



Friday, 28 October 2016

Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd (FCAFC) - representative proceedings - common fund order - orders made to impose burden of costs equally on all class members who stood to benefit from proceeding, not just funded class members (I B C G)

Okwume v Commonwealth of Australia (FCA) - false imprisonment - misfeasance in public office - negligence - applicant detained under s189 *Migration Act 1958* (Cth) - claims arising from detention and fires at detention centre - false imprisonment claim succeeded against two officers (I B C G)

Walker v Sell (FCA) - sale of goods - consumer law - contract - sale of car - purchaser bore risk of car not being genuine - appeal dismissed (I B)

Babcock & Brown DIF III Global Co-Investment Fund, LP & Anor v Babcock & Brown International Pty Ltd & Ors (VSC) - stay - applications for stay of proceedings based on exclusive jurisdiction clause and clearly inappropriate forum dismissed (I B)

Smith v Lucht (QCA) - defamation - dismissal of claim on basis of defence of triviality - no error in finding of primary judge that defence of triviality made out - leave to appeal refused (I)

Ferrari Estate Holdings Pty Ltd v Cooktown Earthmoving & Quarrying Pty Ltd & Anor (QCA) - want of prosecution - negligence - nuisance - trespass - no error in primary judge's dismissal of proceedings - appeal dismissed (I B C G)

Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques (No 2) (QSC) - pleadings - trade practices - claim for misleading or deceptive conduct did not vest in replacement trustee - parts of statement of claim struck out (I B)

Wright v Glencore Queensland Limited (QSC) - workers' compensation - declaration refused that workers' compensation insurer's retraction of agreement as to entity who would perform reassessment was invalid (I)

Reid v Western Australian Planning Commission (WASCA) - planning and environment - imposition of conditions on approval of subdivision - error of law by Tribunal - appeal allowed - matter remitted (I B C G)

Strzelecki Holdings Pty Ltd v Jorgensen (WASCA) - planning and development - strata titles - contract for purchase of apartment 'off the plan' - respondents' statutory right to avoid contract not extinguished by vendor's termination - appeal dismissed (I B C)

George 218 Pty Ltd v Bank of Queensland Limited [No 2] (WASCA) - guarantee - appellants liable to respondent as guarantors under loan agreements - appeal dismissed (I B)

Lean v Cosmorex Coffee Pty Ltd (ACTSC) - negligence - statutory duty - claim by employee against employer for damages for aggravation of asthma due to exposure to green coffee beans' dust - claim failed (I)

Cowie v Gungahlin Veterinary Services Pty Ltd (ACTSC) - negligence - dismissal of claim against employer arising from injury in fall from step-ladder - appeal dismissed - cross-appeal concerning costs dismissed (I)

Summaries With Link (Five Minute Read)

Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd [2016] FCAFC 148

Full Court of the Federal Court of Australia

Murphy, Gleeson & Beach JJ

Representative proceedings - common fund order - applicant sought orders under s33ZF *Federal Court of Australia Act 1976* (Cth) to apply litigation funding terms obliging all members to contribute equally to legal and litigation funding costs by paying funder - QBE contended common fund order would lead to 'substantial and unjustified increase in the aggregate funding commission' compared to funding commission payable under funding equalisation order, would create financial hurdle to case's resolution, would leave class members with lower proportion of settlement money, and that Court did not have power to make orders - *Australian Securities and*

Benchmark

Investments Commission Act 2001 (Cth) - Corporations Act 2001 (Cth) - Australian Consumer Law (Cth) - Federal Court of Australia Act 1976 (Cth) - Federal Court of Australia Amendment Bill 1991 (Cth) - held: Court satisfied it had power to make orders - Court made orders whose effect was to impose burden of legal and litigation funding commission costs equally on all class members who stand to benefit from proceeding - orders made.

[Money Max](#) (I B C G)

[From Benchmark Friday, 28 October 2016]

Okwume v Commonwealth of Australia [2016] FCA 1252

Federal Court of Australia

Charlesworth J

False imprisonment - misfeasance in public office - negligence - applicant detained under s189 *Migration Act 1958 (Cth)* - during applicant's detention fires lit by detainees at detention centre - applicant brought claims arising from detention and fires - s2C *Acts Interpretation Act 1901 (Cth)* - ss34, 35 *Civil Liability Act 1936 (SA)* - s5D *Civil Liability Act 2002 (NSW)* - ss69, 76, 79 & 97 *Evidence Act 1995 (Cth)* - ss19, 32 & 51A *Federal Court of Australia Act 1976 (Cth)* - r23.12 *Federal Court Rules 2011 (Cth)* - ss39B(1A), 56, 79, 80 *Judiciary Act 1903 (Cth)* - ss5, 13, 14, 15, 97, 97A, 103, 107, 108, 109, 116, 118A, 119, 120, 166, 172, 189, 192, 195A, 196, 198, 199, 200, 273(1), 476A, 484, 486A, 496 & 501, Pt 2 *Migration Act 1958 (Cth)* - cl 41 *Migration Litigation Reform Act 2005 (Cth)* - *Public Service Act 1999 (Cth)* - held: applicant succeeded on false imprisonment claim against two officers - application allowed in part.

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

[From Benchmark Thursday, 27 October 2016]

Walker v Sell [2016] FCA 1259

Federal Court of Australia

Bromwich J

Sale of goods - consumer law - contract for sale of car - appeal against decision of Federal Circuit Court of Australia - question of who should bear loss on collectable motor vehicle later found not to be model vendor and purchaser believed it was - common ground car was not worth paid purchase price - primary judge found in vendor's favour - sale by description - express term of contract - 'trade or commerce' - Federal jurisdiction - *Australian Consumer Law and Fair Trading Act 2012 (Vic)* - s18 *Australian Consumer Law (Victoria)* - Sch 2 *Competition and Consumer Act 2010 (Cth)* - ss191 & 191(2)(b) *Evidence Act 1995 (Cth)* - Sch 1 *Federal Circuit Court Rules 2001 (Cth)* - rr1.32, 1.34, 1.35, 25.01 & 25.03 *Federal Court Rules 2011 (Cth)* - ss18 & 61 *Goods Act 1958 (Vic)* - s172 *Legal Profession Uniform Law (NSW)* - s18 *Sale of Goods Act 1923 (NSW)* - held: grounds of appeal failed - appeal dismissed.

[Walker](#) (I B)

[From Benchmark Friday, 28 October 2016]

Babcock & Brown DIF III Global Co-Investment Fund, LP & Anor v Babcock & Brown International Pty Ltd & Ors [2016] VSC 623

Supreme Court of Victoria
Hargrave J

Stay - choice of law - first plaintiff was a United States limited partnership (Babcock & Brown DIF III Global Co-Investment Fund, LP) - second plaintiff was a Cayman Islands company which was 'general partner' of plaintiff - proceedings concerned transactions arrangement by Babcock & Brown group of companies - plaintiffs commenced proceedings seeking damages against range of defendants based on various causes of action - partnership commenced proceeding in Supreme Court of State of New York on same day - some defendants sought permanent stay of proceeding on basis of exclusive jurisdiction clause in 'Letter Agreement' - one defendant sought stay of proceeding on basis Court was clearly inappropriate forum for its determination - standing - effect of exceptions to privity rule under New York law - whether countervailing considerations to prima facie position to grant stay if breach of exclusive jurisdiction clause - held: stay applications dismissed.

[Babcock](#) (I B)

[From Benchmark Tuesday, 25 October 2016]

Smith v Lucht [2016] QCA 267

Court of Appeal of Queensland

M McMurdo P, Philippides JA & Flanagan J

Defamation - applicant sought to appeal against dismissal of defamation claim on basis of defence triviality to publication of defamatory matter in s33 *Defamation Act 2005* (Qld) - whether 'any harm' extended to harm to feelings - applicant contended primarily that, assuming "any harm" was limited to reputational harm, trial judge erred in application of defence of triviality to circumstances - applicant also sought to challenge precautionary assessment of damages - ss3(c), 6, 11, 15(1)(g), 26, 34, 33 & 36 *Defamation Act 2005* (Qld) - s118 *District Court of Queensland Act 1967* (Qld) - held: no error in judge's finding that defence of triviality under s33 made out - even if applicant were successful in proposed grounds of appeal concerning meaning of 'harm' appeal would have failed - leave to appeal refused.

[Smith](#) (I)

[From Benchmark Monday, 24 October 2016]

Ferrari Estate Holdings Pty Ltd v Cooktown Earthmoving & Quarrying Pty Ltd & Anor [2016] QCA 266

Court of Appeal of Queensland

Morrison & P McMurdo JJA; P Lyons J

Want of prosecution - negligence - water flooded and damaged building owned by appellant in 2004 - appellant's director claimed resultant damage caused by work carried out by respondent and builder on neighbouring land - director commenced proceedings in negligence, or alternatively nuisance, and trespass, about six years later against respondent, builder and hotel owner - proceedings had still not come to trial over five years later - case against hotel owner dismissed for want of prosecution - primary judge dismissed claim against respondent and builder for want of prosecution - director sought to appeal - held: primary judge's conclusions

Benchmark

as to prolonged delays with inadequate explanation, failure to proceed in expeditious manner and prospects of success were open to him - no error in exercise of discretion - appeal dismissed.

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

[From Benchmark Monday, 24 October 2016]

Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques (No 2) [2016] QSC 242

Supreme Court of Queensland

Jackson J

Pleadings - summary judgment - trade practices - plaintiff alleged in statement of claim that defendant engaged in misleading or deceptive conduct in breach of *Trade Practices Act 1974* (Cth) and that trustee of unit trust suffered loss or damage - plaintiff was replacement trustee - plaintiff alleged claim vested in it under s15(1) *Trusts Act 1973* (Qld) - defendant sought to strike out statement of claim for failure to disclose reasonable cause of action or summary judgment on basis claim had no prospects of success - ss6, 9 & 36 *Acts Interpretation Act 1954* (Qld) - s58 *Bankruptcy Act 1966* (Cth) - s2 *Constitution Act 1867* (Qld) - s477(2)(c) *Corporations Act 2001* (Cth) - ss106 & 109 *The Constitution* - ss52, 75 & 82 *Trade Practices Act 1974* (Cth) - s10 *Trustees Act 1962* (WA) - s15 *Trusts Act 1973* (Qld) - rr171 & 293 *Uniform Civil Procedure Rules 1999* (Qld) - held: s15(1) did not apply to vest claim in plaintiff as replacement trustee - relevant parts of statement of claim struck out.

[Lanai](#) (I B)

[From Benchmark Thursday, 27 October 2016]

Wright v Glencore Queensland Limited [2016] QSC 247

Supreme Court of Queensland

Henry J

Workers' compensation - injured worker sought declaratory relief in resolution of dispute with respondent - respondent was employer's workers' compensation insurer - dispute arose from worker's request for doctor's reassessment of injury - issue was whether insurer could retract agreement with worker as to entity who would perform re-assessment - worker contended withdrawal of agreement was invalid - statutory construction - s14A *Acts Interpretation Act 1954* (Qld) - ss5, 179, 183 & 186 *Workers' Compensation and Rehabilitation Act 2003* (Qld) - *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (Qld) - held: worker's argument not accepted - declaration refused that withdrawal of agreement was invalid.

[Wright](#) (I)

[From Benchmark Friday, 28 October 2016]

Reid v Western Australian Planning Commission [2016] WASCA 181

Court of Appeal of Western Australia

Martin CJ: Newnes & Murphy JJA

Planning and environment - appellants were registered proprietors of land - appellants sought

Benchmark

approval for subdivision of land into two lots from Western Australian Planning Commission - Commission granted conditional approval - appellant sought review of Commission's imposition of conditions - Tribunal dismissed application - appellant sought to appeal - primary judge refused application - Commission's power to impose conditions on subdivision's approval - *Metropolitan Region Town Planning Scheme Act 1959 (WA)* - *Planning and Development Act 2005 (WA)* - *State Administrative Tribunal Act 2004 (WA)* - *Town Planning and Development Act 1928 (WA)* - held: Tribunal failed to apply principles requiring establishment of 'connection or relationship between planning purpose for which the condition has been imposed, and the likely or possible consequences of the proposed subdivision' - Tribunal's error of law denied appellants the review they were entitled to - matter remitted to Tribunal - appeal allowed.

[Reid \(I B C G\)](#)

[From Benchmark Wednesday, 26 October 2016]

Strzelecki Holdings Pty Ltd v Jorgensen [2016] WASCA 177

Court of Appeal of Western Australia

Buss P; Murphy & Mitchell JJA

Planning and development - respondents contracted with appellant to purchase strata-titled 'off the plan' apartment - no dispute there was notifiable variation between registered strata plan and strata plan proposed in contract - appellant did not notify the respondents of the variation - s69D(1) *Strata Titles Act 1985 (WA)* entitled respondents to the right to avoid contract - before respondents terminated appellant terminated for failure to settle - trial judge dismissed appellant's claim against respondents for breach of contract, finding that respondents' statutory right to avoid contract was not extinguished by appellant's termination - trial judge declared that respondents had avoided contract and were entitled to deposit - held: appellant succeeded in some grounds of appeal but failed to show orders were erroneous - appeal dismissed.

[Strzelecki Holdings Pty Ltd \(I B C\)](#)

[From Benchmark Thursday, 27 October 2016]

George 218 Pty Ltd v Bank of Queensland Limited [No 2] [2016] WASCA 182

Court of Appeal of Western Australia

Martin CJ; Newnes & Murphy JJA

Guarantee - appeal from decision in which primary judge found appellants liable to respondent as guarantors, concluding that guarantees modified under s22 *Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth)* (Transfer Act) secured money which company owed to bank under loan agreements - primary judge found that even if guarantees did not secure money, appellants were estopped from denying state of facts by a conventional estoppel - appellants contended primary judge erred in construing Deed of Consent, in finding appellants estopped from denying guarantees applicable to loan agreements, in finding Transfer Act allowed bank to rely on guarantees, and in finding guarantees included separate indemnity obligation which appellants owed - held: grounds of appeal failed - appeal dismissed.

[George 218 \(I B\)](#)

Benchmark

[From Benchmark Friday, 28 October 2016]

Lean v Cosmorex Coffee Pty Ltd [2016] ACTSC 309

Supreme Court of Australia

Mossop AsJ

Negligence - statutory duty - plaintiff sued defendant for damages for aggravation of asthma due to exposure to green coffee beans' dust - plaintiff claimed defendant breached statutory duty under *Dangerous Substances Act 2004* (ACT) and also claimed defendant was negligent - ss42, 43 & 45 *Civil Law (Wrongs) Act 2002* (ACT) - *Court Procedures Rules 2006* (ACT) - ss6, 10, 11, 15, 16, 17, 19, 31, 34 & 220(2)(a) *Dangerous Substances Act 2004* (ACT) - *Dangerous Substances (Incorporated Document) Notice 2005* (No 2) - s223 *Occupational Health and Safety Act 1989* (ACT) - s267 *Work Health and Safety Act 2011* (ACT) - held: defendant breached duty of care and statutory duty - causation not established - it was possible exposure triggered or was material contribution to recurrence or aggravation of asthma but causation not established - plaintiff's claim failed.

[Lean](#) (I)

[From Benchmark Tuesday, 25 October 2016]

Cowie v Gungahlin Veterinary Services Pty Ltd [2016] ACTSC 311

Supreme Court of the Australian Capital Territory

Mossop AsJ

Negligence - appeal from decision in which Magistrate dismissed appellant's claim against employer arising from injury at work in fall from step-ladder - whether erroneous finding that step-ladder not faulty - whether failure to take into account finding that respondent on notice that appellant believed ladder unstable - whether failure to infer ladder's instability probably contributed to fall - whether erroneous findings as to whether there was reasonable alternative to using step-ladder - whether failure to consider standard of care and erroneous conclusion as to breach - whether failure to apply provisions of s43 *Civil Law (Wrongs) Act 2002* - *Court Procedures Rules 2006* (ACT) - s267 *Work Health and Safety Act 2011* (ACT) - *Workers Compensation Act 1951* (ACT) - held: appeal dismissed - cross-appeal concerning costs dismissed.

[Cowie](#) (I)

[From Benchmark Friday, 28 October 2016]

CRIMINAL

Executive Summary

Engelbrecht v Director of Public Prosecutions (NSW) (NSWCA) - administrative law - criminal law - primary judge misapprehended power pursuant to *Crimes (Appeal and Review) Act 2001* (NSW) - decision quashed - matter returned to District Court

R v Lowe (SASCFC) - criminal law - conviction for attempted murder - DNA evidence - any non-disclosure of material to defence did not constitute miscarriage of justice - permission to adduce fresh evidence refused - verdict not unreasonable - appeal dismissed

Summaries With Link

Engelbrecht v Director of Public Prosecutions (NSW) [2016] NSWCA 290

Court of Appeal of New South Wales

McColl, Macfarlan & Leeming JJA

Administrative law - criminal law - applicant sought review of dismissal of his appeal against sentence imposed by Local Court Magistrate brought pursuant to s11 *Crimes (Appeal and Review) Act 2001* (NSW) - applicant contended primary judge erred due to misapprehension of the nature of power exercised in appeal's determination pursuant to s17 of the Act - applicant contended primary judge fell into jurisdictional error in that 'his Honour refused to have regard to the transcript of the evidence given in the Local Court proceedings in determining the [severity appeal]' - held: primary judge misapprehended power pursuant to s17 - primary judge's determination quashed - proceedings returned to District Court for hearing and determination.

[Engelbrecht](#)

R v Lowe [2016] SASCFC 118

Supreme Court of South Australia

Peek, Nicholson & Doyle JJ

Criminal law - appellant sought to appeal against conviction for attempted murder - appellant contended material concerning miscoding of software used in DNA testing was not disclosed to defence and sought to call fresh evidence contesting aspects of DNA evidence - held: any non-disclosure did not constitute miscarriage of justice - evidence which appellant sought to adduce did not establish prosecution's DNA evidence was erroneous or likely to be erroneous - requirements to admit fresh evidence not satisfied - Court satisfied verdict was not unreasonable - appeal dismissed.

[Lowe](#)



Benchmark

Spirits of the Dead

By [Edgar Allan Poe](#)

I

Thy soul shall find itself alone
'Mid dark thoughts of the gray tombstone—
Not one, of all the crowd, to pry
Into thine hour of secrecy.

II

Be silent in that solitude,
Which is not loneliness—for then
The spirits of the dead who stood
In life before thee are again
In death around thee—and their will
Shall overshadow thee: be still.

III

The night, tho' clear, shall frown—
And the stars shall look not down
From their high thrones in the heaven,
With light like Hope to mortals given—
But their red orbs, without beam,
To thy weariness shall seem
As a burning and a fever
Which would cling to thee for ever.

IV

Now are thoughts thou shalt not banish,
Now are visions ne'er to vanish;
From thy spirit shall they pass
No more—like dew-drop from the grass.

V

The breeze—the breath of God—is still—
And the mist upon the hill,
Shadowy—shadowy—yet unbroken,
Is a symbol and a token—
How it hangs upon the trees,
A mystery of mysteries!?



Benchmark

[Click Here to access our Benchmark Search Engine](#)