



Friday, 24 February 2017

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)

R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) (UKSC) - constitutional law - 'BREXIT' - Act of Parliament required to authorise ministers to give Notice of UK's decision to withdraw from EU - Secretary of State's appeal dismissed

Pioneer Credit Acquisition Services Pty Ltd v Hayes (FCA) - bankruptcy - contract - primary judge erred in dismissing creditor's petition - appeal allowed

Perera v Genworth Financial Mortgage Insurance Pty Ltd (NSWCA) - defamation - negligence - pleadings - novel duty of care - primary judge erred in striking out defamation proceedings - strike out of negligence claims upheld

Ellis's Town House Pty Ltd v Botan Pty Ltd (NSWCA) - leases and tenancies - breaches of lessor's painting and repair covenants - no error in assessment of damages - leave to appeal refused

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (NSWCA) - negligence - psychological injury - worker contracted out to Optus by labour hire company - worker injured in attack by co-worker - Optus did not owe duty of care to worker - Optus not liable - appeal allowed

L.N.E. Cunneen & Co Pty Ltd v Allan Vincent Blackburn (NSWSC) - contract - construction

of contract - dispute concerning contract for provision of 'accounting and business advisory services' - plaintiff's claim against defendants in substance failed

Woolcorp Pty Ltd v Rodger Constructions Pty Ltd (VSCA) - contract - restitution - no basis for contribution of amount to construction of road - appeal allowed

Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd (VSCA) - contempt - law firm not in contempt of Court's orders - leave to appeal refused

Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd (No 2) (VSCA) - equity - contract - law firm had equitable right over costs order - leave to appeal refused

Corporation of the City of Adelaide v Circelli (SASCFC) - environment and planning - Council guilty of contravening authorisation's condition - appeal dismissed

Wood v Adelaide Resource Recovery Pty Ltd (SASCFC) - environment and planning - erroneous acquittal of one count of contravening environmental authorisation's condition - appeal allowed

Roche v Roche (SASC) - wills and estates - probate - deceased had testamentary capacity when he executed Will - application for revocation of probate dismissed

Cutting v Public Trustee For The Northern Territory (NTSC) - joinder - wills and estates - joinder of beneficiaries to plaintiff's application for approval of compromise of entitlement refused

Summaries With Link (Five Minute Read)

R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5

Supreme Court of the United Kingdom

Lord Neuberger, President; Lady Hale, Deputy President; Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwath, Lord Hughes & Lord Hodge
Constitutional law - 'BREXIT' - appeals concerned whether Government could give Notice withdrawing UK from EU Treaties without being authorised by prior Act of Parliament - principle that ministers were 'not normally entitled to exercise any power... if it results in a change in UK domestic law' unless statute provided so - whether ministers' power 'freely to enter into and to terminate treaties without recourse to Parliament' extended to include right of withdrawal from EU Treaties - *European Communities Act 1972* (ECA) - 'devolution issues' - *Northern Ireland Act 1998* - Sewel Convention - held: terms of ECA were inconsistent with ministers' exercise of

power to withdraw from EU Treaties - Act of Parliament required to authorise ministers to give Notice of decision to withdraw from EU - Secretary of State's appeal dismissed.

[R \(on the application of Miller and another\)](#)

[From Benchmark Tuesday, 21 February 2017]

Pioneer Credit Acquisition Services Pty Ltd v Hayes [2017] FCA 124

Federal Court of Australia

Rangiah J

Bankruptcy - contract - Federal Circuit Court of Australia dismissed appellant's creditor's petition which claimed respondent owed debt to appellant and alleged respondent committed act of bankruptcy by failing to comply with bankruptcy notice - primary judge dismissed creditor's petition on basis there was contract between parties for respondent to pay off debt in instalments - appellant contended primary judge erred in finding there was agreement to compromise debt and that appellant had accepted offer by banking money order - appellant contended agreement was void for lack of consideration - held: primary judge erred in finding there was an agreement between parties, erred in finding there was no evidence contradicting inference appellant acted on offer and erred in finding agreement binding - appeal allowed - matter remitted to Federal Circuit Court for new trial.

[Pioneer](#)

[From Benchmark Thursday, 23 February 2017]

Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19

Court of Appeal of New South Wales

Macfarlan, Leeming & Simpson JJA

Defamation - negligence - pleadings - novel duty of care - appellant valuer sued respondent mortgage insurer for damages for defamation and negligence - appellant sought to amend statement of claim - respondent sought to strike out statement of claim on basis pleaded causes of action either frivolous, vexatious, disclosed no reasonable cause of action, or had tendency to cause prejudice, embarrassment or delay in proceedings - primary judge found respondent's complaints about statement of claim made out, struck out existing statement of claim and refused leave to file proposed amended statement of claim - 'negligence occasioning economic loss' - 'negligence occasioning psychiatric injury' - test for summary dismissal - whether alleged novel duty of care meant case should go to trial - whether alleged duty existed - requirement that plaintiff specify imputations relied upon - held: Court found primary judge correct to strike out claims in negligence but defamation proceedings should not have been struck out - appeal allowed in part.

[Perera](#)

[From Benchmark Monday, 20 February 2017]

Ellis's Town House Pty Ltd v Botan Pty Ltd [2017] NSWCA 20

Court of Appeal of New South Wales

Gleeson, Leeming & Simpson JJA

Benchmark

Leases and tenancies - damages - respondent lessee sued applicant lessor for breach of covenants as lessor to paint premises and maintain them - applicant carried out some painting and repair work after proceedings commenced - at time of hearing, respondent had not incurred expenditure - respondent sought damages for breach of painting covenant and repair covenant - there was dispute concerning assessment of damages - amount in issue less than threshold of \$100,000 - applicant sought to appeal concerning issue whether lessee could recover damages on 'cost of cure' basis even though it had not yet incurred costs - held: no error in approach to award of damages - proposed appeal did not raise issue of principle - decision below did not involve injustice - 'ruling principle' governing damages meant respondent entitled to amount to put it in position it would have been in if lessor performed the covenants - the fact that respondent had not incurred this expense no answer to its claim - leave to appeal refused.

[Ellis's](#)

[From Benchmark Tuesday, 21 February 2017]

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21

Court of Appeal of New South Wales

Basten, Hoeben & Gleeson JJA

Negligence - psychological injury - respondent was employed by labour hire company - respondent and co-worker were undertaking training by Optus for work in call centre - respondent and co-worker employed to work for Optus by different agencies - respondent sued Optus for damages for injury suffered in attack by co-worker - respondent claimed that, at time of attack, Optus owed him a duty analogous to that owed by employer to employee - Optus denied it owed duty and contended the only relevant relationship was of occupier of premises and lawful entrant - primary judge found Optus breached duty of care - s32 *Civil Liability Act 2002* (NSW) - held: Optus did not owe duty to respondent to take care not to cause him mental harm - Optus' staff did not owe duty of care to respondent - Optus not vicariously liable - appeal allowed (Gleeson JA dissenting).

[Optus](#)

[From Benchmark Tuesday, 21 February 2017]

L.N.E. Cunneen & Co Pty Ltd v Allan Vincent Blackburn [2017] NSWSC 73

Supreme Court of New South Wales

McDougall J

Contract - plaintiff contended it contracted by contract which was 'partly written, partly oral, and partly implied by conduct' to provide 'accounting and business advisory services' to defendants, and that it was to be remunerated by 10% share of profits defendants made from their businesses, and by 10% share of growth in capital value of businesses' assets - defendants denied contract alleged by plaintiff and that they had performed obligation under retainer - defendants also contended that if there was a contract between them as alleged by plaintiff they were entitled to relief under *Contracts Review Act 1980* (NSW) - construction of contract - draft deed - uncertainty - remedies - held: plaintiff, in substance, failed - Court found

there was agreement for plaintiff to provide services to defendant under which plaintiff entitled to remuneration by receipt of 10% of profits of defendants' business activities - parties had treated the profits of a Unit Trust as proxy for profits, which agreement was terminated by end of April 2013 at the latest - plaintiff not entitled to share in profits after that date - plaintiff not entitled to share of growth value of defendants' defined assets.

[L.N.E. Cunneen](#)

[From Benchmark Thursday, 23 February 2017]

Woolcorp Pty Ltd v Rodger Constructions Pty Ltd [2017] VSCA 21

Court of Appeal of Victoria

Santamaria & Kyrrou JJA; Elliot AJA

Contract - restitution - parties were property developers with interests in adjacent pieces of land under Council's planning control - respondent constructed road as part of a subdivision on land in which it had interest - road benefited applicant - respondent sued applicant claiming they agreed it would contribute to construction's cost or that applicant was obliged to contribute by restitution - trial judge found binding contract existed and awarded amount to respondent - judge also found respondent would have been entitled to same amount by its restitutionary claim if no contract - held: respondent did not have valid claim on basis either of contract or restitution - appeal allowed.

[Woolcorp](#)

[From Benchmark Wednesday, 22 February 2017]

Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd [2017] VSCA 22

Court of Appeal of Victoria

Warren CJ; Tate & McLeish JJA

Contempt - trial judge held firm of lawyers did not breach undertaking to Elliott J concerning payment into Court and thus not in contempt of Elliott J's orders - applicant sought to appeal against decision and also to adduce further evidence - natural justice - bias - adequacy of judge's reasons - whether failure to properly construe undertaking - whether judge erred in taking into account firm's subjective intentions - whether judge should have allowed principal of firm to be cross-examined - whether erroneous acceptance of affidavit - held: leave to appeal refused.

[Bodycorp](#)

[From Benchmark Friday, 24 February 2017]

Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd (No 2) [2017] VSCA 23

Court of Appeal of Victoria

Warren CJ; Tate & McLeish JJA

Equity - contract - applicant sued franchisee for breach of franchise agreement and inducing other franchisees to breach agreements with it - franchisee retained law firm - trial judge dismissed applicant's claim against franchisee and others and ordered applicant to pay costs of franchisee and others - trial judge found law firm had equitable right over the costs order -

applicant sought to appeal - allegation franchise proceeding 'vitiating by fraud' - alleged non-compliance with costs disclosure - bias - adequacy of reasons - deed of charge - whether capping of costs and disbursements - held: grounds of appeal had no prospects of success - leave to appeal refused.

[Bodycorp](#)

[From Benchmark Friday, 24 February 2017]

Corporation of the City of Adelaide v Circelli [2017] SASCF 12

Full Court of the Supreme Court of South Australia

Blue, Lovell & Hinton JJ

Environment and planning - appellant Council was charged on complaint by respondent with four counts of contravening environmental authorisation's condition - Council contended condition contrary to s6 *Wingfield Waste Depot Closure Act 1999* (SA), that condition superseded by steps taken pursuant another condition, and that two charges were out of time and thus statute barred - Environment Court judge found two counts were statute barred but found Council guilty on other two charges - held: Environment Court judge correct to reject Council's defences - appeal dismissed.

[Corporation of the City of Adelaide](#)

[From Benchmark Wednesday, 22 February 2017]

Wood v Adelaide Resource Recovery Pty Ltd [2017] SASCF 13

Full Court of the Supreme Court of South Australia

Blue, Lovell & Hinton JJ

Environment and planning - Judge of Environmental Resources and Development Court acquitted respondent, who operated waste or recycling depot, of two counts of contravening environmental authorisation's condition - whether primary judge erred in finding material stored in stockpiles did not comprise certain categories of waste under conditions - whether primary judge erred in finding meaning of 'Construction and Demolition Waste (Mixed)' and 'Commercial and Industrial Waste (General)' uncertain - held: it was proven beyond reasonable doubt that material in stockpiles comprised 'Construction and Demolition Waste (Mixed)' - appeal allowed - acquittal on one count set aside.

[Wood](#)

[From Benchmark Thursday, 23 February 2017]

Roche v Roche [2017] SASC 8

Supreme Court of South Australia

Kourakis CJ

Wills and estates - probate - testamentary capacity - plaintiff sought that grant of probate in respect of deceased father's Will ('2006 Will') and grant of probate of penultimate will as varied by codicils be revoked - common ground deceased was suffering from dementia when he executed 2006 Will - whether deceased lacked testamentary capacity when he executed 2006 Will - whether deceased knew and approved of 2006 Will's contents - whether Will executed in

accordance with *Wills Act 1936* (SA) - test for testamentary capacity - held: Court concluded deceased had testamentary capacity and knew and approved of Will's contents - application for revocation of probate dismissed.

[Roche](#)

[From Benchmark Tuesday, 21 February 2017]

Cutting v Public Trustee For The Northern Territory [2017] NTSC 6

Supreme Court of the Northern Territory

Master Luppino

Joinder - in substantive proceedings plaintiff sought extension of time to make application under *Family Provision Act* (NT) and order under s8 approving compromise of plaintiff's entitlement - applicants were beneficiaries who sought to be joined as parties - r9.06 *Supreme Court Rules* (NT) - general rule that beneficiaries should not be parties notwithstanding obvious interest - application based on alleged deficiencies in former executors' conduct in relation to assessment and compromise of plaintiff's claim - whether joinder justified by executors' removal and substitution of Public Trustee - held: there was no evidence to support applicants' contentions concerning executors' conduct - Court not satisfied Public Trustee could not uphold Will and represent estate - application dismissed.

[Cutting](#)

[From Benchmark Friday, 24 February 2017]

CRIMINAL

Executive Summary

TO v R (NSWCCA) - criminal law - sexual offences - error in sentencing established - appellant resentenced - appeal against conviction dismissed

R v Peake (SASC) - criminal law - manslaughter by omission - daughter mentally incompetent to commit offence - daughter assumed no legal duty to mother who died of dehydration - objective elements of manslaughter not made out - accused acquitted

Summaries With Link

TO v R [2017] NSWCCA 12

Court of Criminal Appeal of New South Wales

Price, Button & Fagan JJ

Criminal law - sexual offences against person under 10 years - appellant found guilty of offences contrary to ss66A(2)& 66B *Crimes Act 1900* (NSW) - three offences - appellant

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sentenced to 16 years in prison with non-parole period of 12 years for count 1, and concurrent fixed terms of 8 years for counts 2 and 3 - maximum penalty for offence contrary to s66A(2) was life in prison with standard non-parole period of 15 years - maximum penalty for offence contrary to s66B was 25 years with no standard non-parole period - appellant appealed against conviction and sentence - whether judge's refusal to discharge jury due to consequence of aspects of Crown Prosecutor's address to it was miscarriage of justice - whether failure by trial counsel to seek direction pursuant to s165B *Evidence Act 1995* (NSW) was miscarriage of justice - 'forensic disadvantage direction' - whether verdicts unreasonable and unsupported by evidence - whether erroneous application of Pt 4, Div 1A *Crimes (Sentencing Procedure) Act 1999* (NSW) - whether sentences manifestly excessive - whether Court should view 'complainant's two interviews and appellant's ERISP' - held: appeal against conviction dismissed - appeal against sentence allowed - error established in relation to sentencing - judge did not comply with decision in *R v Muldrock* (2011) 244 CLR 120 - appellant re-sentenced.

[TO](#)

R v Peake [2017] SASC 10

Supreme Court of South Australia

Vanstone J

Criminal law - manslaughter - trial by judge alone pursuant s7 *Juries Act 1927* (SA) - accused charged with manslaughter of mother - mother fell outside home and was unable to stand up - accused found mother near back door and helped her crawl to kitchen floor - mother rejected daughter's offer to telephone an ambulance - mother remained floor-bound - accused gave mother no food or water, claiming she feared her mother would choke if given food or water - accused sought no help - mother died of dehydration - charge could be described as 'manslaughter by omission' - held: accused mentally incompetent to commit offence - accused did not assume 'a legally recognised duty to her mother' to ground liability - objective elements of manslaughter not made out - accused acquitted.

[Peake](#)

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Youth and Age

By [Samuel Taylor Coleridge](#)

Verse, a breeze mid blossoms straying,
Where Hope clung feeding, like a bee—
Both were mine! Life went a-maying
With Nature, Hope, and Poesy,
When I was young!

When I was young?—Ah, woful When!
Ah! for the change 'twixt Now and Then!
This breathing house not built with hands,
This body that does me grievous wrong,
O'er aery cliffs and glittering sands,
How lightly then it flashed along:—
Like those trim skiffs, unknown of yore,
On winding lakes and rivers wide,
That ask no aid of sail or oar,
That fear no spite of wind or tide!
Nought cared this body for wind or weather
When Youth and I lived in't together.

Flowers are lovely; Love is flower-like;
Friendship is a sheltering tree;
O! the joys, that came down shower-like,
Of Friendship, Love, and Liberty,
Ere I was old!
Ere I was old? Ah woful Ere,
Which tells me, Youth's no longer here!
O Youth! for years so many and sweet,
'Tis known, that Thou and I were one,
I'll think it but a fond conceit—
It cannot be that Thou art gone!

Thy vesper-bell hath not yet toll'd:—
And thou wert aye a masker bold!
What strange disguise hast now put on,
To make believe, that thou are gone?
I see these locks in silvery slips,
This drooping gait, this altered size:
But Spring-tide blossoms on thy lips,
And tears take sunshine from thine eyes!
Life is but thought: so think I will



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That Youth and I are house-mates still.

Dew-drops are the gems of morning,
But the tears of mournful eve!

Where no hope is, life's a warning
That only serves to make us grieve,
When we are old:

That only serves to make us grieve
With oft and tedious taking-leave,
Like some poor nigh-related guest,
That may not rudely be dismiss;
Yet hath outstay'd his welcome while,
And tells the jest without the smile.

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