



Friday, 30 September 2016

## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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

### Executive Summary (1 minute read)

**Moravcik v Giasoumi** (FCA) - bankruptcy - not established that sequestration order 'ought not to have been made' - application for annulment of bankruptcy dismissed (B)

**Oztech Pty Ltd v Public Trustee of Queensland (No 14)** (FCA) - evidence - documents 'evidencing or concerning Premium Investment Fund (PIF) transaction' admitted (B)

**Williams Group Australia Pty Ltd v Crocker** (NSWCA) - contract - guarantee - 'electronic signature' - ostensible authority - ratification - director not bound by guarantee - appeal dismissed (I B C G)

**Shearman v Owners Corporation No 1 417405Y** (VSC) - administrative law - dispute resolution - orders granted to owners' corporation for rectification of breach of Model Rules and Special Rules - appeal dismissed (I B C G)

**Re Buchanan** (QSC) - will and estates - testamentary capacity - handwritten provisions on deceased's Will formed part of Will - declaration (B)

**Vantage Holdings Group Pty Ltd v Donnelly** (WASC) - freezing orders - strong arguable case - risk of dissipation of assets - application to discharge freezing orders dismissed (B)

**Chaplin v Lane** (TASFC) - negligence - conviction for negligent driving - outstanding grounds of

review - no denial procedural fairness - no arrogation of expert witness's role - appeal dismissed (I B G)

## Summaries With Link (Five Minute Read)

### **Moravcik v Giasoumi [2016] FCA 1163**

Federal Court of Australia

Jessup J

Bankruptcy - applicant's estate sequestered on first respondents petition in capacity as liquidators of second respondent - third respondent was estate's trustee - applicant sought that bankruptcy be annulled under s153B *Bankruptcy Act 1966* (Cth) - whether sequestration order 'ought not to have been made' - whether applicant established Registrar was 'bound not to make the order' - ss 40, 109 & 153B *Bankruptcy Act* - ss459E, 459P, 588FE, 588FF & 588FG *Corporations Act 2001* (Cth) - held: Court rejected applicant's case that order should not have been made - taking all evidence into account, order was 'obvious outcome' to first respondents' application - application dismissed.

[Moravcik](#) (B)

### **Oztech Pty Ltd v Public Trustee of Queensland (No 14) [2016] FCA 1162**

Federal Court of Australia

Yates J

Evidence - applicant objected to tender of documents evidencing or concerning Premium Investment Fund (PIF) transaction - documents' authenticity not in dispute - applicant contended documents not relevant and should be rejected under s135 *Evidence Act 1995* (Cth) - applicant also objected on basis documents would be used as tendency evidence without compliance with s97 of the Act - held: Court satisfied documents admissible as 'evidence of the primary facts and circumstances concerning the PIF transaction' - applicant's position concerning tendency evidence was arguable but Court not prepared to reach final view now - Court was prepared to hear further argument on question in final closing submissions - evidence admitted.

[Oztech](#) (B)

### **Williams Group Australia Pty Ltd v Crocker [2016] NSWCA 265**

Court of Appeal of New South Wales

Ward, Simpson & Payne JJA

Contract - guarantee - appellant was supplier of building materials - respondent builder was one of three directors of company (IDH) - respondent and co-directors were also directors of related company (Image) - appellant approved Image's credit application supported by guarantee which each of Image's directors signed pursuant to which it supplied building materials to Image on credit - appellant approved similar credit application by IDH which was forwarded to appellant by facsimile bearing electronically affixed signatures of IDH's directors accompanied

by guarantee bearing the directors' signatures in capacity as guarantors - by latter credit agreement, appellant supplied building materials on credit to IDH - appellant sued IDH and directors for outstanding debt - appellant obtained summary judgment against respondent's two co-directors but respondent successfully denied liability on basis his 'electronic signature' was placed by unknown person on guarantee without respondent's authority - held: no error in Court not finding respondent bound by guarantee due to ostensible authority - no error in application of test of knowledge when considering case on ratification - appeal dismissed.

[Williams Group](#) (I B C G)

## **Shearman v Owners Corporation No 1 417405Y [2016] VSC 551**

Supreme Court of Victoria

Bell J

Administrative law - owners corporation contended applicant breached Model Rules and Special Rules 'by altering or damaging common property without its prior approval' - Victorian Civil and Administrative Tribunal sought orders for breach's rectification - one ground of applicant's opposition was that owners corporation had not followed dispute resolution process required by the rules before applying to Tribunal - Tribunal granted orders sought by owners corporation - ss153(3) & 164 *Owners Corporation Act 2006* (Vic) - s148(1) *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic) - held: Tribunal did not properly exercise its discretion to not dismiss or strike out application on basis of owners corporation's alleged non-compliance with s153(3) *Owners Corporation Act* by failure to exhaust dispute resolution process - however obligations which provision imposed not engaged because dispute resolution process had not been activated in present case - appeal dismissed.

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

## **Re Buchanan [2016] QSC 214**

Supreme Court of Queensland

P Lyons J

Wills and estates - testamentary capacity - application for determination under s18 *Succession Act 1981* (Qld) that handwritten provisions on deceased's Will formed part of Will - held: Court satisfied that provisions written on Will were intended to alter deceased's Will - Court satisfied deceased had testamentary capacity - Court satisfied that photocopy of deceased's Will on which handwritten provisions appeared was an alteration of deceased's Will - application granted - declaration made.

[Re Buchanan](#) (B)

## **Vantage Holdings Group Pty Ltd v Donnelly [2016] WASC 311**

Supreme Court of New South Wales

Martino J

Freezing orders - Court granted freezing orders against first and second defendants - first defendant sought to discharge freezing order against him and compensation order - first defendant contended plaintiffs did not establish a strong arguable case, adduce evidence of risk

# Benchmark

of dissipation of assets or disclose material facts - first defendant also contended balance of convenience warranted discharging freezing order - held: plaintiff's had a strong arguable case and established there was real risk first defendant would dispose of assets to make judgment fruitless - balance of convenience favoured continuation of freezing order - application dismissed.

[Vantage](#) (B)

## **Chaplin v Lane [2016] TASFC 8**

Full Court of the Supreme Court of Tasmania

Tennent, Wood & Estcourt JJ

Negligence - negligent driving - Magistrate convicted appellant in relation to death of child which appellant caused when he collided with her - conviction quashed by Chief Justice - Chief Justice dealt with only one ground of review - State successfully appealed - remaining grounds of review outstanding - matter remitted to Chief Justice to deal with remaining grounds - whether denial of procedural fairness - whether Magistrate 'impermissibly arrogated to herself the role of expert witness' - whether Magistrate determined charge on basis which prosecutor did not advance at trial - held: all grounds of appeal failed - appeal dismissed.

[Chaplin](#) (I B G)

## CRIMINAL

### Executive Summary

**R v JX** (QCA) - criminal law - conviction appeal - jury seeking directions from judge - directions not provided before verdicts handed down - error in taking verdicts before giving jury directions - retrial ordered

**MB v The State of Western Australia** (WASCA) - criminal law - sexual offences - trial judge failed to give adequate *Longman* warning - appeal allowed - convictions quashed - retrial

### Summaries With Link

## **R v JX [2016] QCA 240**

Court of Appeal of Queensland

Margaret McMurdo P, Morrison JA, North J

Criminal law - conviction appeal - appellant charged and convicted of two counts of rape of a child - jury sent judge a note requesting "Could we please have direction on one member of the jury informing of being raped as a younger woman" - the judge, without objection from either counsel, took verdicts without giving further direction to the jury - argued verdicts unreasonable



and error in trial judge's failure to direct the jury prior to taking the verdicts - held: the respondent rightly conceded that the counts were defective in that they charged rapes as continuing offences - application to amend the indictment to insert the words "on a date unknown" allowed, there being no injustice (see s572(3) *Criminal Code 1899* (Qld); *R v Fahey & Ors* [2002] 1 Qd 391; *R v AP* [2003] QCA 445) - the verdicts were not unreasonable - the fact that a juror has been a victim of crime, even a crime of the type charged against the accused, does not automatically mean that the juror cannot decide the case impartially in accordance with their solemn oath or affirmation - the note did not say that the juror concerned was acting partially or seeking to improperly influence the other jurors - however the note sought "directions" and the NSW and SA authorities holding a judge should not take a verdict until any requests from the jury for direction have been answered fully, should be followed (see s620 *Criminal Code 1899* (Qld); *R v TAB* [2002] NSWCCA 274; *R v Hickey* 137 A Crim R 62; *Alameddine v R* [2012] NSWCCA 63; *R v Lapins* [2007] SASC 281) - the jury not having the benefit of directions before returning verdicts of guilty there is a real possibility that there has been a miscarriage of justice - appeal allowed - verdicts set aside - retrial ordered.

[JX](#)

## **MB v The State of Western Australia [2016] WASCA 160**

Court of Appeal of Western Australia

Martin CJ; Mazza & Mitchell JJA

Criminal law - sexual offences - appellant convicted on one count of indecent dealing with a child and another count of sexual penetration of a child - appellant contended that directions given by trial judge in order to give effect to principles in *Longman v The Queen* [1989] HCA 60 and concerning delay between time offences allegedly occurred and matter coming to trial were inadequate - held: trial judge gave inadequate *Longman* warning - direction did not contain clear warning alerting jury to danger of miscarriage of justice if they convicted on complainant's uncorroborated evidence without 'closest scrutiny' of the evidence taking into account prejudice from significant delay - appeal allowed - convictions quashed - retrial.

[MB](#)



## Introduction to the Songs of Innocence

By [William Blake](#)

Piping down the valleys wild  
Piping songs of pleasant glee  
On a cloud I saw a child.  
And he laughing said to me.

Pipe a song about a Lamb;  
So I piped with merry chear,  
Piper pipe that song again—  
So I piped, he wept to hear.

Drop thy pipe thy happy pipe  
Sing thy songs of happy chear,  
So I sung the same again  
While he wept with joy to hear

Piper sit thee down and write  
In a book that all may read—  
So he vanish'd from my sight.  
And I pluck'd a hollow reed.

And I made a rural pen,  
And I stain'd the water clear,  
And I wrote my happy songs  
Every child may joy to hear?

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