

Friday, 3 July 2020

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance

Limited (HCA) insurance - motor vehicle collision - inferences from DNA evidence - treatment of advantage of trial judge - adequacy of Court of Appeal's reasons - erroneous finding that first appellant was driver of vehicle at time of collision - appeals allowed

Nguyen v The Queen (HCA) - criminal law - evidence - erroneous decision not to adduce 'mixed statements' - 'prosecutorial obligation' - appeal allowed

Minister for Immigration and Border Protection v CED16 (HCA) - migration law - protection visa - erroneous finding that 'Certificate' was "new information" - appeal allowed

DIF III - Global Co-Investment Fund L.P v DIF Capital Partners Limited (NSWCA) - contract - 'Management Agreement' - insurance - professional indemnity insurance - *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) - appeal dismissed

Dickson v Commissioner, Australian Federal Police (NSWCA) - summary dismissal - judicial review - proceeds of crime - application for leave to appeal refused

Ea v Diaconu (NSWCA) - misfeasance in public office - primary judge erred in summarily dismissing applicant's claim against first respondent - appeal allowed

Bondi Road Development Pty Ltd v Selected Properties Pty Ltd (NSWSC) - settlement agreement - joint venture - plaintiff sought declaration Notice of Termination 'void and of no effect' and declarations of entitlement to specific performance of Settlement Agreement -

plaintiff also sought damages - plaintiff entitled to relief sought

Jayfield Pty Ltd v Cussen & Ors (VSC) - personal property - second defendant sought order it was 'authorised to sell by public auction or otherwise dispose of' 'stored goods' - plaintiff claimed against second defendant for its failure to release stored goods to plaintiff - second defendant entitled to dispose of stored goods - plaintiff's claim failed

Summaries With Link (Five Minute Read)

Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited [2019] HCA 28

High Court of Australia

Kiefel CJ; Bell, Gageler, Nettle & Edelman JJ

Insurance - motor vehicle collision - three appeals arising from motor vehicle collision in which appellant in first appeal rendered 'incomplete tetraplegic' - appellants in second and third appeals were mother and father of appellant in first appeal - at time of collision appellant in first appeal travelling in motor vehicle with mother and father - first appellant contended father driving vehicle at time of collision - respondent defended proceeding on basis that first appellant was driving vehicle - primary judge found first appellant was driving - claim was dismissed - on appeal, McMurdo JA identified 'critical errors' in findings of trial judge, and concluded it was "much more likely" first appellant was not driving vehicle 'save for inference to be drawn from the DNA evidence' - McMurdo JA found it was not established trial judge 'misused his advantage' or that trial judge's decision was "glaringly improbable" or "contrary to compelling inferences" - appeal was dismissed - appellants challenged adequacy of reasons of Court of Appeal concerning 'inferences to be drawn from DNA evidence' - presence of first appellant's blood on airbag - whether failure 'to engage with a critical argument' which was 'based on unchallenged expert evidence' - operation of seatbelt and airbag - Court of Appeal's treatment of trial judge advantage - whether finding that first appellant was the driver 'was contrary to the compelling inferences from uncontroverted evidence' - whether father, not first appellant, was driver of vehicle at time of collision - held: father was driver of vehicle at time of collision - appeals allowed.

[Lee](#)

[From Benchmark Tuesday, 30 June 2020]

Nguyen v The Queen [2020] HCA 23

High Court of Australia

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

Criminal law - evidence - appeal concerning question prosecution obliged to tender 'recorded interview' with appellant which contained 'mixed statements' - whether Full Court of the Supreme Court of the Northern Territory erred in answering question in negative - 'obligation of fairness' in trial's conduct - mixed statements' admissibility - Ch 3 *Evidence (National Uniform Legislation) Act 2011* (NT) - 'practice and principle' - 'differences of opinion and practice' -

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'prosecutorial discretion and fairness' - 'countervailing factors' - held: decision not to adduce mixed statements was not in accordance with 'prosecutorial obligation' respecting presentation of 'Crown case' - appellant disadvantaged - appeal allowed.

[Nguyen](#)

[From Benchmark Thursday, 2 July 2020]

Minister for Immigration and Border Protection v CED16 [2020] HCA 24

High Court of Australia

Gageler, Keane, Nettle, Gordon and Edelman JJ

Migration law - delegate of Minister refused to grant first respondent protection visa - Immigration Assessment Authority affirmed delegate's decision - Judge Street dismissed judicial review application - Derrington J allowed appeal against Judge Street's decision - Minister appealed by special leave - appeal concerned meaning of "new information" - first respondent conceded 'Certificate' could not satisfy condition in s473DE(1)(a)(ii) *Migration Act 1958* (Cth) (Migration Act) 'as interpreted in' *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190, *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31, *Plaintiff M174/2016* [2018] HCA 16 and *SZMTA* [2019] HCA 3 - first respondent, however, contended Derrington J correct to find Certificate was "new information" and correct to conclude receipt of that "new information" caused Authority 'to fall into jurisdictional error' by failure to perform 'procedural obligation' which s473DB(1)(a) Migration Act imposed - whether Certificate could not satisfied description of "information" - whether Certificate was "document" - whether Certificate contained "information" within reference to "any documents or information" in definition of "new information" in s473DC(1) Migration Act - held: appeal allowed.

[Minister](#)

[From Benchmark Thursday, 2 July 2020]

DIF III - Global Co-Investment Fund L.P v DIF Capital Partners Limited [2020] NSWCA 124

Court of Appeal of New South Wales

Bathurst CJ, Bell P & Meagher JA

Contract - insurance - first appellant entered 'Management Agreement' with first respondent ('Manager') - first appellant sued Manager, including for breach of Management Agreement - appellant also sued members of Manager's 'Investment Committee' 'including in negligence and for misleading or deceptive conduct' - appellant also sued 'Directors and Officers Insurers' and first respondent's 'professional indemnity insurers' - professional indemnity insurers undertook Manager's defence of first appellant's claims - professional indemnity insurers were sued under *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) - primary judge dismissed all appellant's claims - whether erroneous finding appellant did not establish loss or damage for admitted breach of contract - causation - whether erroneous finding 'Policy' did not respondent - whether primary judge should have found 'conflict of interest exclusion' under Policy applied - 'due diligence' - whether appellant's claim against respondent was third party Claim which Policy covered - held: appeal dismissed.

[View Decision](#)

[From Benchmark Tuesday, 30 June 2020]

Dickson v Commissioner, Australian Federal Police [2020] NSWCA 125

Court of Appeal of New South Wales

Basten & Meagher JJA

Summary dismissal - judicial review - proceeds of crime - applicant sought declaration that orders granted to respondent under *Proceeds of Crime Act 2002* (Cth) were “vitiating by the fraud” by respondent and involved “fundamental abuses of process and are void ab initio.” - payment of ‘exemplary damages’ by respondent also sought - applicant sought leave to institute proceedings under s4 *Felons (Civil Proceedings) Act 1981* (NSW) (Felons (Civil Proceedings) Act) (leave application) - respondent sought to strike out statement of claim or proceedings’ dismissal - applicant sought summary judgment - Wright J refused leave application and summary judgment claim and dismissed proceedings ‘to the extent necessary’ - applicant sought to appeal - whether to grant extension of time ‘to seek leave to appeal’ - whether to grant leave to appeal under Felons (Civil Proceedings) Act - whether to grant leave under Felons (Civil Proceedings) Act concerning refusal of leave application or concerning proceedings’ summary dismissal - s101 *Supreme Court Act 1970* (NSW) - s6 Felons (Civil Proceedings) Act - held: leave to appeal refused.

[View Decision](#)

[From Benchmark Wednesday, 1 July 2020]

Ea v Diaconu [2020] NSWCA 127

Court of Appeal of New South Wales

Payne & White JJA; Simpson AJA

Misfeasance in public office - applicant prosecuted for offences contrary to ss270.6(2) & 271.2(1B) of schedule to *Criminal Code Act 1995* (Cth) and ‘two aggravated offences’ contrary to s245AC(2) *Migration Act 1958* (Cth) - claim concerned first of two trials of applicant in which jury could not agree on verdicts and jury discharged - applicant claimed for misfeasance in public office and malicious prosecution - primary judge summarily dismissed claim - appellant sought to appeal - appellant contended that primary judge erred in finding appellant’s claim for misfeasance in public office against first respondent ‘hopeless and doomed to fail’ - claim against first respondent police officer arose from ‘alleged behaviour in court’ - elements of tort of misfeasance in public office - whether primary judge erred in summarily dismissing claim - whether arguable first respondent was purporting to exercise “power” in the sense of a de facto power’ which was ‘an incident of her office as an Australian Federal Police officer’ - held: appeal allowed.

[View Decision](#)

[From Benchmark Thursday, 2 July 2020]

Bondi Road Development Pty Ltd v Selected Properties Pty Ltd [2020] NSWSC 845

Supreme Court of New South Wales

Stevenson J

Settlement agreement - joint venture - specific performance - parties entered going venture agreement concerning development of 'residential unit building' - plaintiff sought specific performance of joint venture agreement - parties settled - first and second defendants 'purported to terminate 'Settlement Agreement' by service of "Notice of Termination of Settlement Agreement of 10 March 2020" on plaintiff - plaintiff sought declaration Notice of Termination was 'void and of no effect', declaration of entitlement to specific performance of Settlement Agreement, declaration of entitled to have first and second defendants 'specifically perform their obligations under' Settlement Agreement', and damages - held: plaintiff entitled to relief sought.

[View Decision](#)

[From Benchmark Friday, 3 July 2020]

Jayfield Pty Ltd v Cussen & Ors [2020] VSC 380

Supreme Court of Victoria

Garde J

Personal property - second defendant, under s70 *Australian Consumer Law and Fair Trading Act 2012 (Vic)* (ACLFTA), sought order it was 'authorised to sell by public auction or otherwise dispose of' 'stored goods' at premises which company (Melded Fabrics) 'formerly occupied' - plaintiff claimed against second defendant for its failure to release the stored goods to plaintiff - whether second defendant's right under Pt 4.2 to ACLFTA to dispose of the stored goods was subject to *Personal Property Securities Act 2009 (Cth)* (PPSA) - whether PPSA applied to equitable lien - whether plaintiff entitled to stored goods' return - held: plaintiff's claim failed - second defendant authorised to dispose of stored goods.

[Jayfield](#)

[From Benchmark Wednesday, 1 July 2020]



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Motor Bus

By: Alfred Denis Godley

What is this that roareth thus?

Can it be a Motor Bus?

Yes, the smell and hideous hum

Indicat Motorem Bum!

Implet in the Corn and High

Terror me Motoris Bi:

Bo Motori clamitabo

Ne Motore caedar a Bo—

Dative be or Ablative

So thou only let us live:

Whither shall thy victims flee?

Spare us, spare us, Motor Be!

Thus I sang; and still anigh

Came in hordes Motores Bi,

Et complebat omne forum

Copia Motorum Borum.

How shall wretches live like us

Cincti Bis Motoribus?

Domine, defende nos

Contra hos Motores Bos!

[https://en.wikipedia.org/wiki/A. D. Godley](https://en.wikipedia.org/wiki/A._D._Godley)

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