

Friday, 14 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)

Australian Securities & Investments Commission v Westpac Banking Corporation (No 2) (FCA) - judgments and orders - 'credit contract' - application for determination of separate questions concerning requirements of ss128(c) & 129 *National Consumer Credit Protection Act 2009* (Cth) - application refused

Agnish Pty Limited v Folio Invest Pty Limited (FCA) - service - application for leave to serve documents on third respondent 'by personal service by a private agent' in Republic of Sierra Leone in accordance with laws of Sierra Leone - application granted

Baker & McAuliffe Holdings Pty Ltd t/as JSB Lighting v Carey (FCA) - corporations - application for interlocutory injunction to restrain former employees from contacting three of applicant's clients and from giving assistance on three projects - application dismissed

Cudgegong Australia Pty Limited v Sydney Metro (NSWSC) - judgments and orders - acquisition of land - estoppel - erroneous summary disposal of proceedings seeking declaration acquisition of land was invalid - appeal allowed

Stepanoski v Aslan (No 2) (NSWSC) - judgments and orders - summary judgment - building contract - plaintiffs granted summary judgment against defendant for undisputed amount of damages

Re 2 Nails Pty Ltd (in Liq) (VSC) - corporations - appeal against adjournment of application to proceed against company in liquidation - appellant permitted to proceed on conditions

UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2) (VSC) - arbitration - international arbitration - application for 'Recognition and Enforcement of the Award' granted

Morton Seed & Grain Pty Ltd v Phillbourne Manufacturing Pty Ltd (WASC) - consumer law - contract - action arising from failure of 'tarping system' - breach of agreement not established - misleading representations not established - claim dismissed

Summaries With Link (Five Minute Read)

Australian Securities & Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 1984

Federal Court of Australia

Perram J

Judgments and orders - 'credit contract' - applicant, pursuant to r30.01 *Federal Court Rules 2011* (Cth), sought determination of separate questions concerning requirements of ss128(c) & 129 *National Consumer Credit Protection Act 2009* (Cth) - whether 'trial time' would be saved by determining separate questions - whether risk of 'two sets of appeals' - whether separate questions could give rise to 'problems further down the track' - held: Court not satisfied that separate questions should be stated - application refused.

[Australian Securities & Investment Commission](#)

[From Benchmark Wednesday, 12 December 2018]

Agnish Pty Limited v Folio Invest Pty Limited [2018] FCA 1992

Federal Court of Australia

Griffiths J

Service - applicant, under r10.43(2) *Federal Court Rules 2011* (Cth), sought leave to serve documents on third respondent 'by personal service by a private agent' in Republic of Sierra Leone in accordance with laws of Republic of Sierra Leone - whether Court had jurisdiction in proceeding - whether proceeding was of kind in r10.42 *Federal Court Rules 2011* (Cth) (Rules) - whether conditions in r10.43(4) of the Rules satisfied - whether to exercise discretion to grant leave - held: application granted.

[Agnish](#)

[From Benchmark Thursday, 13 December 2018]

Baker & McAuliffe Holdings Pty Ltd t/as JSB Lighting v Carey [2018] FCA 1972

Federal Court of Australia

Markovic J

Corporations - interlocutory injunction - first and third respondents were applicant's former employees - applicant contended first and third respondents with assistance of fourth respondent, in breach of their employment contracts, statutory and/or fiduciary duties, devised scheme to form second respondent company and use it as a 'vehicle to take away' the

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business' of one of applicant's 'major suppliers' - applicant sought interlocutory relief to restrain first and third respondents from contacting three of its clients and from giving assistance on three projects - whether serious question to be tried - whether damages adequate remedy - delay - balance of convenience - held: application dismissed.

[Baker](#)

[From Benchmark Thursday, 13 December 2018]

Cudgegong Australia Pty Limited v Sydney Metro [2018] NSWCA 298

Court of Appeal of New South Wales

Meagher & Leeming JJA; Sackville AJA

Judgments and orders - summary disposal - acquisition of land - estoppel - respondent's predecessor (Transport NSW) by notice in Government Gazette, under s19(1) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), acquired land for purpose of rail link's construction - applicant sought declaration acquisition invalid - Transport NSW sought dismissal of proceedings under r13.4(1)(b) *Uniform Civil Procedure Rules 2005* (NSW) on basis no reasonable cause of action disclosed - primary judge upheld Transport NSW's argument on basis of estoppel, finding applicant's compensation claim 'amounted to an acceptance' of acquisition's validity and that Transport NSW had 'acted to its detriment' - primary judge granted summary disposal - applicant appealed - Transport NSW, by notice of contention, sought dismissal of appeal as incompetent on basis applicant needed leave to appeal - Transport NSW, by notice of contention, sought to uphold order for summary dismissal on basis proceedings "time-barred" - held: appropriate to dismiss appeal as incompetent - primary judge erred in granting summary disposal - leave to appeal granted - Court not satisfied there was 'high degree of certainty' that 'estoppel by representation' defence would succeed - appeal allowed.

[View Decision](#)

[From Benchmark Monday, 10 December 2018]

Stepanoski v Aslan (No 2) [2018] NSWSC 1916

Supreme Court of New South Wales

Emmett AJA

Judgments and orders - summary judgment - building contract - plaintiffs sought damages from defendant builder for defendant's alleged breaches of building contract - builder cross-claimed for damages for contract's alleged wrongful termination by plaintiffs - plaintiffs, pursuant to pursuant to r13.1 *Uniform Civil Procedure Rules 2005* (NSW), sought summary judgment in respect of amount of claim undisputed by builder - held: no dispute plaintiffs were entitled 'at least' to the amount comprising the difference between undisputed sum required to complete work and sum which builder was seeking to recover by cross-claim - Court satisfied to grant summary judgment in plaintiffs' favour for this 'minimal amount' to which they were entitled.

[View Decision](#)

[From Benchmark Thursday, 13 December 2018]

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Re 2 Nails Pty Ltd (in Liq) [2018] VSC 745

Supreme Court of Victoria

Sifris J

Corporations - appellant appealed against Associate Judge's adjournment of appellant's application for leave to proceed against company in liquidation (Re 2 Nails) - appellant contended Associate Judge's exercise of discretion under s500(2) *Corporations Act 2001* (Cth) miscarried due to Associate Judge's erroneous determination 'leave to proceed would serve no purpose and/or was unnecessary', and that no funds were 'available in the Company' until development had concluded - consideration of affidavit exhibiting 'kerbside valuation' - appellant's inability to lodge 'proof of debt' - prima facie case - whether appellant should wait until development's completion to commence proceeding - held: Court satisfied appellant should be permitted to 'bring on a proceeding' to determine amount owed to it - to extent 'necessary or relevant' Court also satisfied to allow appeal - leave to proceed granted on conditions.

[Re 2 Nails](#)

[From Benchmark Monday, 10 December 2018]

UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2) [2018] VSC 741

Supreme Court of Victoria

Croft J

Arbitration - international arbitration - two applications concerning Arbitrator's Interim Award and Final Award ('Award') - Award made pursuant to arbitration agreement which specified that arbitration's seat was Australia - arbitration was an 'international arbitration' because second respondent's place of business was Hong Kong - application under Art 35, Sch 2 *International Arbitration Act 1974* (Cth) for 'Recognition and Enforcement of the Award' - application, in reliance on articles 34(2)(a)(ii) and (b)(ii) of 'UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)' to set Award aside - Court granted orders for recognition and enforcement and made "self-executing provision" for enforcement - self-executing provision stayed pending determination of application to set aside Award - held: application to set aside Award dismissed - orders for recognition and enforcement of Award granted.

[UDP Holdings](#)

[From Benchmark Monday, 10 December 2018]

Morton Seed & Grain Pty Ltd v Phillbourne Manufacturing Pty Ltd [2018] WASC 386

Supreme Court of Western Australia

Pritchard J

Consumer law - contract - action arising from failure of 'tarping system' - parties entered oral agreement (agreement) under which defendant was to 'supply and install a bunker' at facility - plaintiff contended that, in negotiation of agreement, defendant, through its director, made



representations concerning tarping system and 'joins in the tarpaulins' - plaintiff also contended agreement contained express or implied term concerning tarping system's suitability for purpose and fitness for purpose - plaintiff contended representations were false and that defendant breached alleged term of agreement - held: plaintiff did not establish agreement contained express term, but did establish it was an implied of agreement that tarping system 'would be reasonably fit for the purpose of storing oats and grain' - plaintiff did not establish breach of term, or that representations made or were misleading - claim dismissed.

[Morton Seed](#)

[From Benchmark Wednesday, 12 December 2018]



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Summer Wind

By: William Cullen Bryant

It is a sultry day; the sun has drunk
The dew that lay upon the morning grass;
There is no rustling in the lofty elm
That canopies my dwelling, and its shade
Scarce cools me. All is silent, save the faint
And interrupted murmur of the bee,
Settling on the sick flowers, and then again
Instantly on the wing. The plants around
Feel the too potent fervors: the tall maize
Rolls up its long green leaves; the clover droops
Its tender foliage, and declines its blooms.
But far in the fierce sunshine tower the hills,
With all their growth of woods, silent and stern,
As if the scorching heat and dazzling light
Were but an element they loved. Bright clouds,
Motionless pillars of the brazen heaven—
Their bases on the mountains—their white tops
Shining in the far ether—fire the air
With a reflected radiance, and make turn
The gazer's eye away. For me, I lie
Languidly in the shade, where the thick turf,
Yet virgin from the kisses of the sun,
Retains some freshness, and I woo the wind
That still delays his coming. Why so slow,
Gentle and voluble spirit of the air?
Oh, come and breathe upon the fainting earth
Coolness and life! Is it that in his caves
He hears me? See, on yonder woody ridge,
The pine is bending his proud top, and now
Among the nearer groves, chestnut and oak
Are tossing their green boughs about. He comes;
Lo, where the grassy meadow runs in waves!
The deep distressful silence of the scene
Breaks up with mingling of unnumbered sounds
And universal motion. He is come,
Shaking a shower of blossoms from the shrubs,
And bearing on their fragrance; and he brings
Music of birds, and rustling of young boughs,
And sound of swaying branches, and the voice
Of distant waterfalls. All the green herbs



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Are stirring in his breath; a thousand flowers,
By the road-side and the borders of the brook,
Nod gayly to each other; glossy leaves
Are twinkling in the sun, as if the dew
Were on them yet, and silver waters break
Into small waves and sparkle as he comes.
https://en.wikipedia.org/wiki/William_Cullen_Bryant

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