

Friday, 22 September 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)

Zappia v Comptroller General of Customs (FCAFC) - taxation - demand by collector on licensee of bonded warehouse for payment of duty payable on stolen cigarettes - Tribunal applied incorrect legal test under s35A *Customs Act 1901* (Cth) - appeal allowed (I B C G)

Tony Kazal v Fairfax Media Publications Pty Ltd (No 2) (NSWSC) - security for costs - defamation - action arising from advertisement on Facebook for article published in newspapers - plaintiff to give security for costs (I B C G)

Buildum Construction Pty Ltd v Pile & Bucket Pty Ltd (NSWSC) - contract - settlement agreement - security of payments - unsigned deed of settlement - binding and enforceable agreement reached - plaintiff entitled to specific performance (I B C G)

In the matter of Felan's Fisheries Pty Limited (NSWSC) - discovery - rulings on application for discovery in respect of 44 categories of documents (I B C G)

Gippsreal Ltd v Ross & Albarran (VSCA) - corporations - equity - remuneration of receivers - denial of procedural fairness to appointer in dealing with issue of waiver - appeal allowed (I B C G)

Yarra City Council v Metropolitan Fire and Emergency Services Board (No 2) (VSCA) - costs - mixed success on appeal - appellant to pay 60% of respondent's costs (I B C G)

Allison v Tuna Tasmania Pty Ltd (TASFC) - contract - evidence - special leave for Court to receive further evidence on hearing of appeal refused (I B C G)

Summaries With Link (Five Minute Read)

Zappia v Comptroller General of Customs [2017] FCAFC 147

Full Court of the Federal Court of Australia

Davies, White & Moshinsky JJ

Taxation - authorised "collector" under *Customs Act 1901* (Cth) applied s35A(1) to applicant licensee of bonded warehouse by making demand for payment of duty payable on cigarettes which were stolen from the bonded warehouse - applicant unsuccessfully sought review of Collector's decision in Administrative Appeals Tribunal - Tribunal found demands were properly made - applicant appealed - applicant contended s35A did not encompass employees of person or entity to whom goods entrusted in bonded warehouse, and also contended that, in any event, he was not a person with control over cigarettes - construction of s35A(1) - 'the possession, custody or control' - held: Tribunal did not apply correct legal test - appeal allowed - matter remitted.

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

Tony Kazal v Fairfax Media Publications Pty Ltd (No 2) [2017] NSWSC 1252

Supreme Court of New South Wales

McCallum J

Security for costs - defamation - defendant sought security for costs in proceedings arising from advertisement on Facebook for article published in newspapers - application made on bases that plaintiff was ordinarily resident outside Australia and would be unlikely to comply with costs order in plaintiff's favour - prospects of success - Court's duty to further overriding purpose of Pt 6 *Civil Procedure Act 2005* (NSW) - held: Court satisfied it should grant order for security - plaintiff to give security in sum of \$20,000.

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

Buldum Construction Pty Ltd v Pile & Bucket Pty Ltd [2017] NSWSC 1260

Supreme Court of New South Wales

Parker J

Contract - settlement agreement - security of payments - first defendant made claim under *Building and Construction Industry Security of Payment Act 1999* (NSW) for progress payment under subcontract with plaintiff - first defendant obtained adjudication determination, registered adjudication certificate and issued garnishee notices - plaintiff challenged adjudication determination - parties exchanged drafts of unsigned deed of settlement - plaintiff contended 'binding and enforceable settlement agreement was reached' - whether execution of deed was 'essential element' of agreement - s73 *Civil Procedure Act 2005* (NSW) - held: parties reached

a binding and enforceable agreement - plaintiff entitled to specific performance of agreement.

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

In the matter of Felan's Fisheries Pty Limited [2017] NSWSC 1262

Supreme Court of New South Wales

Black J

Discovery - plaintiff sought discovery in 44 categories of documents - whether discovery in categories necessary for resolution of real issues in dispute - 'reasonably required for the fair disposition of the matter' ss181, 1324 *Corporations Act 2001* (Cth) - Practice Note SC Eq 11 - held: rulings made on proposed discovery categories.

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

Gippsreal Ltd v Ross & Albarran [2017] VSCA 257

Court of Appeal of Victoria

Warren CJ, Kyrrou & Hansen JJA

Corporations - equity - respondents were receivers who made claim based on indemnity or equitable lien against applicant appointor for remuneration - applicant contended receivers' entitlement limited to sum in deeds under which receivers appointed - primary judge upheld applicant's contention there was cap on remuneration but found it had waived its right to rely on cap by its conduct - primary judge also found respondent could rely on equitable lien in respect of property - applicant contended it was not open to judge to find waiver because waiver was not part of receivers' pleaded case, and that even if it was open to consider waiver, that primary judge erred in making the finding - applicant also contended primary judge erred in finding existence of equitable lien, and in not providing reasons for costs orders - held: waiver not part of receivers' pleaded case - finding of waiver not open - primary judge denied applicant procedural fairness in dealing with issue of waiver - appeal allowed.

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

Yarra City Council v Metropolitan Fire and Emergency Services Board (No 2) [2017] VSCA 255

Court of Appeal of Victoria

Warren CJ; Tate & Osborn JJA

Costs - Court allowed appeal 'on a limited number of grounds but rejected many grounds' - determination of what costs order to make given 'mixed disposition' - appellant contended, in reliance on *Marriner v Australian Super Developments Pty Ltd* [2016] VSCA 141, that costs followed event even where successful party did not establish all claims - appellant contended it was the 'ultimately the successful party' because it had succeeded in setting aside primary judge's declaration as to liability against it - appellant also contended that its success on 'abandonment grounds' were likely to be important on remitter - held: declaration was set aside because it was premature - setting aside of declaration was not an 'unqualified success' - 'liability grounds' were the primary contest in appeal and appellant did not succeed challenge to primary judge's finding that it was liable to compensate respondent for costs of compliance

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with clean up notices - appellant also failed on 'retrospectivity grounds' - appellant to pay 60% of respondent's costs.

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

Allison v Tuna Tasmania Pty Ltd [2017] TASFC 9

Full Court of the Supreme Court of Tasmania

Wood, Pearce & Brett JJ

Contract - evidence - appellant sought special leave to admit further evidence from witness on hearing of appeal in proceedings in which trial judge had found there was no contract e creating a partnership or entitling appellant to half of units in unit trust - trial judge had found parties to be "extremely unreliable" witnesses and determined whether there was a contract by application objective test - held: evidence could have been obtained prior to trial's termination by exercise of proper diligence - Court not persuaded there were special circumstances justifying leave to appeal - leave to appeal refused.

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

CRIMINAL

Executive Summary

Obeid v R (NSWCCA) - criminal law - former member of Legislative Council of New South Wales convicted of misconduct in public office - appeals against conviction and sentence dismissed

Summaries With Link

Obeid v R [2017] NSWCCA 221

Court of Criminal Appeal of New South Wales

Bathurst CJ; Leeming JA; R A Hulme J; Hamill J & N Adams J

Criminal law - misconduct in public office - applicant was former member of Legislative Council of New South Wales - applicant convicted of misconduct in public office - applicant appealed against conviction and sentence - whether duty applicant allegedly breached was 'bad in law' - whether charge was in Parliament of New South Wales' 'exclusive cognisance' - whether misdirection concerning 'wilfulness' and/or 'seriousness' - whether finding on 'wilfulness' unreasonable or could not be supported by evidence - whether miscarriage of justice due to legal representatives' conduct - whether offences in Pt 4A *Crimes Act 1900* (NSW) were 'relevant analogue' - whether erroneous finding concerning applicant's motivation - whether error by trial judge in taking into account 'that the jury had been satisfied that Mr Obeid's conduct merited criminal punishment' - whether denial of procedural fairness by finding



mitigating factor not made out under s21A(3)(a) *Crimes (Sentencing Procedure) Act 1999* (NSW) - whether damage to government institutions could be “loss or damage” under s21A *Crimes (Sentencing Procedure) Act* - whether manifestly excessive sentence - held: appeals against conviction and sentence dismissed.

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To One Who Has Been Long in City Pent

BY [JOHN KEATS](#)

To one who has been long in city pent,
 'Tis very sweet to look into the fair
 And open face of heaven,—to breathe a prayer
Full in the smile of the blue firmament.
Who is more happy, when, with heart's content,
 Fatigued he sinks into some pleasant lair
 Of wavy grass, and reads a debonair
And gentle tale of love and languishment?
Returning home at evening, with an ear
 Catching the notes of Philomel,—an eye
Watching the sailing cloudlet's bright career,
 He mourns that day so soon has glided by:
E'en like the passage of an angel's tear
 That falls through the clear ether silently. ?

https://en.wikipedia.org/wiki/John_Keats?

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