

Benchmark

Friday, 25 May 2018

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)

Australian Competition and Consumer Commission v Yazaki Corporation (FCAFC) - competition - statutory interpretation - contraventions of s76(5) *Competition and Consumer Act 2010* (Cth) - penalties refixed against first respondent at \$46 million - appeal allowed in part - cross-appeal and notice of contention dismissed

Decleah Investments Pty Ltd and Prince Removal and Storage Pty Ltd as Trustees for the PRS Unit Trust v Commissioner of Taxation (FCA) - taxation - goods and services tax - Tribunal failed to take evidence of Commissioner's witness into account - Tribunal's decision set aside - matter remitted

Elzahed v State of New South Wales (NSWCA) - judgments and orders - appeal against discretionary decision refusing permission for appellant to give evidence while wearing niqab - appeal dismissed

Cam & Bear Pty Ltd v McGoldrick (NSWCA) - negligence - superannuation - breach of duty and misleading and deceptive conduct by respondent accountant in auditing superannuation fund's accounts - causation established - appeal allowed

Lardis v Lakis (NSWCA) - real property - transfer of interest in property - intent to defraud creditors - evidence - transfer was void - appeal dismissed

Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario

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Novick (NSWSC) - equity - estoppel - promises by deceased to leave estate to plaintiff - trust to be declared over estate's remaining proceeds

Zistis v Zistis (NSWSC) - constitutional law - leases and tenancies - New South Wales Civil and Administrative Tribunal did not have jurisdiction to determine proceedings - plaintiff entitled to possession of premises

Trajkovski v Simpson (NSWSC) - negligence - professional negligence - no duty of care established - no conflict of duties or unconscionable conduct - claim against solicitor and legal practice dismissed

Sader v Langham (NSWSC) - land law - easements - claim for damages arising from works on rights of way - statement of claim dismissed

Dunphy v Russell (NSWSC) - trusts - real property - contribution by plaintiff to defendant's purchase of property - property sold by plaintiff to third party - plaintiff held one third of proceeds of property's sale on trust for defendant

Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd (VSC) - consumer law - building and construction - no error in special referee's finding that plaintiff's claim under Australian Consumer Law should fail - special referee's opinion adopted

Major Carpets Pty Ltd v Marandos (VSCA) - accident compensation - minutes of consent order - calculation of work capacity and loss of earning capacity - credibility - appeal allowed

Murphy v Mackay Labour Hire Pty Ltd (QCA) - costs - corporations - no error in making of non-party costs order against appellant director of company - appeal dismissed

National Australia Bank Limited v Murphy & Anor (QSC) - contract - defendants not released from obligations under mortgage by alleged new agreement - defaults under mortgage established - plaintiff entitled to possession of land

In the Estate of Hildegard Frieda Bibic (Deceased) (SASC) - wills and estates - 'presumption of continuance of life' displaced - deceased died intestate survived by issue of relatives of the fourth degree - directions made as to distribution of deceased's estate

Webster v Leighton (TASSC) - building and construction - magistrate erred in finding notice issued by Director of Building Control was invalid

Northern Territory of Australia v Woodhill and Sons Pty Ltd (NTSC) - security of payments - statutory interpretation - s34(3)(b) *Construction Contracts (Security of Payments) Act* (NT) - adjudicator precluded from determining two disputes

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Summaries With Link (Five Minute Read)

Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73

Full Court of the Federal Court of Australia
Allsop CJ, Middleton and Robertson JJ

Competition - statutory interpretation - primary judge made against declarations and orders, including penalties of \$9.5 million in respect of cartel concerning wire harnesses' supply between two Japanese corporations and Australian subsidiaries - two judgments (liability judgment and relief judgment) - whether erroneous finding of maximum penalty for contraventions - whether penalties should be limited, as primary judge found, to 'two courses of conduct', or should be imposed on five contraventions - construction of s76(5) *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) - whether market in Australia for wire harnesses' supply was required for 'exclusionary provision and contravention' of ss45(2)(a)(i) & 45(2)(b)(i) Competition and Consumer Act - whether market in Australia for wire harnesses supply existed at 'relevant time' - whether subsidiary of first respondent, even though it lacked knowledge of cartel, gave effect to conduct - .held: appeal allowed in part - cross-appeal and notice of intention dismissed - penalties refixed against first respondent at \$46 million for contraventions of ss45(2)(a)(i) & 45(2)(b)(i) Competition and Consumer Act and Competition Code.

[Australian Competition and Consumer Commission](#)

[From Benchmark Monday, 21 May 2018]

Decleah Investments Pty Ltd and Prince Removal and Storage Pty Ltd as Trustees for the PRS Unit Trust v Commissioner of Taxation [2018] FCA 717

Federal Court of Australia
Steward J

Taxation - applicant taxpayer purchased land prior to *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) - applicant subdivided and developed land, and sold lots, applying GST Act's 'margin scheme' provisions - Administrative Appeals Tribunal set aside respondent's objection decision - Tribunal increased amount of GST and penalties payable - procedural fairness - compliance of applicant's valuation with 'professional standards' - 'as is' valuation - held: Tribunal erroneously ignored evidence of Commissioner's witness concerning applicant's valuation - Tribunal's decision set aside - matter remitted.

[Decleah](#)

[From Benchmark Thursday, 24 May 2018]

Elzahed v State of New South Wales [2018] NSWCA 103

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

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Judgments and orders - proceedings arising from execution of search warrant at plaintiffs' home - proceedings involved claims of assault and battery against police officers - appellant, who was party to proceedings, appealed against discretionary decision in which primary judge refused permission for her to give evidence while wearing niqab veil - whether *House v King* error demonstrated - held: no error in primary judge's decision that appellant not permitted to give evidence while her face covered by niqab, or conclusion that fairness 'to all parties' required rejection of application - appeal dismissed.

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[From Benchmark Monday, 21 May 2018]

Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110

Court of Appeal of New South Wales

McColl AP; Macfarlan & White JJA

Negligence - appellant was trustee of superannuation fund - respondent was accountant who audited fund's accounts - appellant claimed negligence and misleading and deceptive conduct against respondent - primary judge found respondent was negligent and had engaged in misleading and deceptive conduct - however primary judge found that respondent's defaults had not caused appellant loss - causation - contributory negligence - proportionate liability - held: primary judge determined causation without considering the 'breadth' of appellant's negligence claim - causation established - Court apportioned responsibility for the loss at 10% to the appellant and 90% to respondent - respondent did not establish company was a concurrent wrongdoer to which some loss should be apportioned, nor should any loss be apportioned to directors of appellant - appeal allowed.

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[From Benchmark Thursday, 24 May 2018]

Lardis v Lakis [2018] NSWCA 113

Court of Appeal of New South Wales

Macfarlan, Meagher & White JJA

Real property - appeal from decision in which primary judge found transfer from third respondent to appellant of interest in property was 'voidable alienation of property with intent to defraud creditors' under s37A(1) *Conveyancing Act 1919* (NSW) - primary judge, in further judgments, declared that transfer was void and made orders for re-conveyance of property - whether erroneous rejection of solicitor's evidence - whether erroneous conclusion there was no 'legally binding agreement' - whether erroneous finding of intent to defraud creditors - held: appellant's challenges to primary judge's decision failed - appeal dismissed.

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[From Benchmark Friday, 25 May 2018]

Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick [2018] NSWSC 692

Supreme Court of New South Wales

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Sackar J

Equity - estoppel - trusts and trustees - plaintiff contended deceased 'represented and promised' to leave his estate, including an apartment, to her as sole beneficiary in return for her 'services, work, care and attention' - plaintiff sought relief on basis of equitable estoppel and constructive trust or breach of contract - defendant, on deceased's death, became apartment's registered and received money from deceased - defendant denied plaintiff's entitlement to relief - whether promises made in alleged terms - effect of wills made in defendant's favour - held: Court satisfied deceased made promises to leave estate to plaintiff - plaintiff had relied to detriment on the promises - unconscionable to permit deceased to resile from the promises - plaintiff should obtain benefit from remainder of estate - trust should be declared on remaining proceeds of estate - contractual claim not made out - Court to hear submissions on declarations to be made.

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[From Benchmark Tuesday, 22 May 2018]

Zistis v Zistis [2018] NSWSC 722

Supreme Court of New South Wales

Latham J

Constitutional law - leases and tenancies - possession - first defendant occupied premises - plaintiff sought termination of tenancy - alternatively plaintiff sought possession of premises and other relief - plaintiff sought declaration that second defendant New South Wales Civil and Administrative Tribunal (NCAT) had jurisdiction to determine proceedings - whether *Residential Tenancies Act 2010* (NSW) (Residential Tenancies Act) conferred judicial power on NCAT - whether NCAT was a court - whether NCAT exercised judicial power - whether NCAT exercised administrative power - *Burns v Corbett; Gaynor v Burns [2017] NSWCA 3* - held: NCAT was not a court - ss81, 83, 85, 187 &119 Residential Tenancies Act did not confer judicial power on NCAT - NCAT did not have jurisdiction to determined matter - plaintiff entitled to possession of premises - judgment for plaintiff.

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[From Benchmark Wednesday, 23 May 2018]

Trajkovski v Simpson [2018] NSWSC 720

Supreme Court of New South Wales

Fagan J

Negligence - professional negligence - solicitors' duties - plaintiff and husband separated - plaintiff obtained Family Court orders under which amount was to be paid by husband to plaintiff - defendants had previously acted for both plaintiff and husband - plaintiff retained another solicitor in Family Court proceedings before terminating retainer - first defendant solicitor and second defendant legal practice acted on husband's instructions on mortgage and sale of properties - plaintiff claimed against defendants in negligence - plaintiff claimed defendants did not exercise reasonable care in securing payment of balance of money due to her under Family Court consent orders from proceeds of sale - scope of solicitor's duty of care - unconscionable

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conduct - s51AB *Trade Practices Act 1974* (Cth) - whether existence and/or breach of duty - whether defendants acting for both plaintiff and husband - held: claims against defendants not made out - no duty of care established - defendants not acting for plaintiff in family law proceedings or in relation to property - husband was plaintiff's 'ostensible agent' - no conflict of duties or unconscionable conduct - claim dismissed.

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[From Benchmark Wednesday, 23 May 2018]

Sader v Langham [2018] NSWSC 727

Supreme Court of New South Wales

Darke J

Land law - easements - plaintiffs owned property with benefit of easements burdening defendants' properties - plaintiffs contended that works first defendant constructed on rights of way were 'substantial interference' with plaintiffs' rights - plaintiffs sought damages, contending works had 'significantly diminished' their land's value - construction of easements - weight to be given to valuer's opinion - held: claim for damages not established - statement of claim dismissed.

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[From Benchmark Thursday, 24 May 2018]

Dunphy v Russell [2018] NSWSC 721

Supreme Court of New South Wales

Sackville AJA

Trusts - real property - dispute concerned contribution which plaintiff father made towards purchase of home by defendant daughter - plaintiff claimed contribution as made on agreed basis between parties that he would acquire in property one third beneficial interest - defendant contended contribution was a gift - defendant sold property to third party - plaintiff lodged caveat over property claiming equitable interest - whether plaintiff established alleged agreement - whether express trust in plaintiff's favour - held: parties intended to create trust - defendant's equitable interest not defeated by s23C(1) *Conveyancing Act 1919* (NSW) - plaintiff could not invoke 'doctrine of advancement' - declaration granted that defendant held one third share of proceeds of property's sale on trust for plaintiff.

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[From Benchmark Friday, 25 May 2018]

Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC 246

Supreme Court of Victoria

Riordan J

Consumer law - building and construction - plaintiff claimed it entered subcontracts concerning building's construction in reliance on defendant's misleading or deceptive representations (Australian Consumer Law claim) - special referee found Australian Consumer Law claim should fail - whether special referee's opinion should be adopted - whether non-disclosure claim within

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pleading's ambit - whether hearing had been conducted on basis of non-disclosure claim - whether pleaded representations were made - whether representations misleading or deceptive - whether reliance established - whether clause of subcontracts barred the Australian Consumer Law claim - held: Court found that special referee's opinion should be adopted - referee erred in finding plaintiff precluded from bringing Australian Consumer Law claim due to failure to give notice within time prescribed by subcontracts

Brighton

[From Benchmark Monday, 21 May 2018]

Major Carpets Pty Ltd v Marandos [2018] VSCA 133

Court of Appeal of Victoria

Beach JA

Accident compensation - plaintiff injured in course of employment with defendant - plaintiff sought, pursuant to s134AB(16)(b) *Accident Compensation Act 1985* (Vic) leave to claim damages in common law proceedings in reliance on 'serious injury' definition in s134AB(37) - primary judge granted plaintiff leave to bring proceedings for both pain and suffering damages and pecuniary loss damages - defendant sought to appeal against grant of leave to claim pecuniary loss damages - plaintiff accepted judge erred in relation to finding of work capacity in relevant employment areas was 20 hours a week, and that this satisfied requirements of 40% loss of earning capacity - parties had filed minutes of consent orders - held: Court satisfied that issues of work capacity and credibility required redetermination - appeal allowed - matter to be reheard by reconstituted Court.

Major Carpets

[From Benchmark Friday, 25 May 2018]

Murphy v Mackay Labour Hire Pty Ltd [2018] QCA 90

Court of Appeal of Queensland

Fraser & Philippides JJA; Boddice J

Costs - corporations - non-party costs order - proceedings involved company of which appellant was director - proceedings did not complete because company was placed in liquidation - appellant appealed against non-party costs order against him - whether erroneous finding of insolvency - whether reliance on irrelevant matters and/or failure to take into account relevant matters - whether error in finding of 'positive obligation to warn' of insolvency and finding of impropriety - whether failure to consider lack of evidence concerning appellant's 'involvement or interest' in litigation - whether factual errors - whether criterion for making of non-party costs order in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 was satisfied - held: no error identified in decision of primary judge - appeal dismissed.

Murphy

[From Benchmark Tuesday, 22 May 2018]

National Australia Bank Limited v Murphy & Anor [2018] QSC 106

Supreme Court of Queensland

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Jackson J

Contract - plaintiff sought possession of land under s78 *Land Title Act 1994* (Qld) - defendants were land's owners land and mortgagors under mortgage to plaintiff - defendants contended parties agreed to rescind and replace 'loan facilities and contracts', with new loan contracts, with result plaintiff's reliance on notices of default were invalid - defendants also contended that part of the new agreement was that guarantee was discharged - defendants also contended plaintiff repudiated new agreement, that defendants had accepted repudiation and guarantee was discharged - held: not necessary for Court to conclude whether new agreement was binding - if new agreement was binding, parties did not agree to rescind guarantee, and new agreement did not 'operate immediately' to rescind agreements or guarantee - defendants not released from obligations under existing facilities or guarantees - defaults established under mortgage - plaintiff entitled to possession - judgment for plaintiff - counterclaim dismissed.

[National Australia Bank Limited](#)

[From Benchmark Wednesday, 23 May 2018]

In the Estate of Hildegard Frieda Bibic (Deceased) [2018] SASC 64

Supreme Court of South Australia

Stanley J

Wills and estates - succession - trusts and trustees - deceased died intestate - Public Trustee appointed administrator of deceased's estate - Public Trustee's investigations established existence of 'relatives of the fourth degree', such relatives being deceased's aunts and uncles - investigations disclosed deceased had possibly not survived uncle (Mr Sauer) - investigations also disclosed issue of aunts and uncles - Public Trustee sought advice and direction concerning net estate's distribution - whether 'presumption of continuance of life' displaced in respect of Mr Sauer - held: presumption was displaced - Court found deceased was not survived by a relative of the fourth degree - estate to be distributed on basis deceased died intestate, survived by issue of relatives of the fourth degree - advice given and directions made.

[In the Estate of Hildegard Frieda Bibic \(Deceased\)](#)

[From Benchmark Tuesday, 22 May 2018]

Webster v Leighton [2018] TASSC 22

Supreme Court of Tasmania

Brett J

Building and construction - respondent charged with failure to comply with building order issued by applicant Director of Building Control - conceded applicant 'had cause' to issue order, that respondent was 'accredited building practitioner' at time of work, and had not complied - respondent contended compliance with order not possible, because he ceased to be accredited building practitioner before order issued, such that it would not be lawful for him to carrying out work under order - magistrate found order not valid - applicant sought review - whether order was valid - statutory interpretation - 'remedial purpose' - held: magistrate erred in finding order was invalid.

[Webster](#)

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[From Benchmark Friday, 25 May 2018]

Northern Territory of Australia v Woodhill and Sons Pty Ltd [2018] NTSC 30

Supreme Court of the Northern Territory

Grant CJ

Security of payments - proceedings concerned two questions in respect of adjudicator appointed to adjudicate two payment disputes - first question was whether s34(3)(b) *Construction Contracts (Security of Payments) Act* (NT) precluded from adjudicating either dispute where one party had not consent to adjudication - second question was whether, if was so precluded, the adjudicator could 'withdraw from, decline or otherwise disavow one appointment' and proceed to adjudicate the other dispute - held: first question answered in the affirmative - adjudicator precluded from adjudicating both disputes - second question answered in the negative.

[Northern Territory of Australia](#)

[From Benchmark Friday, 25 May 2018]

CRIMINAL Executive Summary

R v Jenkin (No 2) (NSWSC) - criminal law - subpoena - murder - accused directed subpoena to Commissioner of Police seeking production of 'criminal histories' of witnesses - documents to be produced - access granted

R v Ahmadi; R v Hosseini; R v A, N; R v M, A (SASCFC) - criminal law - 'criminal trespass' - violence offences - possession of firearm without licence - conduct of prosecutor - judge's directions - appeals against convictions dismissed

Summaries With Link

R v Jenkin (No 2) [2018] NSWSC 697

Supreme Court of New South Wales

Hamill J

Criminal law - subpoena - murder - dispute concerned subpoena which was directed by accused to Commissioner of Police - subpoena sought production of certain prosecution witnesses' 'criminal histories' - whether fishing expedition - whether legitimate forensic purpose - whether 'on the cards' that sought documents would 'materially assist' accused's defence - whether to accept Commissioner's submissions concerning access to documents - 'witness's right to privacy' - 'duty of disclosure' - held: Court concluded that records should

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be produced - access granted.

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R v Ahmadi; R v Hosseini; R v A, N; R v M, A [2018] SASCFC 39

Full Court of the Supreme Court of South Australia

Vanstone, Stanley & Parker JJ

Criminal law - appellants convicted for 'serious criminal trespass and offences of violence' - one appellant also convicted of possessing firearm without licence - appellants appealed against convictions - appellants challenged prosecutor's conduct and trial judge's directions - three appellants contended verdicts 'unsafe and unsatisfactory' - admissibility of evidence of prior incidents - whether direction in respect of alibi evidence necessary - whether miscarriage of justice arising from prosecutor's conduct in respect of suggesting matters 'without basis' to witnesses, and/or in submissions to jury in final address - held: there was some fault in prosecutor's conduct but no miscarriage of justice - no error in judge's directions - open to jury to convict appellants - appeals dismissed.

[Ahmadi](#)

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Poetry

By: Claude McKay

Sometimes I tremble like a storm-swept flower,
And seek to hide my tortured soul from thee,
Bowing my head in deep humility
Before the silent thunder of thy power.
Sometimes I flee before thy blazing light,
As from the specter of pursuing death;
Intimidated lest thy mighty breath,
Windways, will sweep me into utter night.
For oh, I fear they will be swallowed up—
The loves which are to me of vital worth,
My passion and my pleasure in the earth—
And lost forever in thy magic cup!
I fear, I fear my truly human heart
Will perish on the altar-stone of art!

https://en.wikipedia.org/wiki/Claude_McKay

Claude McKay - Wikipedia

en.wikipedia.org

Festus Claudius "Claude" McKay (September 15, 1889 – May 22, 1948) was a Jamaican writer and poet, who was a seminal figure in the Harlem Renaissance. He wrote four novels: *Home to Harlem* (1928), a best-seller that won the Harmon Gold Award for Literature, *Banjo* (1929), *Banana Bottom* (1933), and in 1941 a manuscript called *Amiable With Big ...*

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