

Friday, 18 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)

Moreton Bay Regional Council v Mekpine Pty Ltd (HCA) - real property - resumption of land - leases and tenancies - sub-division of land - extent of tenant's interest in land under lease of premises - appeal allowed

R v Independent Broad-based Anti-corruption Commissioner (HCA) - statutory interpretation - *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) authorised Independent Broad-based Anti-corruption Commission to examine police officers in relation to "Operation Ross" investigation into police officers' conduct - appeal dismissed

Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd (NSWCA) - contract - proceedings arising from termination of agreements for provision of investment and asset management services - appeal allowed in part - cross-appeal dismissed

Pymont Point Pty Ltd v Westacott (NSWCA) - leases and tenancies - retail lease - *Retail Leases Act 1994* (NSW) did not apply to lease - appeal dismissed

Swift v Wearing-Smith (NSWCA) - negligence - respondent injured in fall from balcony when balustrade gave way - appellant owners not liable

McKeith v Royal Bank of Scotland Group PLC; Royal Bank of Scotland Group PLC v James (NSWCA) - contract - employment contract - Royal Bank breached contract by failure to apply redundancy policy to them - damages limited to severance payment

Nitro Circus Touring Australia Pty Ltd v Ilaria Lenzoni (NSWSC) - service - contract - service on defendant in Italy - Italian Authority's certificate of service substantially complied with approved form - plaintiff entitled to default judgment

Linfield Developments Pty Ltd v Shuangxing Development Pty Ltd (NSWSC) - contract - development agreement - enforcement of call option - specific performance granted

Investec v Butterss (VSC) - banking - facility agreement - assignment - plaintiff entitled to judgment against first defendant for payment of amount owing pursuant to guarantee

Bergman v CGU Insurance Ltd (VSC) - insurance - landlord's insurance - fire at property - non-disclosure - misrepresentation - insurer's liability reduced to nil

Dual Homes Pty Ltd v Moores Legal Pty Ltd (VSC) - negligence - solicitors' duties - statutory demands - winding up - negligence and misleading and deceptive conduct - damages

Edwards v State Trustees Ltd (VSCA) - Wills and estates - forfeiture rule - widow who killed deceased not entitled to benefit from deceased's death - appeal dismissed

Australian Dream Homes v Stojanovski (VSCA) - security for costs - termination of domestic building contract - evidence of impecuniosity not compelling - matters of public importance - security for costs of appeal refused

Australia and New Zealand Banking Group Ltd v Manasseh (WASCA) - contract - guarantee - bank not entitled to payment of amount under guarantee - appeal dismissed

Summaries With Link (Five Minute Read)

Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Nettle JJ

Real property - resumption of land - leases and tenancies - respondent was tenant in shopping centre - respondent's lease was over premises on land (former lot 6) - lessor registered plan of subdivision under *Land Title Act 1994* (Qld) (LTA) to amalgamate former lot 6 and an adjacent lot (former lot 1) to form a new lot (new lot 1) - appellant Council resumed part of land - respondent claimed compensation under *Acquisition of Land Act 1967* (Qld) (ALA) - extent of respondent's interest in land under lease of premises - ss2 & 12(5).ALA - Sched 2, ss12, 49, 49A, 50, 64, 65, 182, 183 & 184 LTA (Qld) - Pt 3 Div 2, ss 3, 5, 6, 7(1), 8, 19, 20, 38(2) & 40(1) *Retail Shop Leases Act 1994* (Qld) held: respondent's interest was confined to part of new Lot

1 which previously was within former lot 6 - appeal allowed.

[Moreton](#)

[From Benchmark Friday, 11 March 2016]

R v Independent Broad-based Anti-corruption Commissioner [2016] HCA 8

High Court of Australia

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

Statutory interpretation - appellant police officers summonsed to give evidence at public examination concerning "Operation Ross", an investigation into conduct of police officers - appellants contended *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act) did not authorise Independent Broad-based Anti-corruption Commission to conduct examination or compel answers to questions which might incriminate an examinee where reasonable grounds to suspect examinee guilty - whether Commission empowered by IBAC Act to conduct examination of persons who had not been, but might subsequently be, charged and put on trial for offence relating to examination - whether s144 IBAC Act abrogated examinee's privilege against self-incrimination - held: appellants' contentions failed - Commission authorised by IBAC Act to examine police officers - appeal dismissed.

[IBAC](#)

[From Benchmark Friday, 11 March 2016]

Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd [2016] NSWCA 28

Court of Appeal of New South Wales

Macfarlan, Ward & Gleeson JJA

Contract - insurance - appellant provided investment and asset management services to respondent - appellant contended agreements' early termination entitled it to retain funds held on trust for respondent for repayment of early termination fees and accrued fees - primary judge held that while there was a statutory right of rescission in respondent's favour, respondent had lost statutory right by not exercising it within a reasonable time and by affirming agreements - primary judge also found agreements validly terminated for default and appellant entitled only to certain accrued fees - appellant challenged orders in relation to pre-judgment interest and costs - respondent contended it had not lost right to rescind agreements - held: appeal dismissed except in relation to operation of indemnity clause to release costs concerning certain issues - cross-appeal dismissed.

[Woodlawn](#)

[From Benchmark Thursday, 10 March 2016]

Pymont Point Pty Ltd v Westacott [2016] NSWCA 33

Court of Appeal of New South Wales

Ward & Leeming JJA; Emmett AJA

Leases and tenancies - retail lease - statutory interpretation - applicant was lessee of bottle shop - respondent was lessor of premises - applicant acquired leasehold interest in premises by assignment from company - prior to exercising option to renew applicant sought appointment of

specialist retail valuer pursuant to s 32 *Retail Leases Act 1994* (NSW) - after applicant exercised option application amended to similar application under s31 - respondent denied leave governed by Retail Leases Act and Administrative Decisions Tribunal had no jurisdiction to appoint valuer - jurisdictional issue determined in respondent's favour - applicant sought to appeal from primary judge's decision to refuse leave to appeal from Appeal Panel's decision - whether Retail Leases Act applied to lease - construction of s6(1)(b) - held: no error in primary judge's conclusion that Retail Leases Act did not apply to lease - leave to appeal granted - appeal dismissed.

[Pymont](#)

[From Benchmark Thursday, 10 March 2016]

Swift v Wearing-Smith [2016] NSWCA 38

Court of Appeal of New South Wales

Meagher, Hoeben & Simpson JJA

Negligence - respondent injured when he fell from balcony at rear of appellants' premises when balustrade gave way - respondent alleged appellants negligent by allowing access to balcony - respondent succeeded in claim against appellants - ss5B & 5D(1)(a) *Civil Liability Act 2002* (NSW) - appellants' response to recommendations contained in building inspection report - causation - held: primary judge erred in mechanism of balustrade's failure - primary judge's findings as to content of duty of care went beyond appellants' duty to exercise reasonable care - to extent defect identified appellants had acted reasonably - no reason for appellants to believe further structural work required on balustrade - breach of duty not established - appeal allowed.

[Swift](#)

[From Benchmark Monday, 14 March 2016]

McKeith v Royal Bank of Scotland Group PLC; Royal Bank of Scotland Group PLC v James [2016] NSWCA 36

Court of Appeal of New South Wales

Macfarlan JA; Tobias & Emmett AJJA

Contract - employment contract - appellant (McKeith) and respondent (James) were employees of ABN AMRO Group (ABN) who were retrenched in context of third parties' competing takeover offers for ABN - one offeror was Consortium including first respondent Royal Bank - ABN made public statements that if Royal Bank's offer successful, ABN would ensure continuation of its redundancy policy - employees sued ABN and Royal Bank for non-payment of severance and ex gratia payments under policy - James succeeded - McKeith failed - unsuccessful parties appealed - held: ABN did not make contractual promises in relation to continuation of redundancy policy - Royal Bank breached contractual promise to McKeith and James that ABN would continue to apply policy to them - damages limited to severance payment - no breach by Royal Bank by failure to pay ex gratia payment to either McKeith or James.

[McKeith](#)

[From Benchmark Tuesday, 15 March 2016]

Nitro Circus Touring Australia Pty Ltd v Ilaria Lenzoni [2016] NSWSC 178

Supreme Court of New South Wales

Hammerschlag J

Service - default judgment - contract - plaintiff sued defendant for amount owing under agreement in which plaintiff granted defendant right to present and promote show - plaintiff sought default judgment - defendant resided in Italy - whether defendant validly served with process by post effected by Italian Authority - Arts 3 - 6 *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* - s80 *Interpretation Act 1987* (NSW) - s17 *Civil Procedure Act 2005* (NSW) - Pt 6 r 6.9(1), Pt 11 rr 11A.1, 11A.3(1), 11A.4(1), (2), 11A.5(1), 11A.6(1), (2), (3), 11A.8, 11A.10 *Uniform Civil Procedure Rules 2005* (NSW) - held: certificate of service provided by Italian Authority diverged from approved form but substantially complied with it - process validly served - plaintiff entitled to default judgment.

[Nitro Circus](#)

[From Benchmark Thursday, 10 March 2016]

Linfield Developments Pty Ltd v Shuangxing Development Pty Ltd [2016] NSWSC 68

Supreme Court of New South Wales

Pembroke J

Contract - specific performance - plaintiff sought to enforce a call option contained in development agreement - first defendant was in administration - first defendant agreed to purchase land and entered development agreement with third party plaintiff - development agreement contained call option in plaintiff's favour - event of default occurred - plaintiff called for land under option - main dispute was between plaintiff and sixth defendant - sixth defendant claimed its interest as equitable mortgagee had priority over plaintiff's interest in respect of call option - *Australian Consumer Law - Contracts Review Act 1980* (NSW) - credit - contractual construction - contemporaneous notes and documents - held: no genuine dispute about circumstances of plaintiff's exercise of call option - arguments about exercise of option not supportable - plaintiff entitled to relief sought - specific performance granted - judgment for plaintiff.

[Linfield](#)

[From Benchmark Wednesday, 16 March 2016]

Investec v Butterss [2016] VSC 80

Supreme Court of Victoria

Digby J

Banking - facility agreement - plaintiff sought recovery from first defendant under guarantee and indemnity - novation of facility agreement - assignment of facility agreement, novated facility agreement and guarantee from company to plaintiff - held: plaintiff's demand made to first defendant in accordance with guarantee was properly made - first defendant had failed to make

payment in accordance with demand - judgment for plaintiff.

[Investec](#)

[From Benchmark Thursday, 10 March 2016]

Bergman v CGU Insurance Ltd [2016] VSC 81

Supreme Court of Victoria

Hargrave J

Insurance - non-disclosure - misrepresentation - plaintiff obtained landlord's insurance for property he purchased - building on property damaged by fire - .property was vacant in preparation for demolition before commencing building works - plaintiff sought cost of rebuilding or repairing damaged portions of buildings - insurer refused payment on basis plaintiff failed to disclose intention to demolish, gave false answer to specific question and suffered no loss because he intended to demolish buildings - held: plaintiff breached s 21(1) *Insurance Contracts Act 1984* (Cth) by not disclosing matters relevant to risk - plaintiff's answer to question concerning demolition was false and contained misrepresentation-insurer's liability reduced to nil by s28 - unnecessary to decide whether plaintiff suffered loss - judgment for insurer.

[Bergman](#)

[From Benchmark Monday, 14 March 2016]

Dual Homes Pty Ltd v Moores Legal Pty Ltd [2016] VSC 86

Supreme Court of Victoria

J Dixon J

Negligence - solicitors' duties -proportionate liability - first plaintiff builder and developer was trustee of The Roiniotis Family Trust - second and third plaintiffs were family members and creditors/shareholders of first plaintiff - defendants were solicitor and two firms of which solicitor had been principal or employee - plaintiffs sued defendants for breach of retainer, and misleading or deceptive conduct in breach of s18 *Australian Consumer Law* in relation to conduct concerning creditor's statutory demands served on first plaintiff and winding up application against first plaintiff - first plaintiff had been wound up in insolvency as a result of application, which was undefended - first plaintiff alleged it was solvent at all times - Court terminated winding up - first plaintiff claimed it suffered loss in relation to winding up - held: liability imposed for wrongful conduct in respect of second statutory demand - advice in relation to winding up application negligent and involved misleading and deceptive conduct - advocate's immunity had some application but defendants not protected from award of damages - damages assessed - liability apportioned - judgment for plaintiffs.

[Dual Homes](#)

[From Benchmark Tuesday, 15 March 2016]

Edwards v State Trustees Ltd [2016] VSCA 28

Court of Appeal of Victoria

Whelan, Santamaria & Kyrou JJA

Wills and estates - State Trustees sought Court's directions on how to distribute assets of

deceased's estate in circumstances where primary beneficiary under Will had killed deceased - appellant widow pleaded guilty to offence of defensive homicide - primary judge found Court had no discretion to grant relief from forfeiture rule on basis of widow's tragic circumstances and very low moral culpability, that widow had forfeited her interest in deceased's estate, that it was inappropriate to impose a constructive trust for the benefit of beneficiaries to be determined by Court, that gift-over provisions could not take effect, that estate fell on an intestacy and was to be distributed to deceased's daughter - held: appellant's criminal culpability required that widow should not benefit from deceased's death - forfeiture rule applied - appeal dismissed.

[Edwards](#)

[From Benchmark Monday, 14 March 2016]

Australian Dream Homes v Stojanovski [2016] VSCA 38

Court of Appeal of Victoria
Santamaria & McLeish JJA

Security for costs - builder sought to appeal decision in which primary found it was not open to Tribunal to hold owners acted unreasonably in terminating domestic building contract - contract was in form of Master Builders Association of Victoria New Homes Contract (HC-6 Edition 1-2007) - owners sought security for costs - *Domestic Building Contracts Act 1995 (NSW)* - termination provisions of contract - r64.38(2) *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* - held: evidence of builder's impecuniosity not compelling - there had been delay in seeking security - appeal concerned matters of public importance - security for costs refused.

[Australian Dream Homes](#)

[From Benchmark Wednesday, 16 March 2016]

Australia and New Zealand Banking Group Ltd v Manasseh [2016] WASCA 41

Court of Appeal of Western Australia
McLure P; Buss & Murphy JJA

Contract - guarantee - respondent's husband borrowed money on behalf of company from bank - respondent provided guarantee secured by mortgage - bank contended guarantee continued for subsequent credit contracts offered or made to company - bank sued on one of the subsequent contracts (November 2009 credit contract) - respondent claimed liability came to an end on termination date of extension to guarantee to which she had agreed - respondent did not agree to guarantee November 2009 credit contract - primary judge held there was no misleading or deceptive conduct by bank and that respondent's obligation could only end when company had performed all of its obligations to bank and discharged its liability in full - primary judge held November 2009 credit contract was in substance a replacement agreement which adversely affected respondent's liability under guarantee - respondent would only become liable if she consented or entered into new guarantee - primary judge dismissed bank's claims under guarantee and mortgage dismissed - construction of guarantee - 'Ankar' principle - held: bank' appeal dismissed.

[Australia and New Zealand Banking Group](#)

[From Benchmark Monday, 14 March 2016]

CRIMINAL

Executive Summary

Vincenzo Jon Fedele v R (NSWCCA) - criminal law - applicant pleaded guilty to child pornography offences - sentencing process miscarried - appeal allowed - sentences quashed - applicant resentenced

Bulga Underground Operations Pty Ltd v Nash (NSWCCA) - criminal law - occupational health and safety - failure to ensure employee's health, safety and welfare at work - appeal dismissed - appeal against penalty allowed - appeal against costs order allowed

Summaries With Link

Vincenzo Jon Fedele v R [2015] NSWCCA 286

Court of Criminal Appeal of New South Wales

Hidden, Davies & Adamson JJ

Criminal law - applicant pleaded guilty to child pornography offences - Commonwealth charge was using carriage service to access child pornography - State offence was possessing child abuse material - applicant sentenced to 6 months imprisonment for State offence and 12 months imprisonment for Commonwealth offence to be released after 6 months on entering recognizance - applicant sought leave to appeal against sentences - whether failure to apply relevant statutory provisions or consider alternatives to imprisonment - whether sentences manifestly excessive - s471.19(1) *Criminal Code* (Cth) - ss 17A, 91H(2) & 20(1)(B) *Crimes Act 1900* (Cth) - s5 *Crimes (Sentencing Procedure) Act* (NSW) - Ground 3 complains that his Honour - held (by majority): sentencing process miscarried - unnecessary to decide whether sentences manifestly excessive - appeal allowed - sentences quashed - applicant resentenced.

[Vincenzo](#)

Bulga Underground Operations Pty Ltd v Nash [2016] NSWCCA 37

Court of Criminal Appeal of New South Wales

Bathurst CJ; Hidden & Davies JJ

Criminal law - trial judge convicted appellant of failure to ensure employee's health, safety and welfare at work in contravention of s8(1) *Occupational Health and Safety Act 2000* (NSW) and imposed \$50,000 penalty - appellant appealed against conviction - Attorney General appealed against sentence imposed - Attorney General and prosecutor sought to appeal against costs order - whether failure to take steps which did not entirely eliminate risk constituted breach of Act - whether failure to take steps to prevent risk which existed from crystallising constituted

Benchmark

breach of Act - causal nexus - held: appeal dismissed - appeal against penalty allowed - penalty of \$100 000 imposed - appeal against costs order allowed.

[Bulga](#)



Benchmark

I would not paint — a picture — (348)

BY EMILY DICKINSON

I would not paint — a picture —
I'd rather be the One
It's bright impossibility
To dwell — delicious — on —
And wonder how the fingers feel
Whose rare — celestial — stir —
Evokes so sweet a torment —
Such sumptuous — Despair —

I would not talk, like Cornets —
I'd rather be the One
Raised softly to the Ceilings —
And out, and easy on —
Through Villages of Ether —
Myself endued Balloon
By but a lip of Metal —
The pier to my Pontoon —

Nor would I be a Poet —
It's finer — Own the Ear —
Enamored — impotent — content —
The License to revere,
A privilege so awful
What would the Dower be,
Had I the Art to stun myself
With Bolts — of Melody!

[EMILY DICKINSON](#)

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