

Friday, 31 July 2015

Weekly 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)

Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant) (UKSC) - construction contract - implied term - right to recover payment - restitution - appeal dismissed (B C)

Casaclang v WealthSure Pty Ltd (FCA) - corporations - financial services - conduct of previously "authorised representative" - applicants entitled to damages for losses (I B)

Hockey v Fairfax Media Publications Pty Ltd (No 2) (FCA) - defamation - remedies - injunctions refused - judgment entered for applicant - costs orders (I)

Brown Brothers v Pittwater Council (NSWCA) - contempt - bias - arguable defence to criminal charge of contempt - permission to withdraw guilty pleas - appeal allowed (I B C)

Nadarajapillai v Naderasa (No 2) (NSWCA) - costs - solicitor's misconduct incurred costs improperly and without reasonable cause - costs order against solicitor (I)

Hillam v Iacullo (NSWCA) - contract - successive loans - later loan rescinded earlier loan - breach of loan agreement by lenders - borrower not required to pay "uplift" - appeal allowed (I B)

Rodger v De Gelder (NSWCA) - judicial review - motor accidents compensation - Panel's certificate vitiated by jurisdictional error - appeal dismissed (I G)

LCM Litigation Fund Pty Ltd v Coope; Coope v LCM Litigation Fund Pty Ltd (NSWSC) - contract - plaintiff entitled to terminate defendant's employment contract for serious misconduct (I B)

Aquatic Air Pty Ltd v Siewert (NSWSC) - contract - personal property - share agreements - security agreements - no effective exercise of Call option - breach of payment obligations - claim otherwise dismissed (I B)

Deal v Kodakkathanath (VSCA) - accident compensation - cause of action for breach of statutory duty was unavailable - jury verdict not perverse or not open on evidence - appeal dismissed (I G)

Winky Pop v Mobil (VSC) - damages - petroleum leak - basis for measurement of damages - plaintiffs entitled to sum for costs incurred in investigating leak (I B C)

Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd (VSCA) - building contract - refusal to provide records to principal - erroneous construction of phrase in side deed - appeal allowed (I B C)

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2) (VSCA) - contract - reformulated claim not remitted - appeal dismissed - costs orders (I B C)

Frost v Miller (QSC) - solicitors' costs - conditional costs agreement void for violating formality requirements - declaration (I)

Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd (QSC) - summary judgment - pleadings - security of payments - restitution - applications dismissed (B C CW)

Calvert v Badenach (TASFC) - Wills and estates - solicitors' duties - breach of duty to testator to advise in relation to risk of family maintenance claim - erroneous failure to consider or find solicitors breached duty to intended beneficiary - appeal allowed (I B)

Summaries With Link (Five Minute Read)

Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant) [2015] UKSC 38

Supreme Court of the United Kingdom

Lord Mance, Lord Wilson, Lord Sumption, Lord Reed & Lord Toulson

Construction contract - limitations - respondent contracted with building contractor to carry out asbestos survey and report on blocks of maisonettes which building contractor was considering redeveloping - during redevelopment building contractor allegedly found asbestos containing

materials not identified in report - adjudicator concluded respondent in breach of contractual and tortious duties causing loss to building contractor - parties did not agree to treat adjudicator's decision as final - building contractor did not commence proceedings and limitation period expired - respondent commenced proceedings to recover amount it paid to building contractor pursuant to adjudication - respondent contended no sum was due on examination of merits of original dispute - building contractor counterclaimed for balance of claim and interest - High Court rejected respondent's claim on basis there was no implied term for repayment or entitlement to restitution after expiry of limitation period in 2010 or 2011 - Court of Appeal found there was implied term and allowed appeal - effect of adjudication pursuant to provisions implied into construction contract under s108(5) *Housing Grants, Construction and Regeneration Act 1996*, read *Scheme for Construction Contracts (England and Wales) Regulations 1998* (SI 1998 No 649) - held: it was an implied contractual term that respondent would have directly enforceable right to recover payment if on final determination on merits of original dispute, sums shown not to have been due to building contractor - repayment could also be claimed by way of restitution - building contractor was time-barred from pursuing its counterclaim for the balance of its original claim - appeal dismissed

[Aspect](#) (B C)

[From Benchmark Monday, 27 July 2015]

Casaclang v WealthSure Pty Ltd [2015] FCA 761

Federal Court of Australia

Buchanan J

Corporations - financial services - applicants claimed damages from Wealthsure for losses caused by conduct of previously "authorised representative" of WealthSure - claims based on provisions of *Corporations Act 2001* (Cth), alternative statutory obligations, negligence and contract - Pts 7.7, 7.9 & 7.10 *Corporations Act - Australian Securities and Investments Commission Act 2001* (Cth) - Sch 2 *Competition and Consumer Act 2010* (Cth) - 'financial product' - 'credit facility' - liability of licensee for conduct of authorised representative - actual or apparent authority - liability of licensee in negligence after revocation of authority - held: applicants entitled to damages or compensation for identified loss, plus interest from date of losses, being date of transfer of funds to representative's control - applicants to bring in short minutes of order.

[Casaclang](#) (I B)

[From Benchmark Wednesday, 29 July 2015]

Hockey v Fairfax Media Publications Pty Ltd (No 2) [2015] FCA 750

Federal Court of Australia

White J

Defamation - remedies - costs - Court upheld applicants claims in respect of poster by which Sydney Morning Herald promoted its print edition of 5 May 2014, and two tweets published by The Age - Court assessed applicant's damages at \$120,000 in respect of poster and \$80,000 in respect of tweets - interest - injunctions - costs - form of orders - held: judgment entered for applicant - applicant's claims for injunctions dismissed - costs orders made.

[Hockey \(I\)](#)

[From Benchmark Friday, 24 July 2015]

Brown Brothers v Pittwater Council [2015] NSWCA 215

Court of Appeal of New South Wales

McColl & Macfarlan JJA; Tobias AJA

Bias - procedural fairness - contempt - appellant operated waste skip business on land zoned Light Industrial 4(b1) under *Pittwater Local Environmental Plan 1993* - in 2011 respondent charged two directors of appellant with contempt of court in respect of alleged activities in business in contravention of consent orders - appellant pleaded guilty to charges - directors each sought to withdraw their guilty pleas - directors contended they were made on basis of incorrect legal advice and that they had a viable defence - primary judge refused appellants leave to withdraw guilty pleas - held: prima facie primary judge ought to have recused herself on basis of adverse findings made in respect of director's credit in earlier proceedings but appellants had waived right to object by failing to object to primary judge continuing to hear withdrawal application - no denial of procedural fairness - appellants had pleaded guilty on basis of incorrect legal advice - it was arguable that on the proper construction consent orders there was real question about their guilt - appellant's pleas not attributable to a consciousness of guilt - appellants permitted to withdraw pleas of guilt - alternative would to condone a miscarriage of justice - exceptional case where public interest in finality of litigation and avoiding inconsistent decisions could not be permitted to perpetuate potential injustice - appeal allowed.

[Brown \(I B C\)](#)

[From Benchmark Tuesday, 28 July 2015]

Nadarajapillai v Naderasa (No 2) [2015] NSWCA 209

Court of Appeal of New South Wales

McColl, Macfarlan & Emmett JJA

Costs - legal practitioners - solicitors duties - application for costs against legal representative - Court ordered dismissal of appeal - respondent Lender sought order that solicitor for appellant Borrower, who appeared for Borrower on hearing of appeal, pay Lender amount of costs Borrower was ordered to pay - Court's general power to order a legal representative to personally pay opposing party's costs directly - ss56 & 99 *Civil Procedure Act 2005* (NSW) - held: solicitor's conduct in instituting and maintaining appeal with no prospects of success and no merit constituted serious incompetence as a legal practitioner - costs had been incurred improperly and without reasonable cause in circumstances for which solicitor was responsible - solicitor should bear costs that Borrower was ordered to pay to Lender.

[Nadarajapillai \(I\)](#)

[From Benchmark Thursday, 23 July 2015]

Hillam v Iacullo [2015] NSWCA 196

Court of Appeal of New South Wales

Basten, Ward & Leeming JJA

Contract - successive loan agreements - appellant entered three written loan agreements with

respondents - first loan agreement dealt with advance, second with both original advance and further advance, and third with the two prior advances and final advance - appellant promised to repay principal of each loan plus interest on fixed date and to transfer an “uplift” equal to double principal at end of term - third loan agreement also required appellant to provide respondents with security - appellant contended third loan agreement substituted for second so respondents not entitled to any sum under second loan agreement - appellant contended he was not obliged to pay “uplift” owing because respondents failed to advance final amount promised under agreement - held: third loan agreement dealt with prior advances in manner inconsistent with second loan agreement - third loan agreement necessarily rescinded second - third loan agreement not abandoned - respondents breached third loan agreement by failing to advance final tranche of loan on particular date, an obligation independent of appellant’s obligation to procure charge - obligation to pay “uplift” dependent upon obligation to loan principal - not open to respondents to require appellant to pay uplift of double promised loan of when unwilling to lend all of amount on promised terms - appeal allowed.

[Hillam](#) (I B)

[From Benchmark Friday, 24 July 2015]

Rodger v De Gelder [2015] NSWCA 211

Court of Appeal of New South Wales

Macfarlan, Gleeson & Leeming JJA

Judicial review - motor accidents compensation - respondent injured in motor vehicle accident when vehicle driven by respondent collided with rear of respondent’s stationary vehicle - respondent sued appellant - medical dispute referred to Motor Accidents Medical Assessment Service - Review Panel revoked certificate of medical assessor which certified degree of permanent impairment as 20% - Review Panel certified a degree of permanent impairment as 0% - primary judge found Panel failed to take into account relevant considerations - held: Panel did not engage with evidence of respondent’s complaint of onset of thoracic pain at time of and continuing after accident - Panel misread doctor’s report that recorded history of pain in thoracic region at time of accident - Panel failed to respond to substantial argument based on evidence relied on by respondent as to causation of injury amounting to jurisdictional error - Panel failed to apply itself to real question to be decided in carrying out statutory function in s58(1)(d) *Motor Accidents Compensation Act 1999* (NSW) because it misunderstood evidence relevant to its determination - Panel’s decision was not real exercise of its statutory function - appeal dismissed.

[Rodger](#) (I G)

[From Benchmark Monday, 27 July 2015]

LCM Litigation Fund Pty Ltd v Coope; Coope v LCM Litigation Fund Pty Ltd [2015] NSWSC 992

Supreme Court of New South Wales

Stevenson J

Contract - defendant was joint managing director of plaintiff pursuant to employment contract, clause of which provided for termination of employment if defendant ‘guilty of any serious

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misconduct' - plaintiff purported to terminate defendant's employment on basis of clause - whether defendant was guilty of 'serious misconduct' warranting termination of employment - failure to disclose in course of making 'Separation Proposal', terms of 'Employment Proposal' - ss200B & 200F(2) *Corporations Act 2001* (Cth) - held: defendant engaged in serious misconduct warranting termination of employment - defendant's conduct 'repugnant to the relationship of employee and employer', 'incompatible with the fulfilment of' his duty to plaintiff and 'involved an opposition, or conflict between his interest and his duty' to plaintiff - plaintiff entitled to terminate defendant's employment contract for misconduct.

[LCM](#) (I B)

[From Benchmark Tuesday, 28 July 2015]

Aquatic Air Pty Ltd v Siewert [2015] NSWSC 928

Supreme Court of New South Wales

Brereton J

Contract - personal property - defendants owned all shares in aviation companies through which first defendant conducted aviation operations - plaintiff company claimed in its own right or as assignee of rights of subsidiary in liquidation, orders avoiding two share sale agreements for misrepresentation, damages for misrepresentation and/or breaches of warranty in connection with share sale agreements, orders avoiding a security agreement and associated securities (security agreements) for misrepresentation and damages for misrepresentation - ss9-15(2) & ss38-10(5) *A New Tax System (Goods and Services Tax) Act 1999* (Cth) - s12GM *Australian Securities and Investments Commission Act 2001* (Cth) - Sch2, s243 *Competition and Consumer Act 2010* (Cth) - s477(2)(c) *Corporations Act 2001* (Cth) - Sch 1, ss105-100 *Taxation Administration Act 1953* (Cth) - held: all claims in connection with sale share agreements and security agreements failed - however defendants breached obligation under security agreement to pay outgoings in respect of property - defendants liable to plaintiff for amounts it paid for outgoings accruing after 13/10/11 - no effective exercise of Call option - declaration - plaintiff's claim otherwise dismissed.

[Aquatic](#) (I B)

[From Benchmark Wednesday, 29 July 2015]

Deal v Kodakkathanath [2015] VSCA 191

Court of Appeal of Victoria

Warren CJ, Ashley JA & Digby AJA

Accident compensation - appellant claimed pain and suffering damages against employer for knee injury suffered in course of employment as primary school teacher - jury rejected claim injury suffered due to breach by employer of non-delegable duty of care - ss2, 4 & 20 *Occupational Health and Safety Act 2004* (Vic) - regulations 1.1.1, 1.1.5, 3.1.1, 3.1.2 & 3.1.3 *Occupational Health and Safety Regulations 2007* (Vic) - appellant contended jury's verdict perverse and not open on evidence, and that judge wrongly ruled cause of action for breach of statutory duty which appellant advanced was unavailable - held: primary judge's ruling concerning breach of statutory duty claim was correct - no inadequacy of reasons - no merit in contention jury's verdict on appellant's claim at common law was perverse or not open on the

evidence - appeal dismissed.

[Deal](#) (I G)

[From Benchmark Tuesday, 28 July 2015]

Winky Pop v Mobil [2015] VSC 348

Supreme Court of Victoria

Digby J

Damages - negligence - nuisance - claim arising from petroleum leak (Mobil leak) which created plume of petroleum hydrocarbon in groundwater underneath plaintiffs' land - plaintiffs claimed against Mobil in negligence, nuisance, and for compensation under s151 *Pipelines Act 2005* (Vic) - plaintiffs also claimed against State in negligence - Mobil admitted it contaminated plaintiffs' land and conceded responsibility for leak and clean up - appropriate form of relief - held: proper basis for measurement of damages was diminution in value of plaintiffs' land - plaintiffs did not establish they had or but for Mobil leak would have had opportunity to develop plaintiffs' land residentially - plaintiffs had not lost opportunity to develop plaintiffs' land because of Mobil leak - opportunity to develop plaintiffs' land residentially had no real prospect of being successfully pursued - Mobil leak would not prevent or impair plaintiffs' ability to develop land for residential purposes - plaintiffs are entitled to be paid sum of \$104,273.93 with interest by Mobil in relation to their costs incurred in investigating the Mobil leak.

[Winky](#) (I B C)

[From Benchmark Thursday, 23 July 2015]

Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd [2015] VSCA 190

Court of Appeal of Victoria

Santamaria, Kyrou & McLeish JJA

Building contract - trial judge found applicant building contractor breached its obligations to respondents (principals) under a contract for design and construction of building - finding of breach of contract related to applicant's refusal to provide records to principal to enable principal to verify costs actually paid by applicant in completing project - held: trial judge erred in construction of 'actual trade, supplier, consultant or subcontract cost payable ...' in side deed and in accepting implied term that principal was entitled to be provided with records - leave to appeal granted - notice of contention dismissed - appeal allowed.

[Grocon](#) (I B C)

[From Benchmark Friday, 24 July 2015]

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2) [2015] VSCA 185

Court of Appeal of Victoria

Redlich, Whelan & Santamaria JJA

Contract - costs - appellant failed to establish on appeal that trial judge erred in dismissing claims based on 2002 contract and negligence - however Court found trial judge wrong to hold claims made in reliance on 2004 contract statute-barred - trial judge had retired by time of hearing of appeal - Court sought and received further written and oral submissions - whether

claim under 2004 contract for damages should be remitted - held: it would be unsatisfactory and inherently unfair to respondent to permit appellant to amend and advance reformulated claim - 2004 contract claim should not be remitted - pleaded case bound to fail - reformulated claim should not be permitted to be advanced - appeal dismissed - costs orders made.

[Brirek](#) (I B C)

[From Benchmark Friday, 24 July 2015]

Frost v Miller [2015] QSC 206

Supreme Court of Queensland

Chief Justice

Solicitors' costs - conditional costs agreement - applicant sought declaration under s327(1) *Legal Profession Act 2007* (Qld) that conditional costs agreement executed by applicant and respondent was void for violation of prescribed formality requirements under ss323(3)(d)-(e) in relation to inclusion of a statement that client had been informed of right to seek independent legal advice, and a cooling-off period - respondent claimed contract substantially complied with prescribed formality requirements - whether formality requirements mandatory or recommendatory - whether breach of formality requirements under s323 rendered conditional costs agreement void or voidable - held: conditional costs agreement void for violating ss323(3)(d)-(e) - respondent could recover reasonable legal costs under void costs agreement calculated in accordance with applicable scale or at fair and reasonable value - declaration.

[Frost](#) (I)

[From Benchmark Tuesday, 28 July 2015]

Boriop Pty Ltd v Moussi [2015] VSC 345s

Supreme Court of Victoria

Gardiner AsJ

Corporations - statutory demand - plaintiff sought to set aside statutory demand served on it by defendant for debt described in schedule as 'moneys lent by the creditor to the company on 8 March 2012 and evidenced by a Loan Agreement deed dated 8 March 2012' - plaintiff contended was genuine dispute in respect of demand - plaintiff asserted that debt subject of demand was by owed not by it, but by its director - ss459G & 459H *Corporations Act 2001* (Cth) - held: plaintiff failed to discharge onus to establish dispute on which it relied was genuine - dispute alleged was spurious - proceeding dismissed.

[Boriop](#) (B C CW)

[From Benchmark Monday, 27 July 2015]

Calvert v Badenach [2015] TASFC 8

Full Court of Tasmania

Tennent, Porter & Estcourt JJ

Solicitors' duties - legal practitioner took instructions from client for preparation of Will - Will prepared and executed by testator - testator left whole estate to appellant - testator died - testator made no provision for daughter- daughter made application under *Testator's Family Maintenance Act 1912* (Tas) - judge ordered payment of amount out of estate - plaintiff

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contended solicitor and firm negligent in failing to advise testator of risk of daughter making claim and failing to advise him of options to arrange affairs so as to avoid claim - Court accepted solicitor owed testator duty to take instructions in relation to possible claim under Act and that he breached duty - Court not satisfied that had solicitor discharged duty to testator, testator would have taken steps to frustrate possible claim - Court therefore not required to decide whether solicitor owed plaintiff, as an intended beneficiary, any duty to advise as to risk of claim being made or steps to reduce or extinguish testator's estate in order to avoid consequences of claim - appellant appealed - held: grounds of appeal made out that trial judge erred in failing to find solicitors owed and breached duty of care to plaintiff, in failing to consider plaintiff's claim as one for the loss of an opportunity, failing to assess chance of testator acting as plaintiff contended had solicitors not breached duty, failing to consider whether solicitors owed and/or breached duty of care to plaintiff, and in failing to make any findings as to damages - appeal allowed.

[Calvert](#) (I B)

[From Benchmark Tuesday, 28 July 2015]

CRIMINAL

Executive Summary

Adamson v The Queen (VSCA) - criminal law - child sexual offences - use of internet - presumption of harm - appeal against sentences - appeal on one ground dismissed - leave to appeal refused in respect of two other grounds

R v Lovell; Ex parte Attorney-General (QCA) - criminal law - referred point of law - disfigurement which was remedied by medical treatment was capable of amounting to a serious disfigurement within meaning of 'grievous bodily harm' in s1 of the Criminal Code

Summaries With Link

Adamson v The Queen [2015] VSCA 194

Court of Appeal of Victoria

Warren CJ; Redlich & Weinberg JJA

Criminal law - appellant pleaded guilty to charges arising from two indictments - on first indictment appellant sentenced on multiple charges of using carriage service to procure person under 16 for sexual activity, to groom person under 16 years of age for sexual activity and to transmit indecent communications to a person under 16 - appellant also sentenced on indictment on charges of producing child pornography, procuring minor for child pornography and possessing child pornography - all offences on first indictment committed via internet - on

second indictment appellant sentenced on charge of conspiracy to commit blackmail and two charges of blackmail - appellant granted leave to appeal from sentences on first indictment - appellant contended presumption of harm in respect of child victims did not arise in respect of 'cybersex' offending - appellant sought leave to appeal from sentences in relation to both indictments on grounds sentence manifestly excessive and that sentencing judge failed to give allowance for reduction in applicant's moral culpability - held: persuasive presumption that child had suffered harm as a result of prohibited sexual activity applied no less to cybersex offences than to 'in person' offences - judge made no error in concluding appellant harmed each child victim - appeal dismissed - leave to appeal on other grounds refused.

[Adamson](#)

R v Lovell; Ex parte Attorney-General (Qld) [2015] QCA 136

Court of Appeal of Queensland

Holmes, Gotterson & Philippides JJA

Criminal law - respondent charged with doing grievous bodily harm under s320 *Criminal Code* (Qld) - complainant suffered disfiguring injury to face which was repaired by surgery - primary judge ruled that Crown was required to show existing serious disfigurement in order to prove grievous bodily harm - Crown presented a *nolle prosequi* - jury was discharged from returning a verdict - Attorney-General referred point of law to Court pursuant to s669A(2) of *Criminal Code* question was whether a disfigurement which was remedied by medical treatment capable of amounting to a serious disfigurement within meaning of 'grievous bodily harm' in s1 of the *Criminal Code* - held: primary judge's ruling not correct - Court of Appeal answered question in the affirmative.

[Lovell](#)

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Letter from Town: The Almond Tree

By D. H. Lawrence, 1885 - 1930

You promised to send me some violets. Did you forget?
White ones and blue ones from under the orchard hedge?
Sweet dark purple, and white ones mixed for a pledge
Of our early love that hardly has opened yet.

Here there's an almond tree—you have never seen
Such a one in the north—it flowers on the street, and I stand
Every day by the fence to look up for the flowers that
expand
At rest in the blue, and wonder at what they mean.

Under the almond tree, the happy lands
Provence, Japan, and Italy repose,
And passing feet are chatter and clapping of those
Who play around us, country girls clapping their hands.

You, my love, the foremost, in a flowered gown,
All your unbearable tenderness, you with the laughter
Startled upon your eyes now so wide with hereafter,
You with loose hands of abandonment hanging down.

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