

Friday, 11 May 2018

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

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### Executive Summary (1 minute read)

**Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd** (FCA) - admiralty - joint venture - referee's report - erroneous calculation of amortisation - section of report remitted for correction of error - report otherwise adopted - procedural directions made

**CMP Manufacturing Pty Ltd v Barbieri** (FCA) - industrial law - employment contract - applicant entitled to retrenchment payment or, if not entitled to retrenchment payment, entitled to 'payment in lieu of notice' - appeal dismissed

**The Real Thing Food Supplements CC v Media Tag Pty Ltd** (NSWSC) - consumer law - misleading and deceptive conduct - passing off - action arising from sale of goods to Woolworths stores - proceedings dismissed

**Ku-ring-gai Council v Ichor Constructions Pty Ltd** (NSWSC) - commercial arbitration - arbitrator acting as mediator - no written consent given to resumption of arbitration following mediation - summons dismissed

**Hoskin v Griffin & Ors** (VSC) - execution, seizure and sale - breach of duty by Sheriff to judgment creditor and judgment debtor to obtain fair price for property - parties to be heard on form of relief

**Mavridis v Andronescu** (VSC) - wills and estates - terms of settlement entered under mistake - application for approval of compromise adjourned

**Botsman v Bolitho & Ors** (VSCA) - security for costs - application for leave to appeal against

settlement of group proceedings - security for costs refused

**Bell v Brisbane City Council & Ors** (QCA) - planning and environment - challenge to approval of proposed development in conflict with planning scheme upheld - appeal allowed

**Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd** (QSC) - contract - partnership - applicant failed to establish breach of Co-Owners Deed by respondent - respondent entitled to declaratory relief

**Andressen v Bendigo & Adelaide Bank Ltd** (SASCFC) - service - private international law - appeal against entry of default judgment based on presumptive service of summons and statement of claim while defendant overseas - appeal dismissed

**Stokes v Ragless (No 2)** (SASC) - costs - defamation - self-represented litigant - offers of settlement - not in interests of justice to order indemnity costs in favour of successful plaintiff - costs awarded on party/party basis

**BHP Billiton Iron Ore Pty Ltd v Treby** (WASCA) - workers compensation - respondent injured at work - arbitrator ordered appellant was to pay compensation and statutory allowances to respondent - appeal dismissed

**Engine Protection Equipment Pty Ltd v Miller** (WASCA) - workers compensation - total incapacity - no error in decision of arbitrator to find worker entitled to weekly payments of compensation for claimed periods - appeal dismissed

**Golding v Primavera Holdings Pty Ltd** (ACTSC) - trusts and trustees - plaintiffs entitled to declaration of express trust and orders that first defendant perform obligations under trust

## Summaries With Link (Five Minute Read)

### **Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd [2018] FCA 647**

Federal Court of Australia

Burley J

Admiralty - joint venture agreement - referee's report - Court appointed referee to inquire into disputes between applicant and second defendant concerning business's 'operating profit' for certain periods - parties opposed adoption of certain parts of referee's report - r28.67 *Federal Court Rules 2011* (Cth) - 'related party transactions' - 'allowance for amortisation' - 'rental allowance' - 'costs' - 'useful life' of joint venture agreement - held: referee erred in calculation of amortisation - section of report remitted for correction of error - report otherwise adopted - procedural directions made.

## [Ozmen](#)

[From Benchmark Thursday, 10 May 2018]

### **CMP Manufacturing Pty Ltd v Barbieri [2018] FCA 622**

Federal Court of Australia

Bromberg J

Industrial law - contract - employment contract - respondent was appellant's former employee - respondent unsuccessfully claimed appellant dismissed him in breach of ss340 & 352 *Fair Work Act 2009* (Cth) (Fair Work Act) - appellant was successful in contractual claim of entitlement to retrenchment payment - primary judge held that if he was wrong concerning entitlement to retrenchment payment, then applicant would have succeeded on entitlement to payment of amount 'in lieu of notice' - whether erroneous that finding respondent's position redundant and respondent contractually entitled to retrenchment payment - whether erroneous finding that retrenchment was not excluded as applicant not offered "alternative position" under contract - whether erroneous finding that respondent, if not entitled to the retrenchment pay under contract, would have been entitled to money in lieu of notice under s117 Fair Work Act - held: grounds of appeal failed - appeal dismissed.

## [CMP](#)

[From Benchmark Friday, 11 May 2018]

### **The Real Thing Food Supplements CC v Media Tag Pty Ltd [2018] NSWSC 585**

Supreme Court of New South Wales

Stevenson J

Consumer law - plaintiff incorporated in South Africa made health foods supplements - plaintiff exported to Australia - first defendant was distributor of plaintiff's products to Woolworths stores - first defendant arranged for products to be manufactured in Australia and sold to Woolworths stores - products were similar to those distributed for plaintiff - plaintiff brought proceedings against first defendant and its two directors - it was alleged that first defendant represented to Woolworths that the goods it was supplying were plaintiff's goods, that the representation was misleading and deceptive under s18 *Australian Consumer Law* and that Woolworths was induced by the representation to purchase the goods - it was also alleged that directors were knowingly involved in the contravention and that first defendant engaged in tort of passing off - held: plaintiff failed in case alleging misleading and deceptive conduct, rendering it unable to establish passing off case - proceedings dismissed.

## [View Decision](#)

[From Benchmark Monday, 7 May 2018]

### **Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610**

Supreme Court of New South Wales

McDougall J

Commercial arbitration - second defendant arbitrator heard dispute between plaintiff and first defendant - first defendant contended arbitrator had acted as mediator and had then resumed

arbitration without written consent of parties required by s27D(4) *Commercial Arbitration Act 2010* (NSW) - whether arbitrator acted as mediator and, of so, whether parties gave written consents before arbitration resumed - if consents not given, whether first defendant waived right to object to arbitration's resumption, or was estopped from asserting that s27D(4)'s requirements not met - held: arbitrator acted as mediator - first defendant did not give written consent to arbitration being conducted after mediation - estoppel case failed - waiver not established - summons dismissed.

[View Decision](#)

[From Benchmark Wednesday, 9 May 2018]

## **Hoskin v Griffin & Ors [2018] VSC 216**

Supreme Court of Victoria

Quigley J

Execution, seizure and sale - plaintiff was registered proprietor of land - land sold at auction which first defendant officer conducted on second defendant's behalf - plaintiff contended defendants breached 'duty to act reasonably' in both judgment creditor's interests and judgment debtor's interests to 'obtain a fair price' for sale of interest - whether sale price was fair price - process of establishment of reserve - Sheriff's powers and duties under *Sheriff Act 2009* (Vic) - held: defendants breached duty to plaintiff by proceeding to 'Final Action' and not passing in property after receiving single bid - sale price was not a fair price - property sold at 'significant undervalue' - parties to be hear on appropriate relief

[Hoskin](#)

[From Benchmark Wednesday, 9 May 2018]

## **Mavridis v Andronescu [2018] VSC 227**

Supreme Court of Victoria

Derham AsJ

Wills and estates - defendant sought approval of compromise of plaintiff's claim under Pt IV *Administration and Probate Act 1958* (Vic) - compromise concerned proceeds of sale of estate's 'principal asset' - plaintiff was undischarged bankrupt, but plaintiff had entered compromise believing she was discharged from bankruptcy - plaintiff informed Court she wished to make application to set aside the terms of settlement for mistake - plaintiff sought adjournment of defendant's application - held: advice of defendant's counsel concerning compromise was insufficient to purpose - plaintiff, and likely defendant also, had entered compromise under mistake - plaintiff or defendant may be able to set terms of settlement aside - there was prospect of further claim on deceased's estate - approval of compromise would make it more difficult to pursue further claim - application adjourned.

[Mavridis](#)

[From Benchmark Friday, 11 May 2018]

## **Botsman v Bolitho & Ors [2018] VSCA 111**

Court of Appeal of Victoria

Whelan & Niall JJA

Security for costs - applicant sought to appeal from approval of settlement of group proceeding - group proceeding had arisen from failure of 'non-bank property lender (Banksia) - first respondent was lead plaintiff in group proceeding - first respondent sought that applicant provide security for costs - public interest - whether application for security was designed to end proceedings - protective jurisdiction - whether application would put 'economic pressure' on 'Bolitho interests' - whether risk that costs order would not be satisfied - impecuniosity - stultification - prospects of success - held: Court not satisfied costs order in first respondent's favour would not be met - security for costs refused.

[Botsman](#)

[From Benchmark Wednesday, 9 May 2018]

## **Bell v Brisbane City Council & Ors [2018] QCA 84**

Court of Appeal of Queensland

Sofronoff P; Philippides & McMurdo JJA

Planning and environment - second respondent obtained Council's approval to develop land by towers' construction - applicant, who lived on adjoining land, unsuccessfully challenged approval in Planning and Environment Court - Planning and Environment Court found that even though development conflicted with planning scheme, there were 'sufficient grounds' in public interest to grant approval - applicant sought to appeal - whether trial judge erred in determining non-compliance's extent - height limits - 'community and economic needs' - whether 'reasoning inconsistent with *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209 - whether irrelevant considerations and/or failure to take into account relevant considerations - 'public detriment' - s326(1) *Sustainable Planning Act 2009* (Qld) - held: errors of law established - appeal allowed - matter remitted.

[Bell](#)

[From Benchmark Wednesday, 9 May 2018]

## **Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd [2018] QSC 95**

Supreme Court of Queensland

Jackson J

Contract - partnership - Co-Owners Deed - applicant and respondent co-owned land comprising office building - proceedings concerned whether applicant company was obliged to transfer half-interest as co-owner to respondent - applicant contended it was not obliged to transfer the half-interest as it did not breach Co-Owners Deed, or alternatively on basis that a contractual buy-out mechanism was not 'validly engaged' - applicant sought declaratory relief - respondent sought specific performance - whether applicant breached contract - whether buy-out mechanism validly engaged - held: applicant did not establish that respondent breached Co-Owners Deed - respondent entitled to declaratory relief.

[Clarence](#)

[From Benchmark Tuesday, 8 May 2018]

# Benchmark

## **Andressen v Bendigo & Adelaide Bank Ltd [2018] SASCFC 30**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Kelly & Blue JJ

Service - private international law - Master made 'presumptive service order' under r69 *District Court Civil Rules 2006* (SA) for service of summons and statement of claim by post and email to appellant's solicitor - appellant contended service was defective because he was not in Court's jurisdiction at time of service - Master dismissed application to restrain default judgment's entry based on presumptive service under the presumptive service order - District Court judge and Supreme Court judge dismissed appeals - held: r69 of the Rules extended to presumptive service on a defendant, whether defendant was in South Australian or overseas - r69 was not ultra vires of power which s51 *District Court Act 1991* (SA) conferred - appellant not permitted to raise for the first time on appeal, contention concerning impracticability of overseas service - appeal dismissed.

[Andressen](#)

[From Benchmark Thursday, 10 May 2018]

## **Stokes v Ragless (No 2) [2018] SASC 56**

Supreme Court of South Australia

Bampton J

Costs - defamation - self-represented litigant - successful plaintiff sought order for indemnity costs basis of s38 *Defamation Act 2005* (SA) - plaintiff contended defendant had unreasonably failed to make settlement offer and to agree to settlement offers - defendant was self-represented - plaintiff's offers of settlement did not explain 'implications of accepting or not accepting each offer' (implications) - held: no rule that represented party must inform unrepresented party of implications, but in this case the interests of justice required costs not to be awarded on indemnity basis - it could not be assumed unrepresented defendant would be aware of Supreme Court Rules concerning offers and s38 of the Act - plaintiff to have costs on party/party basis.

[Stokes](#)

[From Benchmark Monday, 7 May 2018]

## **BHP Billiton Iron Ore Pty Ltd v Treby [2018] WASCA 60**

Court of Appeal of Western Australia

Buss P, Murphy JA & Chaney J

Workers compensation - arbitrator found respondent suffered injury at work - arbitrator ordered appellant to pay respondent weekly compensation for total incapacity and statutory allowances - appellant sought leave to appeal pursuant to s247 *Workers' Compensation and Injury Management Act 1981* (WA) - primary judge refused leave - whether open to arbitrator to accept and rely on one doctor's medical report in preference to another doctor's medical report - .held: grounds of appeal did not have merit - appeal dismissed.

[BHP](#)

[From Benchmark Monday, 7 May 2018]

## **Engine Protection Equipment Pty Ltd v Miller [2018] WASCA 55**

Court of Appeal of Western Australia

Murphy, Mitchell & Beech JJA

Workers compensation - respondent worker sought compensation for knee injury - appellant employer paid compensation until worker reached 'prescribed total amount' - worker suffered subsequent back injury - arbitrator decided worker was entitled to compensation of weekly payments by appellant for total incapacity for back injury for periods claimed - primary judge dismissed appeal - appellant sought to appeal, contending arbitrator erred by 'failing to focus' on which of back injury and knee injury was the 'true cause' of incapacity - whether erroneous finding concerning entitlement to weekly payments - whether erroneous finding as to periods of payment - whether incapacity could have only one cause - 'the real cause' - 'the cause' - *Workers' Compensation and Injury Management Act 1981 (WA)* - held: no error in arbitrator not seeking to identify incapacity's 'true cause' - no error in arbitrator's consideration of whether back injury 'materially contributed' to incapacity - grounds of appeal failed - appeal dismissed.

[Engine Protection Equipment](#)

[From Benchmark Tuesday, 8 May 2018]

## **Golding v Primavera Holdings Pty Ltd [2018] ACTSC 118**

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Trusts and trustees - express trust - plaintiffs previously owned land which they sold to first defendant - plaintiff claimed that express trust was created by trust deed over portion of land when contract for sale executed - plaintiff contended they were beneficiaries in equal shares - plaintiffs sought to enforce a condition of trust deed requiring transfer of unit to them for \$1 - plaintiffs sought declaration of express trust, declaration of first defendant's breach of the trust, and order that first defendant perform obligations under trust - held: plaintiffs entitled to declaration of express trust - plaintiff entitled to orders compelling first defendant's performance of obligations under trust - declaration and orders made.

[Golding](#)

[From Benchmark Friday, 11 May 2018]

# Benchmark

## Moments of Vision

**By:** Thomas Hardy

That mirror  
Which makes of men a transparency,  
Who holds that mirror  
And bids us such a breast-bared spectacle to see  
Of you and me?

That mirror  
Whose magic penetrates like a dart,  
Who lifts that mirror  
And throws our mind back on us, and our heart,  
Until we start?

That mirror  
Works well in these night hours of ache;  
Why in that mirror  
Are tincts we never see ourselves once take  
When the world is awake?

That mirror  
Can test each mortal when unaware;  
Yea, that strange mirror  
May catch his last thoughts, whole life foul or fair,  
Reflecting it—where?

[https://en.wikipedia.org/wiki/Thomas\\_Hardy](https://en.wikipedia.org/wiki/Thomas_Hardy)

Thomas Hardy - Wikipedia

en.wikipedia.org

Thomas Hardy OM (2 June 1840 – 11 January 1928) was an English novelist and poet. A Victorian realist in the tradition of George Eliot, he was influenced both in his novels and in his poetry by Romanticism, especially William Wordsworth.

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