

Friday, 11 August 2017

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Apple Inc v Arcadia Trading Limited (EWHC) - trade mark - rejection of application to register IWATCH as a trademark in respect of certain goods - trade mark was descriptive in respect of computer software incorporated in smart watches - appeal dismissed

Midland Funding, LLC v Johnson (SCOTUS) - bankruptcy - limitations - debt collection practices - filing of an 'obviously time barred' proof of claim was not false, deceptive, misleading, unfair, or unconscionable under *Fair Debt Collection Practices Act*, 15 U.S.C - reversed

Commissioner of Taxation v Jayasinghe (HCA) - taxation - privileges and immunities under *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act) - respondent did not hold an office within meaning of s6(1)(d)(i) IOPI Act - Commissioner not bound to exempt respondent from taxation in income years - appeal allowed

MLC Limited v Crickitt (FCA) - insurance - life insurance - policy for husband and wife's benefit - wife now deceased - husband convicted of wife's murder - application by insurer to pay death benefit into Court granted

Spectrum Rare Earths Limited, in the matter of Spectrum Rare Earths Limited (FCA) - corporations - defect in offer of shares - orders regularising offer and sale of shares and providing relief from civil liability for shares' sellers granted

Academy Cleaning & Security Pty Ltd v Deputy Commissioner of Taxation (FCA) - taxation - income tax - disallowance of claim for deduction of amount from assessable income - appeal

dismissed

Australian Securities and Investments Commission v Diploma Group Limited (No 3) (FCA) - costs - discontinuance - corporations - ASIC discontinued proceedings against fifteenth defendant - ASIC to pay fifteenth defendant's costs

Nyoni v Pharmacy Board of Australia (No 4) (FCA) - stay - bankruptcy - stay of claims of misleading or deceptive conduct and malicious falsehood arising from publication of material in reliance on s60(2) *Bankruptcy Act 1966* (Cth) refused

Libra Collaroy Pty Ltd v Bhide (NSWCA) - contract - negligence - plaintiffs injured in balcony collapse - applicant, manager of property Exclusive Management Agency Agreement Residential, appealed against finding of liability against it for plaintiffs' damage - appeal allowed

State of New South Wales v Smith (NSWCA) - false imprisonment - wrongful arrest - respondent awarded damages for wrongful arrest and false imprisonment, including aggravated and exemplary damages - appeal dismissed except in respect of award of exemplary damages

Kim v Angus Developments Pty Ltd (NSWCA) - judgments and orders - leave - separate question - leave to appeal from judge's preliminary determination in respect of development agreement refused

Oneflare Pty Ltd v Chernih (NSWCA) - contract - contract with respondents for provision of search engine optimisation (SEO) services in relation to appellant's website - claim against respondents dismissed - procedural fairness - credit - evidence - appeal dismissed

Deputy Commissioner of Taxation v Arora (NSWSC) - taxation - claim for payment of penalties pursuant to s269-20 *Taxation Administration Act 1953* (Cth) - defence under s269-35 not established - application for adjournment refused - judgment for plaintiff in sum of \$1,894,929.53

Naumovski v Ugrinovski (VSCA) - contract - heads of agreement - special referee's requirements not consistent with Heads of Agreement's proper construction - leave to appeal refused

Berhane v Woolworths Ltd (QCA) - negligence - employer's duty of care - causation - aggravation of pre-existing shoulder condition in course of employment - employer liable

Robinson v State of Queensland (QSC) - negligence - psychiatric injury - employer's duty of care - managerial mistreatment - State liable - judgment for plaintiff in sum of \$1,468,991.11

Summaries With Link (Five Minute Read)

Apple Inc v Arcadia Trading Limited [2017] EWHC 440 (Ch)

High Court of England and Wales (Chancery Division)

Mr Justice Arnold

Trade mark - Brightflash USA LLC (Brightflash) sought to register IWATCH 'as a trade mark in respect of goods in Classes 9 and 14' - application was refused in respect of Class 14 goods on basis it was 'descriptive or devoid of distinctive character' - application accepted for Class 9 goods - Arcadia Trading Ltd (Arcadia) opposed application to register trade mark in Class 9 on basis it was 'descriptive or devoid of distinctive character' - Brightflash assigned application to Apple Inc (Apple) - Arcadia alleged application was in bad faith - hearing officer acting for Registrar of Trademarks rejected the allegation of bad faith but accepted trade mark was descriptive in respect of some Class 9 goods - application was refused in relation certain goods, namely 'Computer software; computers; monitors and monitoring devices; computer hardware; wireless communication devices; audio and video devices; global positioning system devices; accessories, parts, components, and cases for all of the foregoing goods' - Apple appealed - held: challenge failed to conclusion that goods in Class 9 in respect of which application to register trade mark had been covered smart watches - no error in concluding trade mark was descriptive of 'computer software incorporated in smart watches' - no error in interpretation of Article 3(3) 'European Parliament and Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version)' - appeal dismissed.

[Apple Inc](#)

[From Benchmark Monday, 7 August 2017]

Midland Funding, LLC v Johnson

Supreme Court of the United States: Docket No 16-348

Coram: Roberts CJ, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor & Kagan JJ

Bankruptcy - limitations - petitioner filed proof of claim in respondent's bankruptcy case -

petitioner claimed respondent owed it credit-card debt - last time charge appeared on

respondent's account was 'more than 10 years ago' - relevant limitation was six years -

Bankruptcy Court disallowed respondent's objection - whether filing an 'obviously time-barred

debt' was 'false,' 'deceptive,' 'misleading,' 'unconscionable,' and 'unfair' debt collecting

practice under *Fair Debt Collection Practices Act*, 15 U.S.C. - meaning of 'claim' in Bankruptcy

Code - 'delicate balance of a debtor's protections and obligations' - held: filing of an

'obviously time barred' proof of claim was not false, deceptive, misleading, unfair, or

unconscionable - decision of the Eleventh Circuit reversed.

[Midland Funding](#)

[From Benchmark Wednesday, 9 August 2017]

Commissioner of Taxation v Jayasinghe [2017] HCA 26

High Court of Australia

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Kiefel CJ, Gageler, Keane, Gordon, Edelman JJ

Taxation - privileges and immunities in *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act) - respondent engaged by United Nations Office for Project Services (UNOPS) as 'project manager' under Individual Contractor Agreement - appeal concerned whether respondent was entitled to exemption from taxation - two questions: whether respondent was entitled to exemption from taxation in certain income years because he was 'a person who holds an office' in an international organisation pursuant to s6(1)(d)(i); and whether appellant, by reason of s357-60(1) of Sch 1 *Taxation Administration Act 1953* (Cth), was bound to exempt respondent from income received from UNOPS - statutory construction - Taxation Determination TD 92/153 - 'who holds an office in an international organisation to which [the IOPI Act] applies' - 'exemption from taxation on salaries and emoluments received from the organisation' - held: both questions answered in the negative - respondent did not hold an office within meaning of s6(1)(d)(i) - Commissioner not bound to exempt respondent from taxation - appeal allowed.

[Commissioner of Taxation](#)

[From Benchmark Thursday, 10 August 2017]

MLC Limited v Crickitt [2017] FCA 898

Federal Court of Australia

Allsop CJ

Insurance - life insurance - applicant insurer of life policy sought payment of death benefit into Court pursuant to s215 *Life Insurance Act 1995* (Cth) - life policy had been taken out for benefit of husband and wife - wife now deceased - husband had been convicted of wife's murder - respondent had appealed, or was to appeal against conviction - forfeiture - power to pay money into Court - held: Court satisfied it should make orders which parties had provided and which would 'finally resolve matter' for insurer - application granted - death benefit to be paid into Court - insurer to be discharged from liability in relation to death benefit - orders made.

[MLC Limited](#)

[From Benchmark Tuesday, 8 August 2017]

Spectrum Rare Earths Limited, in the matter of Spectrum Rare Earths Limited [2017] FCA 883

Federal Court of Australia

Barker J

Corporations - plaintiff sought order regularising offer and sale of shares since initial offer, and providing relief from civil liability for shares' sellers - relief sought because of defect in offer of shares - defect was use of cleansing notices instead of disclosure by prospectus - use of cleansing notices not open to plaintiff due to suspension of trading 'for more than five days in the prior 12 months' under s708A(5)(b) *Corporations Act 2001* (Cth) - whether 'just and equitable' to make order - whether plaintiff an 'interested person who may seek relief' - whether parties who may have on sold shares acted dishonestly - prejudice - ss707(3), 727(1) & 1322(4)(c) *Corporations Act* - held: Court satisfied it should grant relief - orders made.

[Spectrum Rare Earths](#)

[From Benchmark Wednesday, 9 August 2017]

Academy Cleaning & Security Pty Ltd v Deputy Commissioner of Taxation [2017] FCA 875

Federal Court of Australia

Rares J

Taxation - income tax - proceedings arising from applicant taxpayer's entry into commercial contract (emissions reduction purchase agreement) - applicant taxpayer appealed under s14ZZ *Taxation Administration Act 1953* (Cth) against Deputy Commissioner of Taxation's decision to disallow objection to assessment of income tax - whether Commissioner should have disallowed its claim for deduction of purchase price amount from assessable income due to amount being an 'outgoing that it incurred in gaining or producing its assessable income' pursuant to s81(1)(a) *Income Tax Assessment Act 1997* (Cth) or 'necessarily incurred in carrying on a business for the purpose of gaining or producing its assessable income' pursuant to s8-1(1)(b) - whether erroneous determination that, if outgoing were deductible, any tax benefit applicant was not allowable because of being obtained in connection with scheme which Pt IVA *Income Tax Assessment Act 1936* (Cth) applied to - whether whole purchase price incurred on applicant's entry into emissions reduction purchase agreement - whether tax benefit in connection with scheme - *Carbon Pollution Reduction Scheme Bill 2009* (Cth) - s63 Evidence Act 1995 (Cth) - held: grounds of appeal failed - appeal dismissed.

[Academy Cleaning & Security Pty Ltd](#)

[From Benchmark Wednesday, 9 August 2017]

Australian Securities and Investments Commission v Diploma Group Limited (No 3) [2017] FCA 891

Federal Court of Australia

McKerracher J

Costs - discontinuance - corporations - plaintiff commenced proceedings amongst defendants - plaintiff sought that fifteenth defendant be wound up and appointment of provisional liquidator to fifteenth defendant until determination of winding up - plaintiff discontinued proceedings against fifteenth defendant - fifteenth defendant claimed costs - plaintiff objected to payment of costs - plaintiff contended it had acted reasonably and thus should not be obliged to pay costs - whether good reason for Court to order otherwise than that discontinuing party pay costs - s131(2)(h) *Evidence Act 1995* (Cth) - held: no suggestion of unreasonable conduct by plaintiff, however Court not persuaded there was sufficient reason for fifteenth defendant to bear costs - plaintiff to pay fifteenth defendant's costs.

[Australian Securities and Investment Commission](#)

[From Benchmark Wednesday, 9 August 2017]

Nyoni v Pharmacy Board of Australia (No 4) [2017] FCA 911

Federal Court of Australia

Siopis J

Stay - bankruptcy - applicant contended first and third respondents published material which 'impugned his reputation and was misleading or deceptive' - applicant contended publication gave rise to causes of action in defamation, misleading or deceptive conduct and malicious falsehood - applicant claimed compensation and injunctive relief - sequestration order made against applicant's estate - respondents sought stay of applicant's claims for misleading or deceptive conduct and malicious falsehood in reliance on s60(2) *Bankruptcy Act 1966* (Cth) - whether claims fell within s60(4)(a) for being in respect of 'any personal injury or wrong done to the bankrupt...' - whether claims did not fall within s60(4)(a) because claims compensated 'for economic loss' - held: substance of matter in respect of which applicant made claims was a 'personal injury or wrong done to the bankrupt' - stay refused.

[Nyoni](#)

[From Benchmark Friday, 11 August 2017]

Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196

Court of Appeal of New South Wales

McColl, Meagher & Ward JJA

Contract - negligence - applicant sought to appeal against District Court judge's decision that it was liable for damage suffered by plaintiffs injured in balcony collapse at residential property - applicant managed property pursuant to 'Exclusive Management Agency Agreement Residential' (Management Agreement) with property's owners (first and second respondents) - property was leased to third respondent lessee at time balcony collapsed - plaintiffs each commenced proceedings against applicant and first and second respondents - third respondent commenced proceedings against applicant and first and second respondents - third respondent contended she suffered psychiatric injury due to accident - *Civil Liability Act 2002* (NSW) (CLA) - *Civil Procedure Act 2005* (NSW) - *Uniform Civil Procedure Rules 2005* (NSW) - *Wrongs Act 1936* (SA) - *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) - joint tort-feasors - held: first and second respondents breached duty of care to plaintiffs and third respondent - third respondent breached duty of care to plaintiffs - primary judge erroneously failed to apply provisions of CLA in relation to breach and causation - primary judge should have held first and second respondents entitled to contractual indemnity from applicant for liability to plaintiff - first and second respondent's entitlement to contractual indemnity for amounts for which they may be jointly liable with applicant to plaintiffs, including third respondent, reduced by 30% for their contributory negligence - applicant not entitled to recover contribution from first and second respondents - third respondent's liability to contribute to damages for which applicant was liable to plaintiffs assessed at 20% - appeal allowed - parties to bring in short minutes of order.

[Libra](#)

[From Benchmark Monday, 7 August 2017]

State of New South Wales v Smith [2017] NSWCA 194

Court of Appeal of New South Wales

McColl & Leeming JJA; Sackville AJA

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False imprisonment - wrongful arrest - applicant sought to appeal against decision awarding respondent damages for wrongful arrest and false imprisonment, including aggravated and exemplary damages - respondent had brought proceedings against applicant for wrongful arrest and false imprisonment arising from arrest following complaint to police by former wife - primary judge found for respondent on basis arresting police officer breached ss99(3) & 201 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) - whether arresting offer suspected on reasonable grounds it was necessary to arrest respondent for reason in s99(3) - whether arrest breached s201 due to arresting officer's failure to inform respondent of his name and police station at time of arrest, and failure to inform him of reasons for exercising power of arrest - whether damages excessive - held: appeal dismissed except in relation to award for exemplary damages - appeal allowed in part.

[State of New South Wales](#)

[From Benchmark Monday, 7 August 2017]

Kim v Angus Developments Pty Ltd [2017] NSWCA 193

Court of Appeal of New South Wales

White JA & Emmett AJA

Judgments and orders - leave - separate question - applicant, land owners, sought to appeal against primary judge's determination that provisions of development agreement between them and respondent developer were not subject to a condition precedent for which they contended in relation to respondent obtaining development consent - respondent had commenced proceedings seeking that applicants execute a put and call option purchaser over their property, and specifically perform development agreement - s103 *Supreme Court Act 1970* (NSW) - whether applicants demonstrated 'something more than that the primary judge was arguably wrong' - whether matter involved 'issues of principle' and/or 'questions of general public importance' - whether any injustice involved - held: appeal had reasonable prospects of success - injustice not established - open to applicants, if they failed, to 'raise incorrectness of the preliminary determination' on appeal from proceedings' final orders - leave to appeal refused.

[Kim](#)

[From Benchmark Tuesday, 8 August 2017]

Oneflare Pty Ltd v Chernih [2017] NSWCA 195

Court of Appeal of New South Wales

Meagher, Gleeson & Leeming JJ

Contract - evidence - credit - procedural fairness - appellant retained respondents for provision of search engine optimisation (SEO) services in relation to appellant's website - appellant sued respondents for breach of contract and negligence, contending that respondent had developed and recommended 'incompetent' SEO strategy - appellant contended strategy breached Google Webmaster Guidelines against 'tricks intended to improve search engine rankings', exposing appellant to risk of punishment by Google - primary judge dismissed appellant's claims - primary judge found respondent had been retained to 'devise and implement'

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'aggressive' SEO strategies, and that director of appellant had understood that pursuing such strategies carried risk of Google's adverse action - primary judge rejected much of directors' evidence concerning knowledge and role in respect of strategy's implementation as dishonest - grounds of appeal concerned dishonesty findings, procedural fairness, finding of appellant's instruction that it wished to pursue 'aggressive' SEO strategy, scope and terms of respondent's retainer, and discount to 'low estimates' of loss - held: no denial of procedural fairness - grounds of appeal concerning liability rejected - appeal dismissed.

[Oneflare Pty Ltd](#)

[From Benchmark Wednesday, 9 August 2017]

Deputy Commissioner of Taxation v Arora [2017] NSWSC 1016

Supreme Court of New South Wales

Davies J

Taxation - plaintiff Deputy Commissioner of Taxation sought judgment for payment of penalties pursuant to s269-20 *Taxation Administration Act 1953* (Cth) - defendant admitted claims but relied on defence pursuant to s269-35 of the Act - defendant also sought vacation of hearing date two days before hearing - director's obligation to cause companies to pay withholding tax and superannuation guarantee charges - illness - 'took all reasonable steps' - held: defence pursuant to s269-35 not established - application for adjournment failed - judgment for plaintiff in sum of Judgment for the Plaintiff in the sum of \$1,894,929.53.

[Deputy Commissioner of Taxation](#)

[From Benchmark Tuesday, 8 August 2017]

Naumovski v Ugrinovski [2017] VSCA 200

Court of Appeal of Victoria

Whelan, Beach & McLeish JJA

Contract - heads of agreement - parties settled agreement by 'Binding Heads of Agreement' (Heads of Agreement) - special referee appointed under Heads of Agreement - special referee produced report setting out steps for Heads of Agreement's implementation - respondent contended steps were inconsistent with Heads of Agreement - primary judge found special referee's requirements not consistent with Heads of Agreement's proper construction - applicant sought to appeal - implementation of provisions on inter-company loans - certain grounds raised for first time on appeal - held: no error in contractual construction - leave refused in respect of grounds raised for first time on appeal - respondent had not had proper opportunity to meet matters raised by grounds, grounds addressed issues not finally determined, and would not render orders incorrect - leave to appeal refused.

[Naumovski](#)

[From Benchmark Friday, 11 August 2017]

Berhane v Woolworths Ltd [2017] QCA 166

Court of Appeal of Queensland

Gotterson & Morrison JJA; Dalton J

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Negligence - damages - appellant was employed as a picker in warehouse operated by respondent - shoulder strain from lifting and stacking cartons over 1600 times per day aggravated appellant's pre-existing condition causing bursitis in rotator cuff - appellant claimed against respondent for injury - claim dismissed on basis appellant failed to prove breach of duty by respondent - trial judge did not make finding of duty respondent owed to appellant - appellant contended trial judge erred by failing to make finding of duty owed and in findings on causation - respondent cross-appealed against quantum of damages - whether there was no duty owed due to pre-existing condition - s305D *Workers' Compensation and Rehabilitation Act 2003* (Qld) - Sch 9 *Workers' Compensation and Rehabilitation Regulation 2003* (Qld) - held: trial judge erred in findings on causation, and in not finding duty of reasonable care not to expose appellant to risk of injury - causation established - liability should have been determined in appellant's favour - appeal allowed - cross-appeal on quantum dismissed.

[Berhane](#)

[From Benchmark Thursday, 10 August 2017]

Robinson v State of Queensland [2017] QSC 165

Supreme Court of Queensland

Henry J

Negligence - psychiatric injury - employer's duty of care - plaintiff alleged defendant owed her non-delegable duty to take 'reasonable care to avoid exposing her to foreseeable risk of psychiatric injury' and that injury suffered was due to defendant's negligence - defendant's failures said to involve failure to prevent District Chief Executive Officer from behaviour towards plaintiff - defendant alleged to be directly liable for some of DCEO's conduct and vicariously liable for other conduct - safe system of work - managerial mistreatment - held: defendant made out case in negligence against defendant - judgment for plaintiff in sum of \$1,468,991.11.

[Robinson](#)

[From Benchmark Friday, 11 August 2017]



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The Garden

By [Andrew Marvell](#)

How vainly men themselves amaze
To win the palm, the oak, or bays,
And their uncessant labours see
Crown'd from some single herb or tree,
Whose short and narrow verged shade
Does prudently their toils upbraid;
While all flow'rs and all trees do close
To weave the garlands of repose.

Fair Quiet, have I found thee here,
And Innocence, thy sister dear!
Mistaken long, I sought you then
In busy companies of men;
Your sacred plants, if here below,
Only among the plants will grow.
Society is all but rude,
To this delicious solitude.

No white nor red was ever seen
So am'rous as this lovely green.
Fond lovers, cruel as their flame,
Cut in these trees their mistress' name;
Little, alas, they know or heed
How far these beauties hers exceed!
Fair trees! wheres'e'er your barks I wound,
No name shall but your own be found.

When we have run our passion's heat,
Love hither makes his best retreat.
The gods, that mortal beauty chase,
Still in a tree did end their race:
Apollo hunted Daphne so,
Only that she might laurel grow;
And Pan did after Syrinx speed,
Not as a nymph, but for a reed.

What wond'rous life in this I lead!
Ripe apples drop about my head;
The luscious clusters of the vine
Upon my mouth do crush their wine;

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The nectarine and curious peach
Into my hands themselves do reach;
Stumbling on melons as I pass,
Ensnar'd with flow'rs, I fall on grass.

Meanwhile the mind, from pleasure less,
Withdraws into its happiness;
The mind, that ocean where each kind
Does straight its own resemblance find,
Yet it creates, transcending these,
Far other worlds, and other seas;
Annihilating all that's made
To a green thought in a green shade.

Here at the fountain's sliding foot,
Or at some fruit tree's mossy root,
Casting the body's vest aside,
My soul into the boughs does glide;
There like a bird it sits and sings,
Then whets, and combs its silver wings;
And, till prepar'd for longer flight,
Waves in its plumes the various light.

Such was that happy garden-state,
While man there walk'd without a mate;
After a place so pure and sweet,
What other help could yet be meet!
But 'twas beyond a mortal's share
To wander solitary there:
Two paradises 'twere in one
To live in paradise alone.

How well the skillful gard'ner drew
Of flow'rs and herbs this dial new,
Where from above the milder sun
Does through a fragrant zodiac run;
And as it works, th' industrious bee
Computes its time as well as we.
How could such sweet and wholesome hours
Be reckon'd but with herbs and flow'rs!

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