



Friday 11 July 2014

Weekly Civil Law Review

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

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine 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)

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) (FCA) - life insurance policy - fraudulent non-disclosure - insurer not entitled to avoid policy (I)

Inghams Enterprises Pty Ltd v Sok (NSWCA) - workers compensation - nature of appeals - work capacity decision - appeal dismissed (I G)

McGlashan v QBE Insurance (Australia) Ltd (No 4) (NSWSC) - costs - offer of compromise referring to interim payments non-compliant - indemnity costs refused (I)

Bastick v Allianz Australia Insurance Ltd (NSWSC) - motor accidents compensation - letter to CARS constituted acceptance of amount of damages in assessment - declaration (I G)

RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni (NSWSC) - possession - loan agreements unjust and set aside (B)

Subway Systems v Ireland (VSCA) - arbitration - VCAT was *court* under *Commercial Arbitration Act* - VCAT required to refer franchise dispute for arbitration (I B G)

Velissaris v Fitzgerald (VSCA) - trustee's claims against liquidator for sale of land and equipment at under-value - stay - abuse of process - *Anshun* estoppel (B)



Brunswick Family Dental Pty Ltd v Dr Enegd (VSC) - restraint of trade - interlocutory injunction restraining rival dentist from practicing within area of dental practice refused (I B)

Quadrio v Mackay Sugar Ltd (QSC) - contract - document signed by sugar cane grower was not a contract - declaration made (B)

Belgravia Nominees Pty Ltd v Lowe Pty Ltd (WASC) - joinder - dissolution of partnership - partner had no authority to commence action - joinder of former partner refused (B C)

Summaries with links (5 minute read)

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717

Federal Court of Australia

McKerracher J

Insurance - applicant made claim under life insurance policy on late husband - insurer avoided policy pursuant to s29(2) *Insurance Contracts Act 1984* (Cth) (ICA) on basis of husband's fraudulent non-disclosure - held: insurer established fraudulent non-disclosure as to fainting fits about which husband must have known and was reckless not to consider and disclose - however Court satisfied on evidence that same cover would have been accepted by insurer in any event - insurer not entitled to avoid contract - judgment for applicant.

[Graham](#) (I)

[From Benchmark 8 July 2014]

Inghams Enterprises Pty Ltd v Sok [2014] NSWCA 217

Court of Appeal of New South Wales

Basten & Barrett JJA; Sackville AJA

Workers compensation - worker injured back while employed by former employer - injury aggravated while employed by appellant (Inghams) - worker applied to Workers Compensation Commission to resolve claim for weekly compensation payments - arbitrator upheld worker's claim and apportioned liability equally between employers - Inghams appealed under s352 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - Deputy President found challenge to findings of fact demonstrated no relevant error and that in absence of *work capacity decision* s43 *Workers Compensation Act 1987* (NSW) (WCA) was not an obstacle to award for weekly payments after 1 January 2013 - held: Deputy President did not fail to determine whether errors of fact made - Deputy President did not misconceive nature of appeal as limited to errors of law - s43 WCA did not exclude jurisdiction with respect to matters that could be subject of *work capacity decision* absent such a decision - Commission did not exceed jurisdiction in allowing weekly compensation payments after 1 January 2013 - appeal dismissed.

[Inghams Enterprises Pty Ltd](#) (I G)



[From Benchmark 9 July 2014]

McGlashan v QBE Insurance (Australia) Ltd (No 4) [2014] NSWSC 882

Supreme Court of New South Wales

Campbell J

Indemnity costs - offer of compromise - Court gave judgment for defendant which sought indemnity costs on basis of offer of compromise rejected by plaintiff - plaintiff opposed order on grounds not all evidence had been served at time of service of offer and because offer was made *inclusive of all or any interim or other payments made to or on behalf of the plaintiff by the defendant* which were not quantified - plaintiff claimed it was denied opportunity to properly assess offer - held: reference to interim payments rendered offer non-compliant with r20.26 *Uniform Civil Procedure Rules 2005* (NSW) with consequence defendant not *entitled* to indemnity costs - offeror not required to serve all evidence and comply fully with pre-trial requirements before offer of compromise could give rise to prima facie entitlement to indemnity costs - indemnity costs refused.

[McGlashan](#) (I)

[From Benchmark 7 July 2014]

Bastick v Allianz Australia Insurance Ltd [2014] NSWSC 887

Supreme Court of New South Wales

RS Hulme AJ

Motor accidents compensation - insurer of motor vehicle admitted liability - plaintiff sought declaration it had accepted parties bound by assessment of damages by CARS assessor and order for payment of damages- plaintiff's solicitors had told CARS plaintiff accepted assessor's reasons and certificate but by oversight no letter sent to insurer or its solicitors - insurer wrote to plaintiff's solicitors noting no acceptance of award as required by s95 *Motor Accidents Compensation Act 1999* (NSW) within required time - held: claimant's decision to accept result of assessment must be communicated to someone - no disadvantage to insurer in acceptance being by communication to Authority - plaintiff had accepted assessment by solicitor's letter to CARS assessor by letter of 3/9/13 - declaration made.

[Bastick](#) (I G)

[From Benchmark 10 July 2014]

RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni [2014] NSWSC 849

Supreme Court of New South Wales

Davies J

Possession - unjust contracts - lender claimed possession of properties pursuant to loans defendants entered into for benefit of son, ex-wife and companies - before entering loan agreements, defendants had given guarantees supported by mortgages over properties for borrowings of son, ex-wife and company - held: defendants were never told they were to become borrowers rather than continuing as guarantors - transactions converted them from

guarantors/mortgagors with contingent liability limited to value of properties to borrowers/mortgagors with no limit on liability or rights of recourse as guarantors - mortgage broker not lender's agent but lender on notice further inquiries ought to have been made - defendants' age, language, background and limited business experience contributed to them having special disadvantage - lender engaged in unconscionable conduct - loan agreements unjust and set aside - mortgages discharged.

[RHG Mortgage Corporation Ltd](#) (B)

[From Benchmark 4 July 2014]

Subway Systems v Ireland [2014] VSCA 142

Court of Appeal of Victoria

Maxwell P, Beach JA & Kyrou AJA

Commercial arbitration - parties entered franchise agreement which included arbitration clause - franchisees brought proceeding in VCAT alleging franchisor breached agreement, acted negligently and engaged in misleading or deceptive conduct - franchisor contended disputes were within scope of arbitration clause and that VCAT must refer parties to arbitration pursuant to s8 *Commercial Arbitration Act 2011* (Vic) - franchisor sought to appeal from primary judge's decision that VCAT was not a *court* for purpose of s8 - whether VCAT was a *court before which an action [has been] brought* - held (by majority): word *court* in s8 included VCAT - clear policy of Act and model law which it enacted was that when parties agreed to have disputes determined by private arbitration, neither party at liberty to litigate matter in dispute through State's adjudicative mechanisms - VACT indistinguishable from other adjudicative bodies of State which bore title *court* - appeal allowed.

[Subway Systems](#) (I B G)

Velissaris v Fitzgerald [2014] VSCA 139

Court of Appeal of Victoria

Ashley & Mandie JJA

Stay - summary judgment - abuse of process - *Anshun* estoppel - trust was beneficial owner of property, plant and equipment - trustee alleged liquidator of previous trustee breached duty by selling property, plant and equipment at under-value - trustee sought leave to appeal from order permanently staying proceedings - liquidator contended propositions essential to case were subject of binding determinations by Supreme Court of Victoria and Federal Court and it would be abuse of process to re-litigate those matters - held: no issue estoppels or res judicata arose but order for permanent stay correct in relation to claim for sale of land at undervalue because commencement of proceeding in County Court was patent attempt to avoid orders made in Supreme and Federal Court requiring leave to commence proceedings - *Anshun* estoppel available in relation to claim for sale of plant - summary judgment for liquidator in lieu of stay of that claim - primary judge also correct to make a restraining order - orders made.

[Velissaris](#) (B)

[From Benchmark 4 July 2014]



[From Benchmark 4 July 2014]

Brunswick Family Dental Pty Ltd v Dr Eneqd [2014] VSC 325

Supreme Court of Victoria

Macaulay J

Restraint of trade - interlocutory injunction - dentist's practice was incorporated in 2013 - in 2008 dentist engaged defendant as subcontractor - in 2014 subcontractor set up own practice about 3 km from company's address - company sought interlocutory injunction to restrain former subcontractor from practising as dentist within 5 km of its address relying on restraint of trade clause in contract made with subcontractor in 2013 - held: company established prima facie case contract with defendant contained restraint clause - however court not satisfied company's claim had sufficient probability of success to restrain defendant from conducting practice at address pending trial - interlocutory injunction refused.

[Brunswick Family Dental Pty Ltd](#) (I B)

[From Benchmark 10 July 2014]

Quadrio v Mackay Sugar Ltd [2014] QSC 148

Supreme Court of Queensland

Henry J

Contract - cane grower sought declaration he had not committed to binding supply contract being *Tableland Collective Cane Supply and Processing Agreement - Sugar Industry Act 1999* (Qld) - whether signing an execution page which contained no contractual terms and was not annexed to any document contained terms fulfilling requirement in ss31(5) & 33(2) that grower sign a supply contract - held: Act required grower to sign a supply contract - document signed by grower did not have any content sufficient for it to meet the description of a contract - declaration made.

[Quadrio](#) (B)

[From Benchmark 10 July 2014]

Belgravia Nominees Pty Ltd v Lowe Pty Ltd [2014] WASC 225

Supreme Court of Western Australia

Registrar Boyle

Joinder - partnership - partnership engaged in land trading business entered agreement with service provider for provision of services in respect of land - partnership made payments to service provider - partnership dissolved - plaintiff sued service provider claiming it was prevented by *Real Estate and Business Agents Act 1978* (WA) from receiving payments - partner sought leave under O18 r6(2)(b) *Rules of the Supreme Court 1971* (WA) to join former partner as defendant - authority of partners after dissolution of partnership - ss26 & 49(1) *Partnership Act 1893* (WA) - held: after dissolution, a partner had authority to bind firm only by acts necessary to wind up affairs of partnership and to complete transactions begun but unfinished at dissolution - action not of either



type - plaintiff did not have authority under s49(1) to commence action - want of authority could not be cured by joining former partner as defendant - application refused.

[Belgravia Nominees Pty Ltd](#) (B C)

[From Benchmark 4 July 2014]

The Prairie Town

By Helen Santmyer

Lovers of beauty laugh at this grey town,
Where dust lies thick on ragged curb-side trees,
And compass-needle streets lead up and down
And lose themselves in empty prairie seas.

Here is no winding scented lane, no hill
Crowned with a steepled church, no garden wall
Of old grey stone where lilacs bloom, and fill
The air with fragrance when the May rains fall.

But here is the unsoftened majesty
Of the wide earth where all the wide streets end,
And from the dusty corner one may see
The full moon rise, and flaming sun descend.

The long main street, whence farmers' teams go forth,
Lies like an old sea road, star-pointed north.

[Helen Santmyer](#)

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