

Friday, 15 April 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)

Gosford City Council v Parbery (Liquidator); In the Matter of Lehman Brothers Australia Ltd (In Liq) (Scheme Administrators Appointed) (FCA) - contract - claims resolution process deed construed according to its terms - liquidators' proof of debt upheld

TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim (NSWCA) - contract - insurance - member of fund not entitled to amounts for total and permanent disablement under insurance policies - appeals allowed

Sadiq v NSW Trustee and Guardian (NSWCA) - succession - intestacy - claim of entitlement to deceased's intestate estate or family provision order dismissed - appeal dismissed

Small v K & R Fabrications (W'gong) Pty Ltd (NSWCA) - negligence - workplace injury - inadequate evidence to support claimant's case - appeal dismissed

Arfaras v Vosnakis (NSWCA) - contract - estoppel - appeal required to transfer burial licence to respondent - appeal and cross-appeal dismissed

Hassoun v Wesfarmers General Insurance Ltd t/a Lumley General (NSWCA) - security for costs - want of prosecution - no error in refusal to discharge order for security or dismissal of statement of claim - leave to appeal refused

Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd (NSWSC) - security of payments - claims

served contrary to s13(7) *Building and Construction Industry Security of Payment Act 1999* (NSW) - summary judgment refused

Yes Family Pty Ltd v Sphere Healthcare Pty Ltd (NSWSC) - preliminary discovery - abuse of process - leave to issue subpoenas and notice to produce prior to hearing of application for preliminary discovery refused

Zhang v Popovic (NSWSC) - negligence - insurance - plaintiff injured when metal ramp attached to trailer fell on him - determination of action against parties connected with trailer and insurers joined as defendants

John Urquhart t/as Hart Renovations v Partington (QCA) - security of payments - completion of "enclosed stage" of works - error by Appeal Tribunal of Queensland Civil & Administrative Tribunal - appeal allowed

Jonathan v Mangera (QCA) - limitations - motor vehicle collision - refusal of leave to commence proceedings - leave to appeal refused - permission to adduce further evidence refused

In the matter of an application pursuant to Part 2 (sections 21 to 28) of the Succession Act 1981 (Qld) for the authorisation of the making of a Will on behalf of MPL (QSC) - Wills and estates - authorisation granted for making of proposed Will on behalf of testator who lacked testamentary capacity

Summaries With Link (Five Minute Read)

Gosford City Council v Parbery (Liquidator); In the Matter of Lehman Brothers Australia Ltd (In Liq) [2016] FCA 353

Federal Court of Australia

Foster J

Contract - Gosford Council lodged proof of debt in liquidation of Lehman Brothers - parties entered deed providing for claims resolution process to determine amount to be admitted - deed approved by Court - Adjudicator ruled debt should be only partly admitted - liquidators admitted debt for that amount - Council appealed to the Federal Court - held: deed should be construed objectively in the context of the surrounding circumstances and its purpose - language used in the deed was plain - loss should be calculated on the factual assumptions set out in the deed, notwithstanding the actual circumstances - Council's application dismissed.

[Gosford City Council](#)

[From Benchmark Friday, 15 April 2016]

TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim [2016] NSWCA 68

Court of Appeal of New South Wales

Beazley P, Leeming JA & Emmett AJA

Contract - insurance - Shuetrim was member of superannuation fund - trustee of fund effected insurance policies with Metlife and TAL - Shuetrim sought declarations TAL and MetLife “constructively denied” his claims under policies by not having made any decision until certain dates, and that decisions themselves were “void and of no effect” - Shuetrim also sought declarations he satisfied definition of “Total and Permanent Disablement” in policies and orders TAL and MetLife pay him amounts with interest under s57 *Insurance Contracts Act 1984* (Cth) - primary judge found Shuetrim entitled to total and permanent disability benefits - Metlife and TAL challenged primary judge’s finding they breached insurers’ duty of good faith and good dealings and that Shuetrim sustained onus of showing he satisfied definitions of TPD in policies - held: primary judge erred in construing definitions of total and permanent disablement - primary judge correct to find TAL breached duty but erred in finding Metlife breached duty - Shuetrim had not shown he satisfied definition of total permanent disability in either policy - appeals allowed.

[TAL Life Ltd](#)

[From Benchmark Monday, 11 April 2016]

Sadiq v NSW Trustee and Guardian [2016] NSWCA 62

Court of Appeal of New South Wales

McColl & Leeming JJA; Sackville AJA

Succession - intestacy - appellant contended he was deceased’s de facto partner at time of death and that he was entitled to her intestate estate under s111 *Succession Act 2006* (NSW) or family provision order under Ch 3 - primary judge dismissed claim - r36.16 *Uniform Civil Procedure Rules 2005* (NSW) - conflicting evidence - held: no appellable error in reasons of primary judge - appeal dismissed.

[Sadiq](#)

[From Benchmark Monday, 11 April 2016]

Small v K & R Fabrications (W’gong) Pty Ltd [2016] NSWCA 70

Court of Appeal of New South Wales

McColl, Basten & Simpson JJA

Negligence - workplace injury - appellant claimant suffered workplace injury - claimant failed to satisfy trial judge that respondent breached duty of care - claimant contended primary judge erred by not accepting account of circumstances in which injury arose - adequacy of reasons - *Jones v Dunkel* - held: trial judge had not been satisfied by claimant’s evidence as to how injury occurred - Court could not be satisfied of breach of duty of care without knowing how breach occurred - trial judge’s reasoning not fallacious, erroneous or inadequate - evidence inadequate to support claimant’s case - appeal dismissed.

[Small](#)

[From Benchmark Monday, 11 April 2016]

Arfaras v Vosnakis [2016] NSWCA 65

Court of Appeal of New South Wales
Beazley P; Ward & Simpson JJA

Contract - estoppel - transfer of burial licence - appellant sought to appeal against primary judge's decision that she was required by an estoppel to transfer burial licence to respondent - whether elements of equitable estoppel established - held: n appellant offered gift to respondent of plot respondent and respondent had accepted offer - intention to enter binding contract not ascertainable but elements of proprietary estoppel by encouragement had been established - appeal dismissed - cross-appeal dismissed.

[Arfaras](#)

[From Benchmark Tuesday, 12 April 2016]

Hassoun v Wesfarmers General Insurance Ltd t/a Lumley General [2016] NSWCA 76

Court of Appeal of New South Wales
Ward JA; Sackville & Barrett AJJA

Security for costs - want of prosecution - primary judge dismissed applicant's application to vacate order that he provide security for costs - primary judge also dismissed applicant's statement of claim against insurer in relation to destruction of premises by deliberately lit fire for want of prosecution or failure to comply with Court's orders - applicant sought leave to appeal - s127(2)(a) *District Court Act 1973* (NSW) - ss56, 61 *Civil Procedure Act 2005* (NSW) - rr12.7(1) & 42.21(3) *Uniform Civil Procedure Rules 2005* (NSW) - held: no error in primary judge's dismissal of statement of claim or in refusal to discharge order for security - leave to appeal refused.

[Hassoun](#)

[From Benchmark Thursday, 14 April 2016]

Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd [2016] NSWSC 371

Supreme Court of New South Wales
Meagher JA

Security of payments - summary judgment - plaintiff head contractor contracted with defendant property owner for construction of units - plaintiff sought judgment for unpaid progress payments pursuant to Pt 3, Div 1 *Building and Construction Industry Security of Payment Act 1999* (NSW) - held: evidence established claims served without supporting statement as required by s13(7) - defendant permitted to withdraw contrary admission with costs consequences - summary judgment refused.

[Duffy](#)

[From Benchmark Monday, 11 April 2016]

Yes Family Pty Ltd v Sphere Healthcare Pty Ltd [2016] NSWSC 393

Supreme Court of New South Wales
Slattery J

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Preliminary discovery - leases and tenancies - plaintiff alleged defendant breached lease of facility - plaintiff sought leave to issue three subpoenas and notice to produce before hearing of application for preliminary discovery - defendant contended it was abuse of process to subpoena same documents sought in preliminary discovery application - s56 *Civil Procedure Act 2005* (NSW) - s129(9) *Conveyancing Act 1919* (NSW) - Equity Practice Notice, SC Eq 11 - r5.3 *Uniform Civil Procedure Rules 2005* (NSW) - held: documents being sought were identical to those sought in preliminary discovery application - to issue subpoenas would be abuse of process - leave to issue subpoenas refused.

[Yes Family](#)

[From Benchmark Tuesday, 12 April 2016]

Zhang v Popovic [2016] NSWSC 407

Supreme Court of New South Wales

Adamson J

Negligence - insurance - plaintiff injured when metal ramp attached to trailer behind truck fell on top of him - plaintiff sued parties connected with trailer - plaintiff joined compulsory third party insurer of trailer, and insurer of first four defendants, as fifth and sixth defendants - first defendant was truck driver, second defendant was registered owner of trailer - third defendant was driver's employer and used truck and trailer in freight business - fourth defendant was company associated with driver - ss5B, 5C, 5D *Civil Liability Act 2002* (NSW) - ss11 & 46 *Insurance Contracts Act 1984* (Cth) - ss3, 3A, 10 & 16 *Motor Accidents Compensation Act 1999* (NSW) - Sch 1, cl 38 *Motor Accidents Compensation Amendment Act 2010* (NSW) - s4A *Motor Accidents (Compensation) Act 1979* (NT) - ss4, 5 & 23(1) *Motor Accident Insurance Act 1994* (Qld) - s74 *Trade Practices Act 1974* (Cth) - held: plaintiff granted judgment against first, second and sixth defendants - seventh defendant granted judgment on plaintiff's claim, second and fourth cross-claims - first and second defendants granted judgment on first cross-claim.

[Zhang](#)

[From Benchmark Wednesday, 13 April 2016]

John Urquhart t/as Hart Renovations v Partington [2016] QCA 87

Court of Appeal of Queensland

M McMurdo P, Morrison JA & Henry J

Security of payments - applicant builder performed work on respondents' residence - dispute arose concerning payment of progress payment for building to work's "enclosed stage" - builder sought to appeal against decision of Appeal Tribunal of Queensland Civil & Administrative Tribunal that Magistrate erred in finding "enclosed stage" reached and to matter to QCAT for re-hearing - whether definition of "enclosed stage" met - Sch 2 *Domestic Building Contracts Act 2000* (Qld) - ss142 & 150(3) *Queensland Civil and Administrative Tribunal Act 2009* (Qld) - held: Appeal Panel erred in interpretation of "structural flooring" - appeal allowed - matter remitted for determination according to law.

[John Urquhart](#)

[From Benchmark Tuesday, 12 April 2016]

Jonathan v Mangera [2016] QCA 86

Court of Appeal of Queensland

Morrison JA; Boddice & Burns JJ

Limitations - motor vehicle collision - applicant injured in motor vehicle collision - applicant gave Notice of Accident Claim Form under *Motor Accident Insurance Act 1994* (Qld) - second respondent admitted liability in 2012 - solicitor advised second respondent he was unable to contact applicant - primary judge dismissed application for leave to commence proceedings within 60 days after three events which could not occur before expiry of limitation period - applicant sought leave to appeal - whether good reason for granting leave - whether conscientious effort to comply with Motor Accident Insurance Act - whether applicant chose to leave jurisdiction without leaving instructions - whether risk of significant prejudice to RACQ if leave given - applicant also sought to adduce further evidence - held: leave to adduce further evidence and leave to appeal refused.

[Jonathon](#) (I B W WI WB)

[From Benchmark Wednesday, 13 April 2016]

In the matter of an application pursuant to Part 2 (sections 21 to 28) of the Succession Act 1981 (Qld) for the authorisation of the making of a Will on behalf of MPL [2016] QSC 61

Supreme Court of Queensland

Flanagan J

Wills and estates - succession - statutory Will - MPL injured in motor vehicle accident in 2012 - personal injuries claim resulted in award of damages - approximately \$7.3 million held for MPL by Court appointed administrators - MPL executed Will in 2016 - mother of MPL sought leave to apply for authorisation that Will be made for MPL - proposed Will identical to 2016 Will except for execution clause - whether MPL lacked testamentary capacity - ss21, 22, 23 & 24 *Succession Act 1978* (Qld) - held: MPL lacked testamentary capacity - Court satisfied it should grant leave pursuant to s22 and order made pursuant to s21 authorising Will to be made in terms of proposed Will.

[MPL](#)

[From Benchmark Wednesday, 13 April 2016]

CRIMINAL

Executive Summary

Zaburoni v The Queen (HCA) - criminal law - prosecution had to prove intent to infect complainant with HIV - conviction of unlawfully transmitting a serious disease to another with intent quashed - conviction of unlawful infliction of grievous bodily harm substituted

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Mok v Director of Public Prosecutions (NSW) (HCA) - federal law - Commonwealth law picked up and applied state law - appellant could be guilty of an offence contrary to the NSW law picked up

Summaries With Link

Zaburoni v The Queen [2016] HCA 12

High Court of Australia

Kiefel, Bell, Gageler, Keane & Nettle JJ

Criminal law - appellant convicted of unlawfully transmitting a serious disease (infection by HIV) to another with intent to do so - s317, Criminal Code (Q) - appellant had pled guilty to alternative charge of grievous bodily harm, which did not require proof of intent - prosecution did not accept plea in discharge of the indictment - unnecessary to take verdict on grievous bodily harm charge after verdict of guilty on principal charge - held: s317 required proof of actual intent to transmit HIV - purpose is distinct from motive - where intention to produce a particular result must be proved, prosecution must show the accused had that result as his or her purpose when doing the relevant conduct - in the absence of evidence of malice or knowledge of the degree of risk, a subjective intent to inflict the HIV virus was not proven beyond reasonable doubt - foresight of some risk, and reckless indifference to that risk, was not enough - conviction under s317 quashed and conviction of unlawful infliction of grievous bodily harm substituted - matter remitted to District Court of Queensland for sentence on that charge.

[Zaburoni](#)

Mok v Director of Public Prosecutions [2016] HCA 13

High Court of Australia

French CJ; Kiefel, Bell, Keane & Gordon JJ

Federal jurisdiction - appellant arrested in Victoria under warrant under the Service and Execution of Process Act 1992 (Cth) regarding alleged offences against NSW law - order made under s83(8), Service and Execution of Process Act 1992 (Cth), that appellant be taken to NSW - appellant attempted to escape at Tullamarine Airport - charged in respect of escape attempt under s310D, Crimes Act 1900 - s89(4), Service and Execution of Process Act 1992 (Cth), makes law in place of issue of warrant applicable to escapes - NSW magistrate dismissed the charge - single judge of Supreme Court and Court of Appeal overturned magistrate's ruling - appellant appealed to High Court - held: s89(4), Service and Execution of Process Act 1992 (Cth), picks up NSW law and creates a surrogate Commonwealth law - where state laws are picked up by a Commonwealth law, they may be applied analogically, or in a modified way - s310D, Crimes Act 1900 is applicable by analogy to persons to whom s89(4), Service and Execution of Process Act 1992 (Cth), applies - s310D, Crimes Act 1900, could apply to the escape attempt at Tullamarine Airport - appeal dismissed.

[Mok](#)



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MULGA BILL'S BICYCLE

by A.B. "Banjo" Paterson

'Twas Mulga Bill, from Eaglehawk, that caught the cycling
craze;

He turned away the good old horse that served him many
days;

He dressed himself in cycling clothes, resplendent to be
seen;

He hurried off to town and bought a shining new machine;
And as he wheeled it through the door, with air of lordly
pride,

The grinning shop assistant said, "Excuse me, can you
ride?"

"See here, young man," said Mulga Bill, "from Walgett to the
sea,

From Conroy's Gap to Castlereagh, there's none can ride
like me.

I'm good all round at everything as everybody knows,
Although I'm not the one to talk - I hate a man that blows.

But riding is my special gift, my chiefest, sole delight;

Just ask a wild duck can it swim, a wildcat can it fight.

There's nothing clothed in hair or hide, or built of flesh or
steel,

There's nothing walks or jumps, or runs, on axle, hoof, or
wheel,

But what I'll sit, while hide will hold and girths and straps are
tight:

I'll ride this here two-wheeled concern right straight away at
sight."

'Twas Mulga Bill, from Eaglehawk, that sought his own
abode,

That perched above Dead Man's Creek, beside the
mountain road.

He turned the cycle down the hill and mounted for the fray,

But 'ere he'd gone a dozen yards it bolted clean away.

It left the track, and through the trees, just like a silver steak,

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It whistled down the awful slope towards the Dead Man's Creek.

It shaved a stump by half an inch, it dodged a big white-box:
The very wallaroos in fright went scrambling up the rocks,
The wombats hiding in their caves dug deeper underground,
As Mulga Bill, as white as chalk, sat tight to every bound.
It struck a stone and gave a spring that cleared a fallen tree,
It raced beside a precipice as close as close could be;
And then as Mulga Bill let out one last despairing shriek
It made a leap of twenty feet into the Dean Man's Creek.

'Twas Mulga Bill, from Eaglehawk, that slowly swam ashore:
He said, "I've had some narrer shaves and lively rides before;
I've rode a wild bull round a yard to win a five-pound bet,
But this was the most awful ride that I've encountered yet.
I'll give that two-wheeled outlaw best; it's shaken all my nerve
To feel it whistle through the air and plunge and buck and swerve.
It's safe at rest in Dead Man's Creek, we'll leave it lying still;
A horse's back is good enough henceforth for Mulga Bill."

[A.B. "Banjo" Paterson](#)

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