



Friday, 23 October 2015

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)

Hurd v Zomojo Pty Ltd (FCAFC) - corporations - directors' duties - breach of service agreement - damages - appeal dismissed - application to quash judgments and order also dismissed (I B)

Chu v Ngar (NSWSC) - succession - self-represented litigant - application for family provision order by child of deceased - application dismissed (B)

Chu v Ngar (NSWSC) - costs - succession - no order made as to defendant's costs to intent she would bear own costs - if plaintiff wished to seek her costs be paid out of estate or notional estate she should do so by notice of motion - directions (B)

Hamilton v State of New South Wales (NSWSC) - client legal privilege - misfeasance in public office - documents were subject of client legal privilege - privilege not waived (I)

Greek Orthodox Community of South Australia Inc v Pashalis (SASC) - defamation - newspaper article defamatory of certain plaintiffs - defence of statutory qualified privilege failed - damages (I)

Vadasz v Gadaleta Steel Fabrication Pty Ltd (SASC) - contract - steel and welding services - no contractual right to claim - amount due and payable reduced - appeal allowed in part (I B C)

Lindner v The Corporation of the City of Marion (SASC) - summary judgment - approval of development application - no reasonable cause of action against planning authority - summary judgment granted (I B C)

Summaries With Link (Five Minute Read)

Hurd v Zomojo Pty Ltd [2015] FCAFC 147

Full Court of the Federal Court of Australia

Besanko, Gilmour & Beach JJ

Corporations - directors' duties - applicant managing director found to have breached services agreement - applicant sought extension of time to appeal against judgments on liability and judgment on quantum and relief - applicant also sought to quash the judgments and orders - ss20(1A), 27 *Federal Court of Australia Act 1976* (Cth) - standing - Constitutional writs - assertions of bias, errors of fact, lack of procedural fairness - held: extension of time granted - grounds of appeal not made out - appeal dismissed - application to quash judgments and orders dismissed.

[Hurd](#) (I B)

Chu v Ngar [2015] NSWSC 1505

Supreme Court of New South Wales

Hallen J

Succession - family provision - self-represented litigant - plaintiff child of deceased sought family provision order pursuant to Pt 3.2 *Succession Act 2006* (NSW) - defendant was executor of deceased's Will and mother of plaintiff - no provision made for plaintiff in deceased's Will - whether adequate and proper provision not for plaintiff in Will - size of estate and what may be notional estate - defendant's significant competing claim upon deceased's bounty - incomplete disclosure of plaintiff's financial resources and income - held: extension of time to bring application granted - Court not satisfied plaintiff established jurisdictional threshold for making of order - application dismissed.

[Chu](#) (B)

Chu v Ngar (No 2) [2015] NSWSC 1549

Supreme Court of New South Wales

Hallen J

Costs - family provision - plaintiff litigant in person was unsuccessful in claim for provision out of deceased father's estate - plaintiff not present when reasons for judgment delivered - not known what application plaintiff might make in relation to costs - held: no order made as to defendant's costs to intent she would bear own costs of proceedings - if plaintiff wished her costs to be paid out of estate or notional estate tshe should do so by notice of motion to be filed by certain date - directions.

[Chu](#) (B)

Hamilton v State of New South Wales [2015] NSWSC 1430

Supreme Court of New South Wales

Harrison AsJ

Client legal privilege - misfeasance in public office - Director of Public Prosecutions sought he be excused from producing documents pursuant to r1.9 *Uniform Civil Procedure Rules 2005* (NSW) on basis documents subject to client legal privilege - NSW Commissioner of Police sought that subpoena to produce issued by plaintiff be set aside under r33.4 - ss118 & 119 *Evidence Act 1995* (NSW) - onus - held: documents were subject of client legal privilege - privilege not waived - not a case where interests of justice should dictate result should be otherwise - costs was only issue to be decided in respect of notice of motion of NSW Commissioner of Police - both parties had compromised - parties to bear own costs.

[Hamilton](#) (I)

Greek Orthodox Community of South Australia Inc v Pashalis [2015] SASC 122

Supreme Court of South Australia

Blue J

Defamation - Greek Orthodox Community and others sued defendant publisher of newspaper for defamation arising out of publication of article - defendant admitted publication but denied pleaded imputations or that they were defamatory - defendant pleaded statutory qualified privilege - ss22 & 28 *Defamation Act 1974* (NSW) - held: article was defamatory of second, third and seventh plaintiffs but not Greek Orthodox Community or remaining plaintiffs - defence of statutory qualified privilege failed - damages awarded in plaintiffs' favour.

[Greek Orthodox Community](#) (I)

Vadasz v Gadaleta Steel Fabrication Pty Ltd [2015] SASC 162

Supreme Court of South Australia

Nicholson J

Contract - appellant engaged respondent to undertake certain steel and welding services - appellant challenged respondent's entitlement to be paid invoiced amount of \$70,168.01 - Magistrate made allowance for \$10,000 part payment and reduction of \$1,496.55 on account of errors in invoices - Magistrate found appellant liable, pursuant to contract, to pay respondent sum of \$58,671.46 for work performed - appellant appealed - held: respondent had no contractual entitlement to claim - all hours of work performed by respondent's employees to be charged out at agreed rate of \$75 per hour plus GST - appeal allowed in part - amount due and payable reduced.

[Vadasz](#) (I B C)

Lindner v The Corporation of the City of Marion [2015] SASC 152

Supreme Court of South Australia

Parker J

Summary judgment - plaintiffs brought claim in relation to defendant's decision to grant approval for development on land under *Development Act 1993* (SASC) - plaintiffs claimed

Benchmark

defendant failed to assess development application correctly - defendant sought summary judgment on basis no reasonable cause of action, or dismissal of statement of claim or strike-out of certain parts of statement of claim - ss3, 35, 38, 38(3), 38(5), 86(1)(b) & 86(1)(f) - held: allegation of jurisdictional error served no purpose without application for judicial review - no reasonable basis for allegation of breach of duties or constructive fraud, or aiding or abetting on a fraud - no reasonable basis for claim of nuisance or conspiracy or fraud on a power - summary judgment granted.

[Lindner](#) (I B C)

CRIMINAL

Executive Summary

Elshani v R (NSWCCA) - criminal law - sentence appeal - trafficking marketable quantity of heroin - misapplication of State legislation rather than Commonwealth legislation - sentencing discretion exercised afresh - non-parole period quashed - non-parole period of 3 years and 3 months imposed

Batcheldor v R & Walsh v R - criminal law - specially aggravated kidnapping - murder - constructive murder - inadequate directions to jury - one appellant's convictions quashed - new trial - other appellant's appeal dismissed

Summaries With Link

Elshani v R [2015] NSWCCA 254

Court of Criminal Appeal of New South Wales

Gleeson JA; Adams & Beech-Jones JJ

Criminal law - applicant pleaded guilty in Local Court to offence of trafficking marketable quantity of heroin under s302.3 *Criminal Code Act 1995* (Cth) - maximum penalty was 25 years imprisonment - applicant sentenced to overall sentence of 6 years with non-parole period of 4 years - discount of 25% allowed for his early plea - applicant sought to appeal - whether mistaken application of *Crimes (Sentencing Procedure) Act 1999* (NSW) - proper construction of s16A(2)(p) *Crimes Act 1914* (Cth) - whether only family hardship that could be characterised as exceptional could be taken into account in determining sentence - held: sentencing judge erred in sentencing applicant in accordance with *Crimes (Sentencing Procedure) Act 1999* (NSW) rather than Pt IB *Crimes Act 1914* (Cth) - Court required to exercise sentencing discretion afresh in accordance with of s6(3) *Criminal Appeal Act 1912* (NSW) - non-parole period quashed - non-parole period of 3 years and 3 months imposed

[Elshani](#)



Batcheldor v R & Walsh v R [2014] NSWCCA 252

Court of Criminal Appeal of New South Wales

Bathurst CJ; Hidden & Hulme JJ

Criminal law - appellants charged jointly with specially aggravated kidnapping of Mr Digby and murder of Mr Digby - Walsh alleged to have killed Mr Digby - Batcheldor said to have been complicit - both found guilty and sentenced to imprisonment.- Batcheldor has appealed against conviction and sought leave to appeal against sentence - Walsh appealed against conviction - constructive murder - adequacy of directions to jury - held: trial judge erred in failing to direct jury as to mental element that Batcheldor contemplated infliction of actual bodily harm upon deceased as possible incident of kidnapping offence - deficiency not in relation to elements of constructive murder but in directions about Batcheldor's complicity in specially aggravated kidnapping - directions inadequate to convey notion of being "in company" for purpose of establishing count of kidnapping - Batcheldor's convictions set aside - new trial - Walsh's appeal against conviction dismissed.

[Batcheldor](#)



Benchmark

A Complaint

By William Wordsworth

There is a change—and I am poor;
Your love hath been, nor long ago,
A fountain at my fond heart's door,
Whose only business was to flow;
And flow it did; not taking heed
Of its own bounty, or my need.

What happy moments did I count!
Blest was I then all bliss above!
Now, for that consecrated fount
Of murmuring, sparkling, living love,
What have I? shall I dare to tell?
A comfortless and hidden well.

A well of love—it may be deep—
I trust it is,—and never dry:
What matter? if the waters sleep
In silence and obscurity.
—Such change, and at the very door
Of my fond heart, hath made me poor.

[William Wordsworth](#)

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