

Friday, 7 December 2018

Weekly Business Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Business

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Executive Summary (1 minute read)

Kiraig Pty Ltd (Trustee) v Rent the Roo Pty Ltd (FCA) - contract - consumer law - breach of franchise agreements by franchisor established - franchisee entitled to damages and interest - appeal allowed

Cai v Tsang (No 2) (NSWSC) - contract - guarantee and indemnity - defendant liable as guarantor of plaintiff's loan to company of which defendant was director - judgment for plaintiff in sum of \$4,289,593.60

Rickhuss v The Cosmetic Institute Pty Ltd (NSWSC) - judgments and orders - negligence - consumer law - applications for discontinuation of proceedings as representative proceedings - notices of motion dismissed

Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd ATF the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds Limited on Behalf of Syndicate 2012 (NSWSC) - evidence - hearsay rule - corporations - insurance - evidence sought to be adduced by plaintiffs was an admission - evidence admissible

Hardaker and Ors v Mana Island Resort (Fiji) Limited and Anor (NSWSC) - judgments and orders - 'forum non-conveniens' - proceedings arising from death of first plaintiff's husband in 'boating collision' - defendants sought stay of proceedings on basis Supreme Court of New South Wales was 'inappropriate forum' - notice of motion dismissed

Cornonero v Bright Moon Buddhist Society (VSC) - judicial review - security of payments -

failure to comply with ss28B(5) and 28B(6) *Building and Construction Industry Security of Payment Act 2002* (Vic) - adjudication quashed

Re: CSSC (Qld) Pty Ltd (QSC) - corporations - statutory demand - abuse of process - statutory demand set aside on undertaking by director of applicant to indemnify it for costs

Sante Wines Pty Ltd v Paxton Wines Pty Ltd (SASCFC) - judgments and orders - contract - applicant was seeking to re-agitate questions 'determined adversely' to it - 'no manifest error' in Judge's reasons - permission to appeal refused

Lightfoot v Rockingham Wild Encounters Pty Ltd (WASCA) - negligence - appellant injured back on 'dolphin watching tour' which respondent operated - skipper not negligent in navigating through 'Reef Passage' - respondent not liable - appeal dismissed

GRD v BJD (WASC) - judgments and orders - corporations - plaintiff undischarged bankrupt sought leave to be director of corporation - application granted

Raff Angus Pty Ltd v Resource Management and Planning Appeal (TASSC) - environment and planning - conditional permit for development and operation of abattoir - no error in decision of Tribunal - appeal dismissed

Summaries With Link (Five Minute Read)

Kiraig Pty Ltd (Trustee) v Rent the Roo Pty Ltd [2018] FCA 1904

Federal Court of Australia

Markovic J

Contract - consumer law - franchise agreements - proceedings concerned two franchise agreements between appellant as 'master franchisee', appellant's director as guarantor and respondent as franchisor - master franchisee and director sought sum and equitable compensation or account of profits against franchisor, alleging franchisor breached franchise agreements, breached *Competition and Consumer Act 2010* (Cth) by failure 'to act in good faith' or engaged in unconscionable conduct under Australian Consumer Law, and breached 'obligation of confidence' - Federal Circuit Court dismissed application - appellant challenged primary judge's findings concerning claims of breach of franchise agreements - respondent, by notice of contention, conceded two grounds of appeal but contended judgment should be affirmed - whether erroneous failure to find breach of franchise agreements by failure to 'renew the franchises for Area 10 and Area 20' - whether respondent wrongfully terminated franchise agreements amounting to 'repudiatory conduct' - whether erroneous failure to find appellant entitled to damages and interest - held: appeal allowed.

[Kiraig](#)

[From Benchmark Tuesday, 4 December 2018]

Cai v Tsang (No 2) [2018] NSWSC 1860

Supreme Court of New South Wales

Fagan J

Contract - guarantee and indemnity - plaintiff claimed amount from defendant as guarantor of plaintiff's loan to company of which defendant was director - plaintiff alleged defendant was liable under "Loan Agreement and Deed of Guarantee and Indemnity" (loan agreement) - defendant contended loan agreement provided for third-party mortgage security to be provided in plaintiff's favour - defendant contended he was not liable because the third-party mortgage security not provided - construction of loan agreement - whether loan agreement 'drawn in a form' to show 'joint and several guarantors'- whether implied term or 'argument of construction' pursuant to which defendant's liability conditional on provision of 'guarantee mortgages'- whether basis to imply or infer 'common intention' of parties that defendant should be bound as guarantor only if 'third-party guarantee mortgages' provided - .held: judgment for plaintiff in sum of \$4,289,593.60.

[View Decision](#)

[From Benchmark Wednesday, 5 December 2018]

Rickhuss v The Cosmetic Institute Pty Ltd [2018] NSWSC 1848

Supreme Court of New South Wales

Garling J

Judgments and orders - negligence - consumer law - representative proceedings - group members brought claims in negligence and under Australian Consumer Law - plaintiffs contended defendants breached duty 'to exercise reasonable care and skill' in advising about, and performing, 'breast augmentation surgery' - first to fourth defendants, by notice of motion, sought that proceedings cease as representative action - fifth defendant sought 'similar, but not identical' orders - Pt 10 *Civil Procedure Act 2005* (NSW) (Civil Procedure Act) - interests of justice - pleading's form - costs - whether plaintiffs could obtain 'no greater relief' by proceedings' continuation as representative action - prejudice - timing of application - whether Court should make order under s166 Civil Procedure Act - whether 'sufficiently significant number of common issues' to justify claim's continuation as representative action - held: Court not persuaded it was in interests of justice for proceedings to cease as representative proceedings - notices of motion dismissed.

[View Decision](#)

[From Benchmark Wednesday, 5 December 2018]

Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd ATF the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds Limited on Behalf of Syndicate 2012 [2018] NSWSC 1706

Supreme Court of New South Wales

Slattery J

Evidence - corporations - insurance - Molan Retirement Solutions Pty Ltd (Moylan) was an 'investment advisor', now deregistered - plaintiffs were former clients of Molan - plaintiffs brought 'three related sets of proceedings' - some proceedings brought in 2012 and 2013 - other proceedings brought after Moylan's deregistration in 2014 - plaintiffs joined underwriters as defendants under 'professional indemnity insurance policies' which Molan held - in proceedings brought in 2015, underwriters were joined directly by plaintiffs - proceedings advanced against underwriters under s601AG *Corporations Act 2001* (Cth) - plaintiffs sought to adduce statements by Molan's principal to some plaintiffs - whether evidence admissible - whether statements were 'admissions' under s81 *Evidence Act 1995* (NSW) - whether to admit evidence as 'evidence of the truth of what is asserted' - whether evidence excluded by hearsay rule - held: Court satisfied statements were an admission - evidence admissible.

[View Decision](#)

[From Benchmark Thursday, 6 December 2018]

Hardaker and Ors v Mana Island Resort (Fiji) Limited and Anor [2018] NSWSC 1863

Supreme Court of New South Wales

Johnson J

Judgments and orders - stay - 'forum non-conveniens' - first plaintiff was mother of third, fourth and fifth plaintiffs - first plaintiff, following husband's death in a 'boating collision', brought proceedings, and proceedings as tutor for third, fourth and fifth plaintiffs, against first and second defendants - first and second defendants, under s.67 *Civil Procedure Act 2005* (NSW) sought stay of proceedings on basis Supreme Court of New South Wales was 'inappropriate forum' for proceedings' determination - whether 'clearly inappropriate forum' - whether vexatious and oppressive if proceedings remained in NSW - onus - held: notice of motion dismissed.

[View Decision](#)

[From Benchmark Thursday, 6 December 2018]

Cornonero v Bright Moon Buddhist Society [2018] VSC 737

Supreme Court of Victoria

Digby J

Judicial review - security of payments - plaintiff sought judicial review of adjudication determination by second defendant in first defendant's favour under *Building and Construction Industry Security of Payment Act 2002* (Vic) (Security of Payment Act) - plaintiff contended second defendant erroneously determined first defendant had 'validly commenced the review application' where it had not complied with ss28B(5) or 28B(6) Security of Payment Act - plaintiff contended second defendant had failed, in breach of s28B(5) Security of Payment Act, to pay adjudicated amount, other than 'alleged excluded amounts', to plaintiff prior to making review application, and had breached s28B(6) Security of Payment Act by failure to pay alleged excluded amounts into trust account prior to making review application - held: grounds of review upheld - determination quashed.

[Cornonero](#)

[From Benchmark Wednesday, 5 December 2018]

Re: CSSC (Qld) Pty Ltd [2018] QSC 282

Supreme Court of Queensland

Mullins J

Corporations - winding up - statutory demand - applicant, on instruction of director of company (Mr Scroope), sought, pursuant to s459G *Corporations Act 2001* (Cth), to set aside statutory demand served on applicant by respondent - respondent was the other director of the company - applicant, pursuant to s459H *Corporations Act*, contended there was genuine dispute concerning existence of debt, and that statutory demand's issue by respondent was abuse of process under s459J(1)(b) *Corporations Act* due to respondent's position as applicant's director - *Rinfort Pty Ltd v Arianna Holdings Pty Ltd* (2016) 111 ACSR 607 - whether Mr Scroope authorised to instruct applicant to bring application - held: genuine dispute not established - abuse of process sufficiently established to set aside demand pursuant to s459J(1)(b) *Corporations Act* if proceeding had been properly instituted - statutory demand set aside on Mr Scroope's undertaking to indemnify applicant for costs.

[CSSC](#)

[From Benchmark Wednesday, 5 December 2018]

Sante Wines Pty Ltd v Paxton Wines Pty Ltd [2018] SASCF 124

Full Court of the Supreme Court of South Australia

Kourakis CJ; Kelly & Stanley JJ

Judgments and orders - contract - dispute concerned 'wine distribution agreement' - applicant distributed wines which respondents produced - applicant contended it had exclusive distributions rights 'subject only to a direct mailing exception' - Magistrate did not uphold 'exclusivity agreement' contended for by applicant - Magistrate also found applicant did not establish that an 'online wine sales business' (Vinomofu) to which respondents also supplied wine, was 'licensee in Victoria' - Magistrate found that 'exclusivity provision' which applicant contended for did not cover 'Vinomofu's operation' - Magistrate found respondent entitled to terminate distribution agreement and that applicant repudiated it by 'late payments' - applicant sought to appeal - held: appeal grounds sought to re-agitate questions which Magistrate and Judge had 'determined adversely' to applicant - applicant had not alleged 'error of principle' - 'no manifest error' in Judge's reasons - permission to appeal refused.

[Sante Wines](#)

[From Benchmark Tuesday, 4 December 2018]

Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205

Court of Appeal of Western Australia

Buss P; Murphy & Beech JJA

Negligence - appellants injured her back on 'dolphin watching tour' which respondent operated - applicant sued respondent in negligence - appellants contended that skipper, and therefore

respondent, negligently navigated boat into area where it could foreseeably 'encounter large swell/waves which would endanger the safety of passengers' - primary judge dismissed appellant's claim, concluding skipper not unreasonable to navigate through 'Reef Passage' rather than 'South Channel' - question on appeal was whether there had been a breach of duty of care - appellant contended primary judge erred in finding no negligence by skipper in navigating through Reef Passage - held: appellant failed to establish 'foreseeable and not insignificant risk' that boat, if navigated through Reef Passage, could encounter 'large swell or wave' would could injure passengers - appeal dismissed.

[Lightfoot](#)

[From Benchmark Thursday, 6 December 2018]

GRD v BJD [2018] WASC 374

Supreme Court of Western Australia

Master Sanderson

Judgments and orders - corporations - plaintiff was undischarged bankrupt - plaintiff sought Court's leave under s206G *Corporations Act 2001* (Cth) to be director of corporation - Court's power to grant leave to 'disqualified person' to 'manage a corporation' - whether plaintiff had complied with s206G(2)'s requirements - onus - circumstances of non-payments of debts - extent of plaintiff's cooperation with trustee in bankruptcy - held: Court satisfied to grant application.

[GRD](#)

[From Benchmark Friday, 7 December 2018]

Raff Angus Pty Ltd v Resource Management and Planning Appeal [2018] TASSC 60

Supreme Court of Tasmania

Brett J

Environment and planning - appellant appealed against decision of Planning Appeal Tribunal (Tribunal) to uphold second respondent Council's grant of conditional permit to third respondent for development and operation of abattoir - appellant contended Tribunal 'incorrectly interpreted the requirements of the planning scheme' and thus applied incorrect test - ss51 & 57 *Land Use Planning and Approvals Act 1993* (Tas) - s25 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) - statutory construction - whether erroneous interpretation of planning scheme - 'cost benefit analysis' - held: grounds of appeal failed - appeal dismissed.

[Raff Angus](#)

[From Benchmark Wednesday, 5 December 2018]

Benchmark

Dream On

By: David Conolly

A child in a gallery sits,
takes paper and pencil,
and starts to draw.
The paintings around her
disappear.
They have served
their purpose.

womb of
They have sparked in her
the spirit to create –
the spirit formed in her
along with bone and blood
in the mystic dark of
her mother's womb –
humanity's sacred site.

Thus is passed
from age to age
imagination,
Dream
wonder,
passes
dreams.
unborn.

From another womb
in a faraway age
another child emerged
with a dream –
the Great Dream
of a world renewed by
peace and justice,
formed in the

love.

He said that children
show us
what God is like.

No wonder
we celebrate
his birth.

No wonder that
still lives, and
to children yet

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