

Friday, 8 April 2016

Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Fischer v Nemeske Pty Ltd (HCA) - trusts and trustees - family trust - valid exercise of power to “advance” or “apply” sum - appeal dismissed (I B)

Fan v South Eastern Sydney Local Health District (NSWCA) - medical negligence - claims against Health District for failure to diagnose conditions and perform operation dismissed - appeal dismissed (I)

Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd (NSWCA) - insurance - commercial motor vehicle policy - basis for application of exemption or condition not established - appeal allowed (I B C)

Cohen v Cohen (NSWSC) - principal and agent - power of attorney - defendant breached fiduciary duties by transferring property to himself - plaintiff entitled to set aside transfer and to declaration defendant held property for plaintiff on trust (I B C)

Edmonds v Morrissey (NSWSC) - Wills and estates - judicial advice - meaning of “issue children” in Will - entitlement to gift in remainder - declaration (I B)

SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd (NSWSC) - contract - rectification - parties common intention was that purchase price of land was amount plus GST - rectification granted (I B C)

Benchmark

Estate Cockell; Cole v Paisley (NSWSC) - wills and estates - probate - testamentary capacity - determination of competing claims in relation to small estate (B)

The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd (NSWSC) - building and construction - preliminary issues - there was contract between builder and developer for building works - proceedings not commenced within time (I B C)

Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) (NSWSC) - negligence - plaintiff injured when she tripped while leaving lift - lift had not levelled with floor - defendants not liable - judgment for defendants - cross-claims dismissed (I B C)

Commonwealth Bank of Australia v Codovo Developments Pty Ltd (VSC) - summary judgment - bank entitled to payment of debt - summary judgment refused in respect of counterclaim (I B C)

Brisbane City Council v Gerhardt (QCA) - environment and planning - application by home owners to building certifier to make alterations and additions - no separate application need be made to council - building certifier entitled to approve application - appeal dismissed (I B C)

IBM Australia Ltd v State of Queensland (QSC) - guarantee and indemnity - construction contract - applicant entitled to indemnity costs under clause of agreement (I B C)

George 218 Pty Ltd v Bank of Queensland Ltd (WASCA) - security for costs - primary judge found guarantors liable to bank - bank granted security for costs of appeal (I B C)

Daynite Towing Service (WA) Pty Ltd v Regrowth Karri Pty Ltd (WASCA) - negligence - tourist coach destroyed by fire while being towed - claim against towing contractor upheld - appeal dismissed (I B C)

Motor Accidents Insurance Board v Wright (TASSC) - insurance - motor vehicle accident - respondent entitled to death benefit after death of wife four months after motor vehicle accident - Tribunal's determination confirmed (I B)

Summaries With Link (Five Minute Read)

Fischer v Nemeske Pty Ltd [2016] HCA 11
High Court of Australia
French CJ; Kiefel, Bell, Gageler & Gordon JJ

Benchmark

Trusts and trustees - family trust established by deed of settlement - sole asset was shares in another company (Aladdin) - in September 1994 trustee resolved asset revaluation reserve (sum) be distributed to husband and wife as joint tenants - trustee's books acknowledged debt to husband and wife - in 1995, by deed of charge, trustee covenanted to pay sum to husband and wife "on demand" - in May 1994 husband had orally varied vesting date to June 1992 - husband died in 2011 - wife died in 2010 - Court of Appeal found cause of action in debt accrued to husband and wife when trustee admitted and acknowledged itself to be indebted to them in its accounts and by means of deed of charge - Court of Appeal found oral resolution was not a valid exercise of power conferred by trust deed to vary vesting date, wife had predeceased husband and husband's estate entitled to judgment for sum against trustee - held: resolution was valid exercise of power to "advance" and "apply" sum by creation of debt - appeal dismissed.

[Fischer](#) (I B)

[From Benchmark Friday, 8 April 2016]

Fan v South Eastern Sydney Local Health District [2016] NSWCA 64

Court of Appeal of New South Wales

McColl, Basten & Simpson JJA

Medical negligence - appellant sued respondent Health District for failure to diagnose Type 2 diabetes, failure to diagnose cholecystitis and failure to carry out cholecystectomy - trial judge found appellant did not establish respondent breached duty of care or that if it breached its duty or duties of care it caused appellant to suffer any injury or damage - appellant's case against respondent in negligence and breach of contract failed - appellant appealed - s98 *Civil Procedure Act 2005* (NSW) - s75A *Supreme Court Act 1970* (NSW) - held: appellant failed in challenges to trial judge's findings on liability - not necessary to address arguments as to assessment of damages - appeal dismissed.

[Fan](#) (I)

[From Benchmark Thursday, 7 April 2016]

Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd [2016] NSWCA 67

Court of Appeal of New South Wales

Meagher & Ward JJA; Sackville AJA

Insurance - commercial motor vehicle policy - damage to public road - s102 *Roads Act 1993* (NSW) - arm of excavator loaded on a vehicle struck a bridge causing damage - Barrie Toepfer owned vehicle and excavator and employed driver - RTA claimed costs of repair from Barrie Toepfer - Barrie Toepfer cross-claimed against its insurer under a Commercial Motor Vehicle Policy - Barrie Toepfer also cross-claimed against RTA and NSW - primary judge found s102 established strict liability unrelated to fault or liability in tort - Barrie Toepfer caused damage to bridge - RTA entitled to recover cost it incurred in making good the damage - primary judge gave judgment for RTA against Barrie Toepfer and that insurance policy exclusion for recklessness extended to recklessness of the insured's employed driver - cross-claim against

insurer failed - construction and application of policy provisions - whether findings correct that as truck approached bridge driver appreciated load might strike bridge and consciously decided to run risk by continuing - held: driver not reckless in driving onto bridge - driver did not fail to do what was reasonable - insurers did not establish basis for application of exclusion or condition - appeal allowed.

[Barrie Toepfer](#) (I B C)

[From Benchmark Friday, 8 April 2016]

Cohen v Cohen [2016] NSWSC 336

Supreme Court of New South Wales

Hallen J

Principal and agent - fiduciary duties - unconscionable dealings - conveyancing - plaintiff under legal incapacity sought declaration regarding title to property, order that defendant transfer property to plaintiff, and consequential relief - property had been transferred under power of attorney - s163B *Conveyancing Act 1919* (NSW) - held: Court satisfied that defendant breached fiduciary obligations by transferring property to himself which deprived plaintiff of only substantial asset - defendant abused power bestowed by power of attorney - plaintiff entitled to set aside transaction and to declaration defendant held property in trust for her.

[Cohen](#) (I B C)

[From Benchmark Monday, 4 April 2016]

Edmonds v Morrissey [2016] NSWSC 342

Supreme Court of New South Wales

Darke J

Wills and estates - application for judicial advice - plaintiff and first defendant were children of testator's son - testator's son now deceased - testator's son had also had another child, also now deceased - whether gift in remainder of real estate was shared equally between plaintiff and first defendant or whether it was shared by plaintiff and defendant at one third each, with the final third being shared by the children of the deceased child - construction of Will - "issue children" - held: "issue children" encompassed only children of testator's son - gift in remainder shared equally by plaintiff and first defendant as tenants in common - declaration.

[Edmonds](#) (I B)

[From Benchmark Tuesday, 5 April 2016]

SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd [2016] NSWSC 362

Supreme Court of New South Wales

Stevenson J

Contract - rectification - defendant vendor listed property for public auction - plaintiff purchaser sent its agent to auction to bid on its behalf - agent bid amount to purchase property - auctioneer accepted bid - contracts executed and exchanged - effect of contract was to provide for purchase price inclusive of GST - vendor alleged parties "clear and common intention" was that purchase price was amount plus GST and sought rectification - test of rectification -

conflicting evidence - held: Court satisfied it was parties' common intention that purchase price would be amount plus GST - rectification of contract granted.

[SAMM](#) (I B C)

[From Benchmark Wednesday, 6 April 2016]

Estate Cockell; Cole v Paisley [2016] NSWSC 349

Supreme Court of New South Wales

Lindsay J

Wills and estates - probate - succession - determination of competing claims in relation to deceased estate - whether deceased lacked testamentary capacity when he executed instruments - challenges to deceased's wills - whether wills invalid for lack of testamentary capacity - onus - mental illness - suspicious circumstances - Court's object of due and proper administration of estate - *Guardianship Act 1987*(NSW) - *Succession Act 2006* (NSW) - *Trustee Act 1925* (NSW) - *Uniform Civil Procedure Rules 2005* (NSW) - held: admission of 2006 will to probate confirmed by grant in solemn form - Court ordered that grant of probate in common form was to be confirmed by grant in solemn form to initial grant's recipient.

[Estate](#) (B)

[From Benchmark Wednesday, 6 April 2016]

The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd [2016] NSWSC 375

Supreme Court of New South Wales

McDougall J

Building and construction - preliminary issues - plaintiff owner of strata title development claimed defendant was builder who carried out development for former registered proprietor of land on which development built - owners contended work was defective and it was entitled to recover cost of rectification under s18D *Home Building Act 1989* (NSW) - whether there was contract to which builder was party - whether proceedings out of time - held: Court satisfied there was a contract between builder and developer - proceedings not commenced within time - preliminary questions answered.

[The Owners – Strata Plan No. 69743](#) (I B C)

[From Benchmark Thursday, 7 April 2016]

Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) [2016] NSWSC 333

Supreme Court of New South Wales

Fagan J

Negligence - plaintiff sued defendants for injuries sustained when she tripped while leaving lift in building - lift had not levelled at floor - defendants were occupier of building (Capital Investors), company which serviced repairs and maintained lifts (Thyssenkrupp), and company which managed and oversaw performance of building maintenance contracts (ISS) - *Civil Liability Act 2002* (NSW) - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) held: none of the

defendants was liable to plaintiff - judgment for defendants - cross-claims dismissed.

[Schneider](#) (I B C)

[From Benchmark Friday, 8 April 2016]

Commonwealth Bank of Australia v Codovo Developments Pty Ltd [2016] VSC 122

Supreme Court of Victoria

Almond J

Summary judgment - plaintiff sued first defendant for recovery of money advanced pursuant to banking facilities - plaintiff also sued second, third and fourth defendants as guarantors - defendants counterclaimed against bank for misleading and deceptive conduct, negligent misstatement and unconscionable conduct - bank sought summary judgment - plaintiff contended defendants had no real prospect of defending claim or prosecuting counterclaim - plaintiff contended counterclaim's subject matter had been released clause in Deed of Forbearance - held: plaintiff entitled to payment of debt - Court satisfied defendants had real prospect of success as to limiting scope of release - application for summary judgment on counterclaim rejected.

[Commonwealth Bank of Australia](#) (I B C)

[From Benchmark Tuesday, 5 April 2016]

Brisbane City Council v Gerhardt [2016] QCA 76

Court of Appeal of Queensland

Holmes CJ, McMurdo JA & Daubney J

Environment and planning - owners of house sought permission from respondent private building certifier to make additions and alterations - Council contended owners should have made two applications, one to respondent and one to council - respondent sought declaration no separate application need be made to council and that respondent entitled to approve application - declaration granted - Council sought to appeal under s498 *Sustainable Planning Act 2009* (Qld) (Planning Act) - proper interpretation of Planning Act and *Building Act 1975* (Qld) - held: Council's arguments rejected - no restriction on respondent to grant sought approval - respondent entitled to declarations - appeal dismissed.

[Brisbane](#) (I B C)

[From Benchmark Tuesday, 5 April 2016]

IBM Australia Ltd v State of Queensland [2016] QSC 70

Supreme Court of Queensland

Martin J

Guarantee and indemnity - construction contract - Court found applicant had been released from State's claims against it - release contained in agreement which parties entered and which contained clause providing that "If the State makes a claim against an IBM Party which is the subject of the State Covenant or State Release, then the State fully indemnifies each IBM Party against any liability (including the amount of any judgement [sic], settlement sum and legal and other costs) incurred by the IBM Party as a result of that claim" - applicant sought order giving

effect to clause and order for costs - construction of clause - held: clause entitled IBM to indemnity costs - there was nothing to suggest indemnity costs order inappropriate - State to pay applicant's costs on indemnity basis.

[IBM](#) (I B C)

[From Benchmark Wednesday, 6 April 2016]

George 218 Pty Ltd v Bank of Queensland Ltd [2016] WASCA 56

Court of Appeal of Western Australia

Murphy JA

Security for costs - primary judge found appellant guarantors liable to respondent bank - first, second and fourth appellants were corporate guarantors - bank sought security for costs of appeal - application made pursuant to pt 5 r44(1) *Supreme Court (Court of Appeal) Rules 2005* (WA) and under s1335(1) *Corporations Act 2001* (Cth) in relation to corporate guarantors - ss10, 12, 117, 147, 153 & 332 *Personal Property Securities Act 2009* (Cth) - held: there was reason to believe corporate guarantors would be unable to pay bank's costs - substantial risk that third appellant guarantor would not be able to meet costs order against her - Court concluded it was interests of justice to grant security for costs - orders made.

[George](#) (I B C)

[From Benchmark Thursday, 7 April 2016]

Daynite Towing Service (WA) Pty Ltd v Regrowth Karri Pty Ltd [2016] WASCA 55

Court of Appeal of Western Australia

McLure P, Buss JA & Corboy J

Negligence - respondent was bus and coach operator - appellant was towing contractor - District Court upheld respondent's claim for damages for destruction of tourist coach by fire while appellant was towing it - held: primary judge's finding that caging of brakes was necessary for exercise of reasonable care not in error - open to primary judge to find that before fire occurred there were changes in pressure gauges which tow truck operator failed to detect - no error in finding on causation or assessment of evidence's reliability - appeal dismissed.

[Daynite](#) (I B C)

[From Benchmark Thursday, 7 April 2016]

Motor Accidents Insurance Board v Wright [2016] TASSC 13

Supreme Court of Tasmania

Pearce J

Insurance - motor vehicle accident - Board appealed against decision of Motor Accidents Compensation Tribunal that respondent entitled to death benefit following death of wife four months after motor vehicle accident - respondent had been driving car in which wife was passenger - s23 *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) - Sch 1, Pt 4 *Motor Accidents (Liabilities and Compensation) Regulations 2010* (Tas) - Board contended Tribunal failed to give meaning to word 'directly', erred in finding peritonitis probable cause of death and erred by not giving parties opportunity to heard or provide further expert evidence -

held: grounds of appeal not made out - Tribunal's determination confirmed.

[Motor Accidents Insurance Board](#) (I B)

[From Benchmark Monday, 4 April 2016]

CRIMINAL

Executive Summary

Allen (a Pseudonym) v The Queen (VSCA) - criminal law - incest and indecent act with child - admission of irrelevant, highly prejudicial evidence - appeal allowed - retrial

The Queen v DK (ACTCA) - criminal law - acts of indecency of person under 16 years - no sentencing error or manifest inadequacy - appeal dismissed

Summaries With Link

Allen (a Pseudonym) v The Queen [2016] VSCA 59

Court of Appeal of Victoria

Maxwell P, Redlich & Priest JJA

Criminal law - incest - indecent act with a child - applicant convicted of one charge of incest and eight charges of indecent act with child under 16 - applicant pleaded guilty to one charge of making a threat to kill - judge sentenced applicant to seven years and three months' with fixed non-parole period of five years and three months - applicant sought extension of time to appeal against conviction - held: counsel's assertion of complainant's collusion with plaintiff's mother not based on instruction or evidence - assertion should not have been made - no forensic benefit from pursuing assertion of collusion - counsel failed to resist admission of irrelevant and highly prejudicial evidence - trial judge permitted admission of such evidence - there was substantial miscarriage of justice - appeal allowed - retrial.

[Allen](#)

The Queen v DK [2016] ACTCA 7

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Perry JJ

Criminal law - Crown appealed against sentences imposed on respondent for five acts of indecency on person under 16 years - sentencing judge sentenced DK to total sentence of 18 months imprisonment immediately suspended subject to 18-month good behaviour - held: judge's apparently incorrect description of operation of s10(2) *Crimes (Sentencing) Act* did not amount to sentencing error - manifest inadequacy of sentences not established - appeal dismissed.

[The Queen](#)



Benchmark

The Florist Wears Knee-Breeches

Wallace Stevens

My flowers are reflected
In your mind
As you are reflected in your glass.
When you look at them,
There is nothing in your mind
Except the reflections
Of my flowers.
But when I look at them
I see only the reflections
In your mind,
And not my flowers.
It is my desire
To bring roses,
And place them before you
In a white dish.

[Wallace Stevens](#)

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