

Friday, 11 March 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)

Victoria v Tatts Group Ltd (HCA) - contract - Tatts not entitled to terminal payment from State under agreement - State's appeal allowed

Tabcorp Holdings Ltd v Victoria (HCA) - statutory interpretation - Tabcorp not entitled to terminal payment provided for in s4.3.12(1) *Gambling Regulation Act 2003* (Vic) - appeal dismissed

Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) (UKSC) - negligence - home-carer injured when she slipped on snow-covered icy foot path outside client's house - employer's failure to provide footwear attachments was breach of *Personal Protective Equipment at Work Regulations 1992* and negligence at common law - appeal allowed

JR Consulting & Drafting Pty Limited v Cummings (FCAFC) - contract - copyright - ownership and control of software used in design and manufacture of items used in construction of buildings - appeal dismissed - cross-appeal allowed in part

Seymour v Commissioner of Taxation (FCAFC) - taxation - AAT's decision to allow appellants in tax appeals to give evidence by video-link from overseas quashed - appeal dismissed

Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd (NSWCA) - corporations - statutory

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demand - applicant not entitled to commence proceedings because it had not complied with Pt 7, Div 1, r 7.1. I *Uniform Civil Procedure Rules 2005* (UCPR) - leave to appeal refused

Lee v Elgammal (NSWCA) - professional negligence - primary judge erred in concluding client suffered any loss or damage due to solicitor's advice - appeal allowed

Barrak Corporation Pty Ltd v Jaswil Properties Pty Ltd (NSWCA) - contract for sale of land - vendor not entitled to terminate contract for purchaser's breach of essential time stipulation - appeal dismissed - cross-appeal allowed

Bartlett v Australia & New Zealand Banking Group Ltd (NSWCA) - contract - employment contract - wrongful dismissal - bank not entitled to terminate appellant's contract for alleged serious misconduct - appeal allowed

ANZ v Loftus (VSC) - mortgage - fraud - bank could enforce judgment debt against mortgagor - mortgage was valid - bank's security interest not defeasible for fraud

Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd (VSCA) - contract - farm lease extensively amended before execution - liability for costs of rates taxes assessments and outgoings levied on landlord - ambiguity - construction of lease - appeal allowed

Summaries With Link (Five Minute Read)

Victoria v Tatts Group Ltd [2016] HCA 5

High Court of Australia

French CJ; Kiefel, Bell, Keane & Gordon JJ

Contract - appeal concerning parties' entry into agreement in 1995 after privatisation of TAB - agreement provided for terminal payment to be made to respondent (Tatts) "[i]f the Gaming Operator's Licence expires without a new gaming operator's licence having issued to [Tatts]" - whether Tatts entitled to payment under clause of agreement due to State's allocation of gaming machine entitlements under *Gambling Regulation Act 2003* (Vic) - meaning of "new gaming operator's licence" in clause of agreement - held: "new gaming operator's licence" meant a gaming operator's licence granted under Pt 3 *Gaming Machine Control Act 1991* (Vic) - a "new gaming operator's licence" was never issued - respondent not entitled to payment under clause of agreement - appeal allowed.

[Victoria](#)

[From Benchmark Friday, 4 March 2016]

Tabcorp Holdings Ltd v Victoria [2016] HCA 4

High Court of Australia

French CJ; Kiefel, Bell, Keane & Gordon JJ

Statutory interpretation - appellant (Tabcorp) claimed entitlement to terminal payment under s4.3.12(1) *Gambling Regulation Act 2003* (Vic) - Tabcorp contended allocation of gambling machine entitlements was "grant of new licences" under of s4.3.12(1) as the entitlements were "substantially similar" to Tabcorp's licences - meaning of "grant of new licences" in s4.3.12(1) - statutory construction - held: "grant of new licences" meant "grant of wagering licence and gaming licence" issued under Pt 3 of Ch 4 *Gambling Regulation Act 2003* (Vic) - Tabcorp not entitled to terminal payment - appeal dismissed.

[Tabcorp](#)

[From Benchmark Friday, 4 March 2016]

Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] UKSC 6

Supreme Court of the United Kingdom

Lady Hale, Deputy President; Lord Wilson, Lord Reed, Lord Toulson & Lord Hodge

Negligence - appellant employed by respondent as home carer - appellant injured wrist when she slipped on sloping public footpath covered in snow overlying ice outside client's house - appellant was wearing flat boots with ridged soles when she slipped and fell - employer's duty of care - risk assessments - precautions - causation - admissibility of expert evidence on health and safety practice - held: employer's failure to provide footwear attachments to appellant constituted both a breach of *Personal Protective Equipment at Work Regulations 1992* and negligence at common law - appeal allowed.

[Kennedy](#)

[From Benchmark Wednesday, 9 March 2016]

JR Consulting & Drafting Pty Limited v Cummings [2016] FCAFC 20

Full Court of the Federal Court of Australia

Bennett, Greenwood & Besanko JJ

Contract - proceedings relating to ownership and control of software used in design and manufacture of items used in construction of buildings - primary judge determined Deed of Agreement between first appellant and first respondent abandoned and termination of licence agreement between second appellant and second respondent invalid - construction of contract - doctrine of abandonment - principles in relation to copyright in computer software - ss236, 237 *Australian Consumer Law* - ss10(1), 13(2), 14(1), 22(1), 29(1) & (2), 31(1), 32(1) and (2), 36(1), 36(1A), 115 & 135AQ(2) *Copyright Act 1968* (Cth) - s126 *Trade Marks Act 1995* (Cth) - appeal dismissed - cross-appeal allowed to extent of variation of restraint orders and declaration to be made.

[JR Consulting](#)

[From Benchmark Monday, 7 March 2016]

Seymour v Commissioner of Taxation [2016] FCAFC 18

Full Court of the Federal Court of Australia

Siopis, Griffiths & Pagone JJ

Taxation - Commissioner sought judicial review of Administrative Appeals Tribunal's decision to allow appellants to give evidence in tax appeals by video link from outside Australia - primary judge quashed decision on basis AAT's interlocutory decision erroneous because AAT took irrelevant considerations in account, failed to apply s39 *Administrative Appeals Tribunal Act 1975* (Cth) and denied Commissioner procedural fairness - held (by majority): no error in decision of primary judge - appeal dismissed.

[Seymour](#)

[From Benchmark Monday, 7 March 2016]

Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd [2016] NSWCA 23

Court of Appeal of New South Australia

McColl & Meagher JJA

Corporations - statutory demand - respondent issued statutory demand to applicant under s459E *Corporations Act 2001* (Cth) - proceedings commenced by applicant's director to set demand aside - director not separately a plaintiff in proceedings pursuing cause of action - applicant did not retain solicitor to commence claim - respondent sought declaration applicant not entitled to commence proceedings because it failed to comply with Div 1, Pt 7, r7.1 *Uniform Civil Procedure Rules 2005* (UCPR), and stay of proceedings following which proceedings would be dismissed if rule not complied with - primary judge stayed proceeding to enable applicant to obtain legal representation - applicant indicated it did not propose to retain solicitor - primary judge dismissed proceeding - whether company a "person under legal incapacity" - whether director a "tutor" and "plaintiff" - held: applicant's proposed appeal did not have arguable prospects of success - leave to appeal refused.

[Tanamerah](#)

[From Benchmark Thursday, 3 March 2016]

Lee v Elgammal [2016] NSWCA 26

Court of Appeal of New South Wales

Gleeson JA; Tobias & Emmett JJA

Professional negligence - evidence - appeal concerning whether appellant solicitor liable to respondent client for liability client incurred under guarantee he gave in bank's favour for loan made by bank to customer - client had retained solicitor to advise him on liabilities and obligations under guarantee and contended solicitor failed to advise him properly - solicitor admitted breach of retainer and negligence but disputed client suffered loss - primary judge gave judgment in client's favour - whether client would have signed guarantee if liability limited to certain amount - whether bank would not have released term deposit if provided with guarantee with client's liability limited - held: primary judge erred in concluding client suffered any loss or damage due to solicitor's advice - appeal allowed.

[Lee](#)

[From Benchmark Friday, 4 March 2016]

Barrak Corporation Pty Ltd v Jaswil Properties Pty Ltd [2016] NSWCA 32

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Court of Appeal of New South Wales

Beazley P; Sackville & Emmett AJJA

Conveyancing - equity - appellant vendor and respondent purchaser entered contract for sale of land - agreed completion date passed - vendor issued notice to complete with time of the essence - vendor failed to provide transfer pursuant to s27 *Corporations Act 2001* (Cth) at settlement - vendor served notice of termination on purchaser - purchaser sought specific performance and damages for delay - primary judge held contract validly terminated for breach of essential time stipulation but ordered equitable relief in purchaser's favour - vendor appealed against grant of equitable relief to purchaser and sought declaration contract terminated and vendor entitled to forfeit deposit - purchaser sought declaration that contract was not terminated and remittal of matter for determination of damages - "preventing principle" - held: a vendor who failed to provide transfer to purchaser in registrable form was not willing and able to complete - a vendor not willing and able to complete was not entitled to terminate for failure of purchaser to complete - vendor's termination was invalid - appeal dismissed - cross-appeal allowed.

[Barrak](#)

[From Benchmark Tuesday, 8 March 2016]

Bartlett v Australia & New Zealand Banking Group Ltd [2016] NSWCA 30

Court of Appeal of New South Wales

Macfarlan, Meagher & Simpson JJA

Contract - employment contract - wrongful dismissal - bank purported to terminate appellant's employment without notice on basis of serious misconduct - appellant sued bank for damages for breach of contract alleging he was not guilty of serious misconduct and that bank was not entitled to terminate his employment without notice - primary judge found appellant sent doctored email to journalist and that bank was entitled to terminate contract without notice on that basis- s140 Evidence Act 1995 (NSW) - s100 Supreme Court Act 1970 (NSW) - onus - held: bank failed to discharge onus to prove alleged misconduct - bank required to act reasonably - bank failed to act reasonably due to its deficiencies in investigating alleged misconduct - bank not entitled to summarily terminate appellant's employment - appellant entitled to damages for wrongful dismissal in sum of \$110,000 with interest.

[Bartlett](#)

[From Benchmark Wednesday, 9 March 2016]

ANZ v Loftus [2016] VSC 58

Supreme Court of Victoria

Cameron J

Mortgage - fraud - defendant was registered proprietor of property - defendant defaulted on repayment pursuant to loan agreement with plaintiff bank - bank sought possession of property alleging that defendant agreed to grant registered mortgage over property as security - defendant contended he never signed mortgage, that signature was forged and bank's mortgage security was defeasible - Associate judge found in favour of bank and ordered

payment of judgment debt - whether mortgage procured by fraud - whether bank could enforce judgment debt over property in reliance on mortgage - ss42, 76 & 78. *Transfer of Land Act 1958* (Vic) - held: bank could enforce judgment debt - mortgage was valid - bank's security interest not defeasible for fraud - judgment for bank.

[ANZ](#)

[From Benchmark Friday, 4 March 2016]

Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd [2016] VSCA 23

Court of Appeal of Victoria

Santamaria, Kyrou & McLeish JJA

Contract - farm lease - printed standard form 'farm lease' extensively amended before execution - lease entered in 1988 between company as landlord and Mr Morris as tenant - lease granted for 99 years - entire rental paid at lease's commencement - respondent acquired leasehold reversion - Mr Morris assigned and transferred term of lease to appellant - respondent sought payment of money for accrued rates taxes assessments and outgoings - appellant appealed against decision in which primary judge construed clause of lease in respondent's favour - ambiguity - parts of lease struck out but which were legible in executed document - held (by majority): appellant succeeded in contesting primary judge's interpretation of clause of lease - appeal allowed.

[Gee Dee](#)

[From Benchmark Tuesday, 8 March 2016]

CRIMINAL

Executive Summary

DPP v Garrett (a Pseudonym) (VSCA) - criminal law - refusal of application for advance ruling seeking leave under s38(1)(a) *Evidence Act 2008* (Vic) to cross-examine own witness - appeal allowed

R v Coss (QCA) - criminal law - rape - failure to adequately direct jury resulting in miscarriage of justice - appeal allowed - convictions set aside - retrial

Summaries With Link

DPP v Garrett (a Pseudonym) [2016] VSCA 31

Court of Appeal of Victoria

Maxwell P; Redlich & Beach JJA

Criminal law - respondent charged with intentionally causing injury - Crown sought leave to



appeal against judge's refusal of its application for advance ruling seeking leave under s 38(1)(a) *Evidence Act 2008* (Vic) to cross-examine one of its witnesses - 'unfavourable' - held: trial judge erred in interpreting meaning of evidence 'unfavourable' to party who called witness - trial judge took incorrect approach to evaluating whether witness's evidence was unfavourable - leave to appeal granted - appeal allowed - ruling set aside.

[Garrett](#)

R v Coss [2016] QCA 44

Court of Appeal of Queensland

M McMurdo P; Gotterson & Morrison JJA

Criminal law - appellant convicted of two counts of rape - appellant appealed against conviction - appellant contended trial judge did not adequately direct jury in relation to crown prosecutor's comments in closing address resulting in miscarriage of justice - held: judge made error of law under s668E(1) *Criminal Code 1899* (Qld) by failing to give comprehensive direction of kind in *Van Der Zyden* [2012] 2 Qd R 568 - there had been substantial miscarriage of justice under s668E(1A) - appeal allowed - convictions set aside - re-trial ordered.

[Coss](#)



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Aspens

BY EDWARD THOMAS

All day and night, save winter, every weather,
Above the inn, the smithy, and the shop,
The aspens at the cross-roads talk together
Of rain, until their last leaves fall from the top.

Out of the blacksmith's cavern comes the ringing
Of hammer, shoe, and anvil; out of the inn
The clink, the hum, the roar, the random singing—
The sounds that for these fifty years have been.

The whisper of the aspens is not drowned,
And over lightless pane and footless road,
Empty as sky, with every other sound
Not ceasing, calls their ghosts from their abode,

A silent smithy, a silent inn, nor fails
In the bare moonlight or the thick-furred gloom,
In tempest or the night of nightingales,
To turn the cross-roads to a ghostly room.

And it would be the same were no house near.
Over all sorts of weather, men, and times,
Aspens must shake their leaves and men may hear
But need not listen, more than to my rhymes.

Whatever wind blows, while they and I have leaves
We cannot other than an aspen be
That ceaselessly, unreasonably grieves,
Or so men think who like a different tree.

[BY EDWARD THOMAS](#)

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