

Friday, 21 December 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)

Stallion Eight Shipping Co. S.A. v Natwest Markets PLC (formerly known as The Royal Bank of Scotland plc) (EWCA) - maritime law - admiralty - appellant owners sought ship's release from arrest unless respondent bank 'provided a cross-undertaking in damages' - Teare J dismissed application - no error in exercise of discretion by Teare J - appeal dismissed

Impiombato v BHP Billiton Limited (No 2) (FCA) - judgments and orders - representative proceedings - case management - three 'open class representative proceedings' commenced against respondent - one proceeding to go forward as open class proceeding - one proceeding stayed - one proceeding temporarily stayed

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd (NSWCA) - corporations - statutory demand - applicant sought extension of time to comply with statutory demand until determination of its summons seeking leave to appeal from dismissal its application to set demand aside - extension of time granted

Burke v Ash Sounds Pty Ltd (VSC) - damages - negligence - consumer law - group proceeding - separate question - Pts VB & VBA *Wrongs Act 1958* (Vic) applied to claim for non-compliance with guarantees if services subject of ss61(1) or 61(2) Australian Consumer Law 'supplied pursuant to a contract between the group member and the defendant'

Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd (VSC) - contract - caveat - plaintiff had no real prospects of success in establishing Heads of Agreement was 'binding contract' - defendant's application for summary judgment on claim for specific performance granted - defendant's application removal of plaintiff's caveat granted

Di Stasio Pty Ltd v R & K Services Pty Ltd (VSCA) - judgments and orders - contract - respondent granted leave to amend pleading, re-open case and adduce evidence - appeal dismissed

Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd (QCA) - summary judgment - pleadings - action for 'price of goods' - no error in refusal to grant summary judgment - erroneous refusal of application to strike out part of defence - appeal allowed in part

Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd (WASCA) - planning and development - State Administrative Tribunal granted conditional approval for development under 'Scheme' - erroneous failure to have 'due regard' to 'Scheme Amendment' - appeal allowed - cross-appeal dismissed

Summaries With Link (Five Minute Read)

Stallion Eight Shipping Co. S.A. v Natwest Markets PLC(formerly known as The Royal Bank of Scotland plc) [2018] EWCA Civ 2760

England and Wales Court of Appeal

Sir Terence Etherton MR, Lord Justice Gross & Lord Justice Flaux

Maritime law - admiralty - appellant (owners) sought release of ship ('M.V. Alkyon') from arrest unless respondent (bank) 'provided a cross-undertaking in damages' (cross-undertaking) 'for the loss flowing from the arrest' - Teare J dismissed application - owners appealed - whether Teare J, in refusing to order M.V Alkyon's release without requiring bank to provide cross-undertaking, erred in exercise of discretion under r61.8(4)(b) *Civil Procedure Rules* (CPR) - whether Court should exercise power under r61.8(4)(b) CPR to release M.V. Alkyon unless cross-undertaking provided by bank - whether Court should depart from 'existing law and practice' concerning 'maritime arrests as of right', non-recoverability of damages for 'wrongful arrest' without 'bad faith' or 'gross negligence', and 'requiring security as the price' for release from arrest of a vessel - whether owners demonstrated 'risk of injustice' or 'hardship' - whether owners established 'alternative security' could not be provided - held: no error in Teare J's exercise of discretion - appeal dismissed.

[Stallion](#)

[From Benchmark Tuesday, 18 December 2018]

Impiombato v BHP Billiton Limited (No 2) [2018] FCA 2045

Federal Court of Australia

Moshinsky J

Judgments and orders - representative proceedings - case management - three 'open class representative proceedings' under Pt IVA *Federal Court of Australia Act 1976* (Cth). commenced against respondent on shareholders' behalf concerning collapse of 'Fundão Dam'

at mine in Brazil - 'Impiombato proceeding' - 'Klemweb proceeding' - 'LACERA proceeding' - whether Court should make orders addressing proceedings' 'potential overlap' - held: Impiombato proceeding to go forward as 'open class proceeding' - Klemweb proceeding permanently stayed - LACERA proceeding temporarily stayed.

[Impiombato](#)

[From Benchmark Thursday, 20 December 2018]

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWCA 336

Court of Appeal of New South Wales

Beazley P

Corporations - statutory demand - applicant sought extension of time to comply with statutory demand which respondent served on it - applicant sought extension of time until determination of its summons seeking leave to appeal from dismissal of its application to set demand aside - applicant contended primary judge 'failed to grapple' with question concerning 'time at which' offsetting claim 'had to have crystallised' in order for it to be available - applicant also challenged assessment of 'likely damages' - prospects of success - whether, unless extension granted, appeal would be rendered nugatory - prejudice - delay - *Building and Construction Industry Security of Payment Act 1999* (NSW) - ss459C, 459F, 459G & 459H *Corporations Act 2001* (Cth) - held: extension of time granted.

[View Decision](#)

[From Benchmark Friday, 21 December 2018]

Burke v Ash Sounds Pty Ltd [2018] VSC 771

Supreme Court of Victoria

McDonald J

Damages - negligence - consumer law - group proceeding - claim arising from injuries allegedly suffered at festival - plaintiff made 'breach of duty' claims and claims for breach of guarantees in ss60 & 61 Australian Consumer Law - liability admitted - separate questions - first question was whether Pts VB & VBA *Wrongs Act 1958* (Vic) (*Wrongs Act*) applied to claim for non-compliance with guarantees if services subject of ss61(1) or 61(2) Australian Consumer Law 'were supplied pursuant to a contract between the group member and the defendant' - second question was whether claimants precluded from non-economic loss damages regardless of whether 'purpose and guarantee claims' required 'proof of fault' and regardless of any contract's nature and existence, due to 'long arm operation' of s28LE *Wrongs Act* - held: first question determined in the affirmative - Court declined to answer second question as it was not 'raised in the proceedings.

[Burke](#)

[From Benchmark Friday, 21 December 2018]

Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd [2018] VSC 787

Supreme Court of Victoria

Mukhtar AsJ

Contract - caveat - proceedings concerned dispute whether there was 'legally enforceable agreement' between defendant landowner and plaintiff property developer for sale of land - plaintiff relied on 'Heads of Agreement' (agreement) which real estate agent furnished to 'a director of the defendant' - plaintiff lodged caveat on land - plaintiff claimed interest as purchaser agreement - plaintiff sought specific performance of agreement by defendant - defendant sought summary judgement on specific performance claim and removal of caveat - held: Court satisfied to grant defendant's applications - plaintiff did not have 'real prospect of success' of establishing Heads of Agreement was 'binding contract' - Court could not order specific performance - plaintiff had no caveatable interest - caveat to be removed.

[Count On Us](#)

[From Benchmark Friday, 21 December 2018]

Di Stasio Pty Ltd v R & K Services Pty Ltd [2018] VSCA 340

Court of Appeal of Victoria

Tate, McLeish & Niall JJA

Judgments and orders - contract - appellant owner of restaurant entered 'costs plus' contract with respondent 'building and construction company' for performance of works ('Stage 1 works') - parties entered 'fixed-price contract for works ('Stage 2 works') - respondent brought proceedings against appellant for 'unpaid progress claims' - trial judge upheld some of respondent's claims - primary judge found second progress claim failed because respondent had not served tax invoice on appellant which was 'equal in value to the certificate issued by the architect as the contract required' - before pronouncement and authentication of orders respondent sought to amend pleading, re-open case and adduce evidence of 'new invoice' - judgment given in respondent's favour - whether proper exercise of discretion in permitting respondent to amend pleading, reopen case and adduce evidence - whether appellant established *House v The King* error - whether any error in costs order in respondent's favour - held: appeal dismissed.

[Di Stasio](#)

[From Benchmark Friday, 21 December 2018]

Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd [2018] QCA 353

Court of Appeal of Queensland

Holmes CJ; Philippides JA & Henry J

Summary judgment - pleadings - appellant brought action for 'price of goods' brought against respondent - primary judge dismissed appellant's summary judgment application - primary judge also refused appellant's application to strike out part of defence in which respondent contended that, on terms of parties' agreement, respondent held 'unsold goods' in respect of which appellant had 'right of immediate possession' as bailee, giving it right of set-off - appellant appealed - appellant contended respondent made 'sufficient admissions' as to agreement's existence and that respondent's failure to make payment entitled appellant to recovery of amount as debt - respondent contended appellant elected to retake unsold goods' possession, that appellant was limited to recovering damages and that appellant was obliged to

mitigate - held :no error in primary judge's refusal to award summary judgment - primary judge erred in dismissing strike-out application - appeal allowed in part.

[Garmin](#)

[From Benchmark Thursday, 20 December 2018]

Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd [2018] WASCA 213

Court of Appeal of Western Australia

Buss P; Murphy & Mitchell JJA

Planning and development - Southern Joint Development Assessment Panel (Panel) refused development approval for development proposed by respondent - respondent sought review - State Administrative Tribunal found, on determination of 'preliminary matter', that respondent's proposed use 'properly classified' under Scheme as 'Convenience Store' not 'Service Station' ('Preliminary Decision') - Tribunal, after Preliminary Decision, heard application for review - a 'Scheme Amendment', which amended 'Service Station' definition 'came into force' after hearing, but before delivery of Tribunal's decision - Tribunal, unaware of Scheme Amendment, gave decision, granting conditional approval under Scheme - appellant appealed - primary judge dismissed appeal - held: Tribunal erroneously failed to have 'due regard' to the Scheme Amendment - appeal allowed - cross-appeal dismissed.

[Presiding Member](#)

[From Benchmark Friday, 21 December 2018]

Benchmark

To Mrs K____, On Her Sending Me an English Christmas Plum-Cake at Paris

By: Helen Maria Williams

What crowding thoughts around me wake,
What marvels in a Christmas-cake!
Ah say, what strange enchantment dwells
Enclosed within its odorous cells?
Is there no small magician bound
Encrusted in its snowy round?
For magic surely lurks in this,
A cake that tells of vanished bliss;
A cake that conjures up to view
The early scenes, when life was new;
When memory knew no sorrows past,
And hope believed in joys that last! —
Mysterious cake, whose folds contain
Life's calendar of bliss and pain;
That speaks of friends for ever fled,
And wakes the tears I love to shed.
Oft shall I breathe her cherished name
From whose fair hand the offering came:
For she recalls the artless smile
Of nymphs that deck my native isle;
Of beauty that we love to trace,
Allied with tender, modest grace;
Of those who, while abroad they roam,
Retain each charm that gladdens home,
And whose dear friendships can impart
A Christmas banquet for the heart!

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

Helen Maria Williams (17 June 1759 – 15 December 1827) was a British novelist, poet, and translator of French-language works. A religious dissenter, she was a supporter of abolitionism and of the ideals of the French Revolution; she was imprisoned in Paris during the Reign of Terror, but nonetheless spent much of the rest of her life in France.. A controversial figure in her own time, the ..

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