

Friday, 22 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)

**Botany Bay City Council v Minister for Local Government** (NSWCA) - judicial review - dismissal of summons seeking relief in relation to Government proposal for appellant's merger with Council - appeal dismissed

**CBX2 Pty Limited v National Australia Bank Ltd** (NSWCA) - security for costs - appellant required to pay security for costs - leave to appeal refused

**Murray v Sheldon Commercial Interiors Pty Ltd** (NSWCA) - negligence - slip and fall from ladder at work - causation not established - erroneous finding of breach of duty - appeal dismissed

**Fistar v Riverwood Legion and Community Club Ltd** (NSWCA) - equity - fraud - club and appellant were both victims of fraudster - club could not recover amount from appellant - appeal allowed

**Palermo Seafoods Pty Ltd v Lunapas Pty Ltd** (NSWCA) - pleadings - leases and tenancies - failure to address case pleaded by appellant - substantial miscarriage of justice - new trial - appeal allowed

**El-Kabbout v Insurance Australia Ltd t/as NRMA Insurance** (NSWSC) - insurance - vehicle driven in area - insurer refused to pay claim - extension of time to appeal against decision in insurer's favour refused

**Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd** (NSWSC) - professional negligence - contract - solicitors' duties - failure to conduct further ASIC search just before draw down of loan was breach of duty/retainer - causation not established

**Laratae v Dean's Pty Ltd** (VSCA) - accident compensation - issue estoppel - no issue estoppel arising as result of County Court judge's decision in serious injury application - leave to appeal refused

**Hammercall Pty Ltd v Minister for Transport & Main Roads** (QCA) - real property - compulsory acquisition of land - refusal of declarations which challenged validity of acquisition of land - appeal dismissed

**Tenney v Matthews** (SASC) - contract - joint venture - no breach of settlement agreement - breach of loan agreement - judgment for defendants

**Hendrex v Keating** (TASSC) - negligence - contract - plaintiff injured in fall from ladder while working on defendants' house - defendants liable

## Summaries With Link (Five Minute Read)

### **Botany Bay City Council v Minister for Local Government [2016] NSWCA 74**

Court of Appeal of New South Wales  
Bathurst CJ, Beazley P & Ward JA

Judicial review - appellant appealed against primary judge's dismissal of summons seeking declaratory and other relief concerning Government proposal for its merger with Rockdale City Council - Council's primary complaint was that there was to be no consideration in delegate's process of Council's alternative proposal - ss218A, 218B, 218D, 218E, 218F, 220, 263, 745 *Local Government Act 1993* (NSW) - procedural fairness - mandatory relevant considerations - proper construction of s263 - scope of delegate's authority - held: grounds of appeal failed - appeal dismissed.

[Botany Bay](#)

[From Benchmark Tuesday, 19 April 2016]

### **CBX2 Pty Limited v National Australia Bank Ltd [2016] NSWCA 79**

Court of Appeal of New South Wales  
Ward JA & Sackville AJA

Security for costs - primary judge allowed an appeal by respondent against associate judge's dismissal of its motion seeking appellant provide security for costs - applicant sought leave to appeal - *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) - s1335

*Corporations Act 2001 (Cth) - rr42.21. 45.2. 49.8, 49.9 Uniform Civil Procedure Rules 2005 (NSW) - held: no error by primary judge - no other matter of principle raised - no substantial injustice if leave to appeal refused - application dismissed.*

[CBX2](#)

[From Benchmark Wednesday, 20 April 2016]

## **Murray v Sheldon Commercial Interiors Pty Ltd [2016] NSWCA 77**

Court of Appeal of New South Wales

Leeming & Payne JJA; Schmidt J

Negligence - appellant glazier injured in slip and fall from ladder at work at construction site - appellant claimed he slipped because of dust - appellant sued head contractor and occupier of site - primary judge found respondent breached duty of care but causation not established - appellant appealed - ss5B, 5C, 5E *Civil Liability Act 2002 (NSW)* - r36.16 *Uniform Civil Procedure Rules 2005 (NSW)* - s151Z *Workers Compensation Act 1987 (NSW)* - challenges to factual findings - whether dust played role in accident - challenge to finding on causation - duty and breach - contributory negligence - held: challenges to primary judge's decision not made out - appeal dismissed.

[Murray](#)

[From Benchmark Wednesday, 20 April 2016]

## **Fistar v Riverwood Legion and Community Club Ltd [2016] NSWCA 81**

Court of Appeal of New South Wales

Bathurst CJ, Leeming JA & Sackville AJA

Equity - fraud - appellant gave cheque to fraudster who was sole director of company and held herself out as financial adviser who could invest money - most funds provided by appellant dissipated - CEO of respondent club transferred amount from club's bank account to fraudster's company account - fraudster procured bank cheque made out to vendor of property and provided it to appellant's solicitors - solicitors delivered cheque to vendor's representatives - club sued fraudster, fraudster's company, CEO of club and appellant - appeal was against judgment obtained by club against appellant - appellant claimed personal action for money had and received could not be maintained and also challenged findings whether she was recipient of funds and volunteer - whether respondent club could recover against appellant where both were fraudster's victims - whether personal action for money had and received would "outflank" knowing receipt claim under *Barnes v Addy* - held: club's claim turned on whether appellant was a volunteer - appellant did not receive bank cheque as volunteer - appellant by solicitors had received bank cheque as repayment by fraudster's company of existing enforceable debt - appeal allowed.

[Fistar](#)

[From Benchmark Thursday, 21 April 2016]

## **Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2016] NSWCA 82**

Court of Appeal of New South Wales

# Benchmark

Simpson JA; Sackville & Emmett AJJA

Pleadings - leases and tenancies - self-represented litigant - appellant claimed declarations and orders arising out of lease of first respondent's premises - appellant claimed first respondent wrongfully prevented its access to premises - in first judgment primary judge answered certain questions and identified questions not properly addressed, calling for further submissions - in second judgment primary judge found appellant entitled to judgment against second respondent - second judgment was subject of appeal - grounds of appeal related to claim concerning alleged use of and refusal to return its goods - held: primary judge failed to address case which appellant pleaded and presented resulting in substantial wrong or miscarriage of justice - new trial necessary in interests of justice - appeal allowed.

[Palermo](#)

[From Benchmark Thursday, 21 April 2016]

## **El-Kabbout v Insurance Australia Ltd t/as NRMA Insurance [2016] NSWSC 417**

Supreme Court of New South Wales

Harrison AsJ

Insurance - plaintiff drove vehicle into area affected by flash flooding - plaintiff sued defendant insurer for denying claim for insurance - Magistrate found in favour of defendant - plaintiff sought extension of time to appeal - *Insurance Contracts Act 1984 (Cth) - Uniform Civil Procedure Rules 2005 (NSW)* - held: plaintiff's explanation for delay was not satisfactory - plaintiff's appeal grounds were weak - no actual prejudice demonstrated - extension of time to appeal refused.

[El-Kabbout](#)

[From Benchmark Wednesday, 20 April 2016]

## **Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd [2016] NSWSC 438**

Supreme Court of New South Wales

Hoeben CJ at CL

Professional negligence - contract - solicitors' duties - plaintiffs in business of lending money secured by property - plaintiffs were former clients who sued incorporated legal practice for professional negligence and breach of contract in relation to provision of services concerning loans - ss5B, 5D, 5E & 5O *Civil Liability Act 2002 (NSW)* - held: plaintiffs made out case for breach of duty/retainer in relation to loan for failure to conduct further ASIC search just before draw down of loan - no defence established under s5O - however causation not established - judgment for defendant.

[Richtoll](#)

[From Benchmark Friday, 22 April 2016]

## **Laratae v Dean's Pty Ltd [2016] VSCA 71**

Court of Appeal of Victoria

Warren CJ; Tate & Beach JJA

Accident compensation - issue estoppel - worker brought proceedings for compensation for

injury - Magistrate held respondent employer was estopped from contesting injury alleged by worker on basis of an issue estoppel arising as result of decision of County Court judge in application for leave to bring damages proceedings under s134AB(16)(b) *Accident Compensation Act 1985* (Vic) - primary judge held there was no issue estoppel because decision in serious injury application was not final - applicant sought to appeal - held: applicant's contention that County Court judge's finding on causation gave rise to issue estoppel was without substance - proposed appeal; had no prospect of success - leave to appeal refused.

[Laratae](#)

[From Benchmark Wednesday, 20 April 2016]

## **Hammercall Pty Ltd v Minister for Transport & Main Roads [2016] QCA 95**

Court of Appeal of Queensland

M McMurdo P; Fraser & Mullins JJ

Real property - compulsory acquisition of land - Court refused appellant's application for declarations which challenged validity of acquisition of its land - ss7, 7(3)(e)(ii), 7(3)(e)(iii), 8(2), 8(2A), 9(1), 9(5), 9(5)(a), 20(1)(a), 20(3) & 36B(2) *Acquisition of Land Act 1967* (Qld) - ss24(1), 24(3), 24(4), 25(1), 25(2), 25(3), 25(8) & s25(12) *Transport Planning and Coordination Act 1994* (Qld) - whether failure to consider material - whether objections not heard by validly appointed or proper hearing officer - whether denial of procedural fairness - whether non-compliance with ss8(2) & 8(2A) *Acquisition of Land Act* - held: appellant did not succeed in grounds of appeal - appeal dismissed.

[Hammercall](#)

[From Benchmark Tuesday, 19 April 2016]

## **Tenney v Matthews [2016] SASC 34**

Supreme Court of South Australia

Bampton J

Contract - joint venture - plaintiff and defendants were joint venturers - following mediation parties executed agreements settling matters in dispute and separating interests - plaintiff alleged breaches of settlement agreement seeking damages from defendants - defendants denied breach of settlement agreement and counterclaimed concerning alleged breaches of vendor loan agreement - defendants sought damages in amount of loan and enforcement of security over plaintiffs mining lease - ss6, 9, 9AA, 20, 21, 22, 26, 34, 35, 39, 73A & 73B *Mining Act 1971* (SA) - regs12 & 29 *Mining Regulations 2012* (SA) - held: no breach of settlement agreement - defendants established breach of loan agreement - defendants entitled to damages - judgment for defendants.

[Tenney](#)

[From Benchmark Friday, 22 April 2016]

## **Hendrex v Keating [2016] TASSC 20**

Supreme Court of Tasmania

Blow CJ

Negligence - contract - damages - defendants were married and living together in house - defendant husband arranged for removal and replacement of roof cladding and for friends to help - plaintiff was one of the friends - defendant arranged to pay plaintiff for his work - defendant set up ladder for workers to use to travel to and from roof via roof of carport - plaintiff injured when he fell from ladder - plaintiff sued for negligence, breach of contract and breach of statutory duties under *Workplace Health and Safety Act 1995* (Tas) and *Workplace Health and Safety Regulations 1998* (Tas) - ss11 & 12(a) *Civil Liability Act 2002* (Tas) - held: claim for breach of statutory duties failed - defendants breached duty to take reasonable care to protect plaintiff from harm - damages reduced by 60% for contributory negligence - judgment for plaintiff in sum of \$1,126,904.

[Hendrex](#)

[From Benchmark Thursday, 21 April 2016]

## CRIMINAL

### Executive Summary

**RB v R** (NSWCCA) - criminal law - sexual offences - indecency - no miscarriage of justice by Crown raising issue of motive to lie - appeal dismissed

**Sweetman v Tasmania** (TASCCA) - criminal law - trafficking controlled substance - sentence not manifestly excessive - appeal dismissed

### Summaries With Link

#### **RB v R [2016] NSWCCA 62**

Court of Criminal Appeal of New South Wales

Ward JA; Price & Adamson JJ

Criminal law - indecency - sexual offences towards complainant daughter aged between 10 and 16 years - appellant was convicted of five counts on indictment: - appellant contended on appeal that "There was a miscarriage of justice as a result of the Crown's address effectively inviting the jury to reason, 'why would they lie?'" - r4 *Criminal Appeal Rules* (NSW) - *R v Jovanovic* direction - held: trial judge "amply and correctly" directed jury concerning onus of proof and need for jury to be satisfied "beyond reasonable doubt of the truth of the complainant's evidence" - no miscarriage of justice or error established - appeal dismissed.

[RB](#)

#### **Sweetman v Tasmania [2016] TASCCA 5**



Court of Criminal Appeal of Tasmania

Wood, Estcourt & Pearce JJ

Criminal law - appellant pleaded guilty to trafficking controlled substance namely cannabis - sentence of 10 months' imprisonment imposed with 3 months to be served - balance of sentence conditionally suspended - appellant contended sentence was manifestly excessive - mitigatory factors - appellant's personal circumstances - whether sentence so far outside range that it demonstrated error - s3 *Misuse of Drugs Act 2001* (Tas) - held: sentence was not unreasonable or plainly unjust - appeal dismissed.

[Sweetman](#)



# Benchmark

## **The Late Worm**

By Kay Ryan

The worms  
which had been  
thick are thin  
upon the ground  
now that it's gotten  
later. They stick  
against the path,  
their pink chapped  
and their inching  
labored. It's a  
matter of moisture  
isn't it? Time, a  
measure of wet,  
shrinking, the  
drier you get.

[Kay Ryan](#)

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