

Friday, 8 September 2017

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Watson & Ors v watchfinder.co.uk Ltd (EWHC) - contract - share option agreement - lack of consent under clause of agreement - failure to comply with 'Braganza Duty' - claimants granted specific performance of share option agreement

SAW (SW) 2010 Ltd & Anor v Wilson & Ors (EWCA) - corporations - declaration that joint administrators' appointment to company was invalid refused - appeal dismissed

SZTAL v Minister for Immigration and Border Protection (HCA) - migration - 'complementary protection regime' - meaning of 'intentionally' in s5(1) *Migration Act 1958* (Cth) - appeals dismissed

Bazzo v Commissioner of Taxation (FCAFC) - contract - taxation - deeds of agreement - extent of Commissioner's obligations under deeds - appeals dismissed

Callychurn v Australian Securities and Investments Commission (FCAFC) - administrative law - appeal against Administrative Appeals Tribunal's decision to ban first appellant from credit activities and to cancel second appellant's licence - appeal allowed

Beaman v Bond (FCAFC) - bankruptcy - dismissal of application for annulment of bankruptcy - appeal dismissed

Comcare v Chambers (FCA) - administrative law - compensation - employer's steps not 'reasonable administrative action taken in a reasonable manner' - epilepsy not contributed to by employment in significant degree - appeal allowed in part

K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd (No 2) (FCA) - bankruptcy - *Personal Properties Securities Act 2009* (Cth) - extension of period for perfection interests by registration granted

Bugeja v Jarrett (NSWCA) - negligence - motor vehicle collision - erroneous findings as to reliability of witnesses - erroneous finding collision occurred due to any negligence by first appellant - appeal allowed

Chaudhary v Chaudhary (NSWCA) - real property - contract - advances by appellant to first respondent constituted loan secured by mortgage - second respondent not liable to repay loan - no unjust contract - appeal allowed

Lipman Pty Ltd v Empire Facades Pty Ltd (formerly known as Empire Glass and Aluminium Pty Ltd) (NSWCA) - stay - building contract - dispute resolution clause did not preclude respondent from commencing proceedings concerning expert determinations - appeal dismissed

Marvoe Management Pty Ltd t/as The Sweet Life v Plantation Management Services (WA) Pty Ltd (No 5) (NSWSC) - contract - contract for sale of goods - diseased seedlings supplied under contract not fit for purpose or of merchantable quality - judgment for plaintiff

Broughton v B & B Group Investments Pty Ltd (VSCA) - contract - purchaser's termination of contract for sale of business satisfied requirements of special condition - appeal allowed

Anderson v City of Stonnington (VSCA) - roads - refusal to declare that lane was neither public highway nor road - lane was a road within definition in *Local Government Act 1989* (Vic) - appeal dismissed

Paskins v Hail Creek Coal Pty Ltd & Anor (QSC) - negligence - worker injured in course of employment with first defendant - incident due to negligence of second defendant's employee - both defendants liable - second defendant obliged to indemnify first defendant under labour hire contract with third party

South Australian Employers' Chamber of Commerce & Industry Incorporated v Commissioner of State Taxation (SASC) - taxation - payroll tax - refusal of application for recognition that appellant was exempt from payroll tax under charitable purpose exemption and for refund of payroll tax paid - appeal dismissed

Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board (TASFC) - negligence - cattle escaped through gateway after detachment of gudgeon pin - motorist injured in collision with one of the cattle - erroneous finding of breach of duty by appellants - appeals allowed

R Developments Pty Ltd v Forth (ACTCA) - building contract - standard form building contract - builder not entitled to terminate contract for owners' failure to comply with requirement to supply evidence of capacity to pay - appeal dismissed

Summaries With Link (Five Minute Read)

Watson & Ors v watchfinder.co.uk Ltd [2017] EWHC 1275 (Comm)

England and Wales High Court

His Honour Judge Waksman QC

Contract - share option agreement - claimants were directors and shareholders of company (Adoreum) - claimants sought specific performance of written share option agreement between them and defendant (Watchfinder) - defendant contended option could not be exercised because no consent was given in accordance with clause agreement - claimants agreed consent not given but contended lack of consent could be disregarded with regard to clause's proper construction or implied term, context in which agreement made, and events - whether clause amounted to unconditional right of veto in defendant's favour - whether discretion to refuse in clause was subject to qualification 'that it must not be exercised capriciously, arbitrarily or unreasonably' - subject matter of consideration of right to veto - whether proper exercise of discretion in compliance with 'Braganza Duty' - 'the target of the duty' - held: defendant failed to comply with Braganza Duty - common ground that if there was Braganza Duty and defendant did not comply with it, Court must proceed as if consent given - claimants granted specific performance of share option agreement.

[Watson](#)

[From Benchmark Wednesday, 6 September 2017]

SAW (SW) 2010 Ltd & Anor v Wilson & Ors [2017] EWCA Civ 1001

England and Wales Court of Appeal

Lady Justice Arden; Lord Justice Briggs

Corporations - conditions for validity of joint administrators' appointment to company - appellants were company's shareholders and creditors respectively - appeal concerned whether first respondents' purported appointment as joint administrators of company was valid - appellants contended appointment was invalid - judge struck out appellants' application for declaration that first respondents' appointment was invalid, finding that Debenture was 'a qualifying floating charge' enforceable at time of first respondents' appointment - whether 'qualifying floating charge' within meaning of para 14 Sch B1 *Insolvency Act 1986* was created by Debenture - whether, if floating charge created by Debenture, it was enforceable at date of first respondents' appointment - 'the automatic crystallisation clause' - common mistake - held: appeal dismissed.

[SAW](#)

[From Benchmark Friday, 8 September 2017]

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34

High Court of Australia

Kiefel CJ; Gageler, Nettle, Gordon & Edelman JJ

Migration - 'complementary protection regime' - two appellants, who had not lawfully left Sri Lanka, sought protection visas - appellants contended 'severe pain or suffering, whether physical or mental' would be 'intentionally inflicted' on them within meaning of s5(1) *Migration Act 1958* (Cth) if they were returned - appeals concerned meaning of 'intentionally' in s5(1) - whether element of intention satisfied - whether a Sri Lankan official who intended to detain an asylum seeker who had been returned, and who knew of custody's 'shocking conditions', therefore intended the asylum seeker to be subjected to shocking conditions - whether complementary protection regime required 'actual subjective intention' - whether 'actual, subjective, intention' provable by proving an official ordering appellants' detention would do so 'with knowledge of consequences of his or her intended act' - ss5(1) & 36 *Migration Act 1958* (Cth) - s5.2(3) *Criminal Code* (Cth) - held: no error in Refugee Review Tribunal's decision that intention by officials 'to inflict requisite degree of pain or suffering or humiliation' was not to be inferred - appeals dismissed.

[SZTAL](#)

[From Benchmark Thursday, 7 September 2017]

Bazzo v Commissioner of Taxation [2017] FCAFC 139

Full Court of the Federal Court of Australia

Dowsett, Pagone & Davies JJ

Contract - taxation - deed of agreement - contractual construction - appeals concerned deeds of agreement entered by Commissioner of Taxation with two sets of appellants - under each deed Commissioner agreed 'to refrain from recovering ... "Taxation Debt"' - trial judge upheld Commissioner's contention that Commissioner's obligation under deeds 'did not extend to general interest charge accruing to the Taxpayer in each case after 7 August 2015' - construction of deeds - held: no error in trial judge's conclusion that Taxation Debt did not include general interest charge - no basis to extend restraint to any liability after 7 August 2015 - appeals dismissed.

[Bazzo](#)

[From Benchmark Monday, 4 September 2017]

Callychurn v Australian Securities and Investments Commission [2017] FCAFC 137

Full Court of the Federal Court of Australia

Rares, Collier & O'Callaghan JJ

Administrative law - primary judge dismissed appeal against decision of Administrative Appeals Tribunal to ban first appellant 'from providing or engaging in credit activities' and to cancel second appellant's credit licence - ss53, 80(1)(d), (e), (f), 216, 225(1), (2), (5) *National Consumer Credit Protection Act 2009* (Cth) (Credit Act) - whether open to Tribunal to make adverse findings on authorisation questions in compliance certificates - 'fit and proper person' -

held: Tribunal erred in finding first appellant contravened Credit Act on grounds ASIC contended for and Tribunal adopted - appeal allowed - matter remitted.

[Callychurn](#)

[From Benchmark Tuesday, 5 September 2017]

Beaman v Bond [2017] FCAFC 142

Full Court of the Federal Court of Australia

Gilmour, McKerracher & Charlesworth JJ

Bankruptcy - appeal against dismissal of application for annulment of bankruptcy - appellant contended presentation of debtor's petition under s55 *Bankruptcy Act 1996* (Cth) should have been annulled due to abuse of process - appellant contended primary judge failed to make finding concerning respondent's predominant purpose in presenting petition - whether erroneous usage of Trustee's affidavit - whether bankruptcy's primary purpose was to defeat Family Court proceedings - whether erroneous failure to uphold application under s135(a) *Evidence Act 1995* (Cth) to exclude parts of Trustee's affidavit - whether failure to provide 'adequate findings and reasons' - delay in judgement's delivery - r7.04 *Federal Circuit Court (Bankruptcy) Rules 2006* (Cth) - held: no error in decision of primary judge - appeal dismissed.

[Beaman](#)

[From Benchmark Tuesday, 5 September 2017]

Comcare v Chambers [2017] FCA 1014

Federal Court of Australia

Perram J

Administrative law - compensation - respondent contended employment significantly contributed to psychological condition and epilepsy - Comcare contended employment did not significantly contribute to onset of epilepsy and that employer engaged in 'reasonable administrative action taken in a reasonable manner' - Tribunal found employment did not cause epilepsy but contributed to its aggravation to significant degree - Tribunal concluded employer had not engaged in reasonable administrative action or action taken reasonably - Tribunal found respondent entitled to compensation for both conditions - ss5A, 5A(1), 5A(2), 5B(1), 5B(1)(b) & 5B(3) *Safety, Rehabilitation and Compensation Act 1988* (Cth) - held: employer's steps were not 'reasonable administrative action taken in a reasonable manner' - respondent's epilepsy was not contributed to by employment to significant degree - appeal allowed in part - matter remitted to Tribunal.

[Comcare](#)

[From Benchmark Monday, 4 September 2017]

K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd (No 2) [2017] FCA 1034

Federal Court of Australia

Davies J

Bankruptcy - applicant sought pursuant to s293(1)(a) *Personal Properties Securities Act 2009*

(Cth) (PPSA) extension of period for 'perfection by registration of purchase money security interests' - applicant held the interests over plant and equipment it leased to respondent - applicant required extension of time to ensure s62(3)(b)(i) PPSA applied to give the interests priority - whether need for extension arose from 'accident, inadvertence or some other sufficient cause' - whether extension would prejudice position of 'other secured parties or other creditors' - whether reliance 'on the period having ended' - held: Court satisfied it should grant extension of time - application granted.

[K.J. Renfrey](#)

[From Benchmark Thursday, 7 September 2017]

Bugeja v Jarrett [2017] NSWCA 219

Court of Appeal of New South Wales

Gleeson JA, Emmett AJA & Davies J

Negligence - motor vehicle collision - motor vehicle owned by second appellant and driven by first appellant pulled out of driveway - vehicle driven by third party collided with appellants' vehicle - respondent's vehicle collided with third party's vehicle - respondent injured - respondent sued appellants - primary judge found first appellant negligent for failure to keep a lookout and that respondent made 15% contribution to collision - judgment entered in respondent's favour in sum of \$616,250 - appellants challenged negligence finding against first appellant - held: primary judge erred in findings that respondent was reliable witness and third party unreliable - primary judge erred in finding accident occurred due to negligence by first appellant - appeal allowed.

[Bugeja](#)

[From Benchmark Monday, 4 September 2017]

Chaudhary v Chaudhary [2017] NSWCA 222

Court of Appeal of New South Wales

Payne JA; Sackville & Emmett AJJA

Real property - contract - appeal concerned whether advances made by appellant in connection with purchase of property by first and second respondents constituted gift to first respondent or a loan to first respondent - advances secured by mortgage over property in appellant's favour (second mortgage) - if advances constituted loan, question was whether loan and second mortgage constituted unfair contract under *Contracts Review Act 1980* (NSW) (Contracts Review Act) - held: primary judge erred in failing to find advances constituted loan secured by second mortgage with no liability on second respondent's part to repay loan - primary judge also erred in contingent conclusion that any arrangement between appellant and second respondent was unjust under Contracts Review Act - appeal allowed.

[Chaudhary](#)

[From Benchmark Monday, 4 September 2017]

Lipman Pty Ltd v Empire Facades Pty Ltd (formerly known as Empire Glass and Aluminium Pty Ltd) [2017] NSWCA 217

Court of Appeal of New South Wales

McColl, Macfarlan & Gleeson JJA

Stay - building contract - respondent commenced proceedings in respect of disputes concerning expert determinations - primary judge dismissed applicant's application for permanent stay or dismissal of proceedings - applicant sought to appeal - s101(1)(r) *Supreme Court Act 1970* (NSW) - applicant contended dispute resolution clause in contract imposed 'pre-condition on the right to litigate' which precluded respondent from litigating dispute - held: applicant 'essentially repeated' argument rejected by primary judge - no error in primary judge's construction of dispute resolution clause - appeal dismissed.

[Lipman](#)

[From Benchmark Tuesday, 5 September 2017]

Marvoe Management Pty Ltd t/as The Sweet Life v Plantation Management Services (WA) Pty Ltd (No 5) [2017] NSWSC 1167

Supreme Court of New South Wales

Campbell J

Contract - plaintiff contended defendant breached contract for sale of goods - plaintiff contended conditions of fitness for purpose and merchantable quality were implied by Sale of Goods Act 1972 (NT) and defendant breached these conditions by supplying it with diseased seedlings - nature of contract - identification of disease's 'probable source' - quantification of loss - held: contract was contract for the sale of goods under which defendant agreed to transfer property in seedlings to plaintiff for unit price under s6 *Sale of Goods Act 1972* (NT) - agreement contained statutory condition of fitness for purpose - condition of merchantable quality also implied - seedlings supplied by defendant to plaintiff were not fit for purpose or of merchantable quality - defendant breached conditions implied in contract for sale - judgment for plaintiff in sum of \$1,112,825.

[Marvoe](#)

[From Benchmark Tuesday, 5 September 2017]

Broughton v B & B Group Investments Pty Ltd [2017] VSCA 227

Court of Appeal of Victoria

Kyrou, Ferguson & McLeish JJA

Contract - County Court judge found in respondent's favour in its claim for breach of contract for sale of business to applicant - it was condition precedent to contract's completion that purchaser had not terminated under special condition 3.6 within three days of completion of due diligence of business - trial judge found right to terminate limited to where due diligence resulted in discovery of information adverse to applicant proceeding - trial judge found applicant's termination in breach of contract because the decision to terminate 'was not influenced to any significant degree by such information' - trial judge also found respondent proved no loss arising from breach and was entitled to retain deposit - whether trial judge misconstrued special condition 3.6 - whether trial judge erred in rejecting applicant's evidence that his decision not to proceed was 'based on the due diligence' - whether erroneous finding respondent entitled to

retain deposit - whether failure to determine respondent's loss and damage - held: trial judge did not misconstrue special condition 3.6 - trial judge erred in finding applicant's termination did not satisfy requirements of special condition - appeal allowed.

[Broughton](#)

[From Benchmark Monday, 4 September 2017]

Anderson v City of Stonnington [2017] VSCA 229

Court of Appeal of Victoria

Warren CJ, Maxwell P & Kyrou JA

Roads - primary judge refused to make declarations that a 'bluestone paved laneway' was neither road nor public highway - primary judge found lane was public highway at common law through dedication and road under *Road Management Act 2004* (Vic) (RMA) because of the inclusion of 'public highway' in 'road's definition in RMA - whether lane's inclusion on Council's register of public roads 'was conclusive of its status' as a 'public road' under RMA and thus a 'road' under *Local Government Act 1989* (Vic) - held: no error in finding land was dedicated as a public highway - applicants succeeded in challenge to finding that lane's inclusion on Council's register of public roads 'was conclusive of its status' as a 'public road' under RMA and thus a 'road' under *Local Government Act 1989* (Vic) (LGA) - however lane was still within definition of 'road' in s3(1) of the LGA - appeal dismissed.

[Anderson](#)

[From Benchmark Wednesday, 6 September 2017]

Paskins v Hail Creek Coal Pty Ltd & Anor [2017] QSC 190

Supreme Court of Queensland

McMeekin J

Negligence - employer's duty of care - vicarious liability - non-delegable duty of care - labour hire contract - plaintiff claimed damages for injuries suffered in course of employment with first defendant while operating haul truck at mine which first defendant operated - plaintiff alleged second defendant's employee caused his injuries - labour of second defendant's employee had been hired to first defendant under contract between second defendant and third party - *Civil Proceedings Act 2011* (Qld) - *Coal Mining Safety and Health Act 1999* (Qld) - *Superannuation Guarantee (Administration) Act 1992* (Cth) - *Workers' Compensation and Rehabilitation Act 2003* (Qld) - held: incident occurred due to negligence of second defendant's employee - both first and second defendant liable for negligence of second defendant's employee - no contributory negligence - second respondent was required under its contract with third party to indemnify first defendant for its liability in relation to plaintiff - judgment for plaintiff against first defendant in sum of \$709,408.26 - judgment for plaintiff against second defendant in sum of \$966,991.38.

[Paskins](#)

[From Benchmark Friday, 8 September 2017]

South Australian Employers' Chamber of Commerce & Industry Incorporated v

Commissioner of State Taxation [2017] SASC 127

Supreme Court of South Australia

Blue J

Taxation - payroll tax - charitable purpose exemption - respondent refused application for recognition that appellant was exempt from payroll tax under charitable purpose exemption and for refund of payroll tax paid - objection to respondent's decision disallowed - whether Chamber had charitable purpose or purposes as sole or dominant purpose - whether wages paid by Chamber were to persons 'engaged exclusively in and for performing work of a kind ordinarily performed in connection with its charitable purposes' - s48 *Payroll Tax Act 2009* (SA) - whether appellant's activities undertaken for charitable purpose of 'promoting trade and commerce in South Australia' - held: appellant did not prove that its dominant purpose or purposes were charitable - appeal dismissed.

[South Australian Employers'](#)

[From Benchmark Friday, 8 September 2017]

Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board [2017] TASFC 6

Full Court of the Supreme Court of Tasmania

Blow CJ; Pearce & Brett JJ

Negligence - two appeals - cattle escaped from farming property as result of gudgeon pin becoming detached from gatepost - some cattle strayed onto highway - motorist 'catastrophically injured' when he drove into one of the cattle - Motor Accident Insurance Board (MAIB) paid amount and "scheduled benefits" to motorist pursuant to *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) - respondent sued couple (Lesters) who owned cattle and land they escaped from, and company (Circular Head Fencing Pty Ltd) which Lesters engaged to construct boundary fence including gateway which the cattle escaped through - primary judge found motorist's injuries resulted from Lesters' negligence and Circular Head Fencing Pty Ltd's negligence - primary judge found Lesters bore 65% liability and Circular Head Fencing Pty Ltd 35%: - Circular Head Fencing Pty Ltd contended trial judge erred in finding it negligent - Lesters challenged both the finding of negligence against them and apportionment of liability - s13 *Civil Liability Act 2002* (Tas) - s28C *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) - held: breach of duty of care not established - factual causation not established - both appeals allowed.

[Circular Head Fencing](#)

[From Benchmark Monday, 4 September 2017]

R Developments Pty Ltd v Forth [2017] ACTCA 38

Court of Appeal of the Australian Capital Territory

Refshauge, Burns & Collier JJ

Building contract - standard form building contract - agreement for construction of residence by appellant (builder) for respondents (owners) - primary judge found builder was not entitled to terminate contract for owners' failure to comply with requirement to supply evidence of capacity to pay - primary judge also found owners failed to prove entitlement to anything more than

nominal damages for builder's wrongful repudiation - builder appealed - construction of contract - held: no error in primary judge's conclusion concerning effect and nature of clauses of contract - grounds of appeal unsubstantiated - appeal dismissed.

[R Developments](#)

[From Benchmark Tuesday, 5 September 2017]

Benchmark

Inviting a Friend to Supper

BY [BEN JONSON](#)

Tonight, grave sir, both my poor house, and I
Do equally desire your company;
Not that we think us worthy such a guest,
But that your worth will dignify our feast
With those that come, whose grace may make that seem
Something, which else could hope for no esteem.
It is the fair acceptance, sir, creates
The entertainment perfect, not the cates.
Yet shall you have, to rectify your palate,
An olive, capers, or some better salad
Ushering the mutton; with a short-legged hen,
If we can get her, full of eggs, and then
Lemons, and wine for sauce; to these a cony
Is not to be despaired of, for our money;
And, though fowl now be scarce, yet there are clerks,
The sky not falling, think we may have larks.
I'll tell you of more, and lie, so you will come:
Of partridge, pheasant, woodcock, of which some
May yet be there, and godwit, if we can;
Knat, rail, and ruff too. Howsoe'er, my man
Shall read a piece of Virgil, Tacitus,
Livy, or of some better book to us,
Of which we'll speak our minds, amidst our meat;
And I'll profess no verses to repeat.
To this, if ought appear which I not know of,
That will the pastry, not my paper, show of.
Digestive cheese and fruit there sure will be;
But that which most doth take my Muse and me,
Is a pure cup of rich Canary wine,
Which is the Mermaid's now, but shall be mine;
Of which had Horace, or Anacreon tasted,
Their lives, as so their lines, till now had lasted.
Tobacco, nectar, or the Thespian spring,
Are all but Luther's beer to this I sing.
Of this we will sup free, but moderately,
And we will have no Pooley, or Parrot by,
Nor shall our cups make any guilty men;
But, at our parting we will be as when
We innocently met. No simple word
That shall be uttered at our mirthful board,



Shall make us sad next morning or affright
The liberty that we'll enjoy tonight.

<https://www.poetryfoundation.org/poets/ben-jonson?>

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