178

Court of Appeal of New South Wales

McColl & Meagher JJA

Judgments and orders - motor vehicle accident - applicant sought to appeal from orders made in case management of Protective List matter which Court remitted for further hearing following allowing of appeal - *NSW Trustee and Guardian Act 2009* (NSW) - s101(2)(e) *Supreme Court Act 1970* (NSW) - held: orders concerned practice and procedure - orders' terms did not have effect which could result in substantial injustice to applicant - no 'sensible basis' identified, to contend any error in making of orders - summons dismissed.

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

Cisera v Cisera Holdings Pty Ltd [2017] NSWSC 960

Supreme Court of New South Wales

Parker J

Equity - trusts and trustees - advantageous dealings - plaintiffs sought orders in relation to vesting date in Trust Deed under s81(1) *Trustee Act 1925* (NSW) - identification of 'list of dealings' - 'transaction' - 'disposition' - whether dealing 'expedient' in trust property's 'management or administration' - held: sought orders were beyond authorisation of 'transactions' for purposes of s81 - plaintiffs' proposal was not 'expedient' - summons dismissed.

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

Melbourne City Investments Pty Ltd v Myer Holdings Limited [2017] VSCA 187

Court of Appeal of Victoria

Osborn, Whelan & Ferguson JJA

Stay - abuse of process - applicant was created as vehicle to bring class actions for breach of continuous disclosure provisions in *Corporations Act 2001* (Cth) - applicant held small parcels of shares in publicly listed companies - applicant held shares it purchased in respondent - applicant was lead plaintiff in securities class action against respondent - company associated with sole director of applicant (BSLLP) was sole shareholder of applicant - applicant had commenced other class actions against companies in which it held shares - BSLLP had been litigation funder for applicant in other securities class actions in which director had acted as solicitor for plaintiff - primary judge granted permanent stay of current proceeding on basis its predominant purpose was 'to generate income or revenue for interests associated' with director - held: primary judge correct to stay proceeding - proceeding had been instituted to gain 'collateral advantage' - proceeding was abuse of process.

[Melbourne City Investments](#) (I B C G)

Alan Hickinbotham P/L v The Australian Kidney Foundation [2017] SASC 108

Supreme Court of South Australia

Master Roder

Discovery - legal professional privilege - contract - leases and tenancies - defendant challenged plaintiff's claims to privilege over documents - defendant contended pleadings put plaintiff's state of mind into issue, that legal advice which plaintiff sought and was given was relevant to issue, and that privilege's maintenance was inconsistent with plaintiff putting state of mind in issue - held: nothing in pleadings was inconsistent with maintenance of privilege - privilege had not been waived.

[Alan Hickinbotham](#) (I B C G)

Gemini Energy and Minerals Pty Ltd v Luff [2017] WASC 190

Supreme Court of Western Australia

Le Miere J

Contract - parties made written agreement that defendant would pay amount to plaintiff shares in plaintiff - agreement provided that \$100,000 payable on agreement's execution with balance payable by instalments - defendant did not pay the \$100,000 on execution or instalments on

dates agreement specified - plaintiff claimed debt against defendant or damages for breach of contract or specific performance - held: parties intended to create legal relations - defendant was bound to pay amounts on dates specified in agreement - amounts payable as debts - agreement not abandoned - no misleading or deceptive conduct by plaintiff - defendant did not establish loss or damage due to entering agreement or making payments to plaintiff - judgment for plaintiff for claimed amount and interest.

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

Construction Occupations Registrar v Bates (No 2) [2017] ACTCA 27

Court of Appeal of the Australian Capital Territory

Elkaim, Mossop & Rangiah JJ

Costs - successful appellant in proceedings sought costs of appeal, submitting it was 'as successful as it could have been', and that case did not qualify as public interest litigation - respondent contended that proceedings were 'a matter of public importance' - s29(1)(b) *Building Act 2004* (ACT) - r5001 *Court Procedures Rules 2006* (ACT) - held: Court not satisfied it was case where Court should depart from the usual rule that costs follow event - respondent to pay appellant's costs.

[Construction Occupations Registrar](#) (I B C G)

CRIMINAL

Executive Summary

Director of Public Prosecutions (NSW) v Jones, Dillon Michael (NSWCCA) - criminal law - questions of law on stated case - Local Court empowered to deal with breach of good behaviour bond imposed by District Court judge - questions of law answered

R v Leka - criminal law - drug offences - no failure by sentencing judge to have regard to relevant mitigating consideration - appeal dismissed

Summaries With Link

Director of Public Prosecutions (NSW) v Jones, Dillon Michael [2017] NSWCCA 164

Court of Criminal Appeal of New South Wales

Basten JA; Harrison & R A Hulme JJ

Criminal law - questions on case stated under s5B *Criminal Appeal Act 1912* (NSW) - seven four-part questions - underlying issues were: whether Local Court had jurisdiction to revoke good behaviour bond imposed by District Court judge where there was failure to comply with its conditions; whether first issue's resolution affected by District Court judge's act in fixing bond's



conditions including that any breach be reported to judge who imposed bond; and issue concerning power of District Court judge to determine whether Local Court had jurisdiction to deal with the breaches - ss98 & 99 *Crimes (Sentencing Procedure) Act 1999* (NSW) - held: Local Court had power to deal with breach of bond - District Court judge's condition that breach be reported to him not effective to remove power - questions of law answered.

[Director of Public Prosecutions](#)

R v Leka [2017] SASCFC 77

Full Court of the Supreme Court of South Australia

Peek, Stanley & Hinton JJ

Criminal law - appellant pleaded guilty to one count of 'cultivating a large commercial quantity of controlled plants for sale, one count of cultivating controlled plants for sale and one count of trafficking in cannabis' - appellant sentenced under s18A *Criminal Law (Sentencing) Act 1988* (SA) to five years and seven months in prison - appellant contended sentencing judge failed to take into account additional hardship he would suffer during imprisonment due to prospect of deportation upon release, and that sentence was manifestly excessive due to failure to take the mitigating consideration into account - held: even if prospect of deportation was relevant mitigating consideration, sentencing judge had taken it into account - no evidence was put to Court, as required, to enable 'sensible quantification of the risk that deportation' would occur and proof it would be a hardship during imprisonment - hardship arising from deportation had pre-existed sentence's imposition - appeal dismissed

[R v Leka](#)

Benchmark

The Author to Her Book

By [Anne Bradstreet](#)

Thou ill-form'd offspring of my feeble brain,
Who after birth didst by my side remain,
Till snatched from thence by friends, less wise than true,
Who thee abroad, expos'd to publick view,
Made thee in raggs, halting to th' press to trudge,
Where errors were not lessened (all may judg).
At thy return my blushing was not small,
My rambling brat (in print) should mother call,
I cast thee by as one unfit for light,
Thy Visage was so irksome in my sight;
Yet being mine own, at length affection would
Thy blemishes amend, if so I could:
I wash'd thy face, but more defects I saw,
And rubbing off a spot, still made a flaw.
I stretched thy joynts to make thee even feet,
Yet still thou run'st more hobling then is meet;
In better dress to trim thee was my mind,
But nought save home-spun Cloth, i' th' house I find.
In this array 'mongst Vulgars mayst thou roam.
In Criticks hands, beware thou dost not come;
And take thy way where yet thou art not known,
If for thy Father askt, say, thou hadst none:
And for thy Mother, she alas is poor,
Which caus'd her thus to send thee out of door.

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