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## Daily Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Australian Competition and Consumer Commission v Servcorp Limited (FCA)** - consumer law - service contracts - terms of contracts were unfair and void - declarations and consent orders made

**Hosking v Extend N Build Pty Ltd (NSWCA)** - corporations - winding up - unfair preferences - dismissal of claims in relation to payments made to respondents and other entities - appeal allowed in respect of one respondent

**Pentelow v Bell Lawyers Pty Ltd (NSWCA)** - costs - barristers' costs - Chorley exception - barrister party to litigation - whether barrister entitled to costs of work she personally performed where she had also retained lawyers - summons for review allowed in part

**Neale v Mahony (NSWSC)** - summary disposal - pleadings - claims against solicitor in relation to conduct of proceedings - claims dismissed except claim of failure to lodge caveats - statement of claim struck out - leave to replead granted

**Pham v Enterprise ICT Pty Ltd and Others; Pham v Sebie (No. 7) (NSWSC)** - real property - security for costs - plaintiffs sought possession of and - plaintiffs as cross-defendants sought security for costs of cross-claim of corporate entity - Court satisfied to grant both applications

**Del Papa v Falting & Ors (VSC)** - property - restrictive covenant - application for modification of covenant to remove 'single dwelling restriction' and allow land's subdivision - application refused

# Benchmark

## Summaries With Link (Five Minute Read)

### **Australian Competition and Consumer Commission v Servcorp Limited [2018] FCA 1044**

Federal Court of Australia

Markovic J

Consumer law - proceeding concerned 'service contracts' entered by respondents - applicant contended each contract was a "small business contract" under s23(4) Australian Consumer Law (ACL) and "standard form contract" under s27 ACL - applicant sought relief against respondents on basis terms of contracts were unfair under s24 ACL rendering them void pursuant to s23(1) ACL - parties had agreed on relief and had provided 'Proposed Orders' - whether to make declarations and consent orders - 'significant imbalance and detriment' - held: Court satisfied service contracts were small business contracts and standard form contracts - Court satisfied that 'Impugned Terms' were unfair under s24, and void under s23(1) to extent they were contained in the service contracts - declarations granted - consent orders made.

[Australian Competition and Consumer Commission](#)

### **Hosking v Extend N Build Pty Ltd [2018] NSWCA 149**

Court of Appeal of New South Wales

Bathurst CJ; Beazley P & Gleeson JA

Corporations - winding up - first and second appellant were liquidators of company (Evolvebuilt) - first and second appellant brought proceedings under ss588FA, 588FC, 588FE & 588FF *Corporations Act 2001* (Cth), claiming payments made to respondents and other entities were void because they were 'unfair preferences' under s588FA(1) - primary judge dismissed claims against first to fifth respondents - primary judge found payments to sixth respondent were unfair preferences but that sixth respondent could rely on defence in s588FG(2) - whether erroneous construction of s588FA(1) - whether failure to follow decisions in *Burness v Supaproducts Pty Ltd* (2009) 259 ALR 339 and *Federal Commissioner of Taxation v Kassem* (2012) 205 FCR 156 - whether erroneous factual findings - whether erroneous conclusion that defence in s588FG(2) was available - held: sixth defendant did not establish defence s588FG(2) - appeal allowed in respect of sixth respondent - appeal otherwise dismissed.

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### **Pentelow v Bell Lawyers Pty Ltd [2018] NSWCA 150**

Court of Appeal of New South Wales

Beazley ACJ; Macfarlan & Meagher JJA

Costs - barristers' costs - applicant barrister was party to litigation in relation to which she had retained lawyers - applicant contended, on basis of an 'extension' to the 'Chorley exception' of fact, not amenable to judicial review - Chorley exception applied to self-represented barristers - determination of applicant's entitlement to costs raised issue of mixed fact and law, and was amenable to judicial review - applicant was, in principle, entitled to recover costs for work she performed - entitlement to recovery of claimed costs was a cost assessment matter - summons

# Benchmark

allowed in part.

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## **Neale v Mahony [2018] NSWSC 1046**

Supreme Court of New South Wales

Davies J

Summary disposal - pleadings - plaintiff sued defendant, contending defendant was negligent in acting for plaintiff in earlier proceedings concerning mortgage - defendant sought dismissal of proceedings or strike-out of statement of claim - claims concerning sale of property at undervalue, loan to defendant, 'wrong advice', costs agreement, and 'failure to lodge caveats' - advocates' immunity - estoppel - rr13.4, 14.28 *Uniform Civil Procedure Rules 2005* (NSW) - held: claims dismissed except claim in relation to failure to lodge caveats - whole pleading in statement of claim struck out - leave to re-plead claim concerning failure to lodge caveats.

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

## **Pham v Enterprise ICT Pty Ltd and Others; Pham v Sebie (No. 7) [2018] NSWSC 1063**

Supreme Court of New South Wales

Slattery J

Possession - security for costs - real property - determination of two applications in proceedings - plaintiffs were land's registered proprietors - plaintiffs sought possession of land - defendants were in occupation of land - plaintiffs as cross-defendants sought security for costs of corporate entity's cross-claim of equitable interest in land - service - whether notice of motion served on land's occupants - whether corporate entity had assets to meet any costs order against it - r6.8 *Uniform Civil Procedure Rules 2005* (NSW) - held: Court satisfied to grant both applications - orders made.

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## **Del Papa v Falting & Ors [2018] VSC 384**

Supreme Court of Victoria

Lansdowne AsJ

Property - restrictive covenant - plaintiff was registered proprietor of land encumbered by restrictive covenant - plaintiff sought to modify covenant to remove 'single dwelling restriction' and allow subdivision of land - whether restriction obsolete - whether modification would 'not occasion substantial injury to beneficiaries' - ss84(1)(a) & 84(1)(c) *Property Law Act 1958* (Vic) - held: plaintiff did not establish that covenant was obsolete or that modification would not 'substantially injure beneficiaries' - application refused.

[Del Papa](#)

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