

Friday, 5 February 2016

Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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Executive Summary (1 minute read)

Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm) (FCAFC) - pleadings - refusal in part of permission to amend pleadings in separate proceedings - appeal dismissed

Medallion Homes Pty Ltd v Lares Homes Pty Ltd (FCA) - interlocutory injunction - consumer law - copyright - injunction restraining reproduction of floor plans and construction of display home refused

Nightingale v Blacktown City Council (NSWCA) - negligence - appellant injured when he stepped into depression in footpath - Council not liable - appeal dismissed

Jobema Developments Pty Ltd v Zhu (NSWSC) - real property - conveyancing - vendor refused permission to rescind off the plan contract for sale under sunset clause

Re: Application of the Anglican Property Trust Diocese of Bathurst (NSWSC) - judicial advice - trusts and trustees - judicial advice granted

Wales v Wales (No 2) (VSCA) - costs - applicant to pay respondents' costs of unsuccessful applications for leave to appeal against costs orders - direction in respect of senior counsel's fees refused

Zwiersen v Field & Hall Pty Ltd (VSC) - negligence - contribution proceedings - apportionment of liability between employer and manufacturers/suppliers for contraction of mesothelioma in course of employment

Summaries With Link (Five Minute Read)

Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2

Full Court of the Federal Court of Australia

Gilmour, Perram & Beachy JJ

Pleadings - corporations - appellants appealed against refusal in part of applications to amend pleadings in separate proceedings - appellants contended exercise of primary judge's discretion miscarried, that primary judge failed to accord procedural fairness and that primary judge erred in finding that claim under s1041E *Corporations Act 2001* (Cth) liable to be struck out - ss37M & 37N *Federal Court of Australia Act 1976* (Cth) - rr8.21(1) & 16.53 *Federal Court Rules 2011* (Cth) - held: primary judge erred in finding appellant failed to explain importance of amendments but this was a minor error not material to outcome - even if Court obliged to exercise discretion it would not have done so differently - primary judge plainly correct in conclusions - appeal dismissed.

[Tamaya](#)

[From Benchmark Wednesday, 3 February 2016]

Medallion Homes Pty Ltd v Lares Homes Pty Ltd [2016] FCA 12

Federal Court of Australia

Besanko J

Interlocutory injunction - consumer law - copyright - corporations - applicant sought interlocutory injunction restraining respondents from reproducing floor plans and constructing display home - applicant contended respondents copied its plans and also sought to restrain respondents from making allegedly misleading or deceptive representations on website and promotional material - *Australian Consumer Law* - s35 *Copyright Act 1968* (Cth) - *Corporations Act 2001* (Cth) - prima facie case - balance of convenience - held: applicant's causes of action failed to support grant of interlocutory injunction - balance of convenience in respondents' favour - application dismissed.

[Medallion](#)

[From Benchmark Tuesday, 2 February 2016]

Nightingale v Blacktown City Council [2015] NSWCA 423

Court of Appeal of New South Wales

Beazley P; Basten, Macfarlan, Meagher & Simpson JJA

Negligence - appellant injured when he stepped into depression in footpath - appellant sued Council in negligence - trial judge dismissed claim on basis appellant failed to prove Council as "roads authority", had "actual knowledge of "particular risk the materialisation of which resulted in the harm" - provision in s45 *Civil Liability Act 2002* (NSW) that roads authority "not liable" if the harm arose from "a failure of the authority to carry out road work, or to consider carrying out road work" - "actual knowledge" - whether majority view in *North Sydney Council v Roman* [2007] NSWCA 27 correct - whether Council liable because it conducted inspections negligently - principle of restraint in relation to departure from previous authority - held: *Roman* should

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remain binding - no basis for inference that Council's officers about whom evidence was led and with relevant knowledge for purposes of test in *Roman* had "actual knowledge" of relevant risk - immunity in s45 applied because failure to repair footpath caused injury - appeal dismissed.

[Nightingale](#)

[From Benchmark Wednesday, 3 February 2016]

Jobema Developments Pty Ltd v Zhu [2016] NSWSC 3

Supreme Court of New South Wales

Black J

Real property - conveyancing - plaintiff vendor sought order under 66ZL *Conveyancing Act 1919* (NSW) permitting it to rescind off the plan contract for sale with fourth defendant under sunset clause - ss15, 16, 66ZL, 66ZL(4), 66ZL(6) & 66ZL(7) - *Conveyancing Amendment (Sunset Clauses) Act 2015* (NSW) - "sunset date" - whether just and equitable to grant leave - whether purchaser consented to rescission - whether plaintiff acted unreasonably or in bad faith - reason for delay in creating subject lot - effect of rescission on purchaser - whether reasons for rescission established - held: permission to rescind contract refused - application dismissed.

[Jobema](#)

[From Benchmark Tuesday, 2 February 2016]

Re: Application of the Anglican Property Trust Diocese of Bathurst [2016] NSWSC 13

Supreme Court of New South Wales

Slattery J

Judicial advice - trusts and trustees - plaintiff responsible entity of trust sought judicial advice pursuant to s63 *Trustee Act 1925* (NSW) - whether plaintiff justified to defend proceedings, justified to use Trust's resources of Trust to defend proceedings and justified not to commence proceedings against insurance company in event it denied or did not admit liability under policy - *Anglican Church of Australia Constitution Act 1961* (NSW) - *Anglican Church of Australia Constitution Act 1902* (NSW) - *Australian Securities and Investments Commission Act 2001* (Cth) - *Contracts Review Act 1980* (NSW) - *Fair Trading Act 1987* (NSW) - held: plaintiff justified in defending proceedings, having recourse to trust assets for that purpose and justified in not commencing proceedings against insurance company.

[Anglican Property Trust](#)

[From Benchmark Wednesday, 3 February 2016]

Wales v Wales (No 2) [2015] VSCA 365

Court of Appeal of Victoria

Kyrou & McLeish JJA; Ginnane AJA

Costs - trusts and trustees - Court dismissed two applications for leave to appeal against costs orders in respect of discontinued proceedings - respondents sought that applicants pay costs of application for leave and that Costs Court allow senior counsel's fees in excess of scale - applicants conceded they should pay respondents' costs but opposed direction for senior counsel's costs - costs of negotiating summary of facts - costs of amending written case -

r19 *Supreme Court (Chapter I Scale of Costs Appendices A and B Amendment) Rules 2014* (Vic) - whether Court should allow greater flexibility than that allowed by maximum fee - held: applicant to pay respondents' costs of each application - no circumstances to justify direction in respect of senior counsel's costs - direction refused.

[Wales](#)

[From Benchmark Wednesday, 3 February 2016]

Zwiersen v Field & Hall Pty Ltd [2016] VSC 16

Supreme Court of Victoria

Rush J

Negligence - contribution proceedings - joint tortfeasors - plaintiff electrician claimed damages for contraction of mesothelioma in course of employment due to negligent exposure to asbestos - defendants conceded breach of duty of care - plaintiff settled claim against first, second and fourth defendants - first, third and fourth defendants sought contribution against each other pursuant to Pt IV *Wrongs Act 1958* (Vic) - parties' respective responsibilities - apportionment between first defendant employer, and third and fourth defendant manufacturers/suppliers - contribution - held: in relation to culpability, third and fourth defendants, as compared to first defendant, should share more significant contribution on apportionment - first, third and fourth defendants liable for contraction of mesothelioma - liability apportioned in amounts of 20% for first defendant, 40% for third defendant and 40% for fourth defendant.

[Zwiersen](#)

[From Benchmark Wednesday, 3 February 2016]



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The Grasshopper

BY RICHARD LOVELACE

To My Noble Friend, Mr. Charles Cotton

O thou that swing'st upon the waving hair
Of some well-fillèd oaten beard,
Drunk every night with a delicious tear
Dropped thee from heaven, where now th' art reared;

The joys of earth and air are thine entire,
That with thy feet and wings dost hop and fly;
And, when thy poppy works, thou dost retire
To thy carved acorn-bed to lie.

Up with the day, the sun thou welcom'st then,
Sport'st in the gilt-plats of his beams,
And all these merry days mak'st merry men,
Thyself, and melancholy streams.

But ah, the sickle! Golden ears are cropped;
Ceres and Bacchus bid good night;
Sharp, frosty fingers all your flowers have topped,
And what scythes spared, winds shave off quite.

Poor verdant fool, and now green ice! thy joys,
Large and as lasting as thy perch of grass,
Bid us lay in 'gainst winter rain, and poise
Their floods with an o'erflowing glass.

Thou best of men and friends! we will create
A genuine summer in each other's breast,
And spite of this cold time and frozen fate,
Thaw us a warm seat to our rest.

Our sacred hearths shall burn eternally,
As vestal flames; the North Wind, he
Shall strike his frost-stretched wings, dissolve, and fly
This Etna in epitome.

Dropping December shall come weeping in,
Bewail th'usurping of his reign:
But when in showers of old Greek we begin,
Shall cry he hath his crown again!



Night, as clear Hesper, shall our tapers whip
From the light casements where we play,
And the dark hag from her black mantle strip,
And stick there everlasting day.

Thus richer than untempted kings are we,
That, asking nothing, nothing need:
Though lords of all what seas embrace, yet he
That wants himself is poor indeed.?

[RICHARD LOVELACE](#)

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