



Friday, 9 November 2018

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

 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.

Executive Summary (1 minute read)

Prodata Solutions Pty Ltd v South Australian Fire and Emergency Services

Commission (FCA) - security for costs - corporations - two respondents sought that applicant provide further security for costs - application granted

Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd (NSWCA) - judgments and orders - stay - security for costs - stay of judgment granted but not in respect of unchallenged amount of judgment sum or costs order - security for costs order refused

Global Consulting Services Pty Ltd v Gresham Property Investments Ltd (NSWCA) - equity - guarantee and indemnity - priority dispute - liability of guarantors - co-ordinate liabilities - exception to contribution's availability - appeal allowed

FC Securities Pty Ltd v Menilden Creek Farming Pty Ltd (NSWSC) - corporations - *Personal Property Securities Act 2009* (Cth) - application for extension of registration time for financing statements - application granted

Sweetpea Petroleum Pty Ltd v Paltar Petroleum Limited (NSWSC) - judgments and orders - joint venture - defendant sought dismissal of proceedings on basis plaintiff failed to comply with dispute resolution procedure in Joint Venture and Operating Agreement - notice of motion dismissed

In the matter of Ardent Leisure Limited trading as Ardent Leisure Limited; Ardent Leisure Management Limited in its capacity as the responsible entity of the Ardent Leisure Trust (NSWSC) - corporations - plaintiff granted orders to convene members' meeting in

respect of scheme of arrangement - responsible entity of trust granted judicial advice it was justified to convene unitholders' meeting to consider amendment to Trust's constitution

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd (NSWSC) - corporations - winding up - statutory demand - off-settling claim established - amount in statutory demand reduced on conditions

Grewal v Layton (NSWSC) - contract - loan agreement by SMS messages' exchange - contract was between plaintiff and first defendant, not plaintiff and second defendant - judgment for plaintiff

Bank of Queensland Ltd v AIG Australia Ltd (NSWSC) - banking - insurance - claim for indemnity under Civil Liability Insurance Policy - loss for which insurers liable arose from multiple "Claims" - bank to bear multiple Retentions

Hawker v Powercor Australia Ltd (VSC) - judgments and orders - group proceeding - misleading statements in newspaper article - Court satisfied to include 'clarifying statement' in opt-out notice

Botsman v Bolitho (VSCA) - judgments and orders - two proceedings arising from collapse of 'non-bank lender' - debenture holder's appeal against approval of proceedings' settlement allowed

Re Mirabela Nickel Ltd (receivers and managers appointed) (in liq); Ex Parte Madden (WASC) - corporations - application for directions concerning 'sale contract', distribution of sale proceeds, and defence of 'foreshadowed proceedings' - certain directions granted

Johnson v The Minister for Planning (WASC) - administrative law - application for judicial review of decisions to approve proposed amendment to Planning Scheme and to approve amendment as modified, and of publication of approved scheme amendment in Government Gazette - application dismissed

Summaries With Link (Five Minute Read)

Prodata Solutions Pty Ltd v South Australian Fire and Emergency Services Commission [2018] FCA 1665

Federal Court of Australia
Charlesworth J

Security for costs - corporations - two respondents sought that applicant provide security for

costs - applicant had provided security to each respondent voluntarily in form of 'two irrevocable bank guarantees' - respondents contended amount of security which bank guarantees provided was insufficient - applicant contended that Court's power to order security for costs was not enlivened - held: Court satisfied additional security should be provided by applicant to respondents - orders made.

[Prodata](#)

[From Benchmark Friday, 9 November 2018]

Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd [2018] NSWCA 256

Court of Appeal of New South Wales

Macfarlan JA

Judgments and orders - stay - security for costs - McDougall J declared applicant held certain proceeds on trust and gave judgment for first respondent in sum of \$3,958,651.08 - applicant appealed against certain amount of judgment sum and sought stay of whole judgment and of order that it pay costs - first respondent sought security for costs from applicant - whether applicant's appeal submissions 'reasonably arguable' - whether to grant stay - r51.44 *Uniform Civil Procedure Rules 2005* (NSW) - applicant's prospects of success - whether "there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted" - applicant's financial resources - whether 'special circumstances' established warranting order for security for costs - whether order for security for costs could frustrate applicant's appeal - held: Court satisfied to grant stay but not in respect of unchallenged part of judgment sum or costs order - security for costs order refused.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

Global Consulting Services Pty Ltd v Gresham Property Investments Ltd [2018] NSWCA 255

Court of Appeal of New South Wales

Bathurst CJ; McColl & Leeming JJA

Equity - guarantee and indemnity - 'junior secured creditors' lent money to fund property development - appeal concerned priority dispute between junior secured creditors in respect of surplus from sale proceeds of land following payment of senior secured creditors - whether whole proceeds of land's sale should be used to repay senior secured creditors or only proceeds attributable to largest parcel's sale - whether three respondent guarantors now in receivership liable to contribute in equity - exceptions to contribution's availability - whether liabilities of guarantors co-ordinate - whether second respondent was 'primary obligor' - whether 'proper regard' not given to benefits second, third and fourth respondents received - whether one guarantor 'enjoys all the benefits' - whether erroneous rejection that there was 'agreement or common intention' between second, third and fourth respondents that second respondent was 'primarily liable' - *Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116 - held: appeal allowed.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

FC Securities Pty Ltd v Menilden Creek Farming Pty Ltd [2018] NSWSC 1681

Supreme Court of New South Wales

Parker J

Corporations - defendants granted plaintiff security interests over defendants' personal property - proceedings concerned 'twelve financing statement registrations' on Personal Property Securities Register in respect of the security interests - plaintiff, pursuant to s588FM *Corporations Act 2001* (Cth), sought extension of registration time for the financing statements by orders which would effectively 'back-date' the registrations to time when security interests granted - *Personal Property Securities Act 2009* (Cth) - held: application granted.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

Sweetpea Petroleum Pty Ltd v Paltar Petroleum Limited [2018] NSWSC 1649

Supreme Court of New South Wales

Ball J

Judgments and orders - joint venture - proceedings arising from 'Joint Venture and Operating Agreement' (Agreement) between parties concerning gas exploration in Northern Territory - defendant, under r13.4(1) *Uniform Civil Procedure Rules 2005* (NSW) or Court's inherent power, sought proceedings' dismissal on basis plaintiff had not complied with dispute resolution procedure in Agreement - whether dispute resolution procedure applicable to dispute - if dispute resolution procedure applicable to dispute, whether Court should grant stay rather than dismiss proceedings - estoppel - prejudice - conduct - held: notice of motion dismissed.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

In the matter of Ardent Leisure Limited trading as Ardent Leisure Limited; Ardent Leisure Management Limited in its capacity as the responsible entity of the Ardent Leisure Trust [2018] NSWSC 1665

Supreme Court of New South Wales

Black J

Corporations - scheme of arrangement - judicial advice - trusts and trustees - plaintiff, under s411 *Corporations Act 2001* (Cth), sought orders to convene members' meeting to consider, and approve, if considered fit for approval, a scheme of arrangement between plaintiff and its members (Scheme) - responsible entity of Ardent Leisure Trust, under s63 *Trustee Act 1925* (NSW), sought judicial advice it was justified to convene unitholders' meeting to consider amendment to Trust's constitution to facilitate transfer of units consistently with Scheme - 'potential liabilities' - 'Ineligible Foreign Securityholders' - 'performance rights' - 'deemed warranty' - held: Court granted orders in proposed form.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWSC 1647

Supreme Court of New South Wales

Parker J

Corporations - winding up - defendant served statutory demand on plaintiff - debt in statutory demand arose from sub-contract between parties - plaintiff sought to set statutory demand aside - plaintiff contended that it had had three off-setting claims - general conditions of contract - liquidated damages - 'liquidated milestone damages' - 'cost to complete works' - whether off-setting claim established - whether to set aside statutory demand - whether to impose conditions - ss459G, 459H, 459M & 459S *Corporations Act 2001* (Cth) - held: plaintiff established offsetting claim in amount 'significantly less' than sum in statutory demand - amount in statutory demand reduced on conditions.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

Grewal v Layton [2018] NSWSC 1634

Supreme Court of New South Wales

Ball J

Contract - plaintiff sought to recover loan amount and interest from first defendant pursuant to agreement by SMS messages' exchange - proceedings concerned whether agreement was made with first defendant or second defendant, which was now in liquidation - first defendant controlled second defendant at time of loan - 'conclusions a reasonable person would reach from the facts known to the parties, including the purpose and object of the transaction' - whether use of 'you' in messages was an 'obvious reference' to second defendant - whether email from plaintiff to first defendant constituted an admission by plaintiff that loan made to second defendant - held: contract was between plaintiff and first defendant - judgment for plaintiff.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

Bank of Queensland Ltd v AIG Australia Ltd [2018] NSWSC 1689

Supreme Court of New South Wales

Stevenson J

Banking - insurance - plaintiff sought indemnity under Civil Liability Insurance Policy which defendants issued - Bank sought "Loss" and "Defence Costs" incurred in defending and settling "Representative Proceedings" against Bank and its agent - first defendant lead insurer under policy liable for 37.5 per cent of insured loss - third defendant liable for 25 per cent of insured loss - Bank had settled with second defendant - whether loss which insurers were liable for arose from single "Claim" under Policy or multiple "Claims" - if multiple "Claims", multiple 'Retentions' would apply such that insurers would have no liability to make payment to Bank - held: loss arose from multiple "Claims" - Claims did not arise from, were not 'based on', or 'attributable to', a series of related Wrongful Acts' - Bank required to bear multiple Retentions.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

Hawker v Powercor Australia Ltd [2018] VSC 661

Supreme Court of Victoria

John Dixon J

Judgments and orders - group proceeding - group members claimed loss due to bushfire - newspaper published article: 'Leading bushfire lawyer says insurance companies cannot take control of bushfire claims' - plaintiff proposed opt-out notice and procedure - insurers expressed concern statements in article were misleading - insurers proposed amendments to opt-out notice clarifying statements - standing - whether statements misleading - 33ZF *Supreme Court Act 1986 (Vic)* - held: Court satisfied to include 'clarifying statement' in opt-out notice.

[Hawker](#)

[From Benchmark Friday, 9 November 2018]

Botsman v Bolitho [2018] VSCA 278

Court of Appeal of Victoria

Tate, Whelan & Niall J

Judgments and orders - two proceedings against company (Trust Nominees) arising from collapse of 'non-bank lender' (Banksia) - Banksia appointed Trust nominees 'to oversee its business' - in first proceeding (group proceeding), lead plaintiff contended Trust Nominees breached duties to debenture holders. Banksia (in liquidation) brought second proceeding, contending Trust Nominees breached duties to Banksia - special purpose receivers conducted second proceeding - proceedings both compromised and settlement recorded in a deed - lead plaintiff sought approval of group proceeding settlement - special purpose receivers applied separately for authorisation to settle second proceeding - judge found settlement 'fair and reasonable' - trial judge granted applications - applicant debenture holder appealed - whether judge erred in approving distributions to litigation funder - whether erroneous imposition of 'extensive confidentiality regime' - whether erroneous failure to appoint contradictor - whether 'miscarriage in the process' - whether settlement sum 'fair and reasonable' - held: appeal allowed - matter remitted to different judge to determine issue of approval of distribution from settlement sum for legal expenses and 'funder's commission'.

[Botsman](#)

[From Benchmark Friday, 9 November 2018]

Re Mirabela Nickel Ltd (receivers and managers appointed) (in liq); Ex Parte Madden [2018] WASC 335

Supreme Court of Western Australia

Vaughan J

Corporations - plaintiffs were receivers and managers of companies (MBN and MBI) - plaintiffs sought directions pursuant to s424 *Corporations Act 2001 (Cth)* - first two directions concerned sale transaction - receivers sought direction they were justified to enter 'sale contract' as to

'principal assets of MBN and MBI' and direction they were justified to distribute proceeds received - MSI opposed the two directions - receivers also sought direction whether they were justified to defend proceedings which MSI was to commence - held: Court concluded it was 'unnecessary and inappropriate' to make direction concerning sale contract - other directions granted substantially in terms sought.

[Mirabela](#)

[From Benchmark Friday, 9 November 2018]

Johnson v The Minister for Planning [2018] WASC 334

Supreme Court of Western Australia

Smith J

Administrative law - applicant was sole director of company (Zyran) which was registered proprietor of land (lot 500) - applicant sought judicial review of Minister for Planning's decisions to approve proposed amendment (Amendment 57) to Planning Scheme and to approve Amendment 57 as modified - applicant also sought judicial review of publication of approved scheme amendment in Government Gazette - whether criteria in cl5.16.1 LPS3 were mandatory considerations - 'procedural matters' required to be considered by Minister when 'approving or refusing to approve' amendment - whether failure to consider or misconstruction of cl5.16.1 LPS3 - held: grounds for judicial review not established - application dismissed.

[Johnson](#)

[From Benchmark Friday, 9 November 2018]



Benchmark

Floating Island

By: Dorothy Wordsworth

Harmonious Powers with Nature work

On sky, earth, river, lake, and sea:

Sunshine and storm, whirlwind and breeze

All in one duteous task agree.

Once did I see a slip of earth,
By throbbing waves long undermined,
Loosed from its hold; — how no one knew
But all might see it float, obedient to the wind.

Might see it, from the mossy shore
Dissevered float upon the Lake,
Float, with its crest of trees adorned
On which the warbling birds their pastime take.

Food, shelter, safety there they find
There berries ripen, flowerets bloom;
There insects live their lives — and die:
A peopled world it is; in size a tiny room.

And thus through many seasons' space
This little Island may survive
But Nature, though we mark her not,
Will take away — may cease to give.

Perchance when you are wandering forth
Upon some vacant sunny day
Without an object, hope, or fear,
Thither your eyes may turn — the Isle is passed away.

Buried beneath the glittering Lake!
Its place no longer to be found,
Yet the lost fragments shall remain,
To fertilize some other ground.

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

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