

Friday, 8 April 2016

## Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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### Executive Summary (1 minute read)

**Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd** (NSWCA) - insurance - commercial motor vehicle policy - basis for application of exemption or condition not established - appeal allowed

**Cohen v Cohen** (NSWSC) - principal and agent - power of attorney - defendant breached fiduciary duties by transferring property to himself - plaintiff entitled to set aside transfer and to declaration defendant held property for plaintiff on trust

**SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd** (NSWSC) - contract - rectification - parties common intention was that purchase price of land was amount plus GST - rectification granted

**The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd** (NSWSC) - building and construction - preliminary issues - there was contract between builder and developer for building works - proceedings not commenced within time

**Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”)** (NSWSC) - negligence - plaintiff injured when she tripped while leaving lift - lift had not levelled with floor - defendants not liable - judgment for defendants - cross-claims dismissed

**Commonwealth Bank of Australia v Codovo Developments Pty Ltd** (VSC) - summary judgment - bank entitled to payment of debt - summary judgment refused in respect of counterclaim

**Brisbane City Council v Gerhardt** (QCA) - environment and planning - application by home owners to building certifier to make alterations and additions - no separate application need be made to council - building certifier entitled to approve application - appeal dismissed

**IBM Australia Ltd v State of Queensland** (QSC) - guarantee and indemnity - construction contract - applicant entitled to indemnity costs under clause of agreement

**George 218 Pty Ltd v Bank of Queensland Ltd** (WASCA) - security for costs - primary judge found guarantors liable to bank - bank granted security for costs of appeal

**Daynite Towing Service (WA) Pty Ltd v Regrowth Karri Pty Ltd** (WASCA) - negligence - tourist coach destroyed by fire while being towed - claim against towing contractor upheld - appeal dismissed

## Summaries With Link (Five Minute Read)

### **Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd [2016] NSWCA 67**

Court of Appeal of New South Wales

Meagher & Ward JJA; Sackville AJA

Insurance - commercial motor vehicle policy - damage to public road - s102 *Roads Act 1993* (NSW) - arm of excavator loaded on a vehicle struck a bridge causing damage - Barrie Toepfer owned vehicle and excavator and employed driver - RTA claimed costs of repair from Barrie Toepfer - Barrie Toepfer cross-claimed against its insurer under a Commercial Motor Vehicle Policy - Barrie Toepfer also cross-claimed against RTA and NSW - primary judge found s102 established strict liability unrelated to fault or liability in tort - Barrie Toepfer caused damage to bridge - RTA entitled to recover cost it incurred in making good the damage - primary judge gave judgment for RTA against Barrie Toepfer and that insurance policy exclusion for recklessness extended to recklessness of the insured's employed driver - cross-claim against insurer failed - construction and application of policy provisions - whether findings correct that as truck approached bridge driver appreciated load might strike bridge and consciously decided to run risk by continuing - held: driver not reckless in driving onto bridge - driver did not fail to do what was reasonable - insurers did not establish basis for application of exclusion or condition - appeal allowed.

[Barrie Toepfer](#)

[From Benchmark Friday, 8 April 2016]

### **Cohen v Cohen [2016] NSWSC 336**

Supreme Court of New South Wales

Hallen J

Principal and agent - fiduciary duties - unconscionable dealings - conveyancing - plaintiff under legal incapacity sought declaration regarding title to property, order that defendant transfer property to plaintiff, and consequential relief - property had been transferred under power of attorney - s163B *Conveyancing Act 1919* (NSW) - held: Court satisfied that defendant breached fiduciary obligations by transferring property to himself which deprived plaintiff of only substantial asset - defendant abused power bestowed by power of attorney - plaintiff entitled to set aside transaction and to declaration defendant held property in trust for her.

[Cohen](#)

[From Benchmark Monday, 4 April 2016]

### **SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd [2016] NSWSC 362**

Supreme Court of New South Wales

Stevenson J

Contract - rectification - defendant vendor listed property for public auction - plaintiff purchaser sent its agent to auction to bid on its behalf - agent bid amount to purchase property - auctioneer accepted bid - contracts executed and exchanged - effect of contract was to provide for purchase price inclusive of GST - vendor alleged parties "clear and common intention" was that purchase price was amount plus GST and sought rectification - test of rectification - conflicting evidence - held: Court satisfied it was parties' common intention that purchase price would be amount plus GST - rectification of contract granted.

[SAMM](#)

[From Benchmark Wednesday, 6 April 2016]

### **The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd [2016] NSWSC 375**

Supreme Court of New South Wales

McDougall J

Building and construction - preliminary issues - plaintiff owner of strata title development claimed defendant was builder who carried out development for former registered proprietor of land on which development built - owners contended work was defective and it was entitled to recover cost of rectification under s18D *Home Building Act 1989* (NSW) - whether there was contract to which builder was party - whether proceedings out of time - held: Court satisfied there was a contract between builder and developer - proceedings not commenced within time - preliminary questions answered.

[The Owners – Strata Plan No. 69743](#)

[From Benchmark Thursday, 7 April 2016]

### **Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) [2016] NSWSC 333**

Supreme Court of New South Wales

Fagan J

Negligence - plaintiff sued defendants for injuries sustained when she tripped while leaving lift in building - lift had not levelled at floor - defendants were occupier of building (Capital Investors), company which serviced repairs and maintained lifts (Thyssenkrupp), and company which managed and oversaw performance of building maintenance contracts (ISS) - *Civil Liability Act 2002* (NSW) - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) held: none of the defendants was liable to plaintiff - judgment for defendants - cross-claims dismissed.

[Schneider](#)

[From Benchmark Friday, 8 April 2016]

## **Commonwealth Bank of Australia v Codovo Developments Pty Ltd [2016] VSC 122**

Supreme Court of Victoria

Almond J

Summary judgment - plaintiff sued first defendant for recovery of money advanced pursuant to banking facilities - plaintiff also sued second, third and fourth defendants as guarantors - defendants counterclaimed against bank for misleading and deceptive conduct, negligent misstatement and unconscionable conduct - bank sought summary judgment - plaintiff contended defendants had no real prospect of defending claim or prosecuting counterclaim - plaintiff contended counterclaim's subject matter had been released clause in Deed of Forbearance - held: plaintiff entitled to payment of debt - Court satisfied defendants had real prospect of success as to limiting scope of release - application for summary judgment on counterclaim rejected.

[Commonwealth Bank of Australia](#)

[From Benchmark Tuesday, 5 April 2016]

## **Brisbane City Council v Gerhardt [2016] QCA 76**

Court of Appeal of Queensland

Holmes CJ, McMurdo JA & Daubney J

Environment and planning - owners of house sought permission from respondent private building certifier to make additions and alterations - Council contended owners should have made two applications, one to respondent and one to council - respondent sought declaration no separate application need be made to council and that respondent entitled to approve application - declaration granted - Council sought to appeal under s498 *Sustainable Planning Act 2009* (Qld) (Planning Act) - proper interpretation of Planning Act and *Building Act 1975* (Qld) - held: Council's arguments rejected - no restriction on respondent to grant sought approval - respondent entitled to declarations - appeal dismissed.

[Brisbane](#)

[From Benchmark Tuesday, 5 April 2016]

## **IBM Australia Ltd v State of Queensland [2016] QSC 70**

Supreme Court of Queensland

Martin J

Guarantee and indemnity - construction contract - Court found applicant had been released



from State's claims against it - release contained in agreement which parties entered and which contained clause providing that "If the State makes a claim against an IBM Party which is the subject of the State Covenant or State Release, then the State fully indemnifies each IBM Party against any liability (including the amount of any judgement [sic], settlement sum and legal and other costs) incurred by the IBM Party as a result of that claim" - applicant sought order giving effect to clause and order for costs - construction of clause - held: clause entitled IBM to indemnity costs - there was nothing to suggest indemnity costs order inappropriate - State to pay applicant's costs on indemnity basis.

[IBM](#)

[From Benchmark Wednesday, 6 April 2016]

## **George 218 Pty Ltd v Bank of Queensland Ltd [2016] WASCA 56**

Court of Appeal of Western Australia

Murphy JA

Security for costs - primary judge found appellant guarantors liable to respondent bank - first, second and fourth appellants were corporate guarantors - bank sought security for costs of appeal - application made pursuant to pt 5 r44(1) *Supreme Court (Court of Appeal) Rules 2005* (WA) and under s1335(1) *Corporations Act 2001* (Cth) in relation to corporate guarantors - ss10, 12, 117, 147, 153 & 332 *Personal Property Securities Act 2009* (Cth) - held: there was reason to believe corporate guarantors would be unable to pay bank's costs - substantial risk that third appellant guarantor would not be able to meet costs order against her - Court concluded it was interests of justice to grant security for costs - orders made.

[George](#)

[From Benchmark Thursday, 7 April 2016]

## **Daynite Towing Service (WA) Pty Ltd v Regrowth Karri Pty Ltd [2016] WASCA 55**

Court of Appeal of Western Australia

McLure P, Buss JA & Corboy J

Negligence - respondent was bus and coach operator - appellant was towing contractor - District Court upheld respondent's claim for damages for destruction of tourist coach by fire while appellant was towing it - held: primary judge's finding that caging of brakes was necessary for exercise of reasonable care not in error - open to primary judge to find that before fire occurred there were changes in pressure gauges which tow truck operator failed to detect - no error in finding on causation or assessment of evidence's reliability - appeal dismissed.

[Daynite](#)

[From Benchmark Thursday, 7 April 2016]



# Benchmark

## **The Florist Wears Knee-Breeches**

Wallace Stevens

My flowers are reflected  
In your mind  
As you are reflected in your glass.  
When you look at them,  
There is nothing in your mind  
Except the reflections  
Of my flowers.  
But when I look at them  
I see only the reflections  
In your mind,  
And not my flowers.  
It is my desire  
To bring roses,  
And place them before you  
In a white dish.

[Wallace Stevens](#)

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