

Friday, 10 August 2018

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

An NHS Trust and others (Respondents) v Y (by his litigation friend, the Official Solicitor) and another (Appellants) (UKSC) - judgments and orders - Court order was not, in all circumstances, required before 'clinically assisted nutrition and hydration' could be withdrawn from a person with 'prolonged disorder of consciousness' - appeal dismissed

Scevola v Minister Administering National Parks and Wildlife (NSWCA) - environment and planning - summary dismissal - costs - leave to appeal against two decisions of Land and Environment Court refused

PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM (NSWCA) - costs - dismissal of successful defendants' application for non-party costs order against unsuccessful plaintiff's sole director and shareholder - appeal dismissed

The Owners - Strata Plan No 66375 v King (NSWCA) - building and construction - appeal against dismissal of owners corporation's claim on basis respondents were not "developers" under s3A *Home Building Act 1989* (NSW) - respondents were parties to building contract and liable for 'design defects' - appeal allowed

Quach v New South Wales Health Care Complaints Commission; Quach v New South Wales Civil and Administrative Tribunal (NSWCA) - vexatious proceedings - three notices of motion seeking to set aside vexatious proceedings orders - notices of motion dismissed

Alam v Allianz Australia Insurance Limited (NSWSC) - administrative law - motor accidents compensation - procedural fairness - whole person impairment - insurer granted extension of

time to seek review of medical assessment - summons dismissed

Wu v Zhao (NSWSC) - judgments and orders - loan - Local Court appeal - inadequate reasons - failure to make findings on credit and to consider evidence bearing on credit - appeal allowed

O'Keeffe v Toop & Ors (VSC) - summary judgment - negligence - solicitors' duties - claims of negligence and breach of retainer - claims barred by terms of Release or were abuse of process - summary judgment granted

Inghams Enterprises Pty Ltd v Kim Yen Tat (QCA) - negligence - worker attacked by third party in car park of employer - causation not established - employer not liable - appeal allowed

Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission (QCA) - corporations - winding up - no error in primary judge's decision that companies should be wound up on just and equitable grounds - appeal dismissed

D'Arcy v Caltex Australia Limited (ACTSC) - negligence - plaintiff injured when relining petrol tank - employer liable - judgment for plaintiff

Summaries With Link (Five Minute Read)

An NHS Trust and others (Respondents) v Y (by his litigation friend, the Official Solicitor) and another (Appellants) [2018] UKSC 46

Supreme Court of the United Kingdom

Lady Hale, President; Lord Mance, Lord Wilson, Lord Hodge, & Lady Black

Judgments and orders - appeal concerned question whether, in all circumstances, a Court order must be obtained before 'clinically assisted nutrition and hydration' (CANH) could be withdrawn from a person with a 'prolonged disorder of consciousness' - whether 'mandatory requirement', under common law and/or European Convention on Human Rights (ECHR), to obtain Court's approval for withdrawal of CANH - whether Court's approval required to ensure proper safeguarding of a patient's 'vulnerable position' - Mental Capacity Act Code of Practice - s42(1) *Mental Capacity Act 2005* (MCA 2005) - Court Protection Rules 2007 - held: neither domestic law nor ECHR required that Court be involved in deciding best interests of every patient with 'prolonged disorder of consciousness' before withdrawal of CANH could occur - Court satisfied that if MCA 2005's provisions were followed, 'relevant guidance' observed, and there was agreement on patient's best interests - patient could be treated in accordance with agreement - appeal dismissed.

[An NHS Trust](#)

[From Benchmark Friday, 10 August 2018]

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Scevola v Minister Administering National Parks and Wildlife [2018] NSWCA 171

Court of Appeal of New South Wales

Meagher & Gleeson JJA

Environment and planning - summary dismissal - costs - applicant owned lot in 'Heritage Estates' - applicant sought to appeal from two Land and Environment Court decisions - in first decision Court summarily dismissed applicant's claim for relief in relation to land's 'alleged compulsory acquisition', including declaration of right "in fee simple" comprising "unformed roads" in Heritage Estates - in second decision, Court ordered applicant to pay respondents' costs of summary dismissal application - *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) - held: no basis for finding primary judge erred in summarily dismissing proceeding or that there was miscarriage in primary judge's exercise of discretion as to costs - application for leave to appeal refused.

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[From Benchmark Tuesday, 7 August 2018]

PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM [2018] NSWCA 168

Court of Appeal of New South Wales

McColl, Basten & Leeming JJA

Costs - primary judge dismissed successful defendants' application for non-party costs order against unsuccessful plaintiff's sole director and shareholder - whether erroneous reasoning on part of primary judge - whether erroneous finding that application "should or must fail" by reference to certain findings of primary facts' - whether *House v King* error established - "far from a disinterested company director" - 'personal animosity' - whether necessary to establish unreasonable conduct - 'ordinary run of cases' - whether exceptional circumstances - 98(1)(b) *Civil Procedure Act 2005* (NSW) - held: appeal dismissed.

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[From Benchmark Tuesday, 7 August 2018]

The Owners - Strata Plan No 66375 v King [2018] NSWCA 170

Court of Appeal of New South Wales

Ward, Leeming & White JJA

Building and construction - appellant owners corporation sued respondents and others in respect of building defects - primary judge dismissed claim against respondents on basis they were not "developers" under s3A *Home Building Act 1989* (NSW) - primary judge also found that, even if respondents were "developers", claims against them in respect of a number of defects would have failed because relevant work which builder performed did not include 'defective design' causing the defects - appellant contended primary judge erred in finding it failed to establish respondents were parties to the building contract, and in finding that the work did not include the defective design causing the defects - statutory construction - ss18B(c) & 18D of the Act - held: respondents were parties to the building contract - respondents were liable as developers under s18C for breach of statutory warranty in s18B(c), even though the

building work's non-compliance resulted from design defects - appeal allowed.

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[From Benchmark Wednesday, 8 August 2018]

Quach v New South Wales Health Care Complaints Commission; Quach v New South Wales Civil and Administrative Tribunal [2018] NSWCA 175

Court of Appeal of New South Wales

Gleeson, Payne & White JJA

Vexatious proceedings - three notices of motion in which applicant, under s9 *Vexatious Proceedings Act 2008* (NSW), sought to set aside vexatious proceedings orders - whether Court which made vexatious proceedings orders was 'invalidly constituted' because one judge exceeded 70 years - whether reliance on s72 Constitution misconceived - whether requirement of leave in s14 Vexatious Proceedings Act applied to applicant's application under s9 Vexatious Proceedings Act - whether applicant should be permitted to rely on point not raised at show cause hearing - held: notices of motion dismissed.

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[From Benchmark Friday, 10 August 2018]

Alam v Allianz Australia Insurance Limited [2018] NSWSC 1214

Supreme Court of New South Wales

Adamson J

Administrative law - motor accidents compensation - procedural fairness - first defendant's solicitor applied by letter to Proper Officer of State Insurance Regulatory Authority for extension of time to seek review under s63(1) *Motor Accidents Compensation Act 1999* (NSW) of medical assessment of plaintiff's whole person impairment - Proper Officer sent an email to plaintiff's solicitor containing the letter - plaintiff's solicitor was away and did not respond to Proper Officer's email until returning from leave - Proper Officer granted extension of time - common ground Proper Officer had not afforded plaintiff procedural fairness in making decision without having heard from plaintiff's solicitor in response to first defendant's application - whether Proper Officer obliged to quash and remake decision - whether decision amenable to judicial review - whether Proper Officer 'rectified deficiency' in subsequent decision, following consideration of plaintiff's submissions, to maintain original decision to extend time - whether open to find "exceptional circumstances" warranting extension of time - held: grounds for review not made out - summons dismissed.

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[From Benchmark Wednesday, 8 August 2018]

Wu v Zhao [2018] NSWSC 1182

Supreme Court of New South Wales

Davis J

Judgments and orders - loan - Local Court appeal - plaintiff was executor of deceased father's will - plaintiff sued defendant sister for repayment of balance of loan which parents had made to

defendant - defendant contended she had repaid loan's balance and relied on document signed by parents and two family members - defendant also relied on defence under *Limitation Act 1969* (NSW) (Limitation Act) - Magistrate rejected defence under Limitation Act but was not satisfied any debt was owing when it 'would have passed' to deceased's estate - plaintiff appealed - adequacy of Magistrate's reasons - 'competing versions' - credit - 'documentary evidence' - held: Magistrate did not provide adequate reasons - Magistrate failed to make findings on credit, and to consider documentary evidence bearing on credit - appeal allowed.

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[From Benchmark Thursday, 9 August 2018]

O'Keeffe v Toop & Ors [2018] VSC 421

Supreme Court of Victoria

Lansdowne AsJ

Summary judgment - negligence - solicitors' duties - plaintiff alleged defendants were negligent and breached retainer in conduct of her WorkCover damages claim - writ filed 'almost six years' after the retainer was terminated - earlier proceedings had touched on retainer - defendants sought dismissal or stay of proceedings on basis of earlier proceedings - Anshun estoppel - abuse of process - s63 *Civil Procedure Act 2010* (Vic) - held: plaintiff had no real prospect of success on allegations - allegations barred by terms of Release parties had entered in proceedings in which solicitors' firm had sought to recover costs of taxation - summary judgment could also be given under r23.01 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) on basis of abuse of process.

[O'Keeffe](#)

[From Benchmark Monday, 6 August 2018]

Inghams Enterprises Pty Ltd v Kim Yen Tat [2018] QCA 182

Court of Appeal of Queensland

Gotterson & Morrison JJA; Bond J

Negligence - respondent was shift worker at applicant's factory - applicant attacked in factory's car park by third party - applicant suffered post-traumatic stress disorder - respondent sued applicant in negligence - primary judge gave judgment for applicant - finding of causation based on applicant's breach of duty in to 'educate staff to report suspicious behaviour in and about the car park' - whether erroneous finding of breach of duty - adequacy of reasons - whether erroneous evaluation of evidence concerning causation - test for factual causation - "but for" test - ss305D *Workers' Compensation and Rehabilitation Act 2003* (Qld) - held: primary judge erred concerning whether respondent's injury was caused by applicant's breach of duty - appeal allowed.

[Inghams](#)

[From Benchmark Wednesday, 8 August 2018]

Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission [2018] QCA 181

Court of Appeal of Queensland

Sofronoff P; Gotterson & McMurdo JJA

Corporations - winding up - primary judge granted Australian Securities and Investments

Commission's application that appellant companies be wound up under s461(1)(k)

Corporations Act 2001 (Cth) on basis it was just and equitable - appellants appealed,

contending factual errors had affected primary judge's exercise of discretion - 'nature and

extent' of displaced director's 'ongoing involvement' if companies permitted to continue -

whether adverse finding in respect of new director ought to have been made - public interest -

'lamentable history of mismanagement and misconduct' - risk to public interest if companies

were to continue - held: no error in primary judge's conclusion that companies should be wound

up on just and equitable ground - appeal dismissed.

[Gognos](#)

[From Benchmark Wednesday, 8 August 2018]

D'Arcy v Caltex Australia Limited [2018] ACTSC 206

Supreme Court of the Australian Capital Territory

Burns J

Negligence - plaintiff suffered injuries including burns when relining petrol tank - plaintiff sued

first defendant and second defendant in negligence - second defendant was plaintiff's employer

- first defendant sued as 'alleged de facto occupier' of premises where tanks situated - first

defendant denied it was owner or occupier and denied breach of duty - second defendant

accepted there was evidence it breached non-delegable duty of care to plaintiff but contended

plaintiff was contributorily negligent - whether failure to provide safe system of work - whether

statutory breaches - held: no duty of care owed by first defendant - even if first defendant had

owed duty of care under s42 *Civil Laws (Wrongs) Act 2002* (ACT) it did not breach it - second

defendant breached duty of care to plaintiff - no contributory negligence by plaintiff - judgment

for plaintiff.

[D'Arcy](#)

[From Benchmark Wednesday, 8 August 2018]



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Sonnet 76

By: William Shakespeare

Why is my verse so barren of new pride,
So far from variation or quick change?
Why with the time do I not glance aside
To new-found methods and to compounds strange?
Why write I still all one, ever the same,
And keep invention in a noted weed,
That every word doth almost tell my name,
Showing their birth and where they did proceed?
O, know, sweet love, I always write of you,
And you and love are still my argument;
So all my best is dressing old words new,
Spending again what is already spent:
For as the sun is daily new and old,
So is my love still telling what is told.

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

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