

Friday, 14 September 2018

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

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### Executive Summary (1 minute read)

**Commissioner of the Australian Federal Police v Fernandez** (NSWCA) - proceeds of crime - statutory construction - 'proceeds' - erroneous failure to make forfeiture order in respect of property - appeal allowed

**Hagerty v Hills Central Pty Ltd** (NSWCA) - real property - wills and estates - deed - option to acquire land not validly exercised - appeal allowed

**Hanna v Raoul** (NSWCA) - contract - transfer of property from respondent to appellant was not binding - deed and transfer unconscionable and unjust - appeal dismissed

**Scudooda Pty Ltd v K&E Property Pty Ltd** (NSWSC) - leases and tenancies - retail leases - real property - defendant entitled to demised premises' possession, arrears and mesne profits

### Summaries With Link (Five Minute Read)

#### **Commissioner of the Australian Federal Police v Fernandez [2018] NSWCA 198**

Court of Appeal of New South Wales

Beazley P; Payne & McColl JJA

Proceeds of crime - Commissioner of the Australian Federal Police sought order that funds to respondent's credit in bank accounts in respondent's name be forfeited under s49 *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) - primary judge dismissed summons - Commissioner appealed - proper construction of "proceeds" in s329(1) *Proceeds of Crime Act* -

onus - public interest - held: primary judge erroneously found that 'property in issue' was not proceeds of offence under s49(4) Proceeds of Crime Act - discretion to refused forfeiture order did not arise - appeal allowed.

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[From Benchmark Wednesday, 12 September 2018]

## **Hagerty v Hills Central Pty Ltd [2018] NSWCA 200**

Court of Appeal of New South Wales

McColl, Macfarlan & Leeming JJ

Real property - wills and estates - deed - primary judge found respondent validly exercised option to acquire land which appellants owned as executors of mother's deceased estate - deed which granted option required delivery of two executed contracts for sale, and provided for completion date 42 days after contract - respondent, in purported execution of option, left completion date blank and requested date of completion in covering letter of 192 days from contract's date, citing 'irrelevant clause' in deed - whether respondent validly exercised option - construction of deed - construction of documents purportedly exercising option - *Real Property Act 1900* (NSW) - held: option was not validly exercised - appeal allowed.

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[From Benchmark Thursday, 13 September 2018]

## **Hanna v Raoul [2018] NSWCA 201**

Court of Appeal of New South Wales

Beazley P; Macfarlan & White JJA

Contract - respondent was registered proprietor of property subject to a mortgage in third party financier's favour - respondent resided in house on property - respondent and appellant executed deed of arrangement providing appellant would discharge mortgage and respondent would transfer property to appellant subject to life estate in respondent's favour - appellant discharged mortgage - transfer executed and registered under *Real Property Act 1900* (NSW) - primary judge found transfer not binding, and that respondent was beneficially entitled to property, subject to compensation to appellant for money paid in discharging mortgage - whether respondent had capacity to enter deed and transfer - whether deed and transfer could be set aside because they were unconscionable - whether deed and transfer unjust - held: deed and transfer were unconscionable and unjust - appeal dismissed.

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[From Benchmark Friday, 14 September 2018]

## **Scudooda Pty Ltd v K&E Property Pty Ltd [2018] NSWSC 1397**

Supreme Court of New South Wales

Darke J

Leases and tenancies - retail leases - real property - plaintiff was lessee in respect of land - lessors sold and transferred land to defendant, which became proprietor of fee simple in 2015 - plaintiff claimed to have validly exercised first option to renew lease in 2014 and was in



occupation of land - plaintiff sought specific performance of agreement to grant new lease - plaintiff also claimed that costs of electricity supplied to premises fell on lessor - plaintiff had met costs of electricity and sought reimbursement of some amounts - defendant denied reimbursement to plaintiff - plaintiff ceased paying rent on basis it was entitled to set off for electricity costs - construction of lease - *Retail Leases Act 1994* (NSW) - held: plaintiff failed in claim of entitlement to electricity costs - defendant entitled to demised premises' possession, arrears and mesne profits - judgment for defendant.

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[From Benchmark Thursday, 13 September 2018]

# Benchmark

## The Crocuses

**By:** Frances Ellen Watkins Harper  
They heard the South wind sighing  
    A murmur of the rain;  
And they knew that Earth was longing  
    To see them all again.

While the snow-drops still were sleeping  
    Beneath the silent sod;  
They felt their new life pulsing  
    Within the dark, cold clod.

Not a daffodil nor daisy  
    Had dared to raise its head;  
Not a fairhaired dandelion  
    Peeped timid from its bed;

Though a tremor of the winter  
    Did shivering through them run;  
Yet they lifted up their foreheads  
    To greet the vernal sun.

And the sunbeams gave them welcome,  
    As did the morning air—  
And scattered o'er their simple robes  
    Rich tints of beauty rare.

Soon a host of lovely flowers  
    From vales and woodland burst;  
But in all that fair procession  
    The crocuses were first.

First to weave for Earth a chaplet  
    To crown her dear old head;  
And to beauty the pathway  
    Where winter still did tread.

And their loved and white haired mother  
    Smiled sweetly 'neath the touch,  
When she knew her faithful children  
    Were loving her so much.



[https://en.wikipedia.org/wiki/Frances\\_Harper](https://en.wikipedia.org/wiki/Frances_Harper)

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