

Friday, 8 November 2019

Weekly Civil 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)

Meneses v Directed Electronics OE Pty Ltd (FCAFC) - discovery - privilege - corporations - 'privilege against self-incrimination' - 'privilege against self-exposure to penalties' - erroneous consideration of 'privilege claims' - appeal allowed (I B C G)

Phonographic Performance Company of Australia Limited v Copyright Tribunal of Australia (Costs) (FCAFC) - costs - judicial review - copyright - Court allowed application in part - determination of costs (I B)

National Australia Bank Limited v State of Queensland (FCA) - bankruptcy - applicant 'registered mortgagee' sought vesting in it of 'disclaimed properties' - application granted (B C)

Australian Securities and Investments Commission v Vocation Limited (In Liquidation) (No 2) (FCA) - corporations - 'excuse provisions' - disqualification - pecuniary penalties - contraventions of ss180(1), 674(2) & 1041H(l) *Corporations Act 2001* (Cth) - determination of remaining questions - declarations and orders made (I B)

Cytec Industries Inc. v Nalco Company (FCA) - patent - interlocutory application for leave to amend '990 application' - interlocutory application granted (I B)

Scone Race Club Ltd v Cottom (NSWCA) - negligence - respondent employee injured while removing bin liner from bin - employer not liable - appeal allowed (I)

Small v Phillips (No 2) (NSWCA) - wills and estates - succession - statutory will - dismissal of summons seeking authorisation of making of will on fourth respondent's behalf - appeal allowed (B)

Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd (NSWCA) - contract - 'cleaning services' agreement - appeal against dismissal of claim's balance - appeal dismissed (B C I G)

Youssef v Commissioner of the Australian Federal Police (NSWCA) - proceeds of crime - refusal to exclude property from restraining order - leave to appeal refused (I B)

Dempsey v Director of Public Prosecutions (NSWCA) - judicial review - costs - applicant sought judicial review of costs orders - procedural unfairness established - appeal allowed - matter remitted (I B G)

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (NSWSC) - negligence - contract - plaintiff injured in fall from horse at event which defendant organised - defendant not liable (I)

Rodd v Hall (No 2) (NSWSC) - costs - Court found in plaintiff's favour in proceedings - parties sought special costs orders - r42.34 *Uniform Civil Procedure Rules 2005* (NSW) did not apply - plaintiff granted indemnity costs order (I B)

Urban v Junior Academy ELC Pty Ltd & Ors (VSCA) - corporations - leave to bring proceeding in respondent company's name refused - leave to appeal refused (I B)

Bisnovaty v Matchland Pty Ltd (QCA) - want of prosecution - appellant injured in course of employment with respondent - appellant's proceeding against respondent struck out for want of prosecution - appeal dismissed (I B)

State of South Australia v Holder (SASCFC) - damages - assault - battery - false imprisonment - challenge to exemplary damages award - appeal dismissed (I B)

Armet v CFC Consolidated Pty Ltd (WASCA) - workers compensation - election - procedural fairness - appellant sought damages in respect of injury - proceedings struck out - appeal dismissed (I B C G)

Armstrong v McIntosh [No 3] (WASC) - defamation - subpoena - legal professional privilege - subpoena issued to company at defendant's request - certain documents produced by company privileged (I)

Summaries With Link (Five Minute Read)

Meneses v Directed Electronics OE Pty Ltd [2019] FCAFC 190

Full Court of the Federal Court of Australia

Moshinsky, Wheelahan & Abraham JJ

Discovery - privilege - corporations - first applicant was second applicant's 'sole director and shareholder' - applicants sought to resist order for documents' production in reliance on 'privilege against self-incrimination' and 'privilege against self-exposure to penalties' ('penalty privilege') - primary judge refused 'privilege claims' - applicants sought leave to appeal - whether primary judge erred in framing of questions concerning privilege - whether primary judge 'directed himself to the wrong questions' - whether erroneous conclusion documents not "capable of attracting Privilege" due to circumstances of their creation - whether erroneous application of *Re Kala Capital Pty Ltd (No 2)* [2012] NSWSC 1293 - held: primary judge erred in consideration of privilege claims - appeal allowed.

[Meneses](#) (I B C G)

[From Benchmark Tuesday, 5 November 2019]

Phonographic Performance Company of Australia Limited v Copyright Tribunal of Australia (Costs) [2019] FCAFC 192

Full Court of the Federal Court of Australia

Besanko, Middleton & Burley JJ

Costs - copyright - proceedings concerned judicial review application in respect of Tribunal's decision to vary 'licence scheme' - Court allowed application in part - determination of costs - consideration of case's 'two aspects' - 'Power Issue' - 'Issues 1-4' - 'percentage reduction approach' - 'broad brush approach' - whether to award costs on lump sum basis as sought by parties - *GlaxoSmithKline Consumer Healthcare Investments (Ireland) (No 2) Limited v Generic Partners Pty Limited (No 2)* [2018] FCAFC 100 - r40.02(b) *Federal Court Rules 2011* (Cth) - *Idenix and in Sandvik Intellectual Property AB v Quarry Mining & Construction Equipment Pty Ltd (No 2)* [2017] FCAFC 158. s154(4) *Copyright Act 1968* (Cth) - held: applicant to pay 50% of second respondent's costs fixed as lump sum - second respondent to pay 70% of costs of second to fourth applicants (excluding 'joinder application' costs) fixed as lump sum - orders made.

[Phonographic](#) (I B)

[From Benchmark Friday, 8 November 2019]

National Australia Bank Limited v State of Queensland [2019] FCA 1804

Federal Court of Australia

Robertson J

Bankruptcy - applicant, under s133(9) *Bankruptcy Act 1966* (Cth), sought that 'disclaimed properties vest in' applicant as party interested as a 'registered' mortgagee in 'subject properties' - effect of trustee's disclaimer - whether applicant's interest endured 'notwithstanding the disclaimer' - mortgagees' rights - whether applicant had 'right of sale' - whether Court

satisfied to order that properties vest in applicant to enable applicant to realise debt which mortgages over properties secured - whether 'just and equitable' to vest disclaimed properties in applicant - "claiming an interest in" - *Westpac Banking Corporation v State of Queensland* [2019] FCA 1433 - held: application granted - Court satisfied to make sought orders.

[National Australia Bank](#) (B C)

[From Benchmark Tuesday, 5 November 2019]

Australian Securities and Investments Commission v Vocation Limited (In Liquidation) (No 2) [2019] FCA 1783

Federal Court of Australia

Nicholas J

Corporations - Court found contravention by defendants of provisions of *Corporations Act 2001* (Cth) (Corporations Act) - determination of remaining questions - whether to excuse third defendant under ss1317S & 1318 Corporations Act ('excuse provisions') - whether to make 'disqualification order' concerning third defendant and, if so, which order to make - whether to impose 'pecuniary penalty' on third defendant and, if so, what pecuniary penalty - disqualification orders to be made concerning second and fourth defendants - pecuniary penalties to be imposed on second and fourth defendants - costs - ss180(1), 674(2) & 1041H(I) Corporations Act - held: declarations and orders made.

[Australian Securities and Investments Commission](#) (I B)

[From Benchmark Tuesday, 5 November 2019]

Cytec Industries Inc. v Nalco Company [2019] FCA 1800

Federal Court of Australia

Burley J

Patent - applicant sought patent by '990 application' - applicant, by interlocutory application, sought pursuant to s105(1A) *Patents Act 1990* (Cth) (Patents Act), to amend 990 application - amendments not opposed by respondent - whether requirements of s102 Patents Act satisfied - whether specification would, as result of amendments, 'claim or disclose matter extending beyond that disclosed in' filed application - 'enablement' test - s40(2) Patents Act - *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) - held: Court satisfied to exercise discretion to grant leave - interlocutory application granted.

[Cytec Industries](#) (I B)

[From Benchmark Wednesday, 6 November 2019]

Scone Race Club Ltd v Cottom [2019] NSWCA 260

Court of Appeal of New South Wales

Gleeson & Brereton JJA; Emmett AJA

Negligence - respondent worker employed by appellant - respondent injured while removing bin liner from garbage bin - respondent sued appellant in negligence - primary judge found in respondent's favour - appellant appealed against finding of liability - respondent cross-appealed against primary judge's refusal 'to order interest' on certain damages - whether appellant

breached duty to respondent as appellant's employee - whether breach of duty or statutory duty - content of duty - whether primary judge erred in concluding failure by appellant 'to take reasonable care' due to its 'failure to install concrete pads' on which to locate bins - whether to permit respondent's raising of argument by notice of contention that appellant negligently failed to supervise respondent to ensure his adoption of system of work - *Civil Liability Act 2002* (NSW) - held: appeal allowed.

[View Decision](#) (I)

[From Benchmark Monday, 4 November 2019]

Small v Phillips (No 2) [2019] NSWCA 268

Court of Appeal of New South Wales

Brereton & McCallum JJA; Emmett AJA

Wills and estates - succession - statutory will - appellant was fourth defendant's grandson - appellant, under *Succession Act 2006* (NSW) (Succession Act), sought authorisation of making of will on fourth respondent's behalf - primary judge dismissed summons - whether to authorise making of will - procedural fairness - whether fourth respondent had capacity to make a will - whether 'proposed will' 'was, or was reasonably likely to be' a will which fourth respondent would have made if she had testamentary capacity - 'appropriateness' of proposed will - 'standard of review' - ss18, 19 & 23(1)(b) Succession Act - held: appeal allowed.

[View Decision](#) (B)

[From Benchmark Tuesday, 5 November 2019]

Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd [2019] NSWCA 270

Court of Appeal of New South Wales

Gleeson & White JJA; Barrett AJA

Contract - appellant claimed 'liquidated sum' (sum) from respondent under 'cleaning services agreement' or damages in amount of sum for contractual breach - 90% of work performed on appellant's behalf 'undertaken by subcontractors' - primary judge found appellant breached agreement by use of 'unauthorised subcontracted labour' - primary judge allowed claim for sum in part - claim allowed in respect only of cleaning services appellant itself performed - appellant appealed against primary judge's rejection of 'balance of its claim' - construction of contract - whether claimed sum was 'earned' at date respondent terminated agreement and, if so, whether 'any accrued right to receive the contract price would continue' after respondent's 'valid termination' - held: appellant had not earned 'contract price' for services provided by unauthorised subcontracted labour - appeal dismissed.

[View Decision](#) (B C I G)

[From Benchmark Wednesday, 6 November 2019]

Youssef v Commissioner of the Australian Federal Police [2019] NSWCA 272

Court of Appeal of New South Wales

Gleeson JA; Emmett & Barrett AJJA

Proceeds of crime - applicants sought exclusion of property from restraining order under

Proceeds of Crime Act 2002 (Cth) (Proceeds of Crime Act) - primary judge dismissed application - applicants sought to appeal - applicants contended primary judge erred in refusing, upon applicants' giving of undertaking, to exercise discretion in applicants' favour under s44(2) *Proceeds of Crime Act* - whether primary judge's exercise of discretion miscarried - *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR - whether erroneous 'factual findings' - whether 'impermissible inferences' - *House v The King* (1936) 55 CLR 499 - held: leave to appeal refused.

[View Decision](#) (I B)

[From Benchmark Thursday, 7 November 2019]

Dempsey v Director of Public Prosecutions [2019] NSWCA 267

Court of Appeal of New South Wales

Meagher & White JJA; Emmett AJA

Judicial review - costs - applicant sought judicial review of costs orders of primary judge ('impugned orders') - applicant contended that primary judge denied applicant procedural fairness by failure to inform applicant of certain matters, namely that 'proceedings were summary rather than indictable' and that 'a party is not entitled to recover all of its costs' - applicant contended she was denied opportunity to address these matters - alternatively applicant contended that primary judge's 30% reduction by taking the matters into account 'was illogical or irrational and constituted jurisdictional error' - applicant sought to set impugned orders aside or that matter be remitted to primary judge - *Crimes (Appeal and Review) Act 2001* (NSW) - *Criminal Procedure Act 1986* (NSW) - held: denial of procedural fairness established - appeal allowed - matter remitted.

[View Decision](#) (I B G)

[From Benchmark Friday, 8 November 2019]

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2019] NSWSC 1506

Supreme Court of New South Wales

Loneragan J

Negligence - contract - plaintiff participated in event which defendant organised - plaintiff injured in fall from horse while competing in event - plaintiff contended fall from horse caused by defendant's negligence - plaintiff also contended defendant breached agreement between parties - defendant queried duty's 'nature and content', denied negligence and contended plaintiff did not meet requirements of ss5B & 5C *Civil Liability Act 2002* (NSW) (*Civil Liability Act*) - defendant also denied 'contractual relationship with' plaintiff - defendant raised defences in ss5F, 5K, 5L & 5H *Civil Liability Act* - defendant also relied on ss60 & 61 *Civil Liability Act* on basis any 'relevant act or omission' was 'part of community work done by volunteers' - duty to warn - obvious risk - dangerous recreational activity - 'liability waiver agreement' - held: breach of duty not established - contractual relationship not established - judgment for defendant.

[View Decision](#) (I)

[From Benchmark Wednesday, 6 November 2019]

Rodd v Hall (No 2) [2019] NSWSC 1528

Supreme Court of New South Wales

Hoeben CJ at CL

Costs - Court gave judgment in plaintiff's favour in proceedings - plaintiff awarded \$470,690.92 - parties each sought special costs order - plaintiff sought indemnity costs order in reliance on offer of compromise - defendant, in reliance on r42.34 *Uniform Civil Procedure Rules* 2005 (NSW) (Rules), contended it should not have to pay plaintiff's costs - whether r42.34 applied - 'an amount of less than \$500,000' - *State of New South Wales v Quirk* [2012] NSWCA 216 - *Milich v The Council of the City of Canterbury (No 3)* [2012] NSWSC 1280 - held: r42.34 Rules did not apply - plaintiff entitled to indemnity costs order.

[View Decision](#) (I B)

[From Benchmark Thursday, 7 November 2019]

Urban v Junior Academy ELC Pty Ltd & Ors [2019] VSCA 247

Court of Appeal of Victoria

Whelan & Emerton JJA; Kennedy AJA

Corporations - primary judge dismissed applicant's application, under s237 *Corporations Act* 2001 (Cth), to bring proceeding in respondent company's name - primary judge found it would not be in respondent company's 'best interests' to grant applicant leave - applicant sought to appeal - alleged breaches of directors duties and breach of 'management agreement' with respondent company - allegations of knowing assistance in duties' breaches - whether in respondent company's 'best interests' to grant applicant leave to bring proceeding - 'conflict of interest' - 'alternative means' for dispute's litigation - held: leave to appeal refused.

[Urban](#) (I B)

[From Benchmark Tuesday, 5 November 2019]

Bisnovaty v Matchland Pty Ltd [2019] QCA 241

Court of Appeal of Queensland

Fraser & Philippides JJA; Lyons SJA

Want of prosecution - appellant employed by respondent - appellant injured in course of employment - appellant claimed against respondent in negligence or for breach of contract - appellant's claim struck out for want of prosecution - whether denial of procedural fairness - whether primary judge erred in referring to appellant's dismissal of solicitors when appellant had not dismissed solicitors - whether order striking out proceeding was 'unreasonable or plainly unjust' - interests of justice - *Tyler v Custom Credit Corporation Ltd & Ors* [2000] QCA 178 - held: appeal dismissed.

[Bisnovaty](#) (I B)

[From Benchmark Thursday, 7 November 2019]

State of South Australia v Holder [2019] SASCF 135

Full Court of the Supreme Court of South Australia

Kourakis CJ; Kelly & Stanley JJ

Damages - primary judge found appellant liable for respondent's 'assault, battery and false imprisonment' - respondent awarded damages of \$135,185.90 including \$35,000 exemplary damages - appellant challenged award of exemplary damages - appellant contended failure by primary judge to give 'adequate reasons' for why exemplary damages awarded, basis for award and award's quantum - appellant also contended exemplary damages award not warranted or supported by primary judge's 'earlier factual findings' - held: appeal dismissed.

[State of South Australia](#) (I B)

[From Benchmark Tuesday, 5 November 2019]

Armet v CFC Consolidated Pty Ltd [2019] WASCA 165

Court of Appeal of Western Australia

Murphy, Mitchell & Vaughan JJA

Workers compensation - election - procedural fairness - appellant claimed weekly compensation for injury before electing to retain 'right to seek damages' - appellant sought damages in respect of injury - primary judge struck out proceedings - appeal concerned 'proper construction and application of' s93K(4) *Workers' Compensation and Injury Management Act 1981* (WA) (WCIMA Act) - appellant contended provisions of WCIMA Act 'operated unjustly and unfairly', that 'Director' breached duty to ensure appellant's right to damages 'appropriately protected under' WCIMA Act, and that appellant's solicitors 'failed to obtain extension of the termination day' - whether primary judge erred in striking out proceedings - held: no error in striking out of proceedings - appeal dismissed.

[Armet](#) (I B C G)

[From Benchmark Monday, 4 November 2019]

Armstrong v McIntosh [No 3] [2019] WASC 396

Supreme Court of Western Australia

Le Miere J

Defamation - subpoena - privilege - Court, at defendant's request, issued subpoena to company (Woodside Energy) - plaintiff and sister claimed legal professional privilege over certain documents which Woodside Energy produced - 'legal advisor' retained by both plaintiff and sister - consideration of two categories of documents - emails between plaintiff and sister - email threads including emails between plaintiff's sister and 'legal advisor' - emails 'discussing instructions and/or providing legal advice from' legal adviser - 'joint interest privilege' - 'common interest privilege' - held: Court satisfied that certain documents were privileged - defendant entitled to inspect other documents.

[Armstrong](#) (I)

[From Benchmark Thursday, 7 November 2019]

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Executive Summary



Summaries With Link



Ode to Psyche

By: John Keats

O Goddess! hear these tuneless numbers, wrung
 By sweet enforcement and remembrance dear,
And pardon that thy secrets should be sung
 Even into thine own soft-conched ear:
Surely I dreamt to-day, or did I see
 The winged Psyche with awaken'd eyes?
I wander'd in a forest thoughtlessly,
 And, on the sudden, fainting with surprise,
Saw two fair creatures, couched side by side
 In deepest grass, beneath the whisp'ring roof
Of leaves and trembled blossoms, where there ran
 A brooklet, scarce espied:

Mid hush'd, cool-rooted flowers, fragrant-eyed,
 Blue, silver-white, and budded Tyrian,
They lay calm-breathing, on the bedded grass;
 Their arms embraced, and their pinions too;
 Their lips touch'd not, but had not bade adieu,
As if disjoined by soft-handed slumber,
And ready still past kisses to outnumber
 At tender eye-dawn of aureorean love:
 The winged boy I knew;
But who wast thou, O happy, happy dove?
 His Psyche true!

O latest born and loveliest vision far
 Of all Olympus' faded hierarchy!
Fairer than Phoebe's sapphire-region'd star,
 Or Vesper, amorous glow-worm of the sky;
Fairer than these, though temple thou hast none,
 Nor altar heap'd with flowers;
Nor virgin-choir to make delicious moan
 Upon the midnight hours;
No voice, no lute, no pipe, no incense sweet
 From chain-swung censer teeming;
No shrine, no grove, no oracle, no heat
 Of pale-mouth'd prophet dreaming.

O brightest! though too late for antique vows,



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Too, too late for the fond believing lyre,
When holy were the haunted forest boughs,
Holy the air, the water, and the fire;
Yet even in these days so far retir'd
From happy pieties, thy lucent fans,
Fluttering among the faint Olympians,
I see, and sing, by my own eyes inspir'd.
So let me be thy choir, and make a moan
Upon the midnight hours;
Thy voice, thy lute, thy pipe, thy incense sweet
From swung censer teeming;
Thy shrine, thy grove, thy oracle, thy heat
Of pale-mouth'd prophet dreaming.

Yes, I will be thy priest, and build a fane
In some untrodden region of my mind,
Where branched thoughts, new grown with pleasant pain,
Instead of pines shall murmur in the wind:
Far, far around shall those dark-cluster'd trees
Fledge the wild-ridged mountains steep by steep;
And there by zephyrs, streams, and birds, and bees,
The moss-lain Dryads shall be lull'd to sleep;
And in the midst of this wide quietness
A rosy sanctuary will I dress
With the wreath'd trellis of a working brain,
With buds, and bells, and stars without a name,
With all the gardener Fancy e'er could feign,
Who breeding flowers, will never breed the same:
And there shall be for thee all soft delight
That shadowy thought can win,
A bright torch, and a casement ope at night,
To let the warm Love in!

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

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