

Friday, 9 December 2016

## Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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

### Executive Summary (1 minute read)

**Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd (SGHC)** - insolvency - corporations - winding up - transactions in between commencement of winding up and winding up order - payments to defendants validated - liquidators' application to recover payments dismissed

**CAA Technologies Pte Ltd v Newcon Builders Pte Ltd (SGHC)** - building and construction - repudiatory breaches of contract - defendant entitled to terminate - plaintiff's claim for breach of contract substantially failed - defendant's counterclaim for breach of contract substantially allowed

**Cheong Woon Weng v Cheong Kok Leong (SGHC)** - real property - trusts and trustees - plaintiff entitled to equal share in property as tenants-in-common with defendant on basis he contributed amount to purchase price - declaration and orders made

**Simic v New South Wales Land and Housing Corporation (HCA)** - contract - performance bonds - Undertakings executed in favour of non-existent named 'Principal' rectified such that they referred to Corporation - appeal allowed - cross-appeals allowed

**Doutch v Commissioner of Taxation (FCAFC)** - taxation - capital gains tax - 50% reduction for small business did not apply to capital gain on sale of mining tenements - appeal dismissed

**Wotton v State of Queensland (No 5) (FCA)** - human rights - racial discrimination -

representative proceedings in relation to death of Aboriginal man (Mulrunji) in police custody - breaches of s9(1) *Racial Discrimination Act 1975* (Cth) by members of Queensland Police Service on Palm Island - declarations and orders

**State of NSW v Wenham** (NSWCA) - workers compensation - separate question - employer entitled to rely on 'blameless motor accident' provisions of *Motor Accidents Compensation Act 1999* (NSW) - appeal allowed

**HP Mercantile Pty Ltd v Hartnett** (NSWCA) - contract - separate questions - failed agricultural investment scheme - loan agreements - construction of 'limited recourse provision' in clause of Investor Loan Agreement - appeal dismissed

**McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No 1)** (VSC) - special referee - discovery - contract - building and construction - Court appointed special referee to answer questions on management of discovery in proceedings generating a very large number of documents - Court accepted opinions of special referee

**Commissioner of State Revenue v Can Barz Pty Ltd** (QCA) - taxation - statutory interpretation - garnishee procedure under *Taxation Administration Act 2001* (Qld) - no error in construction of s50 - appeal against declarations dismissed

**The Queensland Local Government Superannuation Board v Allen** (QCA) - superannuation - total and permanent disablement - privilege - waiver - erroneous disclosure of advice - appeal allowed

**Eicas v Dawson** (SASCFC) - negligence - respondent motorcyclist injured in collision with motor vehicle driven by appellant - appeal against costs order - appeal against apportionment of liability and quantum of damages - appeal and cross-appeal allowed

## Summaries With Link (Five Minute Read)

### **Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd [2016] SGHC 264**

High Court of the Republic of Singapore

Steven Chong J

Insolvency - corporations - winding up - case concerned transactions between parties and corresponding payments which plaintiff made in between commencement of winding up and winding up order - plaintiff's liquidators sought to recover payments - defendant sought to validate payments - s259 *Companies Act* (Cap 50, 2006 Rev Ed) - whether Court satisfied payments would be for company's benefit and therefore creditors' benefit - whether there should be distinction between prospective and retrospective validation - held: payments to

defendants validated - liquidators' application dismissed.

[Centaurea](#)

[From Benchmark Friday, 9 December 2016]

## **CAA Technologies Pte Ltd v Newcon Builders Pte Ltd [2016] SGHC 246**

High Court of the Republic of Singapore

Vinodh Coomaraswamy J

Building and construction - defendant was main contractor for building project which sub-contracted elements of project to plaintiff - plaintiff failed to deliver the elements and failed to meet revised schedule - plaintiff delivered some elements 'out of sequence, incomplete and badly behind schedule' - defendant terminated contract with plaintiff - plaintiff sued defendant for breach of contract - defendant counterclaimed for plaintiff's breach of contract in 'failing to deliver the structural elements as promised' - held: defendant entitled to terminate contract as a result of plaintiff's repudiatory breaches of express and implied terms of contract - plaintiff's claim substantially failed - defendant's counterclaim substantially allowed.

[CAA Technologies](#)

[From Benchmark Friday, 9 December 2016]

## **Cheong Woon Weng v Cheong Kok Leong [2016] SGHC 263**

High Court of the Republic of Singapore

Audrey Lim JC

Real property - trusts and trustees - property purchased and registered in defendant's name - plaintiff claimed entitlement to equal share in property as tenants-in-common with defendant on basis he contributed amount to purchase price - defendant contended amount was loan made to assist him to purchase the property - defendant claimed he repaid loan and lent additional amount to plaintiff - defendant counterclaimed for further sum's repayment - evaluation of evidence in relation to factual disputes - held: plaintiff proved case - counter-claim dismissed - defendant established amount paid to plaintiff, which was to be set-off from any sum due from defendant - declaration and orders made.

[Cheong Woon Weng](#)

[From Benchmark Friday, 9 December 2016]

## **Simic v New South Wales Land and Housing Corporation [2016] HCA 47**

High Court of Australia

French CJ; Kiefel, Gageler, Nettle & Gordon JJ

Contract - performance bonds - second respondent executed two Undertakings on third respondent's instruction in favour of non-existent named 'Principal' - first respondent corporation demanded payment under each Undertaking - second respondent did not pay because corporation not named 'Principal' - whether possible to construe Undertakings in corporation's favour to effect corporation's name in lieu of name which appeared in Undertakings - whether Undertakings should be rectified - common intention - common mistake - held: not possible to construe Undertakings in favour of corporation but Undertakings and

finance applications underlying them should be rectified to refer to corporation - second respondent bound to pay demands - appellants, as guarantors of customer issuing Undertakings, bound to pay amount to second respondent - appeal allowed - cross-appeals allowed.

[Simic](#)

[From Benchmark Thursday, 8 December 2016]

## **Doutch v Commissioner of Taxation [2016] FCAFC 166**

Full Court of the Federal Court of Australia

Greenwood, McKerracher & Moshinsky JJ

Taxation - capital gains tax - applicant sold mining tenements to company - applicant declared capital gain made on sale and claimed 50% capital gains tax (CGT) discount under *Income Tax Assessment Act 1997* (Cth) - applicant objected to assessment on basis 50% reduction for small business in Subdivision 152-C should also apply, contending 'aggregated turnover' of associated entity which carried out activities on land subject of tenements was less than \$2,000,000 - Commissioner disallowed objection - Tribunal affirmed Commissioner's decision, finding the receipts were ordinary income 'in the ordinary course of carrying on a business' - whether receipts in respect of fuel disbursements were part of associated entity's 'annual turnover' - held: no error in Tribunal's decision - appeal dismissed.

[Doutch](#)

[From Benchmark Tuesday, 6 December 2016]

## **Wotton v State of Queensland (No 5) [2016] FCA 1457**

Federal Court of Australia

Mortimer J

Human rights - racial discrimination - representative proceeding - applicant alleged contraventions of s9(1) *Racial Discrimination Act 1975* (Cth) in relation to death of Aboriginal man (Mulrunji) in police custody - action brought on applicants' behalf and on behalf of Indigenous people resident on Palm Island - respondents were State of Queensland and Commissioner of Police for Queensland - whether Queensland Police Service ('QPS') officers contravened s9(1) in police investigation into Mulrunji's death, management of community concerns, tensions and anger, and responses to protests and fires - held: QPS officers contravened s9(1) by 'inappropriate and partial treatment' of officer in charge of police station, treatment of Aboriginal witnesses, conduct of detective senior sergeant in relation to the autopsy report, failure to suspend officer in charge or to communicate with Palm Islanders and defuse tensions, making and continuation of emergency declaration, and 'arrests, entries and searches' of applicants' houses - declarations and orders made.

[Wotton](#)

[From Benchmark Friday, 9 December 2016]

## **State of NSW v Wenham [2016] NSWCA 336**

Court of Appeal of New South Wales

Beazley A/CJ, Meagher & Payne JJA

Workers compensation - separate question - appellant employed worker who was driving behind truck owned by second defendant and driven by first defendant in court below - worker injured when truck's wheel assembly 'somehow became disconnected from the truck' and collided with vehicle she was driving - worker received workers compensation payments from appellant - appellant claimed entitlement to indemnity from respondents under 151Z(1)(d) *Workers Compensation Act 1987* (NSW) on basis respondents were 'liable' to pay damages to worker by deeming provision *Motor Accidents Compensation Act 1999* (NSW) (MACA) - respondents conceded accident was 'blameless motor accident' in s7A MACA - appellant conceded it could not prove breach of care by respondents - primary judge found appellant not entitled to indemnity - whether person liable required to be a 'tortfeasor' or 'wrongdoer' - 'relevant text' - history of s151Z *Workers Compensation Act* - policy considerations - held: employer here entitled to rely upon 'blameless motor accident' provisions of MACA - appeal allowed.

[State of NSW](#)

[From Benchmark Tuesday, 6 December 2016]

## **HP Mercantile Pty Ltd v Hartnett [2016] NSWCA 342**

Court of Appeal of New South Wales

Bathurst CJ; Leeming & Payne JJA

Contract - agricultural investment scheme - appeal concerned 'limited recourse provision' in clause of Investor Loan Agreement between Tumut Rover Orchard Management ('TROM') and respondent Growers - scheme promoted by TROM failed - TROM assigned interest in loan to appellant - appellant sued Growers for outstanding amounts under respective loan agreements - appeal concerned answers separate questions which were designed to resolve issue of whether clause applied in circumstances of case - held: appropriate to answer separate questions - Court of Appeal preferred respondents' construction of clause - appeal dismissed.

[HP Mercantile](#)

[From Benchmark Friday, 9 December 2016]

## **McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No 1) [2016] VSC 734**

Supreme Court of Victoria

Vickery J

Special referee - contract - building and construction - large claim 'involving tens of millions if not hundreds of millions of dollars' arising from gas pipeline's design and construction - construction contract and associated arbitration had generated approximately 4 million electronic or PDF documents - plaintiff had reduced number of relevant documents to 1,400,000 and use of 'predictive coding technology' was likely to reduce and contain volume - central issue for Court was how to manage discovery consistent with proportionality principles and s9 *Civil Procedure Act 2010* (Vic) - held: Court appointed Special Referee under Order 50 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) to conduct reference to answer questions on discovery's management and to deliver report to Court - Court adopted Special

# Benchmark

Referee's opinions - Court to hear parties on form of orders.

[McConnell](#)

[From Benchmark Tuesday, 6 December 2016]

## **Commissioner of State Revenue v Can Barz Pty Ltd [2016] QCA 323**

Court of Appeal of Queensland

Morrison, Philippides & P McMurdo JJA

Taxation - statutory interpretation - appeal concerned whether garnishee procedure under *Taxation Administration Act 2001* (Qld) could be used to recover tax from trust property to satisfy trustees' tax debts which trustees had incurred in different capacity - trial judge answered question in negative - whether trial judge erred in construing s50 *Taxation Administration Act 2001* (Qld) by which tax debt may be recovered from garnishee - held: no error in primary judge's finding that notices given under s50 invalid - appeal against declarations dismissed.

[Commissioner of State Revenue](#)

[From Benchmark Monday, 5 December 2016]

## **The Queensland Local Government Superannuation Board v Allen [2016] QCA 325**

Court of Appeal of Queensland

M McMurdo P, Philippides JA & Burns J

Superannuation - privilege - waiver - total and permanent disablement - trial judge ordered Board to disclose legal advice to respondent in proceeding seeking entitlement to total and permanent disablement benefit under superannuation scheme - issue in court below was whether Board impliedly waived privilege concerning advice - Board sought leave to appeal against disclosure order - s101 *Superannuation Industry (Supervision) Act 1993* (Cth) - ss6, 12, 14, 15 & 19 *Superannuation (Resolution of Complaints) Act 1993* (Cth) - r211 *Uniform Civil Procedure Rules 1999* (Qld) - held: primary judge erred in ordering disclosure of advice - appeal allowed - orders set aside.

[The Queensland Local Government Superannuation Board](#)

[From Benchmark Friday, 9 December 2016]

## **Eicas v Dawson [2016] SASCFC 124**

Full Court of the Supreme Court of South Australia

Nicholson, Parker & Lovell JJ

Negligence - respondent motorcyclist injured in collision with motor vehicle being driven by appellant - trial judge found 20% contributory negligence on part of respondent and gave judgment for respondent - judgment did not exceed appellant's offer - costs order did not give appellant full benefit of offer - appellant appealed against costs order - respondent cross-appealed against apportionment of liability and quantum of damages - ss3, 31, 32, 50 & 54 *Civil Liability Act 1936* (SA) - *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) - held: appellant totally responsible for collision - erroneous assessment for past loss of earning capacity and future loss of earning capacity - damages increased - erroneous

departure from cost penalty's strict application - costs order set aside - appeal and cross appeal allowed.

[Eicas](#)

[From Benchmark Wednesday, 7 December 2016]

## CRIMINAL

### Executive Summary

**Moore v R** (NSWCCA) - criminal law - dishonestly obtaining financial advantage by deception and dealing with proceeds of crime - not established appellant did not have authority to withdraw funds from bank - convictions quashed

**Mulvihill v R** (NSWCCA) - criminal law - murder - self-defence - unlawful and dangerous act manslaughter - appeals against conviction and sentencing dismissed

### Summaries With Link

#### **Moore v R [2016] NSWCCA 260**

Court of Criminal Appeal of New South Wales

Leeming JA, Fagan & N Adams J

Criminal law - appellant convicted of one count of dishonestly obtaining financial advantage by deception contrary to s192E(1)(b) *Crimes Act 1900* (NSW) and one count of dealing with proceeds of crime contrary to s193B(2) - appellant had opened bank account which permitted negative balance to be reached - appellant had borrowed and dissipated funds he knew he had no realistic prospect of repaying - appellant sentenced to concurrent terms of imprisonment - appellant appealed against convictions and sentence - appellant had been granted conditional bail following conviction - nature of bank's mistake - statutory notion of deception in s192B(1)(b) - 'conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make' - held: appellant had acted dishonestly but not 'deceived' bank - no question appellant owed civil debt - not established that appellant not authorised to withdraw funds - convictions quashed - appeal allowed.

[Moore](#)

#### **Mulvihill v R [2016] NSWCCA 259**

Court of Criminal Appeal of New South Wales

Ward JA; Beech-Jones & Fagan JJ

Criminal law - applicant convicted of murder of former lover - applicant had contended death



# Benchmark

resulted from accident having been inflicted by deceased herself in struggle after argument - applicant sought to appeal against conviction and sentence - whether failure to leave manslaughter by unlawful and dangerous act to jury - terms on which self-defence left to jury - provocation - whether erroneous directions - rule in *Browne v Dunn* - prior misconduct - mental illness - held: leave to appeal against conviction granted on grounds concerning self-defence and unlawful and dangerous act manslaughter - grounds of appeal rejected - no error in sentencing - appeals dismissed.

[Mulvihill](#)



# Benchmark

## **The Sea and the Skylark**

By [Gerard Manley Hopkins](#)

On ear and ear two noises too old to end  
Trench—right, the tide that ramps against the shore;  
With a flood or a fall, low lull-off or all roar,  
Frequenting there while moon shall wear and wend.  
Left hand, off land, I hear the lark ascend,  
His rash-fresh re-winded new-skeinèd score  
In crisps of curl off wild winch whirl, and pour  
And pelt music, till none 's to spill nor spend.  
How these two shame this shallow and frail town!  
How ring right out our sordid turbid time,  
Being pure! We, life's pride and cared-for crown,  
Have lost that cheer and charm of earth's past prime:  
Our make and making break, are breaking, down  
To man's last dust, drain fast towards man's first slime.

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