

Friday, 15 February 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)

Williams v Wreck Bay Aboriginal Community Council (HCA) - constitutional law - residential tenancies - provisions of *Residential Tenancies Act 1997* (ACT) could operate concurrently with *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) - appeal allowed (I B C G)

Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection (HCA) - migration law - refusal to grant protection visa - three appeals - notification not disclosed to applicant - s438 *Migration Act 1958* (Cth) - materiality - one appeal allowed - two appeals dismissed (B C I G)

Hocking v Director-General of the National Archives of Australia (FCAFC) - administrative law - refusal to grant access to records - refusal to declare records were 'Commonwealth records' under *Archives Act 1983* (Cth) - appeal dismissed (I B C G)

Sills v State of New South Wales (NSWCA) - non-delegable duty of care - police officer suffered psychological injury in course of work - State liable - appeal allowed (B C I G)

Sanpoint Pty Ltd v V8 Supercars Holding Pty Ltd (NSWCA) - contract - 'Racing Entitlement Contract' - respondent breached contract on basis of non-disclosure - appellant failed to prove loss - appeal dismissed (B C I G)

Perera v Genworth Financial Mortgage Insurance Pty Ltd (NSWCA) - summary dismissal -

malicious prosecution - no error in summary dismissal of proceedings - application for leave to appeal dismissed (B C I G)

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) (NSWCA) - security of payments - contractor appealed against rectification of contract and finding that adjudication determination was valid - appeal allowed (B C I G)

Winky Pop Pty Ltd v The State of Victoria & Mobil (VSCA) - estoppel - negligence - nuisance - State granted summary judgment on first applicant's claim against it - first application refused leave to amend claim - leave to appeal refused (I B C G)

Thomson v Tremco Pty Limited (QCA) - corporations - respondent succeeded on claim against appellant under s588M(3) *Corporations Act 2001* (Cth) - appeal dismissed (I B C G)

Woolnough & Anor v Isaac Regional Council (QSC) - trespass - nuisance - claims arising from installation of sewer line on property - claims dismissed (B C I G)

In the Estate of Gwendoline Katherine Wilkinson (Deceased) (SASC) - wills and estates - executors passed over - Public Trustee granted administration of estate with will annexed (B)

Shahin Enterprises Pty Ltd v BP Australia Pty Ltd (SASC) - contract - preliminary determination of issues - defendant breached clause of "BP Branded Privately Owned Sites Agreement" (B C I G)

Gloucester Resources Limited v Minister for Planning (NSWLEC) - environment and planning - refusal of consent to development application in respect of proposed coal mine - appeal dismissed (B C I G)

Summaries With Link (Five Minute Read)

Williams v Wreck Bay Aboriginal Community Council [2019] HCA 4

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Constitutional law - residential tenancies - appellant was registered member of respondent - respondent granted lease meeting requirements of 'residential tenancy agreement' under *Residential Tenancies Act 1997* (ACT) (Residential Tenancies Act) to appellant - premises in 'substantial disrepair' - proceedings concerned whether provisions of Residential Tenancies Act could apply to lease with retrospective effect to require that lessor maintain premises in 'reasonable state of repair' with regard to premises' condition when tenancy agreement commenced - respondent contended it was not obliged to maintain premises

because the 'relevant provisions' of Residential Tenancies Act could not operate concurrently with *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) (Land Grant Act) - Court of Appeal accepted respondent's contention - held: relevant provisions of Residential Tenancies Act could operate concurrently with Land Grant Act - appeal allowed.

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

[From Benchmark Thursday, 14 February 2019]

Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection [2019] HCA 3

High Court of Australia

Bell, Gageler, Keane, Nettle & Gordon JJ

Migration law - three appeals - Tribunal reviewed refusal to grant protection visa - notification issued to Tribunal by Secretary of the Department of Immigration and Border Protection that s438 *Migration Act 1958* (Cth) applied concerning 'document or information' - notification not disclosed to applicant - whether 'fact of notification' triggered 'obligation of procedural fairness' by Tribunal to disclose to applicant the fact of notification - whether breach of obligation constituted jurisdictional error only if breach was 'material' - whether an 'incorrect notification' constituted jurisdictional error only if it was material - onus - "required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made"[60]?" - Pt 7 *Migration Act 1958* (Cth) - held: one appeal allowed - two appeals dismissed.

[Minister for Immigration and Border Protection](#) (B C I G)

[From Benchmark Thursday, 14 February 2019]

Hocking v Director-General of the National Archives of Australia [2019] FCAFC 12

Full Court of the Federal Court of Australia

Allsop CJ; Flick & Robertson JJ

Administrative law - primary judge refused appellant's application for access to certain records and refused declaration that the records were 'Commonwealth records' under *Archives Act 1983* (Cth) - whether records were Commonwealth's property - whether primary judge erred in rejecting submission that records were to be viewed as Commonwealth's property because subject-matter of records related to Governor-General's performance of 'role and function' - held: appeal dismissed.

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

[From Benchmark Tuesday, 12 February 2019]

Sills v State of New South Wales [2019] NSWCA 4

Court of Appeal of New South Wales

Payne JA; Sackville & Simpson AJJA

Non-delegable duty of care - psychological injury - appellant former police suffered post-traumatic stress disorder (PTSD) - common ground appellant's 'exposure to traumatic

incidents' in course of work was 'contributing factor' to PTSD and 'major depression' - appellant sued respondent - appellant contended respondent breached non-delegable duty of care - State admitted non-delegable common law duty of care - primary judge found that a 'Police Medical Officer' and 'Police Psychologist' had made recommendations in respect of appellant, that NSW Police 'did not implement' the recommendations, and that 'there was no reason' for NSW Police to implement them - primary judge found State did not breach duty of care - 'system of work' - whether primary judge erroneously failed to find State had breached duty of care by failure to to implement system 'for detecting and addressing psychological injury' - whether failure to act on recommendations - whether 'inadequate response' to notification in register - whether contributory negligence - held: appeal allowed.

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

[From Benchmark Monday, 11 February 2019]

Sanpoint Pty Ltd v V8 Supercars Holding Pty Ltd [2019] NSWCA 5

Court of Appeal of New South Wales

Beazley P; Macfarlan & Leeming JJA

Contract - 'Racing Entitlement Contract' - primary judge dismissed appellant's cross-claim against respondents - primary judge found no breach of contract - construction of contract - requirements of 'tender process' under contract - whether respondent required under contract to 'disclose certain information to 'potential bidders' - whether primary judge erroneously failed to find breach of contract on basis of non-disclosure - whether primary judge erroneously failed to find appellant had proved loss - held: Court satisfied that respondent breached contract on basis of non-disclosure - appellant failed to prove loss - appeal dismissed.

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

[From Benchmark Monday, 11 February 2019]

Perera v Genworth Financial Mortgage Insurance Pty Ltd [2019] NSWCA 10

Court of Appeal of New South Wales

Basten & Macfarlan JJA

Summary dismissal - malicious prosecution - primary judge dismissed applicant's claim in malicious prosecution on basis proceedings 'misconceived and disclosed no reasonable cause of action' - whether tort of malicious prosecution extended to 'commencement and carrying on of civil proceedings' - whether primary judge erred in approach to application for summary dismissal - whether failure by primary judge to 'take exceptional caution' - whether primary judge erred in relation to elements of cause of action - r13.4(1) *Uniform Civil Procedure Rules 2005* (NSW) - held: no error in summary dismissal of proceedings - application for leave to appeal dismissed.

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

[From Benchmark Tuesday, 12 February 2019]

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) [2019] NSWCA 11

Court of Appeal of New South Wales

Leeming, Payne & White JJA; Sackville & Emmett AJJA

Security of payments - proceedings arising from claim for progress payments under 'Works Subcontract' (contract) between appellant Contractor and first respondent Subcontractor in liquidation - adjudicator made adjudication determination in first respondent's favour against appellant - appellant did not pay amount to first respondent - appellant contended adjudication determination invalid because first respondent made application outside time limit *Building and Construction Industry Security of Payment Act 1999* (NSW) (Security of Payment Act) - first respondent cross-claimed seeking contract's rectification altering dates on which progress payments required to be made - primary judge found contract should be rectified and that adjudication determination was valid - whether primary judge erred in rectifying contract - whether erroneous finding first respondent not out of time in purporting to make application - whether Security of Payment Act could operate for benefit of builder or subcontractor when builder or subcontractor had 'gone into liquidation in insolvency' - held: appeal allowed.

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

[From Benchmark Friday, 15 February 2019]

Winky Pop Pty Ltd v The State of Victoria & Mobil [2019] VSCA 9

Court of Appeal of Victoria

Maxwell P; Ashley JA & Almond AJA

Summary judgment - estoppel - negligence - nuisance - applicants owned land - leak of petroleum hydrocarbon from pipeline which second respondent operated polluted groundwater under land - first applicant sued second respondent - State joined as defendant - claims heard against second respondent alone due to State's 'late joinder' - second respondent admitted liability - issues at trial were causation and quantum - primary judge dismissed all claims except cost of leak's investigation - appeal was dismissed - application for special leave to appeal to High Court refused - State sought summary judgment, contending first applicant's claim against it had no prospects of success - first applicant sought to amend pleading to add nuisance claim - judge granted summary judgment and refused application to amend claim - first applicant sought leave to appeal - 'issue estoppel' - prejudice - 'Anshun estoppel' - abuse of process - held: leave to appeal refused.

[Winky Pop](#) (I B C G)

[From Benchmark Monday, 11 February 2019]

Thomson v Tremco Pty Limited [2019] QCA 18

Court of Appeal of Queensland

Sofronoff P; Gotterson & Morrison JJA

Corporations - appellant and husband set up company to conduct waterproofing business (Kadoe) - appellant's husband was sole director - respondent supplied Kadoe with products - respondent sought payment of debts - judgment given in respondent's favour - Kadoe wound up on application by respondent - judgment in respondent's favour unsatisfied - respondent, under s588M(3) *Corporations Act 2001* (Cth), sought compensation from appellant as 'de facto

director of Kadoe' - trial judge gave judgment in respondent's favour, and determined interest and costs in a separate decision - appellant appealed - whether apprehended bias - 'proof of debt' - whether decision not made on cases which trial judge referred to - whether invoices delivered - whether trial judge should have called ATO officers as witnesses - held: appeal dismissed.

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

[From Benchmark Friday, 15 February 2019]

Woolnough & Anor v Isaac Regional Council [2019] QSC 17

Supreme Court of Queensland

Henry J

Trespass - nuisance - plaintiffs contended that defendant by installation of sewer line trespassed at plaintiffs' property - plaintiffs also contended installation caused subsidence and leakage of sewage at property - plaintiffs claimed in trespass and nuisance against defendant - time of installation of sewer - whether owners consented to installation - whether installation caused sewage leak and/or subsidence - held: claims dismissed.

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

[From Benchmark Tuesday, 12 February 2019]

In the Estate of Gwendoline Katherine Wilkinson (Deceased) [2018] SASC 200

Supreme Court of South Australia

Stanley J

Wills and estates - deceased appointed her three sons as executors - two sons sought grant of probate of will - one son opposed grant of probate and sought, pursuant to s67 *Testamentary Causes Act 1867* (SA), passing over of other two brothers as executors and that Public Trustee be granted estate's administration with will annexed - s9 *Public Trustee Act 1995* (SA) - whether executors in 'position of conflict' arising from transfer of money - whether 'duty to investigate transactions' - whether 'proper basis' to pass over executors and authorise administration of estate by Public Trustee - interests of beneficiaries - 'conflict between executors' held: executors passed over - Public Trustee granted administration of estate with will annexed.

[In the Estate](#) (B)

[From Benchmark Friday, 15 February 2019]

Shahin Enterprises Pty Ltd v BP Australia Pty Ltd [2019] SASC 12

Supreme Court of South Australia

Blue J

Contract - plaintiff sued defendant for breach of "BP Branded Privately Owned Sites Agreement" (agreement) - preliminary determination of all issues but damages - whether defendant breached clause of agreement by refusal 'to grant branding in respect of' service station - whether 'adverse effect exception' applied - whether defendant breached other clause of agreement by refusal to provide 'requested information' concerning cardholders - held: defendant breached clause of agreement by refusal to grant branding in respect of service

station.

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

[From Benchmark Wednesday, 13 February 2019]

Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7

Land and Environment Court of New South Wales

Preston CJ

Environment and planning - Planning and Assessment Commission refused to consent to appellant's development application for carrying out of coal project - Commission found proposed coal mine would directly contravene objectives of zones in Gloucester Local Environmental Plan 2010, that mine's 'residual visual impact' through all stages of Project 'would be significant', and that Project was not in public interest - appellant appealed - held: Court found Project's 'negative impacts', including 'visual, amenity, social and climate change impacts', outweighed Project's 'public benefits' including 'economic benefits' - Court concluded Project contrary to public interest - consent to development application refused - appeal dismissed.

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

[From Benchmark Wednesday, 13 February 2019]

CRIMINAL

Executive Summary

Summaries With Link



Benchmark

A Sonnet to the Noble Lady, the Lady Mary Wroth

By: Ben Jonson

I that have been a lover, and could show it,
Though not in these, in rithmes not wholly dumb,
Since I exscribe your sonnets, am become
A better lover, and much better poet.
Nor is my Muse or I ashamed to owe it
To those true numerous graces, whereof some
But charm the senses, others overcome
Both brains and hearts; and mine now best do know it:
For in your verse all Cupid's armory,
His flames, his shafts, his quiver, and his bow,
His very eyes are yours to overthrow.
But then his mother's sweets you so apply,
Her joys, her smiles, her loves, as readers take
For Venus' ceston every line you make.

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

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