



Friday, 14 October 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)

Ainsworth v Albrecht (HCA) - real property - community titles scheme - lots owners' opposition to proposal to alter lot owners' rights to scheme's common property not unreasonable - appeal allowed

Cunningham v Commonwealth of Australia (HCA) - constitutional law - former members of House of Representatives - entitlements to retiring allowances - laws and determinations of Remuneration Tribunal did not authorise or constitute acquisitions of plaintiffs' property other than on just terms under s 51(xxxi) Constitution

Moree Plains Shire Council v Goater (FCAFC) - bankruptcy - bankruptcy notice erroneously set aside - appeal allowed

Mackay Sugar Ltd v Wilmar Sugar Australia Ltd (FCAFC) - corporations - no error in declaration that resolution passed in general meeting of company (QSL) which amended QSL's constitution 'was oppressive to, unfairly prejudicial to, or unfairly discriminatory against' respondent - appeal dismissed

Wood v Astra Resources Ltd (UK Company No 07620218) (FCA) - bankruptcy and insolvency - recognition of proceedings in UK in which order winding up company made - orders granted to liquidators in relation to administration, realisation and distribution of assets

Bonafair Holdings Pty Ltd v Hungry Jack's Pty Ltd (NSWCA) - landlord and tenant -

construction of lease - obligations for payment for replacement and relocation of main electrical switchboard, land tax and repairs - appeal and cross-appeal dismissed

RinRim Pty Ltd v Deutsche Bank AG (NSWSC) - banking - negligence - misleading and deceptive conduct - equity capital raising in form of Accelerated Renounceable Entitlement Offer - alleged novel duty of care requiring defendants to invite plaintiff into 'Institutional Offer' component - claims dismissed

Chaudhary v Chaudhary (NSWSC) - real property - contract - default on mortgage - unjust contract - claim for possession of property or order for judicial sale refused

Enwerd Pty Ltd v Metier 3 Pty Ltd (VSCA) - contract - applicants bound to pay last instalment provided for in deed of settlement - leave to appeal refused

Paul v Westpac Banking Corporation (QCA) - pleadings - limitations - guarantee - mortgages - 'change of focus' - new cause of action arose out of substantially same facts as cause of action already pleaded - leave to amend statement of claim - appeal allowed

Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd (ACTCA) - contract - guarantee - interest - erroneous finding that interest was to be calculated as compound interest - appeal allowed

Summaries With Link (Five Minute Read)

Ainsworth v Albrecht [2016] HCA 40

High Court of Australia

French CJ; Bell, Keane, Nettle & Gordon JJ

Real property - community titles scheme - dispute concerned proposal to alter lot owners' rights to scheme's common property to allow one lot owner exclusive use of part of it - adjudicator appointed under *Body Corporate and Community Management Act 1997* (Qld) concluded lot owners' opposition unreasonable and made order deeming that motion supporting proposal was passed - Queensland Civil and Administrative Tribunal overturned decision but Court of Appeal of Queensland upheld it - held: adjudicator addressed wrong question - adjudicators ultimate conclusion 'inevitably affected by an error of law' which also infected Court of Appeal's approach - in circumstances where proposal was 'apt to create a reasonable apprehension that it would affect adversely the property rights of opponents of the proposal and the enjoyment of those rights', lot owners' opposition was not unreasonable - appeal allowed.

[Ainsworth](#)

[From Benchmark Thursday, 13 October 2016]

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Cunningham v Commonwealth of Australia [2016] HCA 39

High Court of Australia

French CJ; Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ

Constitutional law - special case - plaintiffs were former members House of Representatives of the Commonwealth Parliament who received parliamentary allowance and parliamentary office holder allowance and/or ministerial salary and other entitlements - plaintiffs paid proportion to Commonwealth under *Parliamentary Contributory Superannuation Act 1948* (Cth) - plaintiffs entitled to 'retiring allowances' when they ceased service - fourth and fifth plaintiffs also entitled to 'Life Gold Pass' - plaintiffs contended they had property rights in respect of retiring allowances and Life Gold Passes under s51(xxxi) Constitution and that certain legislative changes and determinations of Remuneration Tribunal altered the rights amounting to acquisitions of property other than on just terms under s51(xxxi) - held: no laws and determinations of Remuneration Tribunal, cited in questions stated by parties, 'constitute or authorise an acquisition of any, and if so what, property of the plaintiffs, or any of them, otherwise than on just terms, within the meaning of s51(xxxi) of the Constitution' - questions answered

[Cunningham](#)

[From Benchmark Thursday, 13 October 2016]

Moree Plains Shire Council v Goater [2016] FCAFC 135

Full Court of the Federal Court of Australia

Rares, Katzmann & Markovic JJ

Bankruptcy - Federal Circuit Court set aside bankruptcy notice which appellant had served on respondent requiring payment from Local Court judgment debt for unpaid burial fees - respondent had contended she had counter-claim, set-off or cross-demand which was equal to or exceeded sum which she could not have set up in Local Court proceeding - common ground that respondent's cause of action could not have been set up because it did not exist at time of Local Court judgment - trial judge found that claim relied on under s40(1)(g) *Bankruptcy Act 1966* (Cth) was genuine dispute with reasonable prospect of success - appellant appealed against trial judge's decision to set aside bankruptcy notice - sch2 s18 *Competition and Consumer Act 2010* (Cth) - s27 Federal Court of Australia Act 1976 (Cth) - held: Court not satisfied respondent's claim had 'sufficient legal or factual merit' to justifying setting aside the bankruptcy notice under s40(1)(g) Bankruptcy Act - trial judge erred in setting bankruptcy notice aside - appeal allowed.

[Moree](#)

[From Benchmark Tuesday, 11 October 2016]

Mackay Sugar Ltd v Wilmar Sugar Australia Ltd [2016] FCAFC 133

Full Court of the Federal Court of Australia

Gilmour, Jagot & White JJ

Corporations - issue on appeal was whether trial judge correct to declare that resolution passed in general meeting of company (QSL) which amended QSL's constitution 'was oppressive to,

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unfairly prejudicial to, or unfairly discriminatory against' respondent as member of QSL under s232 *Corporations Act 2001* (Cth) - 'continuing commercial interest' - weighing of relevant circumstances - 'changed competition in the marketing of raw sugar' - 'practical realities of Board appointment' - ss232 & 233 *Corporations Act 2001* (Cth) - s24 *Federal Court of Australia Act 1976* (Cth) - *Foreign Acquisitions and Takeovers Act 1975* (Cth) - *Sugar Industry (Real Choice in Marketing) Amendment Act 2015* - held: no error in trial judge's decision - appeal dismissed.

[Mackay](#)

[From Benchmark Tuesday, 11 October 2016]

Wood v Astra Resources Ltd (UK Company No 07620218) [2016] FCA 1192

Federal Court of Australia

White J

Bankruptcy and insolvency - corporations - winding up - High Court of Justice of England and Wales made order under s117 *Insolvency Act 1986* (UK) for winding up of company incorporated in United Kingdom - company same entity as defendant - liquidators pursuant to Art 15 *United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency* (Model Law) given force by s6 *Cross-Border Insolvency Act 2008* (Cth) sought recognition in Australia of the High Court of Justice proceedings - s583(c) *Corporations Act 2001* (Cth) - ss6, 8 & 10(b)(i) *Cross-Border Insolvency Act 2008* (Cth) - r15A.3 *Federal Court (Corporations) Rules 2010* (Cth) - held: Court satisfied Art 17(2)(a) Model Law applied to present case - application and affidavits complied with Rule 15A.3 *Federal Court (Corporations) Rules 2010* (Cth) - not contrary to Australia's public policy to make order for recognition - recognition order granted - orders granted pursuant to Art 21(1)(e), (g) & (2) in relation to administration, realisation and distribution of assets.

[Wood](#)

[From Benchmark Tuesday, 11 October 2016]

Bonafair Holdings Pty Ltd v Hungry Jack's Pty Ltd [2016] NSWCA 276

Court of Appeal of New South Wales

McCull & Meagher JJA; Sackville AJA

Landlord and tenant - appellant lessor sued respondent lessee for recovery of costs of required works, claiming that the lease required the lessee, to bear cost of replacing and relocating main electrical switchboard (MSB) - whether commercial premises' lessor or lessor must bear cost of replacement and relocation of MSB installed in premises - primary judge found in favour of respondent - held: lease did not require respondent to pay for MSB's replacement and relocation - lease did not require respondent to pay amounts it paid in respect of land tax - primary judge did not err in finding repairs in certain amount were required due to reasonable wear and tear and that respondent was entitled to recover amounts it paid to appeal for those repairs - no error in finding respondent not entitled to recover amounts paid for replacement of tiles because replacement was not due to wear and tear - appeal and cross-appeal dismissed.

[Bonafair](#)

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[From Benchmark Monday, 10 October 2016]

RinRim Pty Ltd v Deutsche Bank AG [2016] NSWSC 1377

Supreme Court of New South Wales

Bergin CJ in Eq

Banking - negligence - misleading and deceptive conduct - novel duty of care - proceedings arising from equity capital raising in form of Accelerated Renounceable Entitlement Offer (AREO) which fourth defendant undertook to fund takeover of company - fourth defendant engaged first to third defendants as underwriters and Joint Lead Managers - AREO comprised Institutional Entitlement Offer (Institutional Offer) component followed Prospectus's release and Retail Entitlement Offer - plaintiff shareholder in fourth defendant plaintiff claimed contractual arrangements between fourth defendant and first to third defendants gave rise to a duty of care requiring them to invite plaintiff into Institutional Offer or notify it that it could contact first to third defendants to seek inclusion - plaintiff claimed it was not included in Institutional Offer due to defendants' negligence and claimed damages for loss arising from alleged breach - no dispute claim in negligence was novel - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) - *Australian Securities and Investment Commission Act 2001*(Cth) - *Civil Liability Act 2002* (NSW) - *Corporations Act 2001*(Cth) - *Fair Trading Act 1987* (NSW) - *Trade Practices Act 1974* (Cth) - held: Court not satisfied defendants owed alleged duty to plaintiff - Court did not accept plaintiff's claim that if invited it would have entered Institutional Offer and renounced its entitlements - misleading or deceptive conduct claim failed - claims dismissed.

[RinRim](#)

[From Benchmark Tuesday, 11 October 2016]

Chaudhary v Chaudhary [2016] NSWSC 1423

Supreme Court of New South Wales

Campbell J

Real property - contract - proceedings arising from breakdown of marriage of first and second defendants - plaintiff was first defendant's father who helped first and second defendants to buy matrimonial home - \$1,200,000 of plaintiff and wife's money made available for purchase of home - central question was on what basis plaintiff provided funds - plaintiff contended he provided loan secured by unregistered, second mortgage - first defendant agreed - plaintiff alleged default and sought possession or order for judicial sale - second defendant contended money was a gift or alternatively loan arrangement was unjust contract or offended principles of equity, or that plaintiff estopped from denying advance was gift - ss7, 8 & 9 *Contracts Review Act 1980* (NSW) - ss66F & 66G *Conveyancing Act 1919* (NSW) - s47 *De Facto Relationships Act 1984* (NSW) - s90B *Family Law Act 1975* (Cth) - *Property (Relationships) Act (1984)* (NSW) - ss3(1), 41, 42, 57 & 60 *Real Property Act 1900* (NSW) - held: advance was gift for first defendant only - mortgage was legal device to try to quarantine money from Family Court of Australia's jurisdiction if marriage broke down - Court satisfied second mortgage did not secure anything - second defendant's agreement to mortgage was unjust contract - mortgage set aside - second defendant not entitled to equitable relief - plaintiff not entitled to possession or

order for judicial sale - declaration and orders made.

[Chaudhary](#)

[From Benchmark Wednesday, 12 October 2016]

Enwerd Pty Ltd v Metier 3 Pty Ltd [2016] VSCA 234

Court of Appeal of Victoria

Whelan & McLeish JJA; Cavanough AJA

Contract - applicants were proprietors of land situated - applicants engaged respondent pursuant to agreement for provision of architectural services and builder pursuant to construction contract - applicants' rights and obligations under architect agreement novated to builder under deed of novation - deed of novation not implemented in practice - dispute arose as to fees payable under architect agreement - parties entered deed of settlement - issue in dispute was whether final instalment was due and payable - trial judge held it had become payable - applicants sought leave to appeal - held: no substance in applicants' grounds of appeal - applicant was bound to pay final instalment - leave to appeal refused.

[Enwerd](#)

[From Benchmark Monday, 10 October 2016]

Paul v Westpac Banking Corporation [2016] QCA 252

Court of Appeal of Queensland

Fraser & Gotterson JJA; Douglas J

Pleadings - limitations - mortgages - guarantee - primary judge refused appellant leave to amend statement of claim to include new cause of action, finding new cause of action did not 'arise out of the same or substantially the same facts as the causes of action for which relief had already been claimed' - ss12CC, 12GD & 12GF *Australian Securities and Investments Commission Act 2001* (Cth) - ss51A, 51AC, 82 & 87 *Trade Practices Act 1974* (Cth) - rr5, 376 & 376(4) *Uniform Civil Procedure Rules 1999* (Qld), - held: primary judge erred in concluding 'change of focus' meant proposed new cause of action did not arise out of substantially same facts as causes of action pleaded - contractual cause of action to be regarded as arising from substantially same facts as statutory cause of action already in existence - test in r376(4)(b) of the Rules was satisfied - appropriate to allow amendment under r376(4)(a) - appropriate to exercise discretion to allow amendment - appeal allowed.

[Paul](#)

[From Benchmark Tuesday, 11 October 2016]

Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd [2016] ACTCA 49

Court of Appeal of Australian Capital Territory

Refshauge ACJ, Perry J & Walmsley AJ

Contract - guarantee - interest - first respondent sued second and third appellants under deed of guarantee and indemnity in respect of first respondent's loans to first appellant - under deed guarantors guaranteed payment of money first appellant owed - first respondent contended first

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appellant defaulted on repayment - whether Master correctly held that interest was payable on loans after certain date and was payable at rate of 'Westpac indicator lending rate' plus 2% or at 8% only, and was to be calculated as compound interest - principles applicable to determination of appeal against factual findings - held: Master erred in finding compound interest payable under oral loan agreement between parties 'or that any such term was to be implied' - appeal allowed.

[Volanne](#)

[From Benchmark Wednesday, 12 October 2016]

CRIMINAL

Executive Summary

Kim v The Queen (VSCA) - criminal law - Commonwealth offence - entitlement to utilitarian benefit following guilty pleas - aiding and abetting dealing with proceeds of crime - appeal against sentences dismissed

DPP (Cth) v Thomas (VSCA) - criminal law - Commonwealth offence - drug offences - entitlement to utilitarian benefit following guilty pleas - Director's appeal against sentences allowed on grounds of manifest inadequacy

Summaries With Link

DPP (Cth) v Thomas [2016] VSCA 237

Court of Appeal of Victoria

Redlich, Santamaria & McLeish JJA

Criminal law - Commonwealth offence - one respondent pleaded guilty to attempted possession of commercial quantity of border controlled drug - other respondent pleaded guilty to importation of commercial quantity of border controlled drug - appeal concerned whether discount for utilitarian benefit of plea of guilty attracted for Commonwealth offence - Director of Public Prosecutions submitted it was not - respondents submitted discount available under s16A(2)(g) *Crimes Act 1914* (NSW) in same way as it was for State offences - whether discount to be allowed for objective utilitarian benefit of guilty plea - whether material difference between 'discount for a willingness to facilitate the course of justice' and discount for utilitarian benefit of guilty plea - effect of decision in *Cameron v The Queen* (2002) 209 CLR 339 - whether discount for guilty plea to Commonwealth offences confined to the three subjective factors stated in *Cameron* - held: Court accepted respondents' submissions that discount was available under s16A(2)(g) in same way as it was available for State offences - Director's appeals against sentences allowed on grounds of manifest inadequacy.

[DPP](#)

Kim v The Queen [2016] VSCA 238

Court of Appeal of Victoria

Redlich, Santamaria & McLeish JJA

Criminal law - Commonwealth offence - applicants pleaded guilty to 'aiding and abetting dealing with proceeds of crime worth \$50,000 or more, contrary to s400.5(1) of the Criminal Code (Cth)' - applicants sought to appeal against sentences - respondents entitled to reduced sentences due to utilitarian benefit following guilty pleas for reasons given in *DPP (Cth) v Thomas* [2016] VSCA 237 but submitted sentencing judge failed to afford them that benefit - whether sentencing judge failed to did not afford them of benefit of reduced sentences by virtue of utilitarian benefit following guilty pleas - whether failure to take into account lack of prior convictions - whether sentences offended parity principle and/or were manifestly excessive - held: no error in decision of sentencing judge - appeal dismissed.

[Kim](#)



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Scorn not the Sonnet ?

By [William Wordsworth](#)

Scorn not the Sonnet; Critic, you have frowned,
Mindless of its just honours; with this key
Shakespeare unlocked his heart; the melody
Of this small lute gave ease to Petrarch's wound;
A thousand times this pipe did Tasso sound;
With it Camöens soothed an exile's grief;
The Sonnet glittered a gay myrtle leaf
Amid the cypress with which Dante crowned
His visionary brow: a glow-worm lamp,
It cheered mild Spenser, called from Faery-land
To struggle through dark ways; and, when a damp
Fell round the path of Milton, in his hand
The Thing became a trumpet; whence he blew
Soul-animating strains—alas, too few!

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