

Tuesday, 29 March 2016

Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Montanile v Board of Trustees of the National Elevator Industry Health Benefit Plan (Supreme Court of the United States) - equity - employee benefits plan sought enforcement of equitable lien over participant's settlement funds - enforcement of lien refused - case remanded

Mesa Minerals Ltd v Mighty River International Ltd (FCAFC) - corporations - authorisation granted for inspection and taking copies of appellant's books - appeal dismissed

Financial Synergy Holdings Pty Ltd v Commissioner of Taxation (FCAFC) - taxation - capital gains tax - "time of acquisition of units" for purposes of s110-25(2) *Income Tax Assessment Act 1997* (Cth) - taxpayer's construction favoured - appeal allowed

Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd (FCAFC) - trade practices - statutory interpretation - collusion - price-fixing - markets for airborne cargo out of Hong Kong, Singapore and Indonesia were markets "in Australia" - appeal allowed

Lifeplan Australia Friendly Society Ltd v Woff (FCA) - equity - fiduciary duties - corporations - contract - inducing breach of contract - passing off - applicants granted declaration and orders

Perera v Genworth Financial Mortgage Insurance Pty Ltd (NSWCA) - pleadings - negligence - novel duties of care - defamation - leave to appeal against strike-out of statement of claim granted

Valuer-General of New South Wales v Oriental Bar Pty Ltd (NSWCA) - valuation of land - exercise of discretion miscarried - failure to discharge statutory functions according to law - Valuer-General's appeal against valuation of land allowed - cross-appeals dismissed

Thiess Pty Ltd v Dobbins Contracting Pty Ltd (NSWSC) - negligence - contract - bailment - proportionate liability - fire destroyed excavator due to 'hot work' performed by defendants' employees - first defendant settled with plaintiff - second defendant not liable

Strauss v Bennett (NSWSC) - contract - claim for possession of land occupied by defendant - defendant failed to make out claim of unwritten agreement for sale to him of plaintiff's interest in land - plaintiff entitled to possession and damages - defendant entitled to restitution

Tan v Russell (VSC) - contract for sale - no valid termination of contract by email sent to real estate agent - plaintiffs' claim failed

Hycenko v Hycenko (VSC) - summary judgment - private undertaking - partial release from solicitor's private undertaking not to release money refused - summary judgment refused

Jakimowicz v Jacks (VSCA) - standing - bankruptcy - trusts and trustees - bankrupt respondent had standing to sue for damages for breach of trust - leave to appeal refused

Thorne Developments Pty Ltd v Thorne (QCA) - corporations - deed of appointment - trust deed - appointment of respondent as trustee of trust valid - respondent not required by trust deed to vacate office - appeal dismissed

Keeley v Horton (QCA) - damages - adequacy of damages - breach of warranties in share sales agreement - erroneous award of only nominal damages for breach of earnings warranties - appeal allowed in part

Maio v City of Stirling [No 2] (WASCA) - contract - deed - dismissal of claim for easement for parking on land adjoining land registered in second respondent's name - appeal dismissed

BGC Construction Pty Ltd v Citygate Properties Pty Ltd (WASC) - construction contract - application to enforce adjudicator's determinations refused - determinations quashed

Summaries With Link (Five Minute Read)

Montanile v Board of Trustees of the National Elevator Industry Health Benefit Plan
Supreme Court of the United States: Docket No 14-723.

Benchmark

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor & Kagan JJ
Equity - petitioner injured by drunk driver - employee benefit plan regulated by *Employee Retirement Income Security Act of 1974* (ERISA) paid amount for medical expenses. - petitioner sued and obtained settlement against drunk driver - Board sought reimbursement from settlement under subrogation clause of plan - petitioner's attorney refused - Board sued petitioner under §502(a)(3) ERISA - Board sought equitable lien on settlement funds or petitioner's property - petitioner contended there was no identifiable fund because he had spent most of settlement - Eleventh Circuit held that even if petitioner had dissipated fund, plan entitled to re-imburement from petitioner's general assets - held: basis for Board's claim was equitable - if fund dissipated on non-traceable items, lien eliminated and plaintiff could not attach defendant's general assets - arguments for enforcement of equitable lien failed - case remanded for District Court.

[Montanile](#)

[From Benchmark Tuesday, 22 March 2016]

Mesa Minerals Ltd v Mighty River International Ltd [2016] FCAFC 16

Full Court of the Federal Court of Australia

Siopis, Gilmour & Katzmann JJ

Corporations - respondent was substantial shareholder in appellant - primary judge authorised respondent to inspect and take copies of appellant's books - appellant contended statutory preconditions for the exercise of Court's discretion not established or errors in exercise of discretion and in orders - ss232, 247A & 461 *Corporations Act 2001* (Cth) - held: no deficiency in reasoning process or findings against evidence - no error in exercise of discretion or determination of scope of order - appeal dismissed.

[Mesa](#)

[From Benchmark Wednesday, 23 March 2016]

Financial Synergy Holdings Pty Ltd v Commissioner of Taxation [2016] FCAFC 31

Full Court of the Federal Court of Australia

Middleton, Logan & Davies JJ

Taxation - capital gains tax - appellant taxpayer was head company of consolidated group - unit trust became subsidiary member of group after sole unitholder disposed of its units to taxpayer in return for shares - issue concerned calculation of units' cost base to determine group's "allocable cost amount" for the unit trust under s705-60 *Income Tax Assessment Act 1997* (Cth) - specific question was time of acquisition of units for the purposes of s110-25(2) - primary judge held "time of acquisition" of units for working out first element of units' cost base was deemed by s122-70(3) to be "before" 20 September 1985 - whether primary judge identified wrong asset in applying s110-25(2)(b) or erred in construing s122-70(3) - held: taxpayer's construction favoured - Court reached different conclusion as to "time of acquisition" of units - Court found time of acquisition of units was 29 June 2007 - appeal allowed.

[Financial Synergy Holdings Pty Ltd](#)

[From Benchmark Thursday, 24 March 2016]

Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd [2016]

FCAFC 42

Full Court of the Federal Court of Australia

Dowsett, Yates & Edelman JJ

Trade practices - statutory interpretation - Commission claimed Air New Zealand Ltd (Air NZ) and Garuda engaged in collusive behaviour by fixing surcharges and fees on carriage of air cargo into Australia contrary to s45 *Trade Practices Act 1974* (Cth) - primary Judge found markets for airborne cargo out of Hong Kong, Singapore and Indonesia were not markets "in Australia" within s4E - primary judge concluded market was located at point airline choice took effect, which was the point at which cargo was delivered to airline - consideration of s4E read with ss45 & 45A - held: all aspects of market were relevant in determination whether market was in Australia - determination was evaluative exercise - Air NZ and Garuda supplied air cargo services including important components which were provided in Australia - services marketed and supplied to customers in Australia - there were Australian barriers to entry into market - market was "in Australia" - appeal allowed.

[ACCC](#)

[From Benchmark Thursday, 24 March 2016]

Lifeplan Australia Friendly Society Ltd v Woff [2016] FCA 248

Federal Court of Australia

Besanko J

Equity - fiduciary duties - corporations - contract - inducing breach of contract - passing off - applicants sought declarations, injunction, delivery up of documents and account of profits against respondents and 'Foresters' - first and second respondents were employees of employees of first applicant - first and second respondents left and became employees of Foresters - prior to ceasing employment first and second respondents established third respondent and were its two directors - third respondent entered agreement with Foresters to provide services for commission - applicant claimed first and second respondents breached fiduciary duties, duties of confidence and contractual duties, and that first respondent contravened *Corporations Act 2001* (Cth) concerning duties of a corporation's officers and employees - applicants claimed Foresters liable for knowingly assistance and involved in contraventions of the *Corporations Act* - applicants also claimed passing off against respondents and Foresters, and claimed Foresters vicariously liable for respondents' equitable "wrongdoing" - ss9, 79, 180, 181, 182, 183, 232, 471B, 1317E, 1317H, 1317HD & 1317J *Corporations Act 2001* (Cth) - ss16C & 21 *Life Insurance Act 1995* (Cth) - s10 *Partnership Act 1890* (UK) - held: applicants entitled to declaration sought against respondents - Foresters liable for knowing assistance but applicants not entitled to profits from Foresters - applicants entitled to orders concerning documents - first respondent to account to applicants in sum of \$24,238 and second respondent in sum of \$24,198.

[Lifeplan](#)

[From Benchmark Wednesday, 23 March 2016]

Perera v Genworth Financial Mortgage Insurance Pty Ltd [2016] NSWCA 53

Court of Appeal of New South Wales

McCull & Leeming JJA

Pleadings - leave to appeal - negligence - novel duties of care - defamation - self-represented litigant - applicant valuer sought leave to appeal from judgment striking out his statement of claim in proceedings against respondent mortgage insurer - applicant sought to sue respondent for economic harm caused by negligence, defamation and nervous shock - held: matter raised issues of principle concerning strike-out power - there was possibility of substantial injustice to applicant - duty of care contended for in economic loss claim was novel - economic loss claim did not disclose no reasonable cause of action - economic loss claim should not have been struck out - factual basis of duty of care in relation to nervous shock claim also yet to be ascertained but it was arguable that nervous shock claim ought not to have been struck out - defamation claim should not have been struck out - leave to appeal granted.

[Perera](#)

[From Benchmark Wednesday, 23 March 2016]

Valuer-General of New South Wales v Oriental Bar Pty Ltd [2016] NSWCA 48

Court of Appeal of New South Wales

Basten & Simpson JJA; Sackville AJA

Valuation of land - Valuer-General's challenged primary judge's finding as to land value of property - Valuer-General sought that declarations should be set aside and confirmation of Valuer-General's determination of land value - by cross-appeal Objectors contended primary judge failed to determine land value in conformity with ss6A & 14G *Valuation of Land Act 1916* (NSW) and sought variation of determinations - ss38-325, 75 & 135-5 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) - ss19(b) & 57 *Land and Environment Court Act 1979* (NSW) - ss4(1), 6A, 14A, 14B, 14G & 37(1) *Valuation of Land Act* - held: primary judge's exercise of discretion miscarried - exercise of discretion based on misapprehension of facts producing unreasonable and plainly unjust result - primary judge did not discharge statutory functions lawfully constituting error of law - Valuer-General's appeal allowed - cross-appeal dismissed.

[Valuer-General of New South Wales](#)

[From Benchmark Thursday, 24 March 2016]

Thiess Pty Ltd v Dobbins Contracting Pty Ltd [2016] NSWSC 265

Supreme Court of New South Wales

McDougall J

Negligence - contract - bailment - proportionate liability - fire destroyed excavator used by second plaintiff - fire caused by 'hot work' carried out by first defendant's employee - second defendant's employee assisted first defendant's employee with the 'hot work' - second plaintiff claimed employees failed to exercise appropriate care and employers were liable - first defendant did not partake in proceedings due to settlement with plaintiffs - first plaintiff was

lessee of excavator - plaintiffs claimed first plaintiff had subleased excavator to second plaintiff at time of accident - nature of precautions required to be taken in context of work performed - contributory negligence - s5B *Civil Liability Act 2002* (NSW) - held: plaintiff's case against second defendant failed - judgment for second defendant.

[Thiess](#)

[From Benchmark Monday, 21 March 2016]

Strauss v Bennett [2016] NSWSC 262

Supreme Court of New South Wales

Darke J

Contract - agreements made between owners of 1/10 interest in land - plaintiff was registered proprietor of 1/10 interest in land - building works carried out on plaintiff's site - plaintiff's daughter and defendant husband lived on site - couple divorced - no property settlement - plaintiff sought possession against defendant - defendant claimed he occupied site pursuant to unwritten agreement for sale to him of plaintiff's interest - defendant sought specific performance - constructive trust - principal and agent - ratification - joint endeavour - held: defendant did not make out claims - plaintiff entitled to possession and damages - defendant entitled to restitution of amount paid pursuing alleged agreement.

[Strauss](#)

[From Benchmark Monday, 21 March 2016]

Tan v Russell [2016] VSC 93

Supreme Court of Victoria

Cameron J

Contract - sale of land - defendant was registered proprietor of company - plaintiffs sought declaration contract for sale of land was terminated by notice of termination sent by email to real estate agent - whether plaintiffs validly terminated contract by email within cooling off period under s31(3) *Sale of Land Act 1962* (Vic) - *Electronic Transactions (Victoria) Act 2000* (Vic) - implied or ostensible authority - statutory authority - held: real estate agent did not have necessary authority to receive notice of termination pursuant to s31 - plaintiff's claim failed - defendant complied with contractual obligations concerning notice of default and rescission - counterclaim succeeded.

[Tan](#)

[From Benchmark Tuesday, 22 March 2016]

Hycenko v Hrycenko [2016] VSC 112

Supreme Court of Victoria

Ierodionou AsJ

Summary judgment - private undertaking - dispute concerning payment of sale proceedings from property - defendant sought release of some net sale proceeds held by solicitor who had given private undertaking given to plaintiff not to release them - defendant sought that solicitor be partially released from undertaking to authorise payment of money, or plaintiff's claim for

payment of more than half of proceeds be struck out and that defendant be given summary judgment - held: no applicable principle to support Court's power to grant partial relief from private undertaking - order requiring solicitor to release money would amount to mandatory injunction, which was not sought, and Associate Justice did not have power to make such order - summary judgment refused as Court not satisfied plaintiff's claim had no prospects of success.

[Hycenko](#)

[From Benchmark Thursday, 24 March 2016]

Jakimowicz v Jacks [2016] VSCA 42

Court of Appeal of Victoria

Warren CJ; Tate & Ferguson JJA

Standing - bankruptcy - trusts and trustees - appellant and former partner (Jacimowicz) sold property to respondent - respondent paid using compensation money he received for injury at work - dispute arose between respondent and Jacimowicz - settlement of proceedings incorporated deed of trust by which Jacimowicz obliged to make payments and discharge mortgage - Jacimowicz breached obligation - respondent evicted - property sold by mortgagee - respondent made bankrupt - respondent sued appellant for breach of trust - trial judge held damages protected and awarded damages in respondent's favour - appellant sought to appeal - ss27, 58(1), 116(1), 116(2)(g) & (n), 116(3) - whether respondent had standing to bring claim for damages - protection of compensation payments for personal injury under *Bankruptcy Act 1966* (Cth) - held: grounds of appeal had no real prospects of success - no error in judge's decision - respondent had standing to bring claim - respondent entitled to amount awarded by trial judge - leave to appeal refused.

[Jakimowicz](#)

[From Benchmark Wednesday, 23 March 2016]

Thorne Developments Pty Ltd v Thorne [2016] QCA 63

Court of Appeal of Queensland

Gotterson, Morrison & Phillipides JJA

Corporations - appellant was trustee of family discretionary trust - appellant deregistered - sole director (Mr Thorne) declared bankrupt - appellant's registration reinstated by ASIC under s601AH(1) *Corporations Act 2001* (Cth) - different sole director appointed (Mr Casey) - by deed of appointment Thorne Mr Thorne, appointed respondent wife and brother as trustees of trust - brother relinquished office prior to appellant's reinstatement - appellant was refused declarations as to invalidity of respondent's appointment - primary judge held deed of appointment validly appointed respondent, no substance to contention appointment not bona fide exercise of power, and trust deed did not require respondent to vacate office - proper construction of deed of appointment and trust deed - s188 *Bankruptcy Act 1966* (Cth) - ss601AD, 601AE & 601AH *Corporations Act* - ss10, 12 & 80(1) *Trusts Act 1973* (Qld) - held: grounds of appeal failed - appeal dismissed.

[Thorne](#)

Benchmark

[From Benchmark Tuesday, 22 March 2016]

Keeley v Horton [2016] QCA 68

Court of Appeal of Queensland

Damages - adequacy of damages - share sales agreement - breach of warranties - respondents found breached warranties under share sale agreement with first appellants - first appellants obtained judgment for breach of warranties as to earnings and second appellant company obtained judgment for breach of warranties concerning pending claims - primary judge found first appellants suffered no loss from breach of earnings warranties and awarded nominal damages of \$100 - company awarded \$271.48 - appellants challenged adequacy of damages and costs orders - held: primary judge wrong to conclude first appellants suffered no loss due to breach of earnings warranties - damages in sum of \$93,367 substituted - no error in award of damages for breach of claims warranties - appeal allowed in part.

[Keeley](#)

[From Benchmark Wednesday, 23 March 2016]

Maio v City of Stirling [No 2] [2016] WASCA 45

Court of Appeal of Western Australia

Martin CJ; Buss & Murphy JJA

Contract - deed - primary judge dismissed appellants' claim concerning alleged proprietary rights in nature of easement for parking on land adjoining land registered in second respondent's name - alleged easement arose pursuant to deed ('2010' deed) to which appellants were not party and which referred to earlier deed ('1983 deed') - appellant not party to 1983 deed - appellants contended they were entitled to enforce covenants in 1983 deed as adopted in 2010 deed or entitled to easement for use of 'Use Area' on lot - doctrine of lost modern grant - prescription - *Prescription Act 1832* (UK) - s11(2) *Property Law Act 1969* (WA) - ss7 & 24 *Town Planning and Development Act 1928* (WA) - s63A, 65(3) & 69 *Transfer of Land Act 1893* (WA) - held: grounds of appeal failed - appeal dismissed.

[Maio](#)

[From Benchmark Monday, 21 March 2016]

BGC Construction Pty Ltd v Citygate Properties Pty Ltd [2016] WASC 88

Supreme Court of Western Australia

Tottle J

Construction contract - dispute concerning construction of extension to shopping centre - three applications - BGC sought leave to enter judgment against Citygate regarding two determinations made by adjudicator - Citygate sought to quash determinations - - whether adjudicator exceeded authority conferred by *Construction Contracts Act 2004* (WA) - whether claims out of time - slip rule - balance of probabilities - rebuttal materials - "material personal interest" - adequacy of reasons - ss26, 29, 31, 32 & 36 *Construction Contracts Act* - regs 4 & 5 *Construction Contracts Regulations 2004* (WA) - held: application to enforce determinations dismissed - jurisdictional error established - determinations quashed.

[BCG](#)

[From Benchmark Tuesday, 22 March 2016]

CRIMINAL

Executive Summary

Lucas Gentry (a Pseudonym) v The Queen (VSCA) - criminal law - sexual penetration of trial - "between dates" charge - alibi evidence was not "fresh evidence" - appeal dismissed

Higgins (a Pseudonym) v The Queen (VSCA) - criminal law - possession of thing (magazine) in connection with assistance in terrorist act - tendency evidence - no error in primary judge's treatment of evidence - application for leave to appeal dismissed

Summaries With Link

Lucas Gentry (a Pseudonym) v The Queen [2016] VSCA 54

Court of Appeal of Victoria

Maxwell P, Santamaria JA & Beale AJA

Criminal law - sexual penetration of a child - appellant charged with sexual offences against complainant and convicted of one charge - charge was a 'between dates' charge - appellant contended significance of certain date was not made clear to him until after sentence - appellant's wife was then able to gather evidence of alibi on that date - appellant appealed on basis of 'fresh evidence' - held: alibi evidence was not 'fresh evidence' - failure to adduce evidence at trial did not cause miscarriage of justice - presentation of the alibi evidence would not have resulted in acquittal - appeal dismissed.

[Lucas](#)

Higgins (a Pseudonym) v The Queen [2016] VSCA 47

Court of Appeal of Victoria

Redlich, Weinberg & Osborn JJA

Criminal law - tendency evidence - interlocutory appeal - applicant charged with possession of a thing (magazine) in connection with assistance in terrorist act - applicant objected to proposed tendency evidence - Crown disavowed reliance on evidence as tendency evidence but contended items admissible as evidence of accused's continuing state of mind, motive and context - trial judge ruled items of evidence were admissible against him - s97 *Evidence Act 2008* (Vic) - s101.4 *Commonwealth Criminal Code 1995* - held: no error in primary judge's approach to evidence - evidence "not admissible only as tendency evidence" - application for leave to appeal refused.

[Higgins](#)



Benchmark

from Don Juan: Canto 1, Stanzas 217-221
BY LORD BYRON (GEORGE GORDON)

217

Ambition was my idol, which was broken
Before the shrines of Sorrow and of Pleasure;
And the two last have left me many a token
O'er which reflection may be made at leisure:
Now, like Friar Bacon's brazen head, I've spoken,
'Time is, Time was, Time's past', a chymic treasure
Is glittering youth, which I have spent betimes—
My heart in passion, and my head on rhymes.

218

What is the end of Fame? 'tis but to fill
A certain portion of uncertain paper:
Some liken it to climbing up a hill,
Whose summit, like all hills', is lost in vapour;
For this men write, speak, preach, and heroes kill,
And bards burn what they call their 'midnight taper,'
To have, when the original is dust,
A name, a wretched picture, and worse bust.

219

What are the hopes of man? old Egypt's King
Cheops erected the first pyramid
And largest, thinking it was just the thing
To keep his memory whole, and mummy hid;
But somebody or other rummaging,
Burglariously broke his coffin's lid:
Let not a monument give you or me hopes,
Since not a pinch of dust remains of Cheops.

220

But I being fond of true philosophy,
Say very often to myself, 'Alas!
All things that have been born were born to die,
And flesh (which Death mows down to hay) is grass;
You've pass'd your youth not so unpleasantly,
And if you had it o'er again—'twould pass—
So thank your stars that matters are no worse,
And read your Bible, sir, and mind your purse.'



221

But for the present, gentle reader! and
Still gentler purchaser! the bard—that's I—
Must, with permission, shake you by the hand,
And so your humble servant, and good bye!
We meet again, if we should understand
Each other; and if not, I shall not try
Your patience further than by this short sample—
'Twere well if others follow'd my example.

[LORD BYRON \(GEORGE GORDON\)](#)

[Click Here to access our Benchmark Search Engine](#)