

Friday, 11 May 2018

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)

Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd (FCA) - admiralty - joint venture - referee's report - erroneous calculation of amortisation - section of report remitted for correction of error - report otherwise adopted - procedural directions made (I B C G)

CMP Manufacturing Pty Ltd v Barbieri (FCA) - industrial law - employment contract - applicant entitled to retrenchment payment or, if not entitled to retrenchment payment, entitled to 'payment in lieu of notice' - appeal dismissed (I B C G)

Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd; Plymouth Brethren (Exclusive Brethren) Christian Church v Fairfax Media Publications Pty Ltd (NSWCA) - defamation - separate question - matters complained of were 'reasonably capable' of identifying appellants company - appeal allowed (I B)

The Real Thing Food Supplements CC v Media Tag Pty Ltd (NSWSC) - consumer law - misleading and deceptive conduct - passing off - action arising from sale of goods to Woolworths stores - proceedings dismissed (I B C G)

Beech v Squire (NSWSC) - succession - family provision - insolvent estate - no provision ordered in favour of two adult children of deceased father's first marriage - summons dismissed (B)

Ku-ring-gai Council v Ichor Constructions Pty Ltd (NSWSC) - commercial arbitration -

arbitrator acting as mediator - no written consent given to resumption of arbitration following mediation - summons dismissed (I B C G)

Estate of Demetrios Katsikas, Deceased (NSWSC) - wills and estates - probate - intestacy - will revoked by marriage - subsequent email did not constitute will - admission of will and email to probate refused (B)

Hoskin v Griffin & Ors (VSC) - execution, seizure and sale - breach of duty by Sheriff to judgment creditor and judgment debtor to obtain fair price for property - parties to be heard on form of relief (I B C G)

Re Flavel; Application by Lipshut (VSC) - wills and estates - family provision - application to be discharged as executor of will and removed as trustee of deceased's estate granted (B)

Mavridis v Andronescu (VSC) - wills and estates - terms of settlement entered under mistake - application for approval of compromise adjourned (I B C G)

Botsman v Bolitho & Ors (VSCA) - security for costs - application for leave to appeal against settlement of group proceedings - security for costs refused (I B C G)

Bell v Brisbane City Council & Ors (QCA) - planning and environment - challenge to approval of proposed development in conflict with planning scheme upheld - appeal allowed (I B C G)

Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd (QSC) - contract - partnership - applicant failed to establish breach of Co-Owners Deed by respondent - respondent entitled to declaratory relief (I B C G)

Andressen v Bendigo & Adelaide Bank Ltd (SASCFC) - service - private international law - appeal against entry of default judgment based on presumptive service of summons and statement of claim while defendant overseas - appeal dismissed (I B C G)

Stokes v Ragless (No 2) (SASC) - costs - defamation - self-represented litigant - offers of settlement - not in interests of justice to order indemnity costs in favour of successful plaintiff - costs awarded on party/party basis (I B C G)

BHP Billiton Iron Ore Pty Ltd v Treby (WASCA) - workers compensation - respondent injured at work - arbitrator ordered appellant was to pay compensation and statutory allowances to respondent - appeal dismissed (I B C G)

Engine Protection Equipment Pty Ltd v Miller (WASCA) - workers compensation - total incapacity - no error in decision of arbitrator to find worker entitled to weekly payments of compensation for claimed periods - appeal dismissed (I B C G)

Golding v Primavera Holdings Pty Ltd (ACTSC) - trusts and trustees - plaintiffs entitled to declaration of express trust and orders that first defendant perform obligations under trust (I B C G)

Summaries With Link (Five Minute Read)

Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd [2018] FCA 647

Federal Court of Australia

Burley J

Admiralty - joint venture agreement - referee's report - Court appointed referee to inquire into disputes between applicant and second defendant concerning business's 'operating profit' for certain periods - parties opposed adoption of certain parts of referee's report - r28.67 *Federal Court Rules 2011* (Cth) - 'related party transactions' - 'allowance for amortisation' - 'rental allowance' - 'costs' - 'useful life' of joint venture agreement - held: referee erred in calculation of amortisation - section of report remitted for correction of error - report otherwise adopted - procedural directions made.

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

[From Benchmark Thursday, 10 May 2018]

CMP Manufacturing Pty Ltd v Barbieri [2018] FCA 622

Federal Court of Australia

Bromberg J

Industrial law - contract - employment contract - respondent was appellant's former employee - respondent unsuccessfully claimed appellant dismissed him in breach of ss340 & 352 *Fair Work Act 2009* (Cth) (Fair Work Act) - appellant was successful in contractual claim of entitlement to retrenchment payment - primary judge held that if he was wrong concerning entitlement to retrenchment payment, then applicant would have succeeded on entitlement to payment of amount 'in lieu of notice' - whether erroneous that finding respondent's position redundant and respondent contractually entitled to retrenchment payment - whether erroneous finding that retrenchment was not excluded as applicant not offered "alternative position" under contract - whether erroneous finding that respondent, if not entitled to the retrenchment pay under contract, would have been entitled to money in lieu of notice under s117 Fair Work Act - held: grounds of appeal failed - appeal dismissed.

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

[From Benchmark Friday, 11 May 2018]

Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd; Plymouth Brethren (Exclusive Brethren) Christian Church v Fairfax Media Publications Pty Ltd [2018] NSWCA 95

Court of Appeal of New South Wales

Beazley P; McColl & Basten JJA

Defamation - proceedings arose from articles published in The Age newspaper and The Sydney Morning Herald newspaper - articles alleged there had been allegations of child sexual abuse within Plymouth Brethren Church and cover up of complaints by elders - Plymouth Brethren (Exclusive Brethren) Christian Church (company) sued, in separate proceedings, The Age and Fairfax in defamation - The Age and Fairfax sought determination, as a separate question, "the capacity of the matters complained of to identify the plaintiff" - primary judge answered question in the negative and gave judgment for The Age and Fairfax - company appealed - whether primary judge erred in ordering determination of separate question - capacity of publication to defame company - held: no error in ordering determination of separate question - matter complained of was 'reasonably capable' of identifying appellant - appeal allowed - matter remitted.

[View Decision](#) (I B)

[From Benchmark Tuesday, 8 May 2018]

The Real Thing Food Supplements CC v Media Tag Pty Ltd [2018] NSWSC 585

Supreme Court of New South Wales

Stevenson J

Consumer law - plaintiff incorporated in South Africa made health foods supplements - plaintiff exported to Australia - first defendant was distributor of plaintiff's products to Woolworths stores - first defendant arranged for products to be manufactured in Australia and sold to Woolworths stores - products were similar to those distributed for plaintiff - plaintiff brought proceedings against first defendant and its two directors - it was alleged that first defendant represented to Woolworths that the goods it was supplying were plaintiff's goods, that the representation was misleading and deceptive under s18 *Australian Consumer Law* and that Woolworths was induced by the representation to purchase the goods - it was also alleged that directors were knowingly involved in the contravention and that first defendant engaged in tort of passing off - held: plaintiff failed in case alleging misleading and deceptive conduct, rendering it unable to establish passing off case - proceedings dismissed.

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

[From Benchmark Monday, 7 May 2018]

Beech v Squire [2018] NSWSC 594

Supreme Court of New South Wales

Kunc J

Succession - family provision - insolvent estate - plaintiffs were adult children of deceased father's first marriage - plaintiffs sought provision from deceased's estate and notional estate - under will, deceased had left whole estate to defendant second wife - no provision made for deceased's children or grandchildren unless defendant did not survive deceased by 30 days - estate insolvent - deceased and defendant jointly owned property which had been sold - transaction not completed when deceased died - deceased and defendant had separated prior to deceased's death - deceased's share in proceeds passed to defendant by survivorship -

common ground that share was only asset in respect of which Court could make notional estate order - *Succession Act 2006* (NSW) - held: Court not satisfied will did not make adequate provision for plaintiffs - Court not prepared to order provision - no notional estate order could be made - summons dismissed.

[View Decision](#) (B)

[From Benchmark Tuesday, 8 May 2018]

Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610

Supreme Court of New South Wales

McDougall J

Commercial arbitration - second defendant arbitrator heard dispute between plaintiff and first defendant - first defendant contended arbitrator had acted as mediator and had then resumed arbitration without written consent of parties required by s27D(4) *Commercial Arbitration Act 2010* (NSW) - whether arbitrator acted as mediator and, of so, whether parties gave written consents before arbitration resumed - if consents not given, whether first defendant waived right to object to arbitration's resumption, or was estopped from asserting that s27D(4)'s requirements not met - held: arbitrator acted as mediator - first defendant did not give written consent to arbitration being conducted after mediation - estoppel case failed - waiver not established - summons dismissed.

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

[From Benchmark Wednesday, 9 May 2018]

Estate of Demetrios Katsikas, Deceased [2018] NSWSC 555

Supreme Court of New South Wales

Lindsay J

Wills and estates - probate - intestacy - deceased died 'ostensibly intestate' - Court granted letters of administration to defendant widow - plaintiff sought that '1985 will' and email be admitted to probate - defendant sought order pursuant s111 *Succession Act 2006* NSW that, if intestacy proved, then estate passed to her - common ground 1985 will revoked by marriage - defendant contended deceased deliberately died intestate so estate would pass to her - whether 1985 will 'revived by email' - whether email authentic - whether disputed email was a will - whether suspicious circumstances - whether fraud established - held: not established deceased was author of email - requirements for informal will not satisfied - statement of claim dismissed

[View Decision](#) (B)

[From Benchmark Wednesday, 9 May 2018]

Hoskin v Griffin & Ors [2018] VSC 216

Supreme Court of Victoria

Quigley J

Execution, seizure and sale - plaintiff was registered proprietor of land - land sold at auction which first defendant officer conducted on second defendant's behalf - plaintiff contended

defendants breached 'duty to act reasonably' in both judgment creditor's interests and judgment debtor's interests to 'obtain a fair price' for sale of interest - whether sale price was fair price - process of establishment of reserve - Sheriff's powers and duties under *Sheriff Act 2009* (Vic) - held: defendants breached duty to plaintiff by proceeding to 'Final Action' and not passing in property after receiving single bid - sale price was not a fair price - property sold at 'significant undervalue' - parties to be heard on appropriate relief

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

[From Benchmark Wednesday, 9 May 2018]

Re Flavel; Application by Lipshut [2018] VSC 228

Supreme Court of Victoria

McMillan J

Wills and estates - plaintiff sought to be discharged as will's executor and removed as trustee of deceased's estate and incidental orders - plaintiff deposed there would be no prejudice to any third party, that he would not seek commission, and did not seek payment of legal costs from deceased's estate - s34(1)(b) *Administration and Probate Act 1958* (Vic) - ss48(1) & 51 *Trustee Act 1958* (Vic) - held: plaintiff to be discharged as will's executor and removed as trustee of deceased's estate - property and assets of deceased's estate to vest in remaining executor and trustee of deceased's estate - orders made.

[Re Flavel](#) (B)

[From Benchmark Friday, 11 May 2018]

Mavridis v Andronescu [2018] VSC 227

Supreme Court of Victoria

Derham AsJ

Wills and estates - defendant sought approval of compromise of plaintiff's claim under Pt IV *Administration and Probate Act 1958* (Vic) - compromise concerned proceeds of sale of estate's 'principal asset' - plaintiff was undischarged bankrupt, but plaintiff had entered compromise believing she was discharged from bankruptcy - plaintiff informed Court she wished to make application to set aside the terms of settlement for mistake - plaintiff sought adjournment of defendant's application - held: advice of defendant's counsel concerning compromise was insufficient to purpose - plaintiff, and likely defendant also, had entered compromise under mistake - plaintiff or defendant may be able to set terms of settlement aside - there was prospect of further claim on deceased's estate - approval of compromise would make it more difficult to pursue further claim - application adjourned.

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

[From Benchmark Friday, 11 May 2018]

Botsman v Bolitho & Ors [2018] VSCA 111

Court of Appeal of Victoria

Whelan & Niall JJA

Security for costs - applicant sought to appeal from approval of settlement of group proceeding -

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group proceeding had arisen from failure of 'non-bank property lender (Banksia) - first respondent was lead plaintiff in group proceeding - first respondent sought that applicant provide security for costs - public interest - whether application for security was designed to end proceedings - protective jurisdiction - whether application would put 'economic pressure' on 'Bolitho interests' - whether risk that costs order would not be satisfied - impecuniosity - stultification - prospects of success - held: Court not satisfied costs order in first respondent's favour would not be met - security for costs refused.

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

[From Benchmark Wednesday, 9 May 2018]

Bell v Brisbane City Council & Ors [2018] QCA 84

Court of Appeal of Queensland

Sofronoff P; Philippides & McMurdo JJA

Planning and environment - second respondent obtained Council's approval to develop land by towers' construction - applicant, who lived on adjoining land, unsuccessfully challenged approval in Planning and Environment Court - Planning and Environment Court found that even though development conflicted with planning scheme, there were 'sufficient grounds' in public interest to grant approval - applicant sought to appeal - whether trial judge erred in determining non-compliance's extent - height limits - 'community and economic needs' - whether 'reasoning inconsistent with *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209 - whether irrelevant considerations and/or failure to take into account relevant considerations - 'public detriment' - s326(1) *Sustainable Planning Act 2009* (Qld) - held: errors of law established - appeal allowed - matter remitted.

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

[From Benchmark Wednesday, 9 May 2018]

Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd [2018] QSC 95

Supreme Court of Queensland

Jackson J

Contract - partnership - Co-Owners Deed - applicant and respondent co-owned land comprising office building - proceedings concerned whether applicant company was obliged to transfer half-interest as co-owner to respondent - applicant contended it was not obliged to transfer the half-interest as it did not breach Co-Owners Deed, or alternatively on basis that a contractual buy-out mechanism was not 'validly engaged' - applicant sought declaratory relief - respondent sought specific performance - whether applicant breached contract - whether buy-out mechanism validly engaged - held: applicant did not establish that respondent breached Co-Owners Deed - respondent entitled to declaratory relief.

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

[From Benchmark Tuesday, 8 May 2018]

Andressen v Bendigo & Adelaide Bank Ltd [2018] SASFC 30

Full Court of the Supreme Court of South Australia

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Kourakis CJ; Kelly & Blue JJ

Service - private international law - Master made 'presumptive service order' under r69 *District Court Civil Rules 2006* (SA) for service of summons and statement of claim by post and email to appellant's solicitor - appellant contended service was defective because he was not in Court's jurisdiction at time of service - Master dismissed application to restrain default judgment's entry based on presumptive service under the presumptive service order - District Court judge and Supreme Court judge dismissed appeals - held: r69 of the Rules extended to presumptive service on a defendant, whether defendant was in South Australian or overseas - r69 was not ultra vires of power which s51 *District Court Act 1991* (SA) conferred - appellant not permitted to raise for the first time on appeal, contention concerning impracticability of overseas service - appeal dismissed.

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

[From Benchmark Thursday, 10 May 2018]

Stokes v Ragless (No 2) [2018] SASC 56

Supreme Court of South Australia

Bampton J

Costs - defamation - self-represented litigant - successful plaintiff sought order for indemnity costs basis of s38 *Defamation Act 2005* (SA) - plaintiff contended defendant had unreasonably failed to make settlement offer and to agree to settlement offers - defendant was self-represented - plaintiff's offers of settlement did not explain 'implications of accepting or not accepting each offer' (implications) - held: no rule that represented party must inform unrepresented party of implications, but in this case the interests of justice required costs not to be awarded on indemnity basis - it could not be assumed unrepresented defendant would be aware of Supreme Court Rules concerning offers and s38 of the Act - plaintiff to have costs on party/party basis.

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

[From Benchmark Monday, 7 May 2018]

BHP Billiton Iron Ore Pty Ltd v Treby [2018] WASCA 60

Court of Appeal of Western Australia

Buss P, Murphy JA & Chaney J

Workers compensation - arbitrator found respondent suffered injury at work - arbitrator ordered appellant to pay respondent weekly compensation for total incapacity and statutory allowances - appellant sought leave to appeal pursuant to s247 *Workers' Compensation and Injury Management Act 1981* (WA) - primary judge refused leave - whether open to arbitrator to accept and rely on one doctor's medical report in preference to another doctor's medical report - .held: grounds of appeal did not have merit - appeal dismissed.

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

[From Benchmark Monday, 7 May 2018]

Engine Protection Equipment Pty Ltd v Miller [2018] WASCA 55

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Court of Appeal of Western Australia

Murphy, Mitchell & Beech JJA

Workers compensation - respondent worker sought compensation for knee injury - appellant employer paid compensation until worker reached 'prescribed total amount' - worker suffered subsequent back injury - arbitrator decided worker was entitled to compensation of weekly payments by appellant for total incapacity for back injury for periods claimed - primary judge dismissed appeal - appellant sought to appeal, contending arbitrator erred by 'failing to focus' on which of back injury and knee injury was the 'true cause' of incapacity - whether erroneous finding concerning entitlement to weekly payments - whether erroneous finding as to periods of payment - whether incapacity could have only one cause - 'the real cause' - 'the cause' - *Workers' Compensation and Injury Management Act 1981 (WA)* - held: no error in arbitrator not seeking to identify incapacity's 'true cause' - no error in arbitrator's consideration of whether back injury 'materially contributed' to incapacity - grounds of appeal failed - appeal dismissed.

[Engine Protection Equipment](#) (I B C G)

[From Benchmark Tuesday, 8 May 2018]

Golding v Primavera Holdings Pty Ltd [2018] ACTSC 118

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Trusts and trustees - express trust - plaintiffs previously owned land which they sold to first defendant - plaintiff claimed that express trust was created by trust deed over portion of land when contract for sale executed - plaintiff contended they were beneficiaries in equal shares - plaintiffs sought to enforce a condition of trust deed requiring transfer of unit to them for \$1 - plaintiffs sought declaration of express trust, declaration of first defendant's breach of the trust, and order that first defendant perform obligations under trust - held: plaintiffs entitled to declaration of express trust - plaintiff entitled to orders compelling first defendant's performance of obligations under trust - declaration and orders made.

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

[From Benchmark Friday, 11 May 2018]

CRIMINAL

Executive Summary

Paul Campbell v R (NSWCCA) - criminal law - sentence appeal - 13 year old found guilty of sexual offences against person under 10 and person under 16 - appeal allowed - proceedings remitted

R v CCA (QCA) - criminal law - drug offences - sentence appeal - further evidence admitted concerning applicant's rape while in custody and its impacts - Court varied sentence by

bringing forward parole eligibility date by four months - appeal allowed

Summaries With Link

Paul Campbell v R [2018] NSWCCA 87

Court of Criminal Appeal of New South Wales

Bathurst CJ; Schmidt & Hamill JJ

Criminal law

Criminal law - sexual offences - applicant was 13 year old child who pleaded guilty to two offences of sexual intercourse with child under 10 and one offence of indecent assault on a person under 16 - applicant sought to appeal against 16 month aggregate sentence with 8 month aggregate non-parole period - held: respondent conceded sentencing proceedings miscarried because, by taking into account an offence which carried life imprisonment, sentencing judge had taken a course prohibited by s33(4)(b) *Crimes (Sentencing Procedure) Act 1999* (NSW) - sentencing judge also erred in assessment of offence's seriousness, in finding applicant 'used his position as a trusted family member' to commit offences, in finding 'wrong in sentencing principle' Crown's concession that sentence 'other than full-time custody was within range', and in failing to consider alternatives to full-time custody - appeal allowed - proceedings remitted.

[View Decision](#)

R v CCA [2018] QCA 82

Court of Appeal of Queensland

Gotterson & Philippides JJA; Mullins J

Criminal law - drug offences - applicant pleaded guilty to four offences including trafficking in dangerous drugs (count 1) - other offences comprised two offences of unlawful possession of dangerous drug (counts 2 and 3), and possession of 'equipment and vehicles' used 'in connection with the trafficking' (count 4) - applicant sentenced to six years in prison for count 1, concurrent sentences of two years for counts 2 and 3 and one year for Count 4 - applicant sought to appeal on basis sentence was manifestly excessive - applicant also sought to adduce further evidence of rape he suffered in custody, the 'immediate physical impacts' of the rape, and the reasons why he had not disclosed the rape - held: Court satisfied that the further evidence should be admitted - rape and its immediate physical impacts were 'moderating sentencing factors' - Court varied sentence by bringing parole eligibility date forward by four months - appeal allowed.

[CCA](#)

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Moments of Vision

By: Thomas Hardy

That mirror
Which makes of men a transparency,
Who holds that mirror
And bids us such a breast-bared spectacle to see
Of you and me?

That mirror
Whose magic penetrates like a dart,
Who lifts that mirror
And throws our mind back on us, and our heart,
Until we start?

That mirror
Works well in these night hours of ache;
Why in that mirror
Are tincts we never see ourselves once take
When the world is awake?

That mirror
Can test each mortal when unaware;
Yea, that strange mirror
May catch his last thoughts, whole life foul or fair,
Reflecting it—where?

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

Thomas Hardy - Wikipedia

en.wikipedia.org

Thomas Hardy OM (2 June 1840 – 11 January 1928) was an English novelist and poet. A Victorian realist in the tradition of George Eliot, he was influenced both in his novels and in his poetry by Romanticism, especially William Wordsworth.

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