

Benchmark

Friday, 17 August 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)

Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate

2003 (FCAFC) - insurance - applicants sought entitlement to insurance cover for defence costs of proceedings against them - terms of policy did not inhibit insurer's right to rely on s28 *Insurance Contracts Act 1984* (Cth) on basis of fraudulent non-disclosure - separate question answered in the negative

Cathro, in the matter of Lidcombe Plastering Services Pty Limited (in liq) (FCA) - corporations - application to set aside orders for production issued by liquidator - application dismissed

Tony Innaimo Transport Pty Ltd v Skyroad Logistics Pty Ltd (FCA) - corporations - winding up - interlocutory application - 'materiality requirement' - defendant granted leave to oppose application for winding up

The Owners - Strata Plan No 66375 v King (NSWCA) - building and construction - appeal against dismissal of owners corporation's claim on basis respondents were not "developers" under s3A *Home Building Act 1989* (NSW) - respondents were parties to building contract and liable for 'design defects' - appeal allowed

In the matter of Rubix Investments Group Pty Ltd (in liq) (NSWSC) - corporations - deed of settlement - approval of deed of settlement granted - direction granted that liquidators justified to enter deed

Australia Health & Nutrition Association Limited v Hive Marketing Group Pty

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Limited (NSWSC) - judgments and orders - contract - dismissal of proceedings on basis of exclusive jurisdiction clause

Ideal Business Centres Pty Ltd v Violin Holdings Pty Ltd atf The Violin Investment Trust (NSWSC) - leases and tenancies - real property - equity - purchaser of premises bound to honour terms of unregistered lease

Murray & Anor v Great Southern Managers Aust Ltd & Ors (an Application by Garry James Parker) (VSC) - judgments and orders - group proceeding - order granted that applicant cease to be a group member

McDonald Murholme Pty Ltd v Victorian Radio Network Pty Ltd (VSC) - judgments and orders - appeal from Magistrates' Court - 'Booking Agreement' - no error in Magistrate's decision that appellant owed debt to respondent under agreements - appeal dismissed

Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd & Anor (VSC) - security of payments - application to quash adjudication determination - error by adjudicator established - determination quashed

McCrohan Super Investments Pty Ltd & Ors v Ashdown & Ors (VSC) - consumer law - subscription agreement - 'financial representations' - misleading or deceptive conduct not established - claim dismissed

Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission (QCA) - corporations - winding up - no error in primary judge's decision that companies should be wound up on just and equitable grounds - appeal dismissed

Sparway Pty Ltd v CPQ Corporation Pty Ltd (ACTSC) - landlord and tenant - leases and tenancies - two applications - tenants' application for declarations they had valid sublease dismissed - landlords' application for possession allowed 'subject to final orders'

Canberra Cleaners Pty Ltd v Commissioner for ACT Revenue (ACTSC) - administrative law - taxation - payroll tax - garnishee notices - compliance notices issued to directors - certain garnishee notices set aside - proceedings otherwise dismissed

Summaries With Link (Five Minute Read)

Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003 [2018] FCAFC 119

Full Court of the Federal Court of Australia

SYNOPSIS

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Allsop CJ; Lee & Derrington JJ

Insurance - separate question - applicants sought order that they were entitled to insurance cover for legal costs in relation to two proceedings against them - respondents were underwriters who had issued 'broadform Liability' policy to companies of which applicants were directors - cover included defence costs' provision to applicants - insurer claimed conduct subject of proceedings was 'dishonest conduct' by applicants which occurred, 'at least in part', before policy's inception, and which applicants had not disclosed - respondents sought to avoid policy on basis of 'fraudulent non-disclosure' - applicants contended that insurer, under terms of policy, was required to meet proceedings' costs 'unless and until' judgment established the 'criminal or dishonest conduct' or they admitted the conduct, regardless of whether or not they had breached disclosure obligation - applicants sought entitlement to indemnity pending proceedings' determination - held: policy's terms did not inhibit insurer's entitlement to rely, on basis of applicants' failure to comply with duty of disclosure, on s28 *Insurance Contracts Act 1984* (Cth) - separate question answered in the negative.

[Onley](#)

[From Benchmark Friday, 17 August 2018]

Cathro, in the matter of Lidcombe Plastering Services Pty Limited (in liq) [2018] FCA 1138

Federal Court of Australia

Gleeson J

Corporations - applicant was wife of director of company in liquidation - applicant sought to set aside orders for production issued at request of plaintiff liquidator seeking information in relation to applicant - applicant contended matters sought to be investigated were outside company's 'examinable affairs' - applicant contended there was 'no nexus' between documents sought, company's examinable affairs, and proposed examinations of director and accounting firm principal - held: Court satisfied that liquidator should have access to documents sought - application dismissed.

[Cathro](#)

[From Benchmark Friday, 17 August 2018]

Tony Innaimo Transport Pty Ltd v Skyroad Logistics Pty Ltd [2018] FCA 1134

Federal Court of Australia

Griffiths J

Corporations - winding up - defendant, under s459S *Corporations Act 2001* (Cth), sought to oppose application for winding up - defendant opposed application on basis it disputed debt which plaintiff alleged was owing in statutory demand - defendant had not sought to set aside statutory demand within 'specified time' - solvency - 'materiality requirement' - whether dispute concerning debt material to proving defendant's solvency - basis for dispute - reasonableness of explanation for not raising disputed debt in application to set aside demand - discretionary factors - held: defendant granted leave to oppose application for winding up.

[Tony Innaimo Transport Pty Ltd](#)

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[From Benchmark Friday, 17 August 2018]

The Owners - Strata Plan No 66375 v King [2018] NSWCA 170

Court of Appeal of New South Wales

Ward, Leeming & White JJA

Building and construction - appellant owners corporation sued respondents and others in respect of building defects - primary judge dismissed claim against respondents on basis they were not "developers"• under s3A *Home Building Act 1989* (NSW) - primary judge also found that, even if respondents were "developers", claims against them in respect of a number of defects would have failed because relevant work which builder performed did not include 'defective design' causing the defects - appellant contended primary judge erred in finding it failed to establish respondents were parties to the building contract , and in finding that the work did not include the defective design causing the defects - statutory construction - ss18B(c) & 18D of the Act - held: respondents were parties to the building contract - respondents were liable as developers under s18C for breach of statutory warranty in s18B(c), even though the building work's non-compliance resulted from design defects - appeal allowed.

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[From Benchmark Friday, 17 August 2018]

In the matter of Rubix Investments Group Pty Ltd (in liq) [2018] NSWSC 1184

Supreme Court of New South Wales

Gleeson JA

Corporations - deed of settlement - 'compromise of debt' - liquidators of company (Rubix) sought Court's approval under s477(2A) *Corporations Act 2001* (Cth) concerning deed of settlement and release, and directions under s90-15 *Insolvency Practice Schedule (Corporations)* - deed provided for payment by company (Gogetta) of settlement sum to Rubix in consideration of Rubix's releases - held: Court satisfied that deed was 'appropriate compromise' - Court satisfied liquidators justified to enter deed - approval and direction granted.

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[From Benchmark Friday, 17 August 2018]

Australia Health & Nutrition Association Limited v Hive Marketing Group Pty Limited [2018] NSWSC 1236

Supreme Court of New South Wales

McDougall J

Judgments and orders - contract - second defendant sought dismissal or permanent stay of proceedings, or that summons' service be set aside - second defendant relied on "exclusive jurisdiction" clause in contract between it, first plaintiff and first defendant - in event second defendant's application failed, plaintiffs sought leave to proceed against second defendant - presumption in respect of exclusive jurisdiction clauses - whether to deprive party of its enjoyment of contractual right's benefit - opposition to application based on risk of 'multiplicity

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of proceedings and inconsistent findings' - held: second defendant established claim for relief - proceedings between first plaintiff and second defendant dismissed.

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[From Benchmark Friday, 17 August 2018]

Ideal Business Centres Pty Ltd v Violin Holdings Pty Ltd atf The Violin Investment Trust [2018] NSWSC 1249

Supreme Court of New South Wales

Kunc J

Leases and tenancies - real property - equity - plaintiff was a lessee of commercial premises - second defendant was premises' registered proprietor under *Real Property Act 1900* (NSW) (Real Property Act) - first defendant purchased premises - proceedings concerned whether first defendant was bound to honour unregistered lease's terms - plaintiff contended first defendant was bound to honour the lease - no doubt first defendant was on notice of lease's terms - proper construction of lease - 'acknowledgment' in clause of lease - whether plaintiff had benefit of 'in personam' equity overcoming first defendant's indefeasible title under s42 Real Property Act - held: first defendant bound to 'observe and give effect to' the lease - plaintiff had no claim against second defendant.

[View Decision](#)

[From Benchmark Friday, 17 August 2018]

Murray & Anor v Great Southern Managers Aust Ltd & Ors (an Application by Garry James Parker) [2018] VSC 416

Supreme Court of Victoria

Croft J

Judgments and orders - group proceedings - managed investment scheme - deed of settlement - applicant sought extension of time in which to opt out of group proceeding under s33J(3) *Supreme Court Act 1986* (Vic) or that he cease to be group member under s33KA(1) of the Act - whether appropriate to extend time where three years had passed since settlement of group proceeding - held: Court satisfied, on basis of group member's 'insufficient connection' with Australia, to order that applicant cease to be a group member under s33KA(1) of the Act.

[Murray & Anor](#)

[From Benchmark Friday, 17 August 2018]

McDonald Murholme Pty Ltd v Victorian Radio Network Pty Ltd [2018] VSC 434

Supreme Court of Victoria

Sloss J

Judgments and orders - appeal from Magistrates' Court - appellant operated employment law firm - respondent operated radio stations - appellant entered two agreements with respondent for 'provision of broadcast radio advertising services' - appellant ceased payments to respondent - respondent terminated agreements and sought payment of money allegedly owing under agreements - Magistrate ordered appellant to pay amount to respondent - appellant

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appealed - construction of agreements - 'Booking Agreement' - whether appellant liable to pay debt to respondent - s109 *Magistrates' Court Act 1989* (Vic) - held: no error in Magistrate's decision - appeal dismissed.

Murholme

[From Benchmark Friday, 17 August 2018]

Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd & Anor [2018] VSC 386

Supreme Court of Victoria

Kennedy J

Security of payments - application to quash second defendant's adjudication determination pursuant to s23 *Building and Construction Industry Security of Payment Act 2002* (Vic) (Act) - whether adjudicator had jurisdiction to make determination - whether valid reference date - whether erroneous failure to 'consider and assess' claims concerning 'alleged defects' - held: ground of appeal upheld that adjudicator erred in finding there was relevant reference date under contract even if plaintiff had validly terminated contract - there was no reference date - ground of appeal also upheld that adjudicator erred by finding it was open plaintiff to claim for alleged defects - adjudication quashed.

Vanguard

[From Benchmark Friday, 17 August 2018]

McCrohan Super Investments Pty Ltd & Ors v Ashdown & Ors [2018] VSC 422

Supreme Court of Victoria

Sifris J

Consumer law - plaintiffs executed subscription agreement with company under which they were allotted shares in company in consideration of sum's payment - shares were 'worthless or of little value' - company went into liquidation - plaintiffs contended that, in negotiations and before agreement's execution, defendants engaged in misleading or deceptive conduct by false or misleading representations - plaintiffs sought damages, contending they would not have entered agreement if the representations were not made - whether false or misleading 'financial representations' - whether representations required 'clarification or qualification' - whether misleading or deceptive conduct - s18 Australian Consumer Law - held: plaintiffs' claim dismissed.

McCrohan

[From Benchmark Friday, 17 August 2018]

Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission [2018] QCA 181

Court of Appeal of Queensland

Sofronoff P; Gotterson & McMurdo JJA

Corporations - winding up - primary judge granted Australian Securities and Investments Commission's application that appellant companies be wound up under s461(1)(k)

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Corporations Act 2001 (Cth) on basis it was just and equitable - appellants appealed, contending factual errors had affected primary judge's exercise of discretion - 'nature and extent' of displaced director's 'ongoing involvement' if companies permitted to continue - whether adverse finding in respect of new director ought to have been made - public interest - 'lamentable history of mismanagement and misconduct' - risk to public interest if companies were to continue - held: no error in primary judge's conclusion that companies should be wound up on just and equitable ground - appeal dismissed.

Gognos

[From Benchmark Friday, 17 August 2018]

Sparway Pty Ltd v CPQ Corporation Pty Ltd [2018] ACTSC 210

Supreme Court of the Australian Capital Territory

Elkaim J

Landlord and tenant - leases and tenancies - two applications - in first application tenants sought declarations they had valid sublease in respect of premises - in second application, landlords sought possession of premises and damages - whether landlords entitled not to abide by obligation to renew lease once its renewal was requested by tenant under clause - held: tenants' application dismissed - landlords entitled to treat lease as ended - landlords' application granted 'subject to final orders'.

Sparway

[From Benchmark Friday, 17 August 2018]

Canberra Cleaners Pty Ltd v Commissioner for ACT Revenue [2018] ACTSC 208

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Administrative law - taxation - two related proceedings seeking judicial review of decisions Commissioner for ACT Revenue had sought to recover payroll tax liability - Commissioner used two methods under *Taxation Administration Act 1999* (ACT) (the Act): garnishing income from businesses' debtors; and making directors responsible to repay the debt - whether to set aside garnishee notices - validity of compliance notices issued to directors - whether unreasonableness - whether failure to take relevant consideration into account - 'financial hardship' - whether irrelevant consideration taken into account - whether garnishee notices authorised - whether garnishee notices 'lacked sufficient clarity' - validity of 'underlying assessment' - whether notice put directors in conflict with duties under *Corporations Act 2001* (Cth) - reasonableness of issuing compliance notices after stay granted in respect of garnishee notices - held: certain garnishee notices set aside - proceedings otherwise dismissed.

Canberra

[From Benchmark Friday, 17 August 2018]

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The Fallow Deer At The Lonely House

By: Thomas Hardy

One without looks in tonight
Through the curtain-chink
From the sheet of glistening white;
One without looks in tonight
As we sit and think
By the fender-brink.

We do not discern those eyes
Watching in the snow;
Lit by lamps of rosy dyes
We do not discern those eyes
Wandering, aglow
Four-footed, tiptoe.

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

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