

Friday, 23 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)

Morris Finance Ltd v Brown (FCAFC) - bankruptcy - plaintiff did not require leave under s58(3)(b) *Bankruptcy Act 1966* (Cth) to proceed with application for possession of property - appeal allowed (I B C G)

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (FCAFC) - representative proceedings - class closure order - opt out notice - leave to appeal from interlocutory decisions refused (I B C G)

Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd (FCAFC) - corporations - 'market manipulation provisions' - separate question - Chapter 2 Criminal Code did not apply to proceedings brought for contravention of civil provisions (I B C G)

Szeto v Situ (NSWCA) - equity - trusts and trustees - evidence - erroneous failure to take into account evidence of appellant's financial contribution to purchase of property - appeal allowed - retrial (I B C G)

Springfield v Duncombe (NSWCA) - negligence - appellant injured when she fell and hit head at house owned by sister - sister not liable - no error in trial judge's factual findings - appeal dismissed (I B C G)

Estate of Beryl Lee Hordern (Deceased); Homersham v Carr (NSWSC) - wills and estates -

deceased did not have testamentary capacity at time of making 2004 will - plaintiff granted administration with will annexed in solemn form in respect of a will deceased made in 2001 (B)

The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) (NSWSC) - building and construction - contract - agency - evidence - owners' corporation's claim in respect of defects in development dismissed (I B C G)

Piazza Trevi v Cromwell BT Pty Ltd as custodian for the Cromwell Symantec House Trust. (NSWSC) - contract - retail lease - failure to exercise option for renewal of lease by operative date - no basis to grant plaintiff further five year lease (I B C G)

In the matter of South Head & District Synagogue (Sydney) (Administrators appointed) (NSWSC) - contract - corporations - equity - injunction - administrators' termination of Rabbi's employment was wrongful dismissal - contract remained on foot - administrators restrained from giving effect to decision (I B C G)

Fuji Xerox Australia Pty Ltd v Xtream Pty Ltd (VSC) - contract - deed of settlement and release - plaintiff entitled to sum and orders that defendants provide properly executed mortgages (I B C G)

Nurisvan Investment Ltd v Anyoption Holdings (VSCA) - contract - deed - specific performance - Heads of Agreement was not a contract between parties to enter Share Sale Agreement - appeal allowed (I B C G)

Fairbank's Selected Seed Co Pty Ltd v Amar Produce Pty Ltd (VSCA) - trade practices - oral representations concerning suitability of seeds for crop - appellant engaged in misleading or deceptive conduct - appeal dismissed (I B C G)

Christos v Curtin University of Technology (WASCA) - negligence - psychiatric injury - employer's grievance and dispute resolution policies - foreseeability - causation - employer not liable - appeal dismissed (I B C G)

Quantum Asset Management Pty Ltd v Love Properties (WA) Pty Ltd (WASC) - summary judgment - contract - loan - default on facility deed - interest provision under facility deed was not a penalty - appeal dismissed (I B C G)

Summaries With Link (Five Minute Read)

Morris Finance Ltd v Brown [2017] FCAFC 97

Full Court of the Federal Court of Australia

Beach, Markovic & Moshinsky JJ

Bankruptcy - applicant claimed to be equitable chargee of land owned by first and second respondents pursuant to commercial goods lease between applicant and first respondent - second respondent gave guarantee of first respondent's obligations under lease - first respondent became bankrupt - third respondent was trustee in bankruptcy - second respondent also became bankrupt - fourth respondent was second respondent's trustee in bankruptcy - amount owed to applicant remained unpaid - applicant sought relief in Supreme Court of New South Wales under s103(2) *Conveyancing Act 1919* (NSW) in order to sell land - applicant sought to appeal against primary judge's determination that, due to respondents' bankruptcies, it required leave under s58(3)(b) *Bankruptcy Act 1966* (Cth) to proceed with application for possession - 'the right of a secured creditor to realize or otherwise deal with his or her security' - ss58(3)(b) & 58(5) - held: judicial process to enforce equitable charge not excluded from s58(5) Bankruptcy Act, which operated as an exception to s58(3)(b) - primary judge erred in finding leave required in order to proceed - appeal allowed - primary judge's answer to separate question set aside.

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

[From Benchmark Wednesday, 21 June 2017]

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited [2017] FCAFC 98

Full Court of the Federal Court of Australia

Jagot, Yates & Murphy JJ

Representative proceedings - applicant sought to appeal against interlocutory orders in shareholder class action which second respondent brought against first respondent (Jones action) - applicant was class member of Jones action - applicant was also representative applicant in competing shareholder class action against first respondent which was permanently stayed as abuse of process - applicant sought, representing class members in Jones action, to appeal against 'class closure order' and setting out of form of 'opt out notice', and against order dismissing applicant's application seeking that class members be sent 'supplementary opt out notice' - whether opt-out notice 'materially misleading' - discretion to make class closure order - held: decisions not attended by sufficient doubt to warrant Full Court's reconsideration - even if decisions assumed to be wrong, no substantial injustice suffered by applicant and class members - leave to appeal refused.

[Melbourne City Investments](#) (I B C G)

[From Benchmark Thursday, 22 June 2017]

Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd [2017] FCAFC 100

Full Court of the Federal Court of Australia

Allsop CJ; Middleton & Bromwich JJ

Corporations - Australian Securities and Investments Commission alleged contraventions of 'market manipulation provisions' of *Corporations Act 2001* (Cth) against defendants - ASIC sought determination of separate question: 'In proceedings brought for the imposition of a civil

penalty for a contravention of s 1041A or s 1041B of the Corporations Act 2001 (Cth) is Chapter 2 of the Criminal Code being the Schedule to the Criminal Code Act 1995 (Cth) engaged, subject to any contrary indication in the Corporations Act 2001 as to any specific provision thereof?' - held: Chapter 2 Criminal Code did not apply to proceedings brought for contravention of civil provision including civil penalty provision - separate question answered in the negative.

[Australian Securities and Investments Commission](#) (I B C G)

[From Benchmark Friday, 23 June 2017]

Szeto v Situ [2017] NSWCA 136

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Leeming JJA

Equity - trusts and trustees - evidence - appellant claimed 50% interest in property of which respondent was registered proprietor - appellant contended that prior to property's purchase she and respondent agreed it would be registered in respondent's name but she would have equal interest in it - appellant contended she paid deposit and shortfall - respondent contended arrangement with appellant was that she would sign loan contract to help him get loan, that he was responsible for property's purchase, and that appellant would have no interest in property - appellant alleged a 'common intention trust' or benefit of resulting trust arising from her contribution to property's acquisition - primary judge dismissed appellant's claim, finding she had no interest in property - appellant appealed - held: primary judge erroneously failed to address evidence of financial contributions appellant made to property's purchase price - retrial ordered.

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

[From Benchmark Monday, 19 June 2017]

Springfield v Duncombe [2017] NSWCA 137

Court of Appeal of New South Wales

Basten JA, Emmett AJA & Adamson J

Negligence - appellant suffered severe blow to head while returning from sister's apartment to apartment she occupied in house owned by sister - injury occurred when appellant fell and struck head on vehicle parked in garage - appellant contended sister negligent for failure to install balustrade on side of steps facing garage - trial judge dismissed appellant's claim against sister on basis she had not established breach of duty - ss5B, 5D, 5E, 5M & 32 *Civil Liability Act 2002* (NSW) - whether failure to give reasons concerning competing inferences - whether misdirection concerning burden of proof - whether erroneous failure to be satisfied as to mechanism of fall - whether erroneous failure to find door's position in relation to timber stairs created risk of loss of balance, and that there was a defect in stairs - held: no error established in respect of trial judge's factual findings - appeal dismissed.

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

[From Benchmark Monday, 19 June 2017]

Estate of Beryl Lee Hordern (Deceased); Homersham v Carr [2017] NSWSC 753

Supreme Court of New South Wales

Robb J

Wills and estates - testamentary capacity - proceedings concerned sole issue whether deceased had testamentary capacity when she executed last will (2004 will) - parties agreed that if deceased found to have testamentary capacity, probate of 2004 will should be granted - whether deceased comprehended and appreciated claims on her bounty - whether insane delusion - principles in *Banks v Goodfellow* (1870) LR 5 QB 549 - held: Court not satisfied that 2004 will was 'the will of a free and capable testator' - plaintiff granted administration with will annexed in solemn form in respect of a will deceased made in 2001.

[Estate of Beryl Lee \(B\)](#)

[From Benchmark Monday, 19 June 2017]

The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) [2017] NSWSC 739

Supreme Court of New South Wales

Ball J

Building and construction - agency - evidence - equity - plaintiff was owners corporation in respect of development involving conversion of warehouse owned by third and fourth defendants - builder was second defendant - first defendant provided home warranty insurance concerning works - fifth defendant was developer whose sole directors were third and fourth defendants - plaintiff claimed for defects in development - whether third and fourth defendants liable for defects on basis they were 'developers' under s3A *Home Building Act 1989* (NSW) - whether, if third and fourth defendants liable, liability extended to certain defects subject claim - whether third and fourth defendants were persons 'on whose behalf' building work done - whether third and fourth defendants were a party to building contract - whether loss claimed by plaintiff resulted from breach of statutory warranties - admissibility of evidence - s76A(1) *Environmental Planning and Assessment Act 1979* (NSW) - s69 *Evidence Act 1995* (NSW) - ss3A, 18B & 18C *Home Building Act 1989* (NSW) - held: if third and fourth defendants were developers, they would be liable to plaintiff breaches of statutory warranties to extent builder liable to them for breaches - claim against third and fourth defendants dismissed - matter to be relisted for determination of outstanding issues.

[The Owners Strata Plan](#) (I B C G)

[From Benchmark Tuesday, 20 June 2017]

Piazza Trevi v Cromwell BT Pty Ltd as custodian for the Cromwell Symantec House Trust. [2017] NSWSC 794

Supreme Court of New South Wales

Sackar J

Contract - retail lease - plaintiff leased premises from defendant for five year term - defendant issued notice to plaintiff to vacate possession of premises - plaintiff contended that, pursuant to option, it was entitled to further five year lease - plaintiff claimed it exercised option or that

defendant waived time for exercise of option, or that defendant estopped from relying on any failure to exercise option - plaintiff also claimed defendant engaged in unconscionable and/or misleading and deceptive conduct under Australian Consumer Law (ACL) and *Retail Leases Act 1994* (NSW) (RLA) - plaintiff sought grant of new five year term by defendant by specific performance, under s237(1) Australian Consumer Law and/or s72 RLA - credit - relief against forfeiture - held: plaintiff failed to validly exercise option by operative date - Court did not accept plaintiff should be granted further five year lease on basis of waiver, estoppel, by specific performance, or under ACL or RLA - relief against forfeiture not enlivened and even if it were enlivened there would not be grounds for relief.

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

[From Benchmark Wednesday, 21 June 2017]

In the matter of South Head & District Synagogue (Sydney) (Administrators appointed) [2017] NSWSC 823

Supreme Court of New South Wales

Brereton J

Contract - corporations - equity - injunction - plaintiffs were administrators of company (South Head & District Synagogue) - defendant was Chief Rabbi of synagogue - terms of engagement between Rabbi and company set out in contract which provided that 'relationship between the Rabbi and the congregation shall be defined in accordance with Halacha', and that 'irreconcilable disputes between Rabbi and congregation shall be decided according to Halacha' - administrators decided company had insufficient funds to pay defendant under contract during administration period, and terminated defendant's employment on grounds of redundancy - defendant contended contract remained on foot and that his life tenure as Rabbi of Synagogue (Hazakah) could only be terminated by judgment of a Din Torah - held: defendant's contract included Hazakah - company not entitled to terminate Rabbi's employment in absence of finding of a Din Torah - termination was wrongful dismissal - contract remained on foot - administrators restrained from giving effect to decision - orders made.

[In the matter of South Head and District Synagogue](#) (I B C G)

[From Benchmark Friday, 23 June 2017]

Fuji Xerox Australia Pty Ltd v Xtream Pty Ltd [2017] VSC 333

Supreme Court of Victoria

Kennedy J

Contract - plaintiff sought judgment pursuant to Deed of Settlement and Release in sum of \$1,910,851.19, and orders that second and third defendants 'provide properly executed mortgages' - construction of deed - whether appropriate to enter judgment for sum and orders for provision of mortgages - whether clauses of deed constituted penalty - whether appropriate to 'summarily enforce the compromise through the existing proceeding' - 'Roberts jurisdiction' - *Roberts v Gippsland Agricultural and Earthmoving Contracting Co Pty Limited* [1956] VLR 555 - held: clauses did not give rise to penalty - plaintiff entitled to relief sought - Court to hear parties on precise form of order.

[Fuji Xerox](#) (I B C G)

[From Benchmark Friday, 23 June 2017]

Nurisvan Investment Ltd v Anyoption Holdings [2017] VSCA 141

Court of Appeal of Victoria

Osborn, Santamaria & Kaye JJA

Contract - deed - specific performance - first applicant was second applicant's sole shareholder - second applicant was authorised to carry on a financial services business - parties negotiated with view to respondent's purchase from first applicant of its shares in second applicant - second applicant and respondent executed 'Binding Heads of Agreement' - first applicant named as party but did not execute agreement - document provided for parties' entry into 'Share Purchase Agreement' - first applicant advised respondent it did not consider itself bound by any agreement with respondent and was not obliged to comply with Heads of Agreement - respondent sought specific performance of Heads of Agreement, or draft Share Transfer Agreement - primary judge ordered specific performance of Share Sale Agreement on terms in Heads of Agreement - held: Heads of Agreement was not a contract between parties to enter Share Sale Agreement, but an agreement between parties to negotiate in good faith concerning Share Sale Agreement's conclusion - appeal allowed.

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

[From Benchmark Tuesday, 20 June 2017]

Fairbank's Selected Seed Co Pty Ltd v Amar Produce Pty Ltd [2017] VSCA 139

Court of Appeal of Victoria

Maxwell P; Whelan & Santamaria JJA

Trade practices - misleading or deceptive conduct - oral representations - respondent horticulturalist sourced broccoli seedlings from nursery which sourced seeds from appellant - respondent sought advice from nursery as to which seeds were appropriate to plant as seedlings - trial judge found appellant told nursery that 'Ironman' seed was suitable for planting, and that nursery conveyed information to respondent, which directed nursery to purchase and propagate Ironman seeds - nursery had then supplied seedlings to respondent - crop failed - trial judge found appellant engaged in misleading and deceptive conduct by telling nursery that Ironman was suitable for planting and that respondent relied on advice suffering loss - trial judge awarded damages to respondent - ss52 & 53(c) *Trade Practices Act 1974* (Cth) - held: no error in trial judge's findings that appellant conveyed to nursery that Ironman seed suitable for crop, and that nursery conveyed information to respondent - appeal dismissed.

[Fairbank's](#) (I B C G)

[From Benchmark Tuesday, 20 June 2017]

Christos v Curtin Univeristy of Technology [2017] WASCA 110

Court of Appeal Western Australia

Murphy, Mitchell & Beech JJA

Negligence - psychiatric injury - grievance and dispute resolution policies - appellant sued

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respondent former employer for psychiatric injury he claimed was caused by respondent's negligence, breach of contract and breach of statutory duty - appellant alleged respondent failed to assess and resolve his grievance complaints, and that he was 'bullied harassed and victimised' by respondent and various staff - primary judge dismissed claim - appellant appealed in relation to failure to resolve and assess grievances - whether erroneous application of test as to whether injury 'likely' - foreseeability - 'reasonable response to the foreseeable risk' - 'causation' - held: appellant established that reasonable person in respondent's position would have foreseen risk that its conduct in dealing with grievances could cause or aggravate a 'psychiatric injury' - appellant failed to establish that a reasonable person would have sought to resolve grievances to avoid risk - appellant also failed to establish that failure to seek to resolve grievances in accordance with policy involved breach of duty, or that the failure 'materially contributed' to his psychiatric injury - appeal dismissed.

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

[From Benchmark Friday, 23 June 2017]

Quantum Asset Management Pty Ltd v Love Properties (WA) Pty Ltd [2017] WASC 167

Supreme Court of Western Australia

Banks-Smith J

Summary judgment - contract - loan - plaintiff provided short-term loan to defendants by facility deed - defendants defaulted on repayment under facility - plaintiff obtained summary judgment - defendants paid judgment sum - defendant contended they were entitled to defend proceedings and also entitled to restitution of money - defendants contended that money claimed and paid to plaintiff was excessive because facility deed's interest provision was unenforceable as penalty - held: inclusion of 'period B interest rate' had purpose other than to punish defendants - plaintiff had interest that explained period B interest rate - no real question to be tried that interest provision operated only as punishment - appeal dismissed.

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

[From Benchmark Thursday, 22 June 2017]

CRIMINAL

Executive Summary

Hughes v The Queen (HCA) - criminal law - evidence - tendency evidence - sexual offences against female complainants under 16 - no error in admission of tendency evidence - appeal dismissed

McPhillamy v R (NSWCCA) - criminal law - evidence - tendency evidence - acts of indecency or sexual intercourse committed on young teenage boy - no error in admission of tendency evidence - appeal dismissed

Summaries With Link

Hughes v The Queen [2017] HCA 20

High Court of Australia

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

Criminal law - evidence - tendency evidence - accused was charged with sexual offences against five female complainants under 16 - prosecution was permitted to adduce certain evidence of each complainant as tendency evidence in relation to each count pursuant to s97 *Evidence Act 1995* (NSW) - identified tendencies in respect of appellant were 'having a sexual interest in female children under 16 years of age' and using 'social and familial relationships ... to obtain access to female children under 16 years of age so that he could engage in sexual activities with them' - appellant found guilty on 10 of 11 counts, giving no verdict on the remaining count - whether tendency evidence had 'significant probative value' in relation to fact in issue - whether erroneous rejection of statement in *Velkoski v The Queen* (2014) 45 VR 680 - held: no error in admission of tendency evidence - tendency evidence had 'significant probative value in relation to proof of each count' - appeal dismissed.

[Hughes](#)

McPhillamy v R [2017] NSWCCA 130

Court of Criminal Appeal of New South Wales

Meagher JA; Harrison & RA Hulme JJ

Criminal law - evidence - tendency evidence - appellant was acolyte who supervised altar servers - appellant convicted of acts of indecency or sexual intercourse committed on complainant in 1995 and 1996 while he was altar boy - Crown at trial relied on evidence of two witnesses' concerning sexual assaults which appellant committed on them 10 years earlier whilst appellant was an assistant house master at college - evidence relied on as tendency evidence of appellant's sexual interest in young teenage boys - trial judge admitted evidence as tendency evidence without giving reasons - whether admission of the evidence as tendency evidence caused miscarriage of justice - s6(1) *Criminal Appeal Act 1912* (NSW) - probative value of evidence - held: primary judge did not err in admitting evidence - there was 'overriding similarity between the charged conduct and the earlier incidents' from which differences in precise circumstances did not detract - time which had elapsed between charged acts and earlier acts 'did not fatally imperil the strength of the inference relied on' - appeal dismissed.

[McPhillamy](#)



Benchmark

The Owl

By [Edward Thomas](#)

Downhill I came, hungry, and yet not starved;
Cold, yet had heat within me that was proof
Against the North wind; tired, yet so that rest
Had seemed the sweetest thing under a roof.

Then at the inn I had food, fire, and rest,
Knowing how hungry, cold, and tired was I.
All of the night was quite barred out except
An owl's cry, a most melancholy cry

Shaken out long and clear upon the hill,
No merry note, nor cause of merriment,
But one telling me plain what I escaped
And others could not, that night, as in I went.

And salted was my food, and my repose,
Salted and sobered, too, by the bird's voice
Speaking for all who lay under the stars,
Soldiers and poor, unable to rejoice.

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