

Friday, 9 November 2018

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Altintas v O'Dea Lawyers (No 2) (FCAFC) - costs - unreasonable conduct by respondent did not cause appellant to incur 'additional costs' - costs application by appellant failed

Melino v Roads and Maritime Services (NSWCA) - land and environment - compulsory acquisition of land - disturbance claims - appeal allowed

Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd (NSWCA) - judgments and orders - stay - security for costs - stay of judgment granted but not in respect of unchallenged amount of judgment sum or costs order - security for costs order refused

Global Consulting Services Pty Ltd v Gresham Property Investments Ltd (NSWCA) - equity - guarantee and indemnity - priority dispute - liability of guarantors - co-ordinate liabilities - exception to contribution's availability - appeal allowed

NRMA Insurance for the Nominal Defendant v Al-Bayati (NSWCA) - judgments and orders - motor vehicle accident - application for leave to appeal against determination of damages claim in sum of \$60,898.56 - leave to appeal refused

Attorney General for New South Wales v Gatsby (NSWCA) - constitutional law - retail tenancies - Civil and Administrative Tribunal of New South Wales was exercising judicial power in determining proceedings - Tribunal not a "court of a State" under Chapter III Constitution and s39 *Judiciary Act 1903* (Cth) - Tribunal did not have jurisdiction to determine the proceedings

Nationwide News Pty Ltd v Vass (NSWCA) - defamation - offer of compromise was not a

counteroffer to offer of amends - open to respondent to accept offer of amends - appeal dismissed

Stuart Henry Masters & Anor v NSW Trustee & Guardian as trustee for Gennie Merlene Gorey (NSWSC) - wills and estates - trusts and trustees - shares in company and 'associated water rights' formed part of testamentary trust - shares to be transferred to trustees

Bank of Queensland Ltd v AIG Australia Ltd (NSWSC) - banking - insurance - claim for indemnity under Civil Liability Insurance Policy - loss for which insurers liable arose from multiple "Claims" - bank to bear multiple Retentions

Summaries With Link (Five Minute Read)

Altintas v O'Dea Lawyers (No 2) [2018] FCAFC 187

Full Court of the Federal Court of Australia

White, Perry & Charlesworth JJ

Costs - proceedings concerned question reserved for Court's consideration by South Australian Employment Tribunal - Court found it lacked jurisdiction to answer reserved question - appellant sought that respondent pay some costs - appellant's counsel submitted order appropriate 'even taking into account' s570 *Fair Work Act 2009* (Cth) - respondent opposed costs order and made no application for costs - common ground s570 FW Act was applicable to appellant's application - whether respondent's conduct unreasonable and, if so, whether the conduct caused costs to be incurred by appellant - held: Court not satisfied that appellant incurred 'additional costs' due to respondent's unreasonable conduct - costs application failed.

[Altintas](#)

[From Benchmark Thursday, 8 November 2018]

Melino v Roads and Maritime Services [2018] NSWCA 251

Court of Appeal of New South Wales

Beazley P; Basten & Payne JJA

Land and environment - compulsory acquisition of land - respondent acquired area of appellant's land for upgrade of highway - appellants made claims under *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (Just Terms Act) for acquired land's market value and decrease in adjoining land's value - appeal concerned disturbance claims under s55(d) (Just Terms Act) which primary judge rejected - whether primary judge erroneously declined to grant compensation for construction of 'new dwelling', relocation of 'existing dwelling', farming structures' replacement and/or 'loan establishment fees and interest' - whether erroneous failure to award 'agreed sum' for road works - held: appeal allowed.

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[From Benchmark Monday, 5 November 2018]

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Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd [2018] NSWCA 256

Court of Appeal of New South Wales

Macfarlan JA

Judgments and orders - stay - security for costs - McDougall J declared applicant held certain proceeds on trust and gave judgment for first respondent in sum of \$3,958,651.08 - applicant appealed against certain amount of judgment sum and sought stay of whole judgment and of order that it pay costs - first respondent sought security for costs from applicant - whether applicant's appeal submissions 'reasonably arguable' - whether to grant stay - r51.44 *Uniform Civil Procedure Rules 2005* (NSW) - applicant's prospects of success - whether "there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted" - applicant's financial resources - whether 'special circumstances' established warranting order for security for costs - whether order for security for costs could frustrate applicant's appeal - held: Court satisfied to grant stay but not in respect of unchallenged part of judgment sum or costs order - security for costs order refused.

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[From Benchmark Thursday, 8 November 2018]

Global Consulting Services Pty Ltd v Gresham Property Investments Ltd [2018] NSWCA 255

Court of Appeal of New South Wales

Bathurst CJ; McColl & Leeming JJA

Equity - guarantee and indemnity - 'junior secured creditors' lent money to fund property development - appeal concerned priority dispute between junior secured creditors in respect of surplus from sale proceeds of land following payment of senior secured creditors - whether whole proceeds of land's sale should be used to repay senior secured creditors or only proceeds attributable to largest parcel's sale - whether three respondent guarantors now in receivership liable to contribute in equity - exceptions to contribution's availability - whether liabilities of guarantors co-ordinate - whether second respondent was 'primary obligor' - whether 'proper regard' not given to benefits second, third and fourth respondents received - whether one guarantor 'enjoys all the benefits' - whether erroneous rejection that there was 'agreement or common intention' between second, third and fourth respondents that second respondent was 'primarily liable' - *Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116 - held: appeal allowed.

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[From Benchmark Thursday, 8 November 2018]

NRMA Insurance for the Nominal Defendant v Al-Bayati [2018] NSWCA 258

Court of Appeal of New South Wales

Macfarlan JA & Barrett AJA

Judgments and orders - applicant sought to appeal against determination of damages claim for personal injury arising from motor vehicle accident - judgment given for respondent against applicant in sum of \$60,898.56 - s127(2)(c)(i) *District Court Act 1973* (NSW) - whether proposed

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appeal arguable - 'whether any issue of principle or of general public importance' raised by case - whether applicant's submissions indicated it had 'plainly suffered an injustice' - held: application for leave to appeal dismissed.

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[From Benchmark Thursday, 8 November 2018]

Attorney General for New South Wales v Gatsby [2018] NSWCA 254

Court of Appeal of New South Wales

Bathurst CJ; Beazley P; McColl, Basten & Leeming JJA

Constitutional law - proceedings concerned challenge to determination of Appeal Panel of Civil and Administrative Tribunal of New South Wales - Appeal Panel had found that, in determining two proceedings pursuant to *Residential Tenancies Act 2010* (NSW), the Tribunal was exercising judicial power of Commonwealth and was empowered to do so because it was a "court of a State" under Chapter III Constitution and s39 *Judiciary Act 1903* (Cth) - determination of questions - whether Tribunal was exercising judicial power in determining *Gatsby v Gatsby* proceeding and *Dibbon v Johnson* proceeding - whether Tribunal was a "court of a State" under Chapter III Constitution and s39 *Judiciary Act 1903* (Cth) - held: Tribunal was exercising judicial power in *Gatsby v Gatsby* and *Dibbon v Johnson* - Civil and Administrative Tribunal of New South Wales was not a "court of a State" under Chapter III Constitution and s39 *Judiciary Act 1903* (Cth) - Civil and Administrative Tribunal of New South Wales did not have jurisdiction to determine *Gatsby v Gatsby* proceeding and *Dibbon v Johnson* - questions determined.

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[From Benchmark Thursday, 8 November 2018]

Nationwide News Pty Ltd v Vass [2018] NSWCA 259

Court of Appeal of New South Wales

McColl, Basten & Leeming JJA

Defamation - applicant published article claiming respondent bought five-panelled painting and sold one panel separately in breach of sale contract - respondent sued applicant in defamation - applicant served 'offer to make amends' under Pt 3, Div 1 *Defamation Act 2005* (NSW) (Defamation Act) - respondent accepted offer of amends in letter to applicant - trial judge declared letter was a 'valid acceptance of the offer' and vacated hearing date - applicant sought to challenge declaration on basis that 'well after' making of offer of amends respondent had served offer of compromise on applicant pursuant to r20.26 *Uniform Civil Procedure Rules 2005* (NSW) - applicant contended the offer of compromise constituted rejection of offer of amends - whether offer of compromise 'had the effect of a counteroffer' - provisions concerning offers to make amends in Pt 3, Div 1 Defamation Act (amends provisions) - whether common law contract principles operated within amends provisions' framework - held: offer of compromise was not a counteroffer - open to respondent to accept offer of amends - appeal dismissed.

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[From Benchmark Friday, 9 November 2018]

Stuart Henry Masters & Anor v NSW Trustee & Guardian as trustee for Genniece Merlene Gorey [2018] NSWSC 1670

Supreme Court of New South Wales

Rees J

Wills and estates - trusts and trustees - deceased made Will in 1969 leaving 'farming lands' on trust for grandsons - when deceased died in 2006 she owned farm and shares in company 'with associated water rights' - whether to appoint replacement trustees to testamentary trust - whether, at time of deceased's death, shares and associated water rights formed part of testamentary trust by law or Constitution of company - if shares and associated water rights did not form part of testamentary trust whether, on proper construction of Will, water rights were included in testamentary trust - whether, if water rights not included in testamentary trust, Will should be rectified - held: shares in company and associated water rights formed part of testamentary trust - shares to be transferred to trustees.

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[From Benchmark Monday, 5 November 2018]

Bank of Queensland Ltd v AIG Australia Ltd [2018] NSWSC 1689

Supreme Court of New South Wales

Stevenson J

Banking - insurance - plaintiff sought indemnity under Civil Liability Insurance Policy which defendants issued - Bank sought "Loss" and "Defence Costs" incurred in defending and settling "Representative Proceedings" against Bank and its agent - first defendant lead insurer under policy liable for 37.5 per cent of insured loss - third defendant liable for 25 per cent of insured loss - Bank had settled with second defendant - whether loss which insurers were liable for arose from single "Claim" under Policy or multiple "Claims" - if multiple "Claims", multiple 'Retentions' would apply such that insurers would have no liability to make payment to Bank - held: loss arose from multiple "Claims" - Claims did not arise from, were not 'based on', or 'attributable to', a series of related Wrongful Acts' - Bank required to bear multiple Retentions.

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Floating Island

By: Dorothy Wordsworth

Harmonious Powers with Nature work

On sky, earth, river, lake, and sea:

Sunshine and storm, whirlwind and breeze

All in one duteous task agree.

Once did I see a slip of earth,
By throbbing waves long undermined,
Loosed from its hold; — how no one knew
But all might see it float, obedient to the wind.

Might see it, from the mossy shore
Dissevered float upon the Lake,
Float, with its crest of trees adorned
On which the warbling birds their pastime take.

Food, shelter, safety there they find
There berries ripen, flowerets bloom;
There insects live their lives — and die:
A peopled world it is; in size a tiny room.

And thus through many seasons' space
This little Island may survive
But Nature, though we mark her not,
Will take away — may cease to give.

Perchance when you are wandering forth
Upon some vacant sunny day
Without an object, hope, or fear,
Thither your eyes may turn — the Isle is passed away.

Buried beneath the glittering Lake!
Its place no longer to be found,
Yet the lost fragments shall remain,
To fertilize some other ground.

https://en.wikipedia.org/wiki/Dorothy_Wordsworth

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