

Friday, 26 February 2016

## Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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### Executive Summary (1 minute read)

**Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)** (FCAFC) - insurance - financial advisor was covered by financial errors and omissions insurance policy - underwriters failed to discharge onus to prove exclusion applied - appeal allowed

**Elachi v Council of the City of Shoalhaven** (NSWCA) - environment and planning - appellant's vegetation clearing work breached *Environmental Planning and Assessment Act 1979* (NSW) - appeal dismissed

**United Petroleum Pty Ltd v Pentaco Oil (Aust) Pty Ltd** (FCA) - contract - estoppel - trade practices - correspondence did not constitute agreement for lease of sites - estoppel case succeeded - misleading and deceptive conduct case succeeded

**In the matter of Securities Exchanges Guarantee Corporation Limited as trustee for the National Guarantee Fund** (NSWSC) - trusts and trustees - judicial advice granted to trustees in relation to compensation regime under Pt 7.5 *Corporations Act 2001* (Cth)

**Swindells v State of Victoria** (VSCA) - misleading and deceptive conduct - employment law - no unlawful appointment and removal of mining warden - appeal dismissed

**T & T Investments Australia Pty Ltd v CGU Insurance Ltd** (NSWCA) - adjournment - costs - vacation of hearing granted - appellant to pay respondent's costs thrown away - further security ordered - appeal stayed pending provision of security

**Re Janette Eleanor Counsel; Ex Parte The Public Trustee** (WASC) - Wills and estates - probate - Public Trustee granted leave to withdraw affidavits lodged in relation to validity of Will

**JMT Builders Pty Ltd v. Ryan** (NTSC) - abuse of process - building contract - writ filed pursuant to deed of settlement - issuing proceedings in absence of genuine dispute was abuse of process - proceedings dismissed

## Summaries With Link (Five Minute Read)

### **Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400) [2016] FCAFC 15**

Full Court of the Federal Court of Australia

Allsop CJ; Gleeson & Beach JJ

Insurance - financial services errors and omissions insurance policy (policy) - proceedings originally comprised two claims - claim by trustee of Sienkiewicz retirement fund - claim by trustee for AT Melville retirement fund - both claims for damages against former financial advisers, namely company and its representatives - company in liquidation - there was also claim against financial advisers' professional indemnity insurers - applicants settled case against representatives and discontinued against company - one representative continued claim against insurers for indemnity - primary judge dismissed representative's cross-claim against insurers - proper construction of policy - ss761A, 716G, 716GA, 766A, 766B, 912B, 913B, 916A & 917A-917E *Corporations Act 2001* (Cth) - reg 7.6.02AAA *Corporations Regulations 2001* (Cth) - *Insurance Contracts Act 1984* (Cth) - held: representative undertook financial planning for claimants encompassing approved investment products - representative was covered by policy - underwriters failed to discharge onus of proof that exclusion in 'Endorsement No. 002' applied - appeal allowed.

[Todd](#)

[From Benchmark Wednesday, 24 February 2016]

### **Elachi v Council of the City of Shoalhaven [2016] NSWCA 15**

Court of Appeal of New South Wales

Basten & Ward JJA; Sackville AJA

Environment and planning - respondent sought declaration in Land and Environment Court that appellant's vegetation clearing work contravened s76A(1) *Environmental Planning and Assessment Act 1979* (NSW) - respondent also sought to restrain appellant from undertaking clearing and that appellant restore property - primary judge granted declaration and restraining order - rectification order made by consent - appellant appealed - s109 Constitution - Divs 1, 2 & 6, Pt 4 & Pt 5, ss4, 5, 13, 18, 21, 26, 33A, 74, 74C, 76A, 76B *Environmental Planning and Assessment Act 1979* (NSW) - Pt 3, Divs 2, 3 & 4, ss11, 12, 16, 19, 20, 21 & 22 *Native Vegetation Act 2003* (NSW) - relationship between cl 5.2.3 *Shoalhaven Development Control Plan 2014* and cl 5.9(8) & (9A) *Shoalhaven Local Environmental Plan 2014* - held: trial judge

correct to determine there was breach of s76A(1) - appeal dismissed.

[Elachi](#)

[From Benchmark Friday, 19 February 2016]

## **United Petroleum Pty Ltd v Pentaco Oil (Aust) Pty Ltd [2016] FCA 118**

Federal Court of Australia

Moshinsky J

Contract - estoppel - trade practices - applicant contended correspondence with respondents constituted agreement to lease sites - applicant sought specific performance of agreement - if Court found no agreement applicant contended it would be unconscionable to resile from representations and respondents were estopped from resiling - applicant also contended in alternative that respondents engaged in misleading and deceptive conduct contravening s18 *Australian Consumer Law - Sch 2, ss2(2), 18(1), 131(1) & 232(1) Competition and Consumer Act 2010 (Cth) - Australian Consumer Law, Fair Trading Amendment (Australian Consumer Law) Act 2010 (Vic) - s126 Instruments Act 1958 (Vic) - s52 Trade Practices Act 1974 (Cth) - held: correspondence did not constitute agreement to lease - estoppel case succeeded - misleading and deceptive conduct case succeeded - injunctions granted.*

[United Petroleum](#)

[From Benchmark Wednesday, 24 February 2016]

## **In the matter of Securities Exchanges Guarantee Corporation Limited as trustee for the National Guarantee Fund [2016] NSWSC 76**

Supreme Court of New South Wales

Ball J

Trusts and trustees - judicial advice - Securities Exchanges Guarantee Corporation Limited (SEGC) was trustee of fund established to compensate retail clients for loss due to default by participant in financial market operated by ASX - SEGC sought judicial advice pursuant to s63 *Trustee Act 1925 (NSW)* regarding settling contract guarantee claims on fund - compensation regime under Pt 7.5 *Corporations Act 2001 (Cth)* - standing - jurisdiction - whether advice should be given - whether trustee justified to allow and settle contract guarantee claims made under subdivision 4.3 of Div 4 of Pt 7.5 *Corporations Regulations 2001 (Cth)* - held: judicial advice granted.

[Securities Exchanges](#)

[From Benchmark Thursday, 18 February 2016]

## **Swindells v State of Victoria [2016] VSCA 9**

Court of Appeal of Victoria

Warren CJ; Tate & Santamaria JJA

Misleading and deceptive conduct - employment law - applicant alleged he was unlawfully appointed to and removed from office of mining warden by State and Minister - applicant claimed damages for loss of salary and entitlements under employment contract, loss of earning capacity, reputational harm and emotional distress - primary judge found State and Minister did not contravene s13 *Fair Trading Act 1999 (Vic)* when appointing appellant and in removing



plaintiff State and Minister did not repudiate or breach any term of employment contract, deny him procedural fairness, act for an improper purpose or with apprehended bias - applicant contended primary judge erred in holding respondents had not misled him by failing to disclose that *Mineral Resources (Sustainable Development) Act 1990* was under review which could lead to abolition of mining warden's office - applicant contended primary judge reversed onus of proof and erred in finding no denial of procedural fairness - held: application for leave had no reasonable prospects of success - application dismissed.

[Swindells](#)

[From Benchmark Thursday, 18 February 2016]

## **T & T Investments Australia Pty Ltd v CGU Insurance Ltd [2016] NSWCA 16**

Court of Appeal of New South Wales

Beazley P, Meagher JA & Sackville AJA

Adjournment - costs - corporations - appellant sought that hearing of appeal be adjourned so it could obtain legal representation - appellant's previous solicitors had filed notice of ceasing to act - respondent sought that matter proceed - if Court granted adjournment respondent sought costs thrown away by adjournment on indemnity basis - respondent also sought lump sum order - respondent sought that costs be paid forthwith and provision for further security for costs - held: Court granted adjournment sought - appellant ordered to pay respondent's costs thrown away on ordinary basis - appellant directed to pay further security for costs into Court - appeal stayed pending provision of security.

[T & T](#)

[From Benchmark Monday, 22 February 2016]

## **Re Janette Eleanor Counsel; Ex Parte The Public Trustee [2016] WASC 47**

Supreme Court of Western Australia

Registrar C Boyle

Wills and estates - probate - evidence required to prove validity - Public Trustee sought probate of deceased's Will - there was suggestion of invalidity of Will - Public Trustee had lodged a number of affidavits on basis invalidity needed to be brought to Court's attention and evidence in relation to it must be disclosed - r8 *Non-contentious Probate Rules 1967 (WA)* - O37 rr6 & 7 *Rules of the Supreme Court 1971 (WA)* - s8 *Wills Act 1970 (WA)* - held: it was not necessary for Public Trustee to disclose evidence - it was inappropriate to do so - Court invited applicant to apply to withdraw affidavits before proceeding to determine application - held: leave granted for applicant to withdraw affidavits.

[Re Janette](#)

[From Benchmark Thursday, 18 February 2016]

## **JMT Builders Pty Ltd v. Ryan [2016] NTSC 6**

Supreme Court of the Northern Territory

Master Luppino

Abuse of process - building contract - plaintiff sued defendant for breach of building contract - plaintiff's solicitors advised writ had been filed pursuant to deed of settlement entered between

parties which fully settled claim - deed did not permit plaintiff to sue on initial dispute - whether proceedings were abuse of process - held: categories of abuse of process not closed - deed provided for dispute's final resolution - proceedings were an 'enforcement backup' in event of default by defendants - there was no genuine dispute - issuing proceedings in absence of genuine dispute was abuse of process - proceedings were abuse of process.

[JMT](#)

[From Benchmark Tuesday, 23 February 2016]



# Benchmark

## **The Plain Sense of Things**

BY WALLACE STEVENS

After the leaves have fallen, we return  
To a plain sense of things. It is as if  
We had come to an end of the imagination,  
Inanimate in an inert savoir.

It is difficult even to choose the adjective  
For this blank cold, this sadness without cause.  
The great structure has become a minor house.  
No turban walks across the lessened floors.

The greenhouse never so badly needed paint.  
The chimney is fifty years old and slants to one side.  
A fantastic effort has failed, a repetition  
In a repetitiousness of men and flies.

Yet the absence of the imagination had  
Itself to be imagined. The great pond,  
The plain sense of it, without reflections, leaves,  
Mud, water like dirty glass, expressing silence

Of a sort, silence of a rat come out to see,  
The great pond and its waste of the lilies, all this  
Had to be imagined as an inevitable knowledge,  
Required, as a necessity requires.

[BY WALLACE STEVENS](#)

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