

Friday, 14 September 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)

EZY Accounting 123 Pty Ltd v Fair Work Ombudsman (FCAFC) - industrial law - appellant "involved in" contraventions of *Fair Work Act 2009* (Cth) - declaration of contravention in respect of 'meal breaks' and 'rest breaks' set aside - penalty varied - appeal otherwise dismissed (B I G)

O'Shanassy v Wingecarribee Shire Council, in the matter of O'Shanassy (FCA) - bankruptcy - application to set aside bankruptcy notice dismissed (B)

Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 3) (FCA) - industrial law - penalties - contravention of s340 *Fair Work Act 2009* (Cth) - declaration made - first respondent to pay \$30,000 pecuniary penalty to applicant (I B)

Commissioner of the Australian Federal Police v Fernandez (NSWCA) - proceeds of crime - statutory construction - 'proceeds' - erroneous failure to make forfeiture order in respect of property - appeal allowed (B C I G)

Hagerty v Hills Central Pty Ltd (NSWCA) - real property - wills and estates - deed - option to acquire land not validly exercised - appeal allowed (B C I G)

Hanna v Raoul (NSWCA) - contract - transfer of property from respondent to appellant was not binding - deed and transfer unconscionable and unjust - appeal dismissed (B C I G)

In the matter of Bar Machiavelli Pty Ltd (Administrator Appointed) (NSWSC) - leases and tenancies - lessor required to consent to assignment of lease - declaration and orders made (B)

In the matter of Statewide Office Furniture Pty Ltd (NSWSC) - equity - probate - corporations - costs - judgments and orders - enforcement - two proceedings - orders and directions granted (B I)

Scudooda Pty Ltd v K&E Property Pty Ltd (NSWSC) - leases and tenancies - retail leases - real property - defendant entitled to demised premises' possession, arrears and mesne profits (B C I G)

Summaries With Link (Five Minute Read)

EZY Accounting 123 Pty Ltd v Fair Work Ombudsman [2018] FCAFC 134

Full Court of the Federal Court of Australia

Flick, Bromberg & O'Callaghan JJ

Industrial law - appellant was firm of accountants - respondent identified contraventions of *Fair Work Act 2009* (Cth) by company (Blue Impression) - Blue Impression sought assistance from appellant to rectify contraventions - further contraventions occurred - employee of Blue Impression sought respondent's assistance - respondent commenced proceedings against Blue Impression and appellant - Blue Impression admitted contraventions - appellant denied liability - Federal Circuit Court found appellant was "involved in" contraventions of s45 of the Act and therefore had itself made the contraventions under s550 of the Act - respondent conceded primary judge had not given reasons for finding contraventions in respect of 'meal breaks' and 'rest breaks' - appellant contended there was no basis for finding it "involved in" the contraventions - held: no error in factual findings - no error in finding that appellant was "involved in" contraventions - appeal dismissed except to extent that declaration of contravention in respect of meal breaks and rest breaks set aside and penalty varied.

[EZY](#) (B I G)

[From Benchmark Friday, 14 September 2018]

O'Shanassy v Wingecarribee Shire Council, in the matter of O'Shanassy [2018] FCA 1381

Federal Court of Australia

Bromwich J

Bankruptcy - applicant sought to set aside bankruptcy notice served on him by Council - Council had obtained judgment by registering costs certificate under s368(5) *Legal Profession Act 2004* (NSW) - bankruptcy notice required payment of judgment debt - applicant contended judgment was beyond what s368(5) permitted and was thus invalid - applicant also contended bankruptcy notice could 'reasonably mislead a debtor', and that he had offsetting claim arising from defamation proceedings against Council 'and related persons' - whether bankruptcy notice had 'proper foundation' - whether notice misleading - whether applicant had offsetting claim - held:

application dismissed.

[O'Shanassy](#) (B)

[From Benchmark Tuesday, 11 September 2018]

Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 3) [2018] FCA 1395

Federal Court of Australia

Wigney J

Industrial law - pecuniary penalties - Court found first respondent, by 'words and conduct' of second and third respondent, contravened s340 *Fair Work Act 2009* (Cth) - determination of relief - applicant sought declaration and order for pecuniary penalty's payment - 'no real dispute' declaration should be made - dispute concerned amount of pecuniary penalty - held: declaration made - first respondent to pay \$30,000 pecuniary penalty to applicant.

[Construction](#) (I B)

[From Benchmark Friday, 14 September 2018]

Commissioner of the Australian Federal Police v Fernandez [2018] NSWCA 198

Court of Appeal of New South Wales

Beazley P; Payne & McColl JJA

Proceeds of crime - Commissioner of the Australian Federal Police sought order that funds to respondent's credit in bank accounts in respondent's name be forfeited under s49 *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) - primary judge dismissed summons - Commissioner appealed - proper construction of "proceeds" in s329(1) *Proceeds of Crime Act* - onus - public interest - held: primary judge erroneously found that 'property in issue' was not proceeds of offence under s49(4) *Proceeds of Crime Act* - discretion to refused forfeiture order did not arise - appeal allowed.

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

[From Benchmark Wednesday, 12 September 2018]

Hagerty v Hills Central Pty Ltd [2018] NSWCA 200

Court of Appeal of New South Wales

McColl, Macfarlan & Leeming JJ

Real property - wills and estates - deed - primary judge found respondent validly exercised option to acquire land which appellants owned as executors of mother's deceased estate - deed which granted option required delivery of two executed contracts for sale, and provided for completion date 42 days after contract - respondent, in purported execution of option, left completion date blank and requested date of completion in covering letter of 192 days from contract's date, citing 'irrelevant clause' in deed - whether respondent validly exercised option - construction of deed - construction of documents purportedly exercising option - *Real Property Act 1900* (NSW) - held: option was not validly exercised - appeal allowed.

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

[From Benchmark Thursday, 13 September 2018]

Hanna v Raoul [2018] NSWCA 201

Court of Appeal of New South Wales

Beazley P; Macfarlan & White JJA

Contract - respondent was registered proprietor of property subject to a mortgage in third party financier's favour - respondent resided in house on property - respondent and appellant executed deed of arrangement providing appellant would discharge mortgage and respondent would transfer property to appellant subject to life estate in respondent's favour - appellant discharged mortgage - transfer executed and registered under *Real Property Act 1900* (NSW) - primary judge found transfer not binding, and that respondent was beneficially entitled to property, subject to compensation to appellant for money paid in discharging mortgage - whether respondent had capacity to enter deed and transfer - whether deed and transfer could be set aside because they were unconscionable - whether deed and transfer unjust - held: deed and transfer were unconscionable and unjust - appeal dismissed.

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

[From Benchmark Friday, 14 September 2018]

In the matter of Bar Machiavelli Pty Ltd (Administrator Appointed) [2018] NSWSC 1395

Supreme Court of New South Wales

Brereton JA

Leases and tenancies - retail lease - assignment - plaintiffs (Bicher) sought order that first defendant lessor consent to third defendant's assignment of lease of premises to Bicher - grounds on which consent to assignment could be withheld - whether 'proposed assignee' had 'financial resources and retailing skills' which were 'not inferior' to proposed assignor's - whether compliance by lessee with procedure for obtaining consent - ss39 & 41 *Retail Leases Act 1994* (NSW) - held: first defendant not entitled to withhold consent to assignment of lease - first defendant required to consent to assignment - declaration and orders made.

[View Decision](#) (B)

[From Benchmark Wednesday, 12 September 2018]

In the matter of Statewide Office Furniture Pty Ltd [2018] NSWSC 1393

Supreme Court of New South Wales

Brereton JA

Equity - probate - corporations - costs - judgments and orders - enforcement - in 'probate proceedings' plaintiffs as special administrators of deceased's estate sought that defendant pay company (Statewide) amount of funds of company 'dealt with in breach of freezing orders', order that defendant reimburse estate in amount of its funds applied to payment of defendant's legal costs, and 'orders and directions for enforcement', including garnishee order in respect of funds to defendant's credit in bank accounts - in 'corporations proceedings' first plaintiff special administrators and second plaintiff as Deed Administrator of Statewide sought that Deed Administrator be granted leave to transfer all of defendant's shares in company to estate - s444GA *Corporations Act 2001* (Cth) - held: orders and directions granted.

[View Decision](#) (B I)

[From Benchmark Wednesday, 12 September 2018]

Scudooda Pty Ltd v K&E Property Pty Ltd [2018] NSWSC 1397

Supreme Court of New South Wales

Darke J

Leases and tenancies - retail leases - real property - plaintiff was lessee in respect of land - lessors sold and transferred land to defendant, which became proprietor of fee simple in 2015 - plaintiff claimed to have validly exercised first option to renew lease in 2014 and was in occupation of land - plaintiff sought specific performance of agreement to grant new lease - plaintiff also claimed that costs of electricity supplied to premises fell on lessor - plaintiff had met costs of electricity and sought reimbursement of some amounts - defendant denied reimbursement to plaintiff - plaintiff ceased paying rent on basis it was entitled to set off for electricity costs - construction of lease - *Retail Leases Act 1994* (NSW) - held: plaintiff failed in claim of entitlement to electricity costs - defendant entitled to demised premises' possession, arrears and mesne profits - judgment for defendant.

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

[From Benchmark Thursday, 13 September 2018]

CRIMINAL

Executive Summary

Summaries With Link



Benchmark

The Crocuses

By: Frances Ellen Watkins Harper
They heard the South wind sighing
 A murmur of the rain;
And they knew that Earth was longing
 To see them all again.

While the snow-drops still were sleeping
 Beneath the silent sod;
They felt their new life pulsing
 Within the dark, cold clod.

Not a daffodil nor daisy
 Had dared to raise its head;
Not a fairhaired dandelion
 Peeped timid from its bed;

Though a tremor of the winter
 Did shivering through them run;
Yet they lifted up their foreheads
 To greet the vernal sun.

And the sunbeams gave them welcome,
 As did the morning air—
And scattered o'er their simple robes
 Rich tints of beauty rare.

Soon a host of lovely flowers
 From vales and woodland burst;
But in all that fair procession
 The crocuses were first.

First to weave for Earth a chaplet
 To crown her dear old head;
And to beauty the pathway
 Where winter still did tread.

And their loved and white haired mother
 Smiled sweetly 'neath the touch,
When she knew her faithful children
 Were loving her so much.



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

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