

Friday, 16 August 2019

## 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)

**Mastronardo v Commonwealth Bank of Australia Limited (FCAFC)** - bankruptcy - two appeals - dismissal of applications to set Bankruptcy Notices aside - appeals dismissed

**Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) (FCA)** - consumer law - applicant contended respondent breached *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) in relation to its 'computer operated loan approval system' - application dismissed

**Hayes v Pioneer Credit Acquisition Services Pty Ltd (FCA)** - bankruptcy - sequestration order made against appellant's estate - appellant denied assistance of 'Mackenzie' friend resulting in denial of procedural fairness - appeal allowed - new trial

**Mekhail v Hana; Mekail v Hana (NSWCA)** - wills and estates - succession - probate - two 'competing wills' - Court granted probate of 2014 will - onus - appeals allowed - probate of 2001 will granted

**Cole v Raykir Holdings Pty Ltd (NSWSC)** - contract - sale of land - plaintiffs validly terminated contract - plaintiff entitled to damages from defendants - judgment for plaintiffs

**Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson trading as Holgerssons Complete Home Service (WASCA)** - insurance contract - 'construction and legal liability policy' - preliminary question - construction of contract - first respondent insured under

policy - appeal dismissed

## Summaries With Link (Five Minute Read)

### **Mastronardo v Commonwealth Bank of Australia Limited [2019] FCAFC 127**

Full Court of the Federal Court of Australia

Flick, Gleeson & Jackson JJ

Bankruptcy - two appeals - appellants in each proceeding appealed against dismissal of applications to set Bankruptcy Notices aside - primary judge had rejected argument that Bankruptcy Notices 'were a nullity' because copy of judgments not "attached" to them when issued by Official Receiver - primary judge, in rejecting argument, followed *Curtis v Singtel Optus Pty Ltd* [2014] FCAFC 144 ("Curtis") - appellants contended Curtis 'wrongly decided' - whether Court 'bound' to follow decision of 'differently constituted Full Court in Curtis' - whether decision in Curtis was "clearly erroneous" - s41 *Bankruptcy Act 1966* (Cth) - regs 4.01 & 4.02 *Bankruptcy Regulations 1996* (Cth) - held: Curtis 'unquestionably correct' - appeals dismissed.

[Matronardo](#)

[From Benchmark Monday, 12 August 2019]

### **Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244**

Federal Court of Australia

Perram J

Consumer law - applicant contended respondent breached *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) in relation to its 'computer operated loan approval system' ('ADS') - whether, in approving 'home loans', respondent 'failed to have regard' to 'living expenses' which consumers had declared on 'loan application forms' - whether breach of NCCPA by 'manner in which' respondent answered 's131(2)(a) Questions' - held: application dismissed.

[Australian Securities](#)

[From Benchmark Wednesday, 14 August 2019]

### **Hayes v Pioneer Credit Acquisition Services Pty Ltd [2019] FCA 1260**

Federal Court of Australia

Rangiah J

Bankruptcy - procedural fairness - primary judge ordered making of sequestration order against appellant's estate - appellant appealed - appellant was self-represented - appellant contended he was 'denied a reasonable opportunity to present his case' due to primary judge's refusal to allow 'Mackenzie' friend' (Mr Welch) to represent appellant, due to 'being deprived of other assistance' as result of primary judge's direction that Mr Welch 'leave the area behind the bar table' and due to primary judge 'calling security staff into the courtroom' - s44 *Federal Circuit Court of Australia Act 1999* (Cth) - whether primary judge denied appellant 'ability to obtain other assistance from Mr Welch' resulting in procedural unfairness - held: appellant was denied

Mr Welch's assistance resulting in procedural unfairness - appeal allowed - new trial.

[Hayes](#)

[From Benchmark Thursday, 15 August 2019]

**Mekhail v Hana; Mekail v Hana [2019] NSWCA 197**

Court of Appeal of New South Wales

Basten & Leeming JJA; Emmett AJA

Wills and estates - two appeals - proceedings concerned question of which of two 'competing wills' (2001 will and 2014 will) of deceased Court should admit to probate - .primary judge granted probate of 2014 will to respondent and dismissed appellants' cross-claim seeking that Court grant probate of 2001 will to New South Wales Trustee & Guardian - primary judge also dismissed appellants' application, under *Succession Act 2006* (NSW), for family provision orders - Court also found no basis to justify deceased's transfer of property to Ms Hana prior to death - appellants appealed - whether to admit 2014 will to probate - "suspicious circumstances" - "testamentary capacity" - "knowledge and approval" - onus - whether erroneous refusal of family provision order - *Gill v Woodall* [2011] Ch 380; [2010] EWCA Civ 1430 - held: probate of 2001 will granted - appeal allowed.

[View Decision](#)

[From Benchmark Friday, 16 August 2019]

**Cole v Raykir Holdings Pty Ltd [2019] NSWSC 1017**

Supreme Court of New South Wales

Darke J

Contract - sale of land - plaintiffs were vendors under contract for sale of land - first defendant was purchaser - second defendant was guarantor of first defendant's obligations - second defendant was first defendant's 'sole director and secretary' - 'common ground' contract terminated - dispute concerned 'how and when the termination occurred' and whether any money 'recoverable' - whether Notice to Complete made 'time of the essence' concerning contract's completion - effect of agreement concerning completion time - whether plaintiffs entitled to terminate due to first defendant's failure to complete or repudiation of contract - whether plaintiffs' claim for recovery of deposit balance defeated on basis provision 'unenforceable as a penalty' - whether amounts which plaintiffs claimed were within scope of guarantee - held: plaintiffs validly terminated contract - plaintiff entitled to damages from defendants - judgment for plaintiffs.

[View Decision](#)

[From Benchmark Thursday, 15 August 2019]

**Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson trading as Holgerssons Complete Home Service [2019] WASCA 114**

Court of Appeal of Western Australia

Buss P; Beech & Pritchard JJA

Insurance contract - fifth respondent was insured concerning 'building activities' under

'construction and legal liability policy' (policy) which appellant issued - second respondents engaged fifth respondent to renovate second respondents' home - fifth respondent engaged first respondent subcontractor for works on home - home damaged by fire 'during the renovations' - second respondents claimed against appellant and others - appellant, after granting fifth respondent indemnity required, in exercise of subrogation rights, fifth defendant to 'maintain proceedings against' first respondent - primary judge, in determination of preliminary question, found first respondent was 'an insured' under policy - appellant sought extension of time to appeal - construction of policy - held: appeal dismissed.

[Tokio](#)

[From Benchmark Monday, 12 August 2019]

## CRIMINAL

### Executive Summary

### Summaries With Link



# Benchmark

## **Down By the Carib Sea (VI: Sunset in the Tropics)**

**By:** James Weldon Johnson

A silver flash from the sinking sun,  
Then a shot of crimson across the sky  
That, bursting, lets a thousand colors fly  
And riot among the clouds; they run,  
Deepening in purple, flaming in gold,  
Changing, and opening fold after fold,  
Then fading through all of the tints of the rose into gray.  
Till, taking quick fright at the coming night,  
They rush out down the west,  
In hurried quest  
Of the fleeing day.

Now above where the tardiest color flares a moment yet,  
One point of light, now two, now three are set  
To form the starry stairs,—  
And, in her firefly crown,  
Queen Night, on velvet slippered feet, comes softly down.

[https://en.wikipedia.org/wiki/James\\_Weldon\\_Johnson](https://en.wikipedia.org/wiki/James_Weldon_Johnson)

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