

Friday, 22 November 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)

Frugniet v Tax Practitioners Board (FCAFC) - administrative law - Administrative Appeals Tribunal affirmed Board's termination of appellant's registration as tax agent and five-year prohibition on reapplication for registration - primary judge dismissed appeal - appeal dismissed (B G)

Technological Resources Pty Limited v Tettman (FCA) - patent - respondent opposed appellant's patent application - respondent did not discharge onus to prove patent, if granted, would be invalid - appeal allowed (I B)

Gordon v Lever (No 2) (NSWCA) - real property - easement - appeal against decision granting easement 'on terms' - appeal allowed in part (I B C)

Olsen v Olsen & Ors (NSWCA) - wills and estates - succession - bias - dismissal of summons seeking further provision from deceased's estate - appeal dismissed (B)

Visual Building Construction Pty Ltd v Armitstead (No 2) (NSWCA) - contract - no error in primary judge's finding that termination of building contract was valid - appeal dismissed (B C I G)

Omega Plumbing Pty Ltd v Harbour Radio Pty Ltd t/as 2GB and 2GB 873 (NSWSC) - injurious falsehood - plaintiff sought interlocutory injunction preventing matters' 'further publication' pending proceedings' 'final hearing' - interlocutory injunction granted (I)

Estate Whiteway (NSWSC) - wills and estates - succession - adult child of deceased sought family provision from deceased's estate - family provision order granted (B)

In the matter of the C.E. Brenchley Family Trust (NSWSC) - trusts - trustee sought rectification of trust deed or judicial advice - Court satisfied to rectify trust deed - judicial advice given (B)

NEXTracker Inc v ACN 003 905 093 Pty Ltd (formerly RCR O'Donnell Griffin Pty Ltd) (In Liquidation) (NSWSC) - contract - plaintiff sought relief giving effect to its contention concerning time at which title to equipment 'passed or was to pass' under contract - amended summons dismissed (B C I)

Anedda v Horsey (VSC) - negligence - motor vehicle collision - collision between car and 'sweeping truck' - defendant driver of sweeping truck not negligent - proceeding dismissed (I)

Barfly's Nominees Pty Ltd v Klinger Partners (a firm) (VSCA) - negligence - solicitors' duties - leases and tenancies - primary judge dismissed appellant's claims against respondent in negligence and for breach of contract - appeal allowed (I B G)

Hooley v Transport Accident Commission (VSCA) - accident compensation - 'serious injury' - primary judge refused applicant leave to commence common law proceeding seeking damages for injury suffered in motor vehicle collision - appeal allowed (I)

State of Queensland v Seltsam Pty Limited (QSC) - workers compensation - WorkCover paid compensation to worker under *Workers' Compensation and Rehabilitation Act 2003* (Qld) - WorkCover claimed against asbestos supplier - asbestos supplier sought to join appellant as third party, seeking 'equitable contribution' - primary judge erred in dismissing appellant's summary judgment application - appeal allowed (I B C G)

Stirling McGregor v Tilt Renewables Australia Pty Ltd & Ors (SASCFC) - environment and planning - Court confirmed development approval for wind farm's development - appeal dismissed (I B C G)

Fox v Channel Seven Adelaide Pty Ltd & Ors (SASC) - defamation - 'disclosure obligations' - appeal against dismissal of application brought under r145 *Supreme Court Civil Rules 2006* (SA) - appeal dismissed (I)

Bollen (SASC) - wills and estates - probate - parents of son sought permission to swear son's death, admission to proof of 'will instructions', and grant of probate of will instructions - orders granted (B)

Zorostar Pty Ltd v Arian Investments Pty Ltd (WASC) - real property - application to lodge 'second caveat' to preserve alleged 'equitable proprietary interests' in property - application dismissed (B C)

Connell v Australian Capital Territory (ACTSC) - privilege - client legal privilege - medical negligence - plaintiff sought access to 'unredacted version of an investigative report prepared for the defendant' - defendant not required to provide unredacted version - redacted version's disclosure did not entail waiver of client legal privilege (I)

Summaries With Link (Five Minute Read)

Frugtniet v Tax Practitioners Board [2019] FCAFC 193

Full Court of the Federal Court of Australia

Perry, Moshinsky & Lee JJ

Administrative law - Tax Practitioners Board (Board) terminated appellant's registration and tax agent and precluded appellant's reapplication for five years - Administrative Appeals Tribunal affirmed Board's decision - primary judge dismissed appeal - appellant contended Tribunal breached procedural fairness, made findings lacking evidence 'or any probative evidence', took irrelevant considerations into account and erroneously found lack of jurisdiction to determine validity of decision of Board - s44 *Administrative Appeals Tribunal Act 1975* (Cth) - ss40-5(1)(b) *Tax Agent Services Act 2009* (Cth) - held: grounds of appeal lacked merit - appeal dismissed.

[Frugtniet](#) (B G)

[From Benchmark Monday, 18 November 2019]

Technological Resources Pty Limited v Tettman [2019] FCA 1889

Federal Court of Australia

Jagot J

Patent - appellant applied for patent ('171 application') - respondent, before Commissioner of Patents, succeeded in opposition to 171 application - Commonwealth Scientific and Industrial Research Organisation (CSIRO) also successful in opposition to 171 application - appellant granted leave to amend and subsequently amended 171 application's claims - respondent amended its 'grounds and particulars' of opposition - whether opponent satisfied Court that patent, if granted, would be invalid - 'the skilled addressee' - 'the common general knowledge' - 'manner of manufacture' - 'novelty' - 'inventive step' - held: respondent did not discharge onus to prove patent, if granted, would be invalid - appeal allowed.

[Technological](#) (I B)

[From Benchmark Tuesday, 19 November 2019]

Gordon v Lever (No 2) [2019] NSWCA 275

Court of Appeal of New South Wales

Bell P, Payne JA & Emmett AJA

Real property - easements - first and second appellants (appellants) sought easement - primary judge granted easement - easement granted 'on terms' limiting circumstances 'in which persons could avail themselves of' it - appellants appealed - 'key issue' concerned easement's terms - whether terms 'not practically or legally workable' or 'not reasonably so' - whether terms were 'uncertain in their practical operation' - whether easement was 'reasonably necessary *all of the time*' not some of the time - whether primary judge should not have imposed terms on grant of easement - ss88K & 89 *Conveyancing Act 1919* (NSW) - *Crown Land Management Act 2016* (NSW) - held: appeal allowed in part.

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

[From Benchmark Tuesday, 19 November 2019]

Olsen v Olsen & Ors [2019] NSWCA 278

Court of Appeal of New South Wales

Meagher & White JJA; Emmett AJA

Wills and estates - succession - bias - appellant was son of deceased by deceased's first wife - will made no provision for appellant - deceased left entire estate to second wife, and if second wife pre-deceased him, to children of deceased and second wife - appellant sought order for family provision under s59 *Succession Act 2006* (NSW) - primary judge dismissed summons - appellant appealed, contending primary judge erred in dismissing his application, that judgment was 'vitiated for actual or apprehended bias' and that primary judge failed to give application 'genuine consideration' - held: appeal dismissed.

[View Decision](#) (B)

[From Benchmark Wednesday, 20 November 2019]

Visual Building Construction Pty Ltd v Armitstead (No 2) [2019] NSWCA 280

Court of Appeal of New South Wales

Bell ACJ; Macfarlan JA & White JA

Contract - primary judge found respondents 'validly terminated a twice varied building contract' with appellant - appellant appealed, contending primary judge erred in finding valid termination of contract - appellant contended termination invalid because there was failure to provide '10 business days' notice' in which to remedy defaults which Notice of Termination detailed - respondents, by notice of contention, contended there were additional grounds in support of finding that contract was validly terminated - whether contract required provision of 10 business days' notice prior to termination - whether, if such requirement existed, it applied only if default 'capable of being remedied' within period of 10 business days - held: no error in primary judge's decision - appeal dismissed.

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

[From Benchmark Friday, 22 November 2019]

Omega Plumbing Pty Ltd v Harbour Radio Pty Ltd t/as 2GB and 2GB 873 [2019] NSWSC 1576

Supreme Court of New South Wales

Davies J

Injurious falsehood - interlocutory injunction - plaintiffs claimed against defendants for injurious falsehood, seeking damages and injunction against matters' further publication' - plaintiff sought interlocutory injunction preventing further publication pending proceedings' final hearing' - whether 'prima facie case on malice' - balance of convenience - held: Court satisfied malice could be inferred prima facie from 'publications already made' - balance of convenience strongly in favour of plaintiff - interlocutory injunction granted.

[View Decision](#) (I)

[From Benchmark Monday, 18 November 2019]

Estate Whiteway [2019] NSWSC 266

Supreme Court of New South Wales

Lindsay J

Wills and estates - succession - plaintiff was child of deceased's first marriage - deceased's estate was principally distributed to plaintiff's stepmother (deceased's widow) - deceased's widow 'died without issue' - plaintiff sought family provision 'vis a vis' deceased's widow - whether to grant extension of time to make application - whether plaintiff was "eligible person" - whether deceased made adequate provision for 'plaintiff's proper maintenance, education and advancement in life' - determination of provision which Court should make - *Family Provision Act 1982* (NSW) - *Succession Act 2006* (NSW) - held: plaintiff entitled to 'modest provision' from deceased's notional estate - family provision order granted.

[View Decision](#) (B)

[From Benchmark Thursday, 21 November 2019]

In the matter of the C.E. Brenchley Family Trust [2019] NSWSC 1602

Supreme Court of New South Wales

Sackar J

Trusts - trust deed - rectification - judicial advice - trustee sought trust deed's rectification to delete words defining "distribution date" - alternatively trustee sought judicial advice concerning whether 'power to vary' could 'be used to extend the distribution date' - s63 *Trustee Act 1925* (NSW) - whether rectification appropriate - whether trust deed reflected each party's intention in creating trust deed - proper law of trust - whether Court had jurisdiction to grant relief - 'rule against remoteness of vesting' - *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 - held: Court satisfied to rectify will - judicial advice given.

[View Decision](#) (B)

[From Benchmark Thursday, 21 November 2019]

NEXTracker Inc v ACN 003 905 093 Pty Ltd (formerly RCR O'Donnell Griffin Pty Ltd) (In Liquidation) [2019] NSWSC 1604

Supreme Court of New South Wales

Ball J

Contract - parties entered contract for plaintiff's supply of 'equipment' for use in solar farm's construction - proceedings concerned question of time at which, under contract, title to equipment 'passed or was to pass' - plaintiff contended title was to pass when defendant paid for equipment and that payment had not occurred - plaintiff sought 'declarations and orders' giving effect to its contention - defendant contended title passed when equipment 'loaded for shipping at the point of origin' and plaintiff supplied 'certain documents' and that those events had occurred - construction of contract - *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 - held: amended summons dismissed.

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

[From Benchmark Friday, 22 November 2019]

Anedda v Horsey [2019] VSC 729

Supreme Court of Victoria

Zammit J

Negligence - motor vehicle collision - plaintiff's vehicle collided with 'sweeping truck' which defendant was driving - plaintiff sued defendant, claiming collision caused by defendant's negligence - defendant denied negligence, claiming collision occurred because plaintiff's vehicle veered into defendant's lane - parties' competing evidence and versions of events - 'physical evidence' at 'collision scene' - expert evidence - 'standard of proof' - s140 *Evidence Act 2008* (Vic) - *Briginshaw v Briginshaw* [1938] HCA 34 - *NOM v DPP* [2012] VSCA 198 - held: plaintiff's vehicle was on wrong side of road when impact occurred - defendant not negligent.

[Anedda](#) (I)

[From Benchmark Monday, 18 November 2019]

Barfly's Nominees Pty Ltd v Kliger Partners (a firm) [2019] VSCA 256

Court of Appeal of Victoria

Tate, Kyrou & Emerton JJA

Negligence - solicitors' duties - leases and tenancies - appellant claimed against respondent in negligence and for breach for contract on basis of advice respondent gave appellant concerning prospects of its 'contractual causes of action' under leases - primary judge dismissed proceeding - appellant appealed - whether respondent's advice that appellant settle Victorian Civil & Administrative Tribunal proceeding negligent and/or in breach of retainer - whether erroneous finding that appellant's claims against landlords 'unrecoverable' due to 'changes in the retail tenancies legislation' - whether erroneous conclusion appellant had not relied on respondent's advice in settling proceeding - whether primary judge should have valued loss of damages or loss of opportunity to pursue damages - appeal allowed - matter remitted.

[Barfly's](#) (I B G)

[From Benchmark Tuesday, 19 November 2019]

Hooley v Transport Accident Commission [2019] VSCA 263

Court of Appeal of Victoria

Tate, Beach & Osborn JJA

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Accident compensation - 'serious injury' - applicant injured in motor vehicle collision sought leave pursuant to s93(4)(d) *Transport Accident Act 1986* (Vic) (TAA) to bring common law proceeding for damages - primary judge dismissed application - applicant sought to appeal - whether erroneous application of *Humphries v Poljak* [1992] VicRp 58 - adequacy of reasons - whether primary judge should have found application satisfied definition of 'serious injury' in s93(17) TAA - held: case was 'borderline' but Court satisfied that applicant's injury was 'very considerable' and 'more than significant or marked' - appeal allowed - applicant granted leave to commence common law proceeding.

[Hooley](#) (I)

[From Benchmark Wednesday, 20 November 2019]

State of Queensland v Seltsam Pty Limited [2019] QCA 248

Court of Appeal of Queensland
Fraser, Morrison & McMurdo JJA

Workers compensation - worker 'worked for three employers' - appellant was worker's first employer - worker claimed he developed mesothelioma following exposure to asbestos - worker claimed compensation against second respondent (WorkCover) which accepted claim and paid amount to worker under *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCRA Act) - WorkCover claimed against first respondent asbestos supplier to recover compensation paid to worker - first respondent sought to join appellant as third party, seeking 'equitable contribution' from appellant - appellant sought summary judgment, contending 'there was no cause of action' against it' - primary judge dismissed application - appellant sought to appeal - whether first respondent could maintain equitable compensation claim against appellant for liability to second respondent under s207B(7) WCRA Act - held: appeal allowed.

[State of Queensland](#) (I B C G)

[From Benchmark Monday, 18 November 2019]

Stirling McGregor v Tilt Renewables Australia Pty Ltd & Ors [2019] SASCFC 142

Full Court of the Supreme Court of South Australia
Kourakis CJ; Kelly & Hinton JJ

Environment and planning - Environment, Resources and Development Court confirmed development approval for wind farm's development by Council - appellant was objector to development approval - appellant challenged findings and reasons' adequacy concerning effect of wind farm's noise on 'health and amenity of nearby residents' and finding of 'no credible evidence' that development would be non-compliant with *Environment Protection (Noise) Policy 2007* - appellant also contended '2009 Guidelines' concerning noise emissions by wind farms 'were flawed' and that Court should have place no weight, or little weight on 2009 Guidelines - appellant also contended Court had mistakenly found expert's experience 'did not include undertaking noise predictions' - held: appeal dismissed.

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

[From Benchmark Friday, 22 November 2019]

Fox v Channel Seven Adelaide Pty Ltd & Ors [2019] SASC 188

Supreme Court of South Australia

Auxiliary Justice David

Defamation - appellant appealed against Master's dismissal concerning interlocutory application brought under r145 *Supreme Court Civil Rules 2006* (SA) (Rules) - application was in relation to 'disclosure obligations' - whether 'raw footage' was 'directly relevant' to proceedings - whether 'impossible to assess' respondents' defence without having 'access to' raw footage - reasonableness of respondents' searches - r136 Rules - held: appeal dismissed.

[Fox](#) (I)

[From Benchmark Wednesday, 20 November 2019]

Bollen [2019] SASC 197

Supreme Court of South Australia

Bampton J

Wills and estates - probate - parents of son sought, pursuant to r68 *Probate Rules 2015* (SA), permission to swear son's death - parents also sought order under s12(2) *Wills Act 1936* (SA) for admission of 'document comprising will instructions' to proof as son's last will ('will instructions') - parents also sought grant of probate of will instructions 'as substitute executors described in the will instructions' - held: orders granted.

[Bollen](#) (B)

[From Benchmark Thursday, 21 November 2019]

Zorostar Pty Ltd v Arian Investments Pty Ltd [2019] WASC 415

Supreme Court of Western Australia

Smith J

Real property - caveat - applicant sought leave to lodge second caveat under s138D *Transfer of Land Act 1893* (WA) - second caveat was a 'subject to claim' caveat over property which parties purchased as tenants in common - applicant had entered agreement for sale of its interest to respondent - parties signed 'transfer instrument' - respondent was property's 'sole registered proprietor' - applicant failed to obtain for extension of caveat to protect its interest as 'unpaid vendor' in property - applicant sought to lodge second caveat to preserve alleged 'equitable proprietary interests' in property until determination of proceedings between parties - whether 'prima facie case' - whether 'serious question to be tried' - balance of convenience - held: leave to lodge second caveat refused - application dismissed.

[Zorostar](#) (B C)

[From Benchmark Thursday, 21 November 2019]

Connell v Australian Capital Territory [2019] ACTSC 307

Supreme Court of the Australian Capital Territory

Mossop J

Privilege - medical negligence - plaintiff sought access to 'unredacted version of an investigative report prepared for the defendant' (report) - whether defendant required to give plaintiff



unredacted version of report - whether client legal privilege remained in report's disclosed 'redacted version' - *Civil Law (Wrongs) Act 2002 (ACT)* - held: defendant not obliged to provide unredacted version of report - client legal privilege in redacted version not 'completely abrogated' - plaintiff entitled to use report for proceedings' purposes - plaintiff not entitled to tender report as it was 'disclosed under compulsion of law' and such disclosure did not entail client legal privilege's waiver.

[Connell \(I\)](#)

[From Benchmark Wednesday, 20 November 2019]

CRIMINAL

Executive Summary

Summaries With Link



Benchmark

To Flush, My Dog

By: Elizabeth Barrett Browning
LOVING friend, the gift of one,
Who, her own true faith, hath run,
Through thy lower nature ;
Be my benediction said
With my hand upon thy head,
Gentle fellow-creature !

Like a lady's ringlets brown,
Flow thy silken ears adown
Either side demurely,
Of thy silver-suited breast
Shining out from all the rest
Of thy body purely.

Darkly brown thy body is,
Till the sunshine, striking this,
Alchemize its dulness, —
When the sleek curls manifold
Flash all over into gold,
With a burnished fulness.

Underneath my stroking hand,
Startled eyes of hazel bland
Kindling, growing larger, —
Up thou leapest with a spring,
Full of prank and curvetting,
Leaping like a charger.

Leap ! thy broad tail waves a light ;
Leap ! thy slender feet are bright,
Canopied in fringes.
Leap — those tasselled ears of thine
Flicker strangely, fair and fine,
Down their golden inches

Yet, my pretty sportive friend,
Little is 't to such an end
That I praise thy rareness !
Other dogs may be thy peers
Haply in these drooping ears,



Benchmark

And this glossy fairness.

But of thee it shall be said,
This dog watched beside a bed
Day and night unwearied, —
Watched within a curtained room,
Where no sunbeam broke the gloom
Round the sick and dreary.

Roses, gathered for a vase,
In that chamber died apace,
Beam and breeze resigning —
This dog only, waited on,
Knowing that when light is gone,
Love remains for shining.

Other dogs in thymy dew
Tracked the hares and followed through
Sunny moor or meadow —
This dog only, crept and crept
Next a languid cheek that slept,
Sharing in the shadow.

Other dogs of loyal cheer
Bounded at the whistle clear,
Up the woodside hieing —
This dog only, watched in reach
Of a faintly uttered speech,
Or a louder sighing.

And if one or two quick tears
Dropped upon his glossy ears,
Or a sigh came double, —
Up he sprang in eager haste,
Fawning, fondling, breathing fast,
In a tender trouble.

And this dog was satisfied,
If a pale thin hand would glide,
Down his dewlaps sloping, —
Which he pushed his nose within,
After, — platforming his chin



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On the palm left open.

This dog, if a friendly voice
Call him now to blyther choice
Than such chamber-keeping,
Come out ! ' praying from the door, —
Presseth backward as before,
Up against me leaping.

Therefore to this dog will I,
Tenderly not scornfully,
Render praise and favour !
With my hand upon his head,
Is my benediction said
Therefore, and for ever.

And because he loves me so,
Better than his kind will do
Often, man or woman,
Give I back more love again
Than dogs often take of men, —
Leaning from my Human.

Blessings on thee, dog of mine,
Pretty collars make thee fine,
Sugared milk make fat thee !
Pleasures wag on in thy tail —
Hands of gentle motion fail
Nevermore, to pat thee !

Downy pillow take thy head,
Silken coverlid bestead,
Sunshine help thy sleeping !
No fly 's buzzing wake thee up —
No man break thy purple cup,
Set for drinking deep in.

Whiskered cats aointed flee —
Sturdy stoppers keep from thee
Cologne distillations ;
Nuts lie in thy path for stones,
And thy feast-day macaroons



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Turn to daily rations !

Mock I thee, in wishing weal ? —
Tears are in my eyes to feel
Thou art made so straightly,
Blessing needs must straighten too, —
Little canst thou joy or do,
Thou who lovest greatly.

Yet be blessed to the height
Of all good and all delight
Pervious to thy nature, —
Only loved beyond that line,
With a love that answers thine,
Loving fellow-creature !

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

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