

Friday, 16 June 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)

Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission (HCA) - trade practices - price fixing by airlines in contravention of s45(2) *Trade Practices Act 1974* (Cth) - there was market in Australia for air cargo services for which airlines competed - appeals dismissed (I B C G)

SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd (NSWCA) - equity - evidence - contract - no error in rectification of contract to reflect common intention that sale price was to be exclusive of goods and services tax - appeal dismissed (I B C G)

Tran v Vo (NSWCA) - negligence - occupier's liability - workers compensation - appellants' casual employee injured hand in juicer at appellants' premises while not rostered on - appellants liable - appeal dismissed (I B C G)

Colley v Insurance Australia Group trading as NRMA Insurance (NSWSC) - judicial review - motor accidents compensation - dismissal of application for referral of medical assessment to review panel of assessors - summons dismissed (I B C G)

Al Muderis v Duncan (No 3) (NSWSC) - damages - aggravated damages - defamation - surgeon vilified in series of publications by former patient upon whom he had operated - surgeon awarded total damages of \$420,000 - permanent injunctive relief granted (I)

Benchmark

Issa v Osman (No.2) (NSWSC) - contract - estoppel - equity - contract for sale of property validly terminated - second defendant not entitled to equitable relief - declaration and order made (I B C G)

Smith v Smith (NSWSC) - fiduciary duties - equity - wills and estates - family provision - power of attorney - dealings with property of incapable principal in breach of fiduciary duties - first, third and fourth defendants held property on trust for plaintiffs - orders made (B)

Waaka v Francois (NSWSC) - estoppel - defendant not bound by equitable proprietary estoppel to enter contract for sale of property to plaintiffs - judgment for defendant (I B C G)

SW Investments NSW Pty Ltd v 16 Boondilla Pty Ltd (NSWSC) - consumer law - agreements for purchase of property void and set aside - first plaintiff to be compensated for loss - orders made (I B C G)

Imagebuild Group Pty Ltd v Fokust Pty Ltd (VSCA) - corporations - dismissal of application to set aside statutory demand - supporting affidavit not filed within time - appeal dismissed (I B C G)

Caltex Australia Petroleum Pty Ltd v Contaminated Sites Committee (WASC) - administrative law - contaminated sites - responsibility for remediation - applicant entitled to writ of prohibition against respondent, to prevent it making decision pursuant to s36(2)(a) *Contaminated Sites Act 2003* (WA) (CS Act) (I B C G)

Korda v Aldi Foods Pty Ltd (ACTSC) - negligence - contributory negligence - plaintiff injured in incident at store's entry gates - breach of duty by failure to install warning sign - causation not established - cross-appeal allowed (I)

Summaries With Link (Five Minute Read)

Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2017] HCA 21

High Court of Australia

Kiefel CJ; Bell, Keane, Nettle & Gordon JJ

Trade practices - price fixing - market identification - primary judge found Air New Zealand Ltd and PT Garuda Indonesia Ltd were parties to price fixing and that conduct would have contravened s45(2) *Trade Practices Act 1974* (Cth) but did not do so because competition between the airlines did not occur in any Australian market - Full Court of Federal Court allowed appeal against primary judge's decision - whether primary judge correct in finding no market in Australia for air cargo services for which airlines competed - ss12 & 13 *Air Navigation Act 1920*

(Cth) - ss4, 4E, 45(2), 45(3) & 45A *Trade Practices Act 1974* (Cth) - held: primary judges factual findings led 'irresistibly to the conclusion that there was a market in Australia for the airlines' air cargo services' - appeals dismissed.

[Air New Zealand](#) (I B C G)

[From Benchmark Thursday, 15 June 2017]

SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd [2017] NSWCA 132

Court of Appeal of New South Wales

McColl & Gleeson JJA; Sackville AJA

Equity - evidence - contract - common intention - rectification - appellant contracted for purchase of property from respondent - appellant appealed against decision in which primary judge found sale price was exclusive of goods and services tax, and rectified contract accordingly to reflect common intention - s100(3)(b) *Civil Procedure Act 2005* (NSW) - *Property, Stock and Business Agents Regulation 2014* (NSW) - whether *Fox v Percy* error warranting Court's intervention in respect of decision to rectify contract - whether erroneous acceptance of evidence - whether proof of common intention warranting order for rectification - whether erroneous finding appellant required to pay interest on purchase price's unpaid balance - held: no error in rectification order - appellant liable to pay interest - appeal dismissed.

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

[From Benchmark Wednesday, 14 June 2017]

Tran v Vo [2017] NSWCA 134

Court of Appeal of New South Wales

Macfarlan, Leeming & Payne JJA

Negligence - occupier's liability - workers compensation - respondent claimed damages for injury at appellants' premises when hand caught in juicing machine - respondent was appellant's casual employee but not rostered on for work on day of accident - primary judge gave verdict for respondent - whether respondent injured 'in the course of' her employment - whether respondent's injury was an injury 'arising out of' her employment - whether workers compensation payments gave rise to double compensation question - held: no error in primary judge's conclusions that injury did not occur in the course of respondent's employment and that the injury was not an injury arising out of respondent's employment - respondent had not been doubly compensated by payment of workers compensation - respondent liable to repay workers compensation payments - appeal dismissed.

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

[From Benchmark Friday, 16 June 2017]

Colley v Insurance Australia Group trading as NRMA Insurance [2017] NSWSC 714

Supreme Court of New South Wales

Latham J

Judicial review - motor accidents compensation - plaintiff sought judicial review of dismissal of application under s63 *Motor Accidents Compensation Act 1999* (NSW) for referral of medical

assessment to review panel of medical assessors - plaintiff challenged basis of rejection of injuries as caused by accident, application of test under s63(3), and adequacy of reasons - s5D *Civil Liability Act 2002* (NSW) - *Guidelines for the assessment of the degree of permanent impairment 2007* (NSW) - held: grounds of appeal failed - summons dismissed.

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

[From Benchmark Tuesday, 13 June 2017]

Al Muderis v Duncan (No 3) [2017] NSWSC 726

Supreme Court of New South Wales

Rothman J

Damages - aggravated damages - defamation - plaintiff orthopaedic specialist operated on second defendant - second defendant alleged complications with surgery which did not 'withstand scrutiny' and vilified plaintiff in series of publications - first defendant joined in vilification - plaintiff sought damages and final injunctive relief - Court found in plaintiff's favour by default judgment - determination of damages - grapevine effect - damage to reputation - level of hurt feelings - Pt 4, Div 3 *Defamation Act 2005* (NSW) - held: defendants liable to plaintiff for payment of damages including aggravated damages in sum of \$320,000 - second defendant liable to pay plaintiff additional sum of \$160,000 for further publications - permanent injunctive relief granted.

[Al Muderis](#) (I)

[From Benchmark Wednesday, 14 June 2017]

Issa v Osman (No.2) [2017] NSWSC 663

Supreme Court of New South Wales

Garling J

Contract - estoppel - equity - plaintiffs sought declaration contract for sale of property between them and first defendant purchaser was validly terminated, and order that second defendant deliver up vacant possession of property - plaintiffs also sought removal of second defendant's caveat and inquiry concerning damages - first defendant cross-claimed that contract was still on foot, valid and enforceable - second defendant claimed caveatable interest in property and declaration was equal to sum he invested in property - alternatively second defendant sought declaration plaintiffs owed him sum - common intention - whether implied term that purchase was subject to finance - whether plaintiffs should be estopped from issuing Notice to Complete - whether plaintiffs willing and able to complete - held: plaintiffs entitled to property and its possession - contract for sale of property validly terminated - no valid contract for sale of property in existence - second defendant not entitled to equitable relief for money spent on property during occupation of property - plaintiffs granted declaration and order - cross-claims dismissed - issue of inquiry as to damages stood over.

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

[From Benchmark Wednesday, 14 June 2017]

Smith v Smith [2017] NSWSC 408

Supreme Court of New South Wales

Lindsay J

Wills and estates - equity - fiduciary duties - power of attorney - first defendant was widow of deceased - second defendant was executor of deceased's estate - third and fourth defendants were first defendant's daughter by earlier marriage, and daughter's husband - plaintiffs were two adult children of deceased's first marriage - plaintiffs claimed first defendant should account to deceased's estate for dealings with deceased's property inter vivos while he was incapable of managing affairs - plaintiffs did not challenge validity of Will favouring first defendant's interests over theirs, validity of enduring power of attorney in first defendant's favour; or validity of enduring guardianship appointment - plaintiffs did not challenge first defendant's purported transactions *at law* but sought relief arising from breach of fiduciary duties - whether failure to act in deceased's best interests without unauthorised benefit to self - whether failure to keep her property separate from deceased - whether failure to keep reasonable accounts and records concerning deceased's property - held: first defendant, without authority, had appropriated deceased's property in breach of fiduciary duty as attorney - plaintiff did not consistently act for deceased's benefit - first defendant did not keep any auditable records - first defendant was liable to account to deceased's estate for mismanagement of deceased's property in breach of fiduciary obligations - defence of laches, acquiescence and delay not established - first, third and fourth defendants held residence, which had been bought with money given by first defendant to third and fourth defendants in breach of fiduciary duties, on trust for deceased's estate - residence was only known 'fund' against which plaintiffs' could enforce proprietary remedy.

[Smith](#) (B W WB) (B)

[From Benchmark Wednesday, 14 June 2017]

Waaka v Francois [2017] NSWSC 744

Supreme Court of New South Wales

Darke J

Estoppel - plaintiffs resided at property owned by defendant - arrangement had been made involving plaintiffs moving into property 'with a view to subsequently purchasing it' from defendant (arrangement) - plaintiffs alleged defendant bound by equitable proprietary estoppel to enter contract to sell property to plaintiffs - defendant denied plaintiffs' allegations and denied shed had acted unconscionably towards them - consideration of terms of arrangement between parties - elements of equitable estoppel by encouragement - circumstances in which proprietary estoppel would arise - held: plaintiffs did not establish equitable proprietary estoppel case against defendant - judgment for defendant.

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

[From Benchmark Thursday, 15 June 2017]

SW Investments NSW Pty Ltd v 16 Boondilla Pty Ltd [2017] NSWSC 762

Supreme Court of New South Wales

Darke J

Benchmark

Consumer law - misleading or deceptive conduct - first plaintiff and second defendant were to jointly purchase land from first defendant - plaintiffs contended involvement in initial transaction procured by misleading or deceptive conduct in contravention of *Competition and Consumer Act 2010* (Cth) or unconscionable conduct in contravention of Australian Consumer Law - plaintiff sought amount paid to first defendant - plaintiffs also alleged first of two subsequent agreements was unenforceable for uncertainty or incompleteness and the second subsequent agreement unenforceable because it was procured by misleading or deceptive, or unconscionable conduct - plaintiffs also claimed against fourth defendant for amount it received from amount received by first defendant - held: Court satisfied agreements were void and should be set aside - first plaintiff to be compensated for loss - orders made.

[SW Investments](#) (I B C G)

[From Benchmark Friday, 16 June 2017]

Imagebuild Group Pty Ltd v Fokust Pty Ltd [2017] VSCA 131

Court of Appeal of Victoria

Whelan JA & Almond AJA

Corporations - statutory demand - respondent obtained sum against defendant under s28R *Building and Construction Industry Security of Payment Act 2002* (Vic) - respondent served statutory demand under s459E *Corporations Act 2001* (Cth) - appellant sought to set aside statutory demand - originating process accompanied by affidavit of 'practice manager' at appellant's solicitors - Associate Judge dismissed application on basis affidavit was not a supporting affidavit under s459G - appellant sought to appeal - held: affidavit not filed and served within time - Court did not have power to extend time once 21 day period had elapsed - no error in decision of Associate Judge - appeal dismissed.

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

[From Benchmark Tuesday, 13 June 2017]

Caltex Australia Petroleum Pty Ltd v Contaminated Sites Committee [2017] WASC 155

Supreme Court of Western Australia

Chaney J

Administrative law - contaminated sites - the applicant sought writ of prohibition against respondent, to prevent it making decision pursuant to s36(2)(a) *Contaminated Sites Act 2003* (WA) (CS Act) concerning responsibility for remediation of land - whether respondent's power to make was confined to sites which are classified as 'contaminated - remediation required', or extended to decisions concerning responsibility for remediation of land with other classifications - held: respondent's capacity to determine responsibility depended on site's classification as 'contaminated - remediation required' - no application or decision made at time site was classified 'contaminated - remediation required' - applicant entitled to writ of prohibition.

[Caltex Australia Petroleum](#) (I B C G)

[From Benchmark Friday, 16 June 2017]

Korda v Aldi Foods Pty Ltd [2017] ACTSC 96

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Supreme Court of the Australian Capital Territory

Robinson AJ

Negligence - contributory negligence - plaintiff injured in incident at customer entry gates to store - plaintiff sued defendant as occupier - plaintiff obtained judgment which was reduced by 50% for contributory negligence - plaintiff appealed against finding of contributory negligence - defendant cross-appealed against finding of liability - ss102 & 168 *Civil Law (Wrongs) Act 2002* (ACT) - held: no error in finding that defendant breached duty for failing to install warning sign - not possible on evidence to infer that failure to install sign caused injury - cross-appeal allowed.

[Korda \(I\)](#)

[From Benchmark Friday, 16 June 2017]

CRIMINAL

Executive Summary

R v Krezic (QCA) - criminal law - murder - no error in refusal of separate trial, or admission of evidence of acts and conversation between appellant and covert operatives - jury's verdict not unreasonable - appeal dismissed

R v Huston (QCA) - criminal law - murder - failure to properly direct jury on common purpose question resulting in miscarriage of justice - appeal allowed - conviction set aside - appellant to be retried

Summaries With Link

R v Krezic [2017] QCA 122

Court of Appeal of Queensland

Gotterson & McMurdo JJA; Boddice J

Criminal law - murder - admissibility of evidence - jury found appellant and another guilty of murder - both sentenced to life imprisonment - appellant contended pre-trial judge erred in ruling as admissible evidence of conversations and acts between appellant and 'covert operatives' - appellant contended pre-trial judge also erred in refusing separate trial from co-accused, and that jury's verdict was unreasonable - whether pre-trial judge erred in admitting evidence 'when conversations and acts occurred in breach of the appellant's right to silence and in breach of relevant legislative provisions' - ss396, 405 & 406 *Police Powers and Responsibilities Act 2000* (Qld) - held: no error in refusal of application for a separate trial or exercise of discretion not to exclude evidence of covert operatives - jury's verdict not unreasonable - appeal dismissed.

[Krezic](#)

R v Huston [2017] QCA 121

Court of Appeal of Queensland

Gotterson & McMurdo JJA; Boddice J

Criminal law - murder - appellant and another were found guilty of murder - appellant contended there was miscarriage of justice arising from trial judge's directions about prosecution's reliance upon s8 *Criminal Code* (Qld) - whether jury misdirected by trial judge's use of word 'likely' instead of 'probable' - whether directions did not make clear to jury 'what evidence was relevant to the common purpose question' - held: trial judge failed to direct jury properly on common purpose question - miscarriage of justice arose because it was 'reasonably possible' that trial judge's failure to direct jury properly on common purpose question 'may have affected verdict' - appeal allowed - conviction set aside - appellant to be retried.

[Huston](#)



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“Dank fens of cedar; hemlock-branches gray”

By [Frederick Goddard Tuckerman](#)

from *Sonnets, First Series*

VI

Dank fens of cedar; hemlock-branches gray
With trees and trail of mosses, wringing-wet;
Beds of the black pitchpine in dead leaves set
Whose wasted red has wasted to white away;
Remnants of rain and droppings of decay, —
Why hold ye so my heart, nor dimly let
Through your deep leaves the light of yesterday,
The faded glimmer of a sunshine set?
Is it that in your darkness, shut from strife,
The bread of tears becomes the bread of life?
Far from the roar of day, beneath your boughs
Fresh griefs beat tranquilly, and loves and vows
Grow green in your gray shadows, dearer far
Even than all lovely lights and roses are?

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