

Friday, 8 December 2017

## 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)

**K.V.G. Properties, Inc. vs. Westfield Insurance Company** (USDCMSD) - summary judgment - commercial insurance policy - damage to commercial property arising from tenants' use of it to grow marijuana - coverage 'properly denied' on basis of exclusions - summary judgment granted (I B C G)

**Beijing Hua Xin Liu He Investment (Australia) Pty Ltd v Lu** (FCAFC) - summary judgment - primary judge erred in finding contractual claims had no reasonable prospects of success - applicants entitled to trial of their claims - appeal allowed (I B C G)

**Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance** (NSWCA) - evidence - insurance - landlord insurance policy - rental property destroyed by fire - circumstantial evidence - exclusions - fraud - appeal against judgment in insurer's favour dismissed (I B C G)

**Smoje v Forrester** (NSWCA) - wills and estates - succession - primary judge erred in finding parties were 'living together' - appeal against family provision order in respondent's favour allowed (B)

**Dougall v Melville** (NSWCA) - limitation of actions - professional negligence - misrepresentation - primary judge erred in not granting summary dismissal in applicants' favour - appeal allowed (I B C G)

**Goode v England** (NSWCA) - negligence - recreational activity - appellant professional jockey

# Benchmark

injured in fall from horse during race - appellant's claim against respondent jockey precluded by s5L *Civil Liability Act 2002* (NSW) - appeal against judgment in respondent's favour dismissed (I B C G)

**Inghams Enterprises Pty Ltd v Belokoski** (NSWCA) - bias - workers compensation - challenge to decision of Deputy President to confirm arbitrator's decision in worker's favour - allegation of reasonable apprehension of bias failed - appeal dismissed (I B C G)

**Gair v Greenwood** (NSWSC) - pleadings - defamation - defence of truth in respect of certain imputations be struck out - certain contextual imputations struck out (I)

**Habricko v Palijan** (NSWSC) - wills and estates - succession - family provision - son of deceased refused order for provision from deceased mother's estate - summons dismissed (B)

**Nixon v Lines** (VSC) - negligence - plaintiff injured when struck by propellers of houseboat - defendant liable - judgment for plaintiff in sum of \$4 million (I B C G)

**Living and Leisure Australia Ltd v Commissioner of State Revenue** (VSC) - taxation - land tax - leases and tenancies - plaintiff entitled to land under lease of Crown land - plaintiff obliged to pay land tax (I B G)

**McNab v Graham** (VSCA) - estoppel - trusts and trustees - proprietary estoppel - wills and estates - land held on constructive trust for carers - no applicable limitation period - appeal dismissed (I B C G)

**Brown v Holzberger & Anor** (QCA) - negligence - evidence - hearsay - *res gestae* - collision between motorcyclist and motor vehicle - driver of motor vehicle not liable - appeal dismissed (I B C G)

**Brown v Holzberger & Anor** (QCA) - negligence - evidence - hearsay - *res gestae* - collision between motorcyclist and motor vehicle - driver of motor vehicle not liable - appeal dismissed (I B C G)

**Aalborg CSP A/S v Ottoway Engineering Pty Ltd** (SASCFC) - security of payments - construction contract - Master erred in awarding summary judgment in respondent's favour - appeal allowed (I B C G)

## Summaries With Link (Five Minute Read)

**K.V.G. Properties, Inc. vs. Westfield Insurance Company Case No. 16-11561**

United States District Court Eastern District of Michigan Southern Division

Hon. Avern Cohn

Summary judgment - contract - property loss insurance - commercial insurance policy issued to KVG by defendant - KVG contended its commercial property was damaged by tenants using it to grow marijuana - KVG contended damage was vandalism, which was covered under the policy - KVG sued defendant for breach of contract and sought 'declaration of coverage' - defendant sought summary judgment on basis KVG had no proof damage occurred in policy period, and that it 'properly denied coverage' on basis of exclusions - 'illegal/dishonest acts' exclusion - 'unauthorized construction or remodeling' exclusion - 'presence of moisture and humidity' exclusion - held: KVG properly denied coverage on basis of exclusions - summary judgment granted.

[K.V.G](#) (I B C G)

[From Benchmark Wednesday, 6 December 2017]

## **Beijing Hua Xin Liu He Investment (Australia) Pty Ltd v Lu [2017] FCAFC 186**

Full Court of the Federal Court of Australia

Gilmour, Jagot & Moshinsky JJ

Summary judgment - contract - appeal against decision in which primary judge summarily dismissed applicants' contractual claims under s31A(2) *Federal Court of Australia Act 1976* (Cth), finding claims had no reasonable prospects of success - s254H *Corporations Act 2001* (Cth) - whether factual issues which should go to trial - whether material disclosed 'sufficient evidentiary foundation' as to dispute's existence - onus - whether contractual claims had merely a 'fanciful' prospect of success - held: primary judge erred in finding contractual claims had no reasonable prospect of success - applicants entitled to trial of contractual claims - appeal allowed.

[Beijing Hua Xin Liu He Investment \(Australia\) Pty Ltd](#) (I B C G)

[From Benchmark Wednesday, 6 December 2017]

## **Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance [2017] NSWCA 307**

Court of Appeal of New South Wales

Macfarlan & Meagher JJA; Sackville AJA

Evidence - insurance - fraud - exclusions - appellant owned rental property which was destroyed by deliberately lit fire - respondent rejected claim under Landlord Insurance Policy - respondent sought to invoke two exclusions in policy, contending appellant's friend lit the fire, either with appellant's knowledge and consent, or had entered property with appellant's permission - respondent also contended appellant's claim was fraudulent under s56(1) *Insurance Contracts Act 1984* (Cth) - insurer relied on 'wholly circumstantial' evidence in defence - primary judge found in insurer's favour - ss128 & 140 *Evidence Act 1995* (NSW) - construction of policy - adverse inferences - held: grounds of appeal failed - appeal dismissed.

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

[From Benchmark Monday, 4 December 2017]

# Benchmark

**Smoje v Forrester [2017] NSWCA 308**

Court of Appeal of New South Wales

Basten, Macfarlan & Meagher JJA

Wills and estates - succession - evidence - respondent obtained family provision order under s59 *Succession Act 2006* (NSW) from deceased's estate - appellant contended primary judge erred in finding respondent and deceased were living in a "close personal relationship" at the time of deceased's death - appellant challenged finding that respondent and deceased were 'living together', failure to find respondent providing services for 'fee and reward', finding that respondent suffering mental health disability, finding that adequate provision was not made, and assessment of amount of provision - appellant also contended primary judge failed to give adequate reasons - held: primary judge erred in finding that parties were 'living together' - challenge to assessment in relation to respondent's credibility also upheld - appeal allowed.

[View Decision](#) (B)

[From Benchmark Wednesday, 6 December 2017]

**Dougall v Melville [2017] NSWCA 309**

Court of Appeal of New South Wales

McCull & Payne JJA; Davies J

Limitation of actions - summary dismissal - professional negligence - misrepresentation - applicants were respondent's former legal representatives - respondent sued applicants in relation to alleged misrepresentations (misrepresentation claim) and alleged negligent advice concerning settlement of workers compensation claim (negligence claim) - misrepresentation and/or negligence said to have occurred in around 2007 - statement of claim, filed in 2014, relied on negligence claim, statement of claim amended in 2015 to raise misrepresentation claim - applicants sought summary dismissal in reliance on ss14 & 63 *Limitation Act 1969* (NSW) (Limitation Act) - once misrepresentation claim raised, applicants relied on limitation period in s68(2) *Fair Trading 2007* (NSW) - primary judge dismissed summary dismissal application - whether respondent's claim barred due to 6 year limitation period - time of accrual of respondent's causes of action - held: primary judge erred in failing to grant summary dismissal in applicants' favour - respondent's claims extinguished in 2013 pursuant to s63 Limitation Act - appeal allowed.

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

[From Benchmark Thursday, 7 December 2017]

**Goode v England [2017] NSWCA 311**

Court of Appeal of New South Wales

Beazley P; Meagher & Leeming JJA

Negligence - recreational activity - appellant injured in fall while riding in race as professional jockey - respondent was riding horse in same race - appellant sued respondent in negligence or breach of duty - appellant contended the way respondent was riding caused interference with appellant and horse, resulting in the fall and injuries - appellant appealed against trial judge's decision in respondent's favour - whether trial judge made factual error concerning horses'



movement - whether erroneous construction of s5L *Civil Liability Act 2002* (NSW) - *Civil Liability (Personal Responsibility) Amendment Bill 2002* (NSW) - whether s5L distinguished between sports participated in for recreational purposes and sports participated in for professional purposes. held: horse racing was recreational activity under s5K of the Act - appellant's claim precluded by s5L - appeal dismissed.

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

[From Benchmark Friday, 8 December 2017]

## **Inghams Enterprises Pty Ltd v Belokoski [2017] NSWCA 313**

Court of Appeal of New South Wales

McColl & Basten JJA; Bellew J

Bias - workers compensation - Deputy President confirmed arbitrator's determination in worker's favour in proceedings - appellant challenged Deputy President's decision, contending there was reasonable apprehension of bias and that President should have disqualified himself - ss353 & 355 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - comment allegedly made by Deputy President as arbitrator in earlier proceeding during telephone conference - contention Deputy President's erroneous refusal to recuse himself was 'was compounded by [his] subsequent conduct of the appeal' - ground of appeal arising from Deputy President's alleged management, as conciliator, of conciliation hearing - held: grounds of appeal not made out - appeal dismissed.

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

[From Benchmark Friday, 8 December 2017]

## **Gair v Greenwood [2017] NSWSC 1652**

Supreme Court of New South Wales

McCallum J

Pleadings - defamation - defences - proceedings arising from YouTube video presenting a 'poem of sorts' which accused first plaintiff of 'having been a corrupt supporter of development applications' - defendants pleaded defence of truth, contextual truth, honest opinion and triviality - plaintiffs sought to strike out parts of defence - ss25, 26, 31 & 33 *Defamation Act 2005* (NSW) - whether particulars of defence of justification in respect of certain imputations lacked precision and were irrelevant to imputations - whether particulars incapable of proving imputations' truth - held: Court concluded defence of truth in respect of certain imputations be struck out; and that certain contextual imputations be struck out

[View Decision](#) (I)

[From Benchmark Tuesday, 5 December 2017]

## **Habricko v Palijan [2017] NSWSC 1695**

Supreme Court of New South Wales

Kunc J

Succession - family provision - plaintiff sought provision from deceased mother's estate pursuant to s59 *Succession Act 2006* (NSW) - deceased left entire estate to defendant, who

# Benchmark

was plaintiff's sister and daughter of deceased - deceased and husband had financially assisted plaintiff during lifetimes, whereas defendant had not received assistance - deceased had purchased property with defendant under agreement defendant would care for deceased and receive estate - defendant cared for deceased until her death - contingencies or vicissitudes - held: Court not satisfied Will made inadequate provision for plaintiff - even if inadequate provision made, in exercise of discretion Court would refused to make order for additional provision - summons dismissed.

[View Decision](#) (B)

[From Benchmark Friday, 8 December 2017]

## **Nixon v Lines [2017] VSC 723**

Supreme Court of Victoria

Keogh J

Negligence - parties and friends hired houseboat - plaintiff injured by houseboat's outboard propellers - plaintiff sued defendant in negligence - plaintiff contended was negligent in putting houseboat into reverse gear and reversing it without warning or ensuring there was no one at houseboat's rear, and by reversing houseboat using upper deck, not lower deck, with result he could not whether decks were clear - *Civil Liability Act 2002* (NSW) - obvious risk - causation - contributory negligence - factual disputes - agreed quantum of damages of \$4 million - held: Court satisfied that defendant breached duty to plaintiff - causation established - judgment for plaintiff.

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

[From Benchmark Monday, 4 December 2017]

## **Living and Leisure Australia Ltd v Commissioner of State Revenue [2017] VSC 675**

Supreme Court of Victoria

Croft J

Taxation - leases and tenancies - proceedings concerned whether plaintiff was liable to pay land tax under *Land Tax Act 2005* (Cth) in respect of interest in two parcels of Crown land used and occupied by plaintiff's wholly owned subsidiaries under pursuant agreements granted under *Alpine Resorts Act 1983* (Cth) - agreements were 'expressed as leases' - Commissioner assessed plaintiff to land tax on basis lands leased to company related to plaintiff - if interest in lands was leasehold interest plaintiff accepted tax payment - if interest was mere licence Commissioner accepted tax not payable - held: Court concluded that plaintiff was entitled to land under lease of Crown land - plaintiff obliged to pay land tax.

[Living and Leisure Australia](#) (I B G)

[From Benchmark Tuesday, 5 December 2017]

## **McNab v Graham [2017] VSCA 352**

Court of Appeal of Victoria

Tate & Santamaria JJA; Keogh AJA

Estoppel - trusts and trustees - proprietary estoppel - wills and estates - County Court judge

# Benchmark

determined landowner represented he would leave absolute interest in land to his carers - landowner's Will had given only occupancy rights for life - County Court judge found there was reasonable, detrimental reliance on the representation, and it was unconscionable for landowner not to leave property in Will - County Court judge declared land held on constructive trust for carers, that there was no applicable limitation period, and ordered taking of steps for transfer of title to carers - held: 'constructive trust' under s3 *Trustee Act 1958* (Vic) extended to constructive trust arising in accordance with proprietary estoppel - no error in determination that proceeding, at time of commencement, was proceeding 'to recover ... trust property' under 21(1)(b) and thus that there was no applicable limitation period - appeal dismissed.

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

[From Benchmark Wednesday, 6 December 2017]

## **Brown v Holzberger & Anor [2017] QCA 295**

Court of Appeal of Queensland

Gotterson & Morrison JJA; Flanagan J

Negligence - evidence - appellant motorcyclist claimed damages against respondents for injuries and loss arising from traffic accident in which he collided with motor vehicle driven by first respondent - appellant contended first respondent did not keep proper look out, turned across his path and failed to stop, and failed to take action to avoid collision - primary judge found appellant did not discharge onus to establish that the accident occurred due to the first respondent's negligence - appellant appealed, challenging liability finding, evidential finding in respect of witness's evidence, and disallowance of gratuitous services damages - hearsay exceptions - *res gestae* - witness testifying to appellant's words - 'I thought he'd stop' - admissibility of statement - *Civil Liability Act 2003* (Qld) - held: grounds of appeal failed - appeal dismissed.

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

[From Benchmark Monday, 4 December 2017]

## **Brown v Holzberger & Anor [2017] QCA 295**

Court of Appeal of Queensland

Gotterson & Morrison JJA; Flanagan J

Negligence - evidence - appellant motorcyclist claimed damages against respondents for injuries and loss arising from traffic accident in which he collided with motor vehicle driven by first respondent - appellant contended first respondent did not keep proper look out, turned across his path and failed to stop, and failed to take action to avoid collision - primary judge found appellant did not discharge onus to establish that the accident occurred due to the first respondent's negligence - appellant appealed, challenging liability finding, evidential finding in respect of witness's evidence, and disallowance of gratuitous services damages - hearsay exceptions - *res gestae* - witness testifying to appellant's words - 'I thought he'd stop' - admissibility of statement - *Civil Liability Act 2003* (Qld) - held: grounds of appeal failed - appeal dismissed.

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

[From Benchmark Monday, 4 December 2017]

## **Aalborg CSP A/S v Ottoway Engineering Pty Ltd [2017] SASCFC 158**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Bampton JJ

Summary judgment - security of payments - contract - parties entered construction contract under *Building and Construction Industry Security of Payment Act 2009* (SA) under which respondent was required to provide documents to appellant in hardcopy and email copy - respondent delivered 23rd invoice and payment claim in August 2016 (August 2016 payment claim) to appellant's registered office in Adelaide but did not email it to appellant - appellant did not provide payment schedule within 15 business days pursuant to s14 of the Act - respondent sought judgment against appellant for amount of the August 2016 payment claim - respondent sought summary judgment - appellant opposed summary judgment on grounds August 2016 payment claim not served in accordance with contract, that respondent estopped by conduct from asserting service, and that respondent engaged in misleading conduct - Master granted summary judgment in respondent's favour - appellant appealed - held: Master erred in finding *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259 determined service issue against appellant, in finding appellant precluded from reliance on estoppel and misleading conduct as a defence, in finding no arguable case for misleading and deceptive conduct, in finding estoppel defence not arguable - appeal allowed - matter remitted.

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

[From Benchmark Wednesday, 6 December 2017]

## CRIMINAL

### Executive Summary

**Binns v R** (NSWCCA) - criminal law - sexual intercourse with person under 10 years - open to jury to find applicant guilty - leave to appeal refused

**R v Lazarus** (NSWCCA) - criminal law - sexual intercourse without consent - respondent not guilty - permissible for trial judge to revise judgment due to typographical error - grounds of appeal failed - Crown appeal dismissed

### Summaries With Link

## **Binns v R [2017] NSWCCA 280**

Court of Criminal Appeal of New South Wales

Basten JA; R A Hulme & Garling JJ



# Benchmark

Criminal law - applicant was convicted in 2015 on one count of sexual intercourse with person under 10 years - applicant filed notice of intention to appeal which lapsed in 2016 - applicant sought leave to appeal - ground of appeal concerning absence of direction as to forensic disadvantage due to delay in prosecution - whether trial judge obliged to provide warning - ground of appeal concerning trial judge's alleged failure to direct jury as to complainant's evidence - ground of appeal concerning directions given as to evidence of the applicant's partner, and evidence of the complainant's friend, who was the daughter of the applicant's partner - whether verdict unreasonable - r4 *Criminal Appeal Rules* - s5(1) *Criminal Appeal Act 1912* (NSW) - held: Court of view it was appropriate to extend time to appeal - it was open to jury to find applicant guilty - leave to appeal refused.

[View Decision](#)

## **R v Lazarus [2017] NSWCCA 279**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Davies & Bellew JJ

Criminal law - sexual intercourse without consent - respondent charged under s61I *Crimes Act 1900* (NSW) with having sexual intercourse with complainant without complainant's consent - respondent found guilty - Court quashed respondent's conviction and ordered retrial - order made that re-trial proceed before judge alone - trial judge found respondent not guilty - Crown appealed - whether trial judge erroneously took respondent's self-induced intoxication into account in determining whether he had no reasonable grounds to believe complainant consented - whether trial judge erroneously failed, in making finding as to respondent's knowledge of consent, to direct herself that she must have regard to any steps taken by respondent to ascertain whether complainant consented - whether amendment which trial judge made to her reasons was beyond permissible scope - held: permissible for trial judge to revise judgment - Crown appeal dismissed.

[View Decision](#)



# Benchmark

## **Of Love, A Sonnet**

**By:** Robert Herrick

How love came in I do not know,  
Whether by the eye, or ear, or no;  
Or whether with the soul it came  
(At first) infused with the same;  
Whether in part 'tis here or there,  
Or, like the soul, whole everywhere,  
This troubles me: but I as well  
As any other this can tell:  
That when from hence she does depart  
The outlet then is from the heart.

[https://en.wikipedia.org/wiki/Robert\\_Herrick\\_\(poet\)](https://en.wikipedia.org/wiki/Robert_Herrick_(poet))

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