

Friday, 16 November 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)

**Comptroller General of Customs v Zappia** (HCA) - customs and excise - employee of holder of warehouse licence met description in s35A(1) *Customs Act 1901* (Cth) - appeal allowed

**Silvia (Trustee) v Williams** (FCAFC) - trusts and trustees - bankruptcy - 'common intention constructive trust case' should not have been entertained - no error in conclusion common intention constructive trust case failed - notice of contention upheld - appeal

**Caratti v Commissioner of Taxation** (FCA) - taxation - contract - Commissioner not required to forbear from enforcing liabilities against first and second applicant - application dismissed

**Ian Jones v The Owners Strata Plan No 69008** (NSWCA) - judgments and orders - solicitors' costs - action struck out to extent it concerned sum for services provided before date of costs disclosure - leave to appeal refused

**Olefines Pty Ltd v Valuer-General of New South Wales** (NSWCA) - valuation of land - statutory interpretation - no error in valuation of parcels of land for purposes of land tax - appeal dismissed

**BB Australia v Danset (No 2)** (NSWSC) - contract - determination of outstanding issue - plaintiff not entitled to recovery of 'enforcement expenses' under franchise agreement and deed of guarantee and indemnity - claim dismissed

**Silver Star Fashions Pty Ltd v Dal Broi** (NSWSC) - land law - contract - vendor sought, under s66ZL(6) *Conveyancing Act 1919* (NSW), to rescind 'off the plan' contracts under "sunset

clause” - statement of claim dismissed

**Silver Star Fashions Pty Ltd v Dal Broi (No 2)** (NSWSC) - costs - variation of costs order - indemnity costs order granted against plaintiff in favour of first to tenth defendants

**Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd (No 2)** (NSWSC) - corporations - winding up - proceedings dismissed - extension of time for compliance with statutory demand granted on condition of undertaking by plaintiff in respect of seeking leave to appeal - orders made

**Everlight Resources Ltd v Barnett & Ors** (QSC) - corporations - statutory demand - application to set aside three statutory demands served by three ‘applicant creditors’ - application dismissed

**BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 4]** (WASC) - freezing orders - plaintiff sought variation of freezing order against first defendant - application allowed in part

## Summaries With Link (Five Minute Read)

### **Comptroller General of Customs v Zappia [2018] HCA 54**

High Court of Australia

Kiefel CJ; Bell, Gageler, Nettle & Gordon JJ

Customs and excise - company held warehouse licence under Pt 5 *Customs Act 1901* (Cth) (Customs Act) - respondent was employee of company - respondent’s father was company’s director - “dutiable goods” stolen from warehouse - authorised “collector” made demand for payment of duty against respondent, respondent’s father and company - appeal concerned whether employee of warehouse licence holder could meet ‘statutory description’ of “a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control” in s35A(1) Customs Act - held: Court satisfied employee could meet the statutory description, and that, on the facts, the respondent met the criteria as company’s employee - appeal allowed.

[Comptroller General](#)

[From Benchmark Friday, 16 November 2018]

### **Silvia (Trustee) v Williams [2018] FCAFC 194**

Full Court of the Federal Court of Australia

Perram, Barker & Derrington JJ

Trusts and trustees - bankruptcy - respondent and Mrs Williams were married - respondent exchanged contracts for residential home’ purchase - sale completed - title placed in respondent’s name - Mrs Williams, after respondent acquired premises, ‘became bankrupt’ -

appellant trustee in bankruptcy claimed respondent held 50% of interest in property on trust for bankrupt estate - trial judge rejected appellant's contention - appellant appealed - whether trial judge correct to find appellant's case for 'common intention constructive trust' failed - whether Court should have entertained appellant's case - whether common intention constructive trust case had been pleaded - whether prejudice to respondent - held: common intention constructive trust case should not have been entertained - no error in trial judge's conclusion that common intention constructive trust case failed - notice of contention upheld - appeal dismissed.

[Silvia](#)

[From Benchmark Friday, 16 November 2018]

## **Caratti v Commissioner of Taxation [2018] FCA 1691**

Federal Court of Australia

Colvin J

Taxation - contract - applicants claimed binding agreement by which Commissioner had 'agreed to forbear from taking recovery action' against first and second applicants until challenges to liabilities determined - alternatively applicants claimed principles of relief against forfeiture or unconscionability applied to excuse applicants from failure to meet agreement's terms in specified time - applicants contended agreement had now been satisfied concerning security's provision and Commissioner 'bound to forbear' - if security was found not to have been provided, applicants alternatively contended that if security provided in future then Commissioner would should forbear - Commissioner contended there would not be forbearance under agreement unless specified security was provided within 30 days of agreement and that security had not been provided as required - held: applicant had not provided security - Commissioner not 'bound to forbear' from enforcement of liabilities - principles of relief against forfeiture or unconscionability did not apply - no entitlement to Commissioner's forbearance in the future by provision of required security - application dismissed.

[Caratti](#)

[From Benchmark Friday, 16 November 2018]

## **Ian Jones v The Owners Strata Plan No 69008 [2018] NSWCA 272**

Court of Appeal of New South Wales

Macfarlan JA & Barrett AJA

Judgments and orders - solicitors' costs - applicant solicitor sought to recover legal costs from respondent - primary judge struck action out to extent it concerned sum for services provided before date of costs disclosure - applicant sought to appeal - ss317(1) & 317(2) *Legal Profession Act 2004* (NSW) - statutory interpretation - whether disclosure had 'retrospective effect' - held: Court not satisfied 'exceptional circumstance' or 'well-based apprehension of miscarriage of justice' demonstrated - leave to appeal refused - summons dismissed.

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[From Benchmark Friday, 16 November 2018]

## **Olefines Pty Ltd v Valuer-General of New South Wales [2018] NSWCA 265**

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Valuation of land - statutory interpretation - appellant owned two parcels of land - land tax assessed on each parcel of land for three tax years - appellant challenged each parcel's valuation - six appeals in Land and Environment Court, each concerning a parcel of land and a tax year - trial judge rejected appeals - appellant, pursuant to s57(1) *Land and Environment Court Act 1979* (NSW), challenged trial judge's decision - whether trial judge misconstrued of s6A *Valuation of Land Act 1916* (NSW) - whether valuations erroneously assessed without regard to remediation costs of 'contaminated soil' and 'location of a large portion' of lot in 'area of acute fire and explosion risk' - whether erroneous acceptance of '10% uplift' - held: appeal dismissed.

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[From Benchmark Friday, 16 November 2018]

## **BB Australia v Danset (No 2) [2018] NSWSC 1745**

Supreme Court of New South Wales

McDougall J

Contract - franchise agreement - deed of guarantee and indemnity - plaintiff unsuccessfully brought proceedings against defendant - Court found breach of franchise agreement by defendant but that plaintiff did not establish loss - Court also found no basis for award of equitable compensation - determination of outstanding issue - whether, on proper construction of franchise agreement and deed of guarantee and indemnity, plaintiff was entitled to recovery of 'enforcement expenses' - whether defendants obliged to indemnify plaintiff - held: claim for enforcement expenses dismissed.

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[From Benchmark Friday, 16 November 2018]

## **Silver Star Fashions Pty Ltd v Dal Broi [2018] NSWSC 1445**

Supreme Court of New South Wales

Darke J

Land law - contract - plaintiff vendor sought, under s66ZL(6) *Conveyancing Act 1919* (NSW) (Conveyancing Act), to rescind nine 'off the plan' contracts under "sunset clause" - contracts concerned mixed-use development of property plaintiff owned - defendants were purchasers under contracts - s66ZL not enacted when contracts entered - s66ZL introduced 'with retrospective effect' by *Conveyancing Amendment (Sunset Clauses) Act 2015* (NSW) - purchasers contended vendor had failed to comply sunset clause, challenged validity of notices vendor claimed to have served under s66ZL(4), and contended Court should not be satisfied it 'just and equitable in all the circumstances' to grant order permitting vendor to rescind - vendor's conduct - delay - loss to purchasers if rescission permitted - held: Court not satisfied that making order permitting rescission of contracts was just and equitable in all the circumstances - purchasers had not 'unreasonably withheld consent' to contracts' rescission - vendor liable to pay purchasers' costs.

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[From Benchmark Friday, 16 November 2018]

**Silver Star Fashions Pty Ltd v Dal Broi (No 2) [2018] NSWSC 1697**

Supreme Court of New South Wales

Darke J

Costs - plaintiff vendor, under s66ZL(6) *Conveyancing Act 1919* (NSW), sought permission to rescind off the plan contracts under “sunset clause” - court dismissed Statement of Claim - Court ordered plaintiff to pay defendants’ costs - plaintiff, and first to tenth defendants sought variation of costs order - first to tenth defendants sought indemnity costs order in reliance on Calderbank offer - plaintiff sought limitation of costs it was ordered to pay eleventh and twelfth defendants to “the proportion of costs of each of the first to tenth defendants” - whether rejection of Calderbank offer unreasonable - whether unreasonable for eleventh and twelfth defendants to retain legal representation separate to representation of first to tenth defendants - held: Court satisfied to grant indemnity costs order in favour of first to tenth defendants - Court not satisfied to limit costs to be paid to eleventh and twelfth defendants - costs orders varied.

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[From Benchmark Friday, 16 November 2018]

**Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd (No 2) [2018] NSWSC 1713**

Supreme Court of New South Wales

Parker J

Corporations - winding up - plaintiff sought that statutory demand served on it by defendant be set aside - Court found that plaintiff had off-setting claim - Court was prepared to order reduction of statutory demand’s amount on condition of undertaking by plaintiff - plaintiff not prepared to proffer undertaking - whether to dismiss proceedings - whether to stay proceeding’s dismissal until Court of Appeal hearing - whether to grant extension of time for compliance with statutory demand in order that plaintiff could pursue appeal - s459F *Corporations Act 2001* (Cth) - held: proceedings dismissed - extension of time for compliance with statutory demand granted on condition of undertaking by plaintiff that application for leave to appeal be commenced and prosecuted with due dispatch, and that plaintiff provide security for costs.

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[From Benchmark Friday, 16 November 2018]

**Everlight Resources Ltd v Barnett & Ors [2018] QSC 244**

Supreme Court of Queensland

Dalton J

Corporations - statutory demand - applicant company (Everlight) sought to set aside three statutory demands based on promise to repay money advanced to Everlight under ‘convertible note agreements’ - not disputed amounts had become payable by Everlight and had not been paid - Everlight contended creditors ‘unable to call for payment’ due to assignment of rights to debts - consideration of ‘convertible note agreement’ and ‘general security agreement’ -



whether legal or equitable assignment - held: application dismissed.

[Everlight](#)

[From Benchmark Friday, 16 November 2018]

**BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 4] [2018] WASC 338**

Supreme Court of Western Australia

Le Miere J

Freezing orders - plaintiff sought variation of freezing order against first defendant - whether 'material change of circumstances' constituted by progress of Singapore proceedings or by scheme of arrangement - whether Court should exercise discretion to vary freezing orders as sought by plaintiff - ss208 & 229 *Corporations Act 2001* (Cth) - held: application allowed in part.

[BCBC](#)

[From Benchmark Friday, 16 November 2018]



# Benchmark

## **Spring, the sweet spring**

**By:** Thomas Nashe

Spring, the sweet spring, is the year's pleasant king,  
Then blooms each thing, then maids dance in a ring,  
Cold doth not sting, the pretty birds do sing:

Cuckoo, jug-jug, pu-we, to-witta-woo!

The palm and may make country houses gay,  
Lambs frisk and play, the shepherds pipe all day,  
And we hear aye birds tune this merry lay:

Cuckoo, jug-jug, pu-we, to-witta-woo!

The fields breathe sweet, the daisies kiss our feet,  
Young lovers meet, old wives a-sunning sit,  
In every street these tunes our ears do greet:

Cuckoo, jug-jug, pu-we, to witta-woo!

Spring, the sweet spring!

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