

Friday, 8 April 2016

Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

 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)

Fischer v Nemeske Pty Ltd (HCA) - trusts and trustees - family trust - valid exercise of power to “advance” or “apply” sum - appeal dismissed

Edmonds v Morrissey (NSWSC) - Wills and estates - judicial advice - meaning of “issue children” in Will - entitlement to gift in remainder - declaration

SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd (NSWSC) - contract - rectification - parties common intention was that purchase price of land was amount plus GST - rectification granted

Estate Cockell; Cole v Paisley (NSWSC) - wills and estates - probate - testamentary capacity - determination of competing claims in relation to small estate

The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd (NSWSC) - building and construction - preliminary issues - there was contract between builder and developer for building works - proceedings not commenced within time

Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) (NSWSC) - negligence - plaintiff injured when she tripped while leaving lift - lift had not levelled with floor - defendants not liable - judgment for defendants - cross-claims dismissed

Commonwealth Bank of Australia v Codovo Developments Pty Ltd (VSC) - summary judgment - bank entitled to payment of debt - summary judgment refused in respect of counterclaim

Brisbane City Council v Gerhardt (QCA) - environment and planning - application by home owners to building certifier to make alterations and additions - no separate application need be made to council - building certifier entitled to approve application - appeal dismissed

Deputy Commissioner of Taxation v Rablin; Deputy Commissioner of Taxation v Shaw (QSC) - summary judgment - taxation - directors' penalties - Commissioner entitled to payment of amounts from directors of company

George 218 Pty Ltd v Bank of Queensland Ltd (WASCA) - security for costs - primary judge found guarantors liable to bank - bank granted security for costs of appeal

Daynite Towing Service (WA) Pty Ltd v Regrowth Karri Pty Ltd (WASCA) - negligence - tourist coach destroyed by fire while being towed - claim against towing contractor upheld - appeal dismissed

Motor Accidents Insurance Board v Wright (TASSC) - insurance - motor vehicle accident - respondent entitled to death benefit after death of wife four months after motor vehicle accident - Tribunal's determination confirmed

Summaries With Link (Five Minute Read)

Fischer v Nemeske Pty Ltd [2016] HCA 11

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Gordon JJ

Trusts and trustees - family trust established by deed of settlement - sole asset was shares in another company (Aladdin) - in September 1994 trustee resolved asset revaluation reserve (sum) be distributed to husband and wife as joint tenants - trustee's books acknowledged debt to husband and wife - in 1995, by deed of charge, trustee covenanted to pay sum to husband and wife "on demand" - in May 1994 husband had orally varied vesting date to June 1992 - husband died in 2011 - wife died in 2010 - Court of Appeal found cause of action in debt accrued to husband and wife when trustee admitted and acknowledged itself to be indebted to them in its accounts and by means of deed of charge - Court of Appeal found oral resolution was not a valid exercise of power conferred by trust deed to vary vesting date, wife had predeceased husband and husband's estate entitled to judgment for sum against trustee - held: resolution was valid exercise of power to "advance" and "apply" sum by creation of debt - appeal dismissed.

[Fischer](#)

[From Benchmark Friday, 8 April 2016]

Edmonds v Morrissey [2016] NSWSC 342

Supreme Court of New South Wales

Darke J

Wills and estates - application for judicial advice - plaintiff and first defendant were children of testator's son - testator's son now deceased - testator's son had also had another child, also now deceased - whether gift in remainder of real estate was shared equally between plaintiff and first defendant or whether it was shared by plaintiff and defendant at one third each, with the final third being shared by the children of the deceased child - construction of Will - "issue children" - held: "issue children" encompassed only children of testator's son - gift in remainder shared equally by plaintiff and first defendant as tenants in common - declaration.

[Edmonds](#)

[From Benchmark Tuesday, 5 April 2016]

SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd [2016] NSWSC 362

Supreme Court of New South Wales

Stevenson J

Contract - rectification - defendant vendor listed property for public auction - plaintiff purchaser sent its agent to auction to bid on its behalf - agent bid amount to purchase property - auctioneer accepted bid - contracts executed and exchanged - effect of contract was to provide for purchase price inclusive of GST - vendor alleged parties "clear and common intention" was that purchase price was amount plus GST and sought rectification - test of rectification - conflicting evidence - held: Court satisfied it was parties' common intention that purchase price would be amount plus GST - rectification of contract granted.

[SAMM](#)

[From Benchmark Wednesday, 6 April 2016]

Estate Cockell; Cole v Paisley [2016] NSWSC 349

Supreme Court of New South Wales

Lindsay J

Wills and estates - probate - succession - determination of competing claims in relation to deceased estate - whether deceased lacked testamentary capacity when he executed instruments - challenges to deceased's wills - whether wills invalid for lack of testamentary capacity - onus - mental illness - suspicious circumstances - Court's object of due and proper administration of estate - *Guardianship Act 1987*(NSW) - *Succession Act 2006* (NSW) - *Trustee Act 1925* (NSW) - *Uniform Civil Procedure Rules 2005* (NSW) - held: admission of 2006 will to probate confirmed by grant in solemn form - Court ordered that grant of probate in common form was to be confirmed by grant in solemn form to initial grant's recipient.

[Estate](#)

[From Benchmark Wednesday, 6 April 2016]

The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd [2016] NSWSC 375

Supreme Court of New South Wales

McDougall J

Building and construction - preliminary issues - plaintiff owner of strata title development claimed defendant was builder who carried out development for former registered proprietor of land on which development built - owners contended work was defective and it was entitled to recover cost of rectification under s18D *Home Building Act 1989* (NSW) - whether there was contract to which builder was party - whether proceedings out of time - held: Court satisfied there was a contract between builder and developer - proceedings not commenced within time - preliminary questions answered.

[The Owners – Strata Plan No. 69743](#)

[From Benchmark Thursday, 7 April 2016]

Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) [2016] NSWSC 333

Supreme Court of New South Wales

Fagan J

Negligence - plaintiff sued defendants for injuries sustained when she tripped while leaving lift in building - lift had not levelled at floor - defendants were occupier of building (Capital Investors), company which serviced repairs and maintained lifts (Thyssenkrupp), and company which managed and oversaw performance of building maintenance contracts (ISS) - *Civil Liability Act 2002* (NSW) - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) held: none of the defendants was liable to plaintiff - judgment for defendants - cross-claims dismissed.

[Schneider](#)

[From Benchmark Friday, 8 April 2016]

Commonwealth Bank of Australia v Codovo Developments Pty Ltd [2016] VSC 122

Supreme Court of Victoria

Almond J

Summary judgment - plaintiff sued first defendant for recovery of money advanced pursuant to banking facilities - plaintiff also sued second, third and fourth defendants as guarantors - defendants counterclaimed against bank for misleading and deceptive conduct, negligent misstatement and unconscionable conduct - bank sought summary judgment - plaintiff contended defendants had no real prospect of defending claim or prosecuting counterclaim - plaintiff contended counterclaim's subject matter had been released clause in Deed of Forbearance - held: plaintiff entitled to payment of debt - Court satisfied defendants had real prospect of success as to limiting scope of release - application for summary judgment on counterclaim rejected.

[Commonwealth Bank of Australia](#)

[From Benchmark Tuesday, 5 April 2016]

Brisbane City Council v Gerhardt [2016] QCA 76

Court of Appeal of Queensland

Holmes CJ, McMurdo JA & Daubney J

Environment and planning - owners of house sought permission from respondent private building certifier to make additions and alterations - Council contended owners should have made two applications, one to respondent and one to council - respondent sought declaration no separate application need be made to council and that respondent entitled to approve application - declaration granted - Council sought to appeal under s498 *Sustainable Planning Act 2009* (Qld) (Planning Act) - proper interpretation of Planning Act and *Building Act 1975* (Qld) - held: Council's arguments rejected - no restriction on respondent to grant sought approval - respondent entitled to declarations - appeal dismissed.

[Brisbane](#)

[From Benchmark Tuesday, 5 April 2016]

Deputy Commissioner of Taxation v Rablin; Deputy Commissioner of Taxation v Shaw [2016] QSC 68

Supreme Court of Queensland

Bond J

Summary judgment - taxation - directors' penalties - in two proceedings Commission claimed money from a director of company in relation to amounts withheld by company for tax which were not paid to Commissioner - Commissioner sought summary judgment or order striking out parts of defences - ss269-30 & 269-35 *Taxation Administration Act 1953* (Cth) - r292 *Uniform Civil Procedure Rules 1999* (Qld) - held: judgment in favour of Commissioner - no prospects of success on defences that penalties had been remitted by operation of law or that defendants had taken all reasonable steps - unnecessary to consider pleading complaints - plaintiff to bring in minutes of order.

[Deputy Commissioner](#)

[From Benchmark Wednesday, 6 April 2016]

George 218 Pty Ltd v Bank of Queensland Ltd [2016] WASCA 56

Court of Appeal of Western Australia

Murphy JA

Security for costs - primary judge found appellant guarantors liable to respondent bank - first, second and fourth appellants were corporate guarantors - bank sought security for costs of appeal - application made pursuant to pt 5 r44(1) *Supreme Court (Court of Appeal) Rules 2005* (WA) and under s1335(1) *Corporations Act 2001* (Cth) in relation to corporate guarantors - ss10, 12, 117, 147, 153 & 332 *Personal Property Securities Act 2009* (Cth) - held: there was reason to believe corporate guarantors would be unable to pay bank's costs - substantial risk that third appellant guarantor would not be able to meet costs order against her - Court concluded it was interests of justice to grant security for costs - orders made.

[George](#)

[From Benchmark Thursday, 7 April 2016]

Daynite Towing Service (WA) Pty Ltd v Regrowth Karri Pty Ltd [2016] WASCA 55

Court of Appeal of Western Australia

McLure P, Buss JA & Corboy J

Negligence - respondent was bus and coach operator - appellant was towing contractor - District Court upheld respondent's claim for damages for destruction of tourist coach by fire while appellant was towing it - held: primary judge's finding that caging of brakes was necessary for exercise of reasonable care not in error - open to primary judge to find that before fire occurred there were changes in pressure gauges which tow truck operator failed to detect - no error in finding on causation or assessment of evidence's reliability - appeal dismissed.

[Daynite](#)

[From Benchmark Thursday, 7 April 2016]

Motor Accidents Insurance Board v Wright [2016] TASSC 13

Supreme Court of Tasmania

Pearce J

Insurance - motor vehicle accident - Board appealed against decision of Motor Accidents Compensation Tribunal that respondent entitled to death benefit following death of wife four months after motor vehicle accident - respondent had been driving car in which wife was passenger - s23 *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) - Sch 1, Pt 4 *Motor Accidents (Liabilities and Compensation) Regulations 2010* (Tas) - Board contended Tribunal failed to give meaning to word 'directly', erred in finding peritonitis probable cause of death and erred by not giving parties opportunity to heard or provide further expert evidence - held: grounds of appeal not made out - Tribunal's determination confirmed.

[Motor Accidents Insurance Board](#)

[From Benchmark Monday, 4 April 2016]

CRIMINAL

Executive Summary

Allen (a Pseudonym) v The Queen (VSCA) - criminal law - incest and indecent act with child - admission of irrelevant, highly prejudice evidence - appeal allowed - retrial

The Queen v DK (ACTCA) - criminal law - acts of indecency of person under 16 years - no sentencing error or manifest inadequacy - appeal dismissed

Summaries With Link

Allen (a Pseudonym) v The Queen [2016] VSCA 59

Court of Appeal of Victoria

Maxwell P, Redlich & Priest JJA

Criminal law - incest - indecent act with a child - applicant convicted of one charge of incest and eight charges of indecent act with child under 16 - applicant pleaded guilty to one charge of making a threat to kill - judge sentenced applicant to seven years and three months' with fixed non-parole period of five years and three months - applicant sought extension of time to appeal against conviction - held: counsel's assertion of complainant's collusion with plaintiff's mother not based on instruction or evidence - assertion should not have been made - no forensic benefit from pursuing assertion of collusion - counsel failed to resist admission of irrelevant and highly prejudicial evidence - trial judge permitted admission of such evidence - there was substantial miscarriage of justice - appeal allowed - retrial.

[Allen](#)

The Queen v DK [2016] ACTCA 7

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Perry JJ

Criminal law - Crown appealed against sentences imposed on respondent for five acts of indecency on person under 16 years - sentencing judge sentenced DK to total sentence of 18 months imprisonment immediately suspended subject to 18-month good behaviour - held: judge's apparently incorrect description of operation of s10(2) *Crimes (Sentencing) Act* did not amount to sentencing error - manifest inadequacy of sentences not established - appeal dismissed.

[The Queen](#)



Benchmark

The Florist Wears Knee-Breeches

Wallace Stevens

My flowers are reflected
In your mind
As you are reflected in your glass.
When you look at them,
There is nothing in your mind
Except the reflections
Of my flowers.
But when I look at them
I see only the reflections
In your mind,
And not my flowers.
It is my desire
To bring roses,
And place them before you
In a white dish.

[Wallace Stevens](#)

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