

Friday, 15 March 2019

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

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### Executive Summary (1 minute read)

**Action Scaffolding & Rigging Pty Limited (in liq) v Citadel Financial Corporation Pty Ltd, in the matter of Action Scaffolding & Rigging Pty Limited (in liq) (FCA)** - bankruptcy - - defendant had not validly 'entered into possession or assumed control of' first plaintiff's property - declaration granted

**PPK Willoughby Pty Ltd v Baird (NSWCA)** - security for costs - primary judge ordered applicant to provide security for costs - leave to appeal refused

**RHG Mortgage Corporation Ltd v Summerfield (NSWCA)** - possession - mortgage - no entitlement to possession of land or money judgment - appeal dismissed

**Fullinfaw v Neil Fletcher Design Pty Ltd (VSC)** - contract - administrative law - termination of building contract under 'no fault' provision - appeal against rejection of claim for liquidated damages - appeal allowed

**MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd (VSCA)** - damages - contract - appeal against finding appellant had not proven claim for loss of opportunity damages - appeal dismissed - cross-appeal dismissed

**Brisbane City Council v Klinkert (QCA)** - planning and environment - appeal upheld against Council's refusal of development application - Council's appeal dismissed

**Spaseski v Mladenovski (WASC)** - arbitration - 'counterpart applications' - owners' application to enforce awards granted - builder's application to set aside awards refused

**Young Investment Group Pty Ltd v QBE Insurance (Australia) Limited (WASC)** - corporations - insurance contract - plaintiffs sought to recover amount payable to plaintiffs by deregistered company from defendant insurer - judgment for plaintiffs

**Daniel Johannes Bredenkamp joint and several liquidators of Conspect Construction Pty Ltd (In Liq) v Andrade Holdings Pty Ltd (WASC)** - corporations - application for order under s588FF(1)(a) *Corporations Act 2001* (Cth) - 'unfair preference' - 'good faith defence' - application dismissed

## Summaries With Link (Five Minute Read)

### **Action Scaffolding & Rigging Pty Limited (in liq) v Citadel Financial Corporation Pty Ltd, in the matter of Action Scaffolding & Rigging Pty Limited (in liq) [2019] FCA 327**

Federal Court of Australia

Gleeson J

Bankruptcy - first plaintiff (Action), under s418A *Corporations Act 2001* (Cth) sought declaration whether defendant had validly 'entered into possession, or assumed control' of Action's property under terms of 'security interest' in property - defendant had taken possession of Action's assets following second plaintiffs' 'appointment as liquidators - defendant 'purported to act 'under 'fixed and floating charge' which Action gave in favour of company (Bibby) pursuant to rights assigned to defendant by deed of assignment - defendant also contended entitlement to assignment's benefit due to 'right of subrogation at general law' or under s3 *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) - held: defendant did not acquire rights under charge by right of subrogation, under to s3 of the Act, or under deed of assignment - defendant had not validly entered into possession or assume control of Action's property - declaration granted.

[Action Scaffolding](#)

[From Benchmark Friday, 15 March 2019]

### **PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48**

Court of Appeal of New South Wales

Bell P; Simpson AJA

Security for costs - primary judge ordered applicant to provide security for costs - applicant sought to appeal - applicant contended primary judge 'applied an incorrect principle' - applicant also contended that discretion in respondents' favour miscarried due to delay in making of application - whether 'issue of principle, question of public importance or any "reasonably clear" injustice' - whether impugned conduct caused applicant's impecuniosity - *Green v CGU Insurance Limited* [2008] NSWCA 148 - held: leave to appeal refused.

[View Decision](#)

[From Benchmark Friday, 15 March 2019]

## **RHG Mortgage Corporation Ltd v Summerfield [2019] NSWCA 44**

Court of Appeal of New South Wales  
Bathurst CJ; Gleeson & Brereton JJA

Possession - mortgage - appellant mortgagee sued respondent mortgagors of for possession of land - primary judge dismissed proceedings, not being satisfied appellant entitled to possession or money judgment - appellant contended entitlement to possession due to respondent's default under 'June 2014 agreement' and default under mortgage - held: default under June 2014 agreement was a contractual breach which did not establish entitlement to possession - one of two defaults under mortgage established however appellant had not given respondent default notice under s88 *National Credit Code* in respect of the default - no entitlement to possession established - appeal dismissed.

[View Decision](#)

[From Benchmark Friday, 15 March 2019]

## **Fullinfaw v Neil Fletcher Design Pty Ltd [2019] VSC 142**

Supreme Court of Victoria  
Garde J

Contract - administrative law - plaintiffs were owners - defendant was builder - plaintiffs ended 'major domestic building contract' with defendant under 'no fault' provision in s41 *Domestic Building Contracts Act 1995* (Vic) - Victorian Civil and Administrative Tribunal rejected plaintiffs' claim for liquidated damages - plaintiffs sought to appeal - whether plaintiffs entitled to deduct liquidated damages for delay from amount payable to builder for work done before end of contract - whether 'right to liquidated damages had accrued' by building contract's termination date - whether erroneous failure to determine builder's 'extension of time' claim - whether builder failed to provide evidence in support of claim for extension of time - cap in s41(6) of the Act - whether evidence to support claim of amount for liquidated damages - held: appeal allowed.

[Fullinfaw](#)

[From Benchmark Friday, 15 March 2019]

## **MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd [2019] VSCA 46**

Court of Appeal of Victoria  
Kyrou, Kaye & Emerton JJA

Damages - contract - parties entered contract for provision of advice and services in relation to growing of borlotti beans - appeal and cross-appeal arising from appellant's claim, following plantings' failure, against respondent for 'breach of contract and negligence' - plaintiff sought damages due to inability to sell borlotti beans to Woolworths under alleged supply contract with Woolworths - appellant challenged judge's findings that appellant had not proven claim for loss of opportunity damages and that there would have been a reduction of any loss of opportunity damages for 'contingencies and contributory negligence' - held: appeal and cross-appeal dismissed.

## [MA & J](#)

[From Benchmark Friday, 15 March 2019]

### **Brisbane City Council v Klinkert [2019] QCA 40**

Court of Appeal of Queensland

Gotterson & Philippides JJA; Boddice J

Planning and environment - Council refused development application seeking approval to demolish house - primary judge upheld respondent's appeal - Council, pursuant to s63 *Planning and Environment Court Act 2016* (Qld) sought to appeal - whether to grant leave to appeal - construction of *Planning Act 2016* (Qld) - whether compliance with 'assessment benchmarks' - assessment manager's obligations concerning development applications - whether s60(2)(a) *Planning Act* required approval of respondent's application by assessment manager 'once it was determined there was compliance' with 'relevant assessment benchmarks' operating at time of application - held: leave to appeal granted - appeal dismissed.

## [Brisbane](#)

[From Benchmark Wednesday, 13 March 2019]

### **Spaseski v Mladenovski [2019] WASC 65**

Supreme Court of Western Australia

Kenneth Martin J

Arbitration - 'counterpart applications' - plaintiffs ('owners'), pursuant to s35 *Commercial Arbitration Act 2012* (WA), sought enforcement of 'partial final award' (10 September award) and 'final award' (6 October award) against defendant ('builder') - builder sought relief under s34 of the Act and to set aside 10 September award and 6 October award under s34(2) - whether arbitrator erroneously refused 'to allow the builder to give evidence' - whether denial of natural justice arising from part of arbitration being heard in builder's absence - held: plaintiffs' enforcement application granted - awards not set aside.

## [Spaseski](#)

[From Benchmark Monday, 11 March 2019]

### **Young Investment Group Pty Ltd v QBE Insurance (Australia) Limited [2019] WASC 74**

Supreme Court of Western Australia

Quinlan CJ

Corporations - insurance contract - plaintiffs, pursuant to s601AG *Corporations Act 2001* (Cth), sought to recover amount payable to plaintiffs by deregistered company from defendant insurer - whether contract with defendant (Financial Institutions Civil Liability Professional Indemnity Policy) covered company's liability to plaintiffs at time company deregistered - whether exclusions applied - held: neither 'Unauthorised Transactions exclusion' nor 'Conflict exclusion' applied to plaintiffs' claims - plaintiffs entitled to judgment against defendant.

## [Young Investment Group Pty Ltd](#)

[From Benchmark Wednesday, 13 March 2019]



**Daniel Johannes Bredenkamp joint and several liquidators of Conspect Construction Pty Ltd (In Liq) v Andrade Holdings Pty Ltd [2019] WASC 70**

Supreme Court of Western Australia

Acting Master Whitby

Corporations - first plaintiffs appointed as second plaintiff's liquidators - plaintiffs, pursuant to s588FF(1)(a) *Corporations Act 2001* (Cth), sought order that defendant pay to second plaintiff amount equal to sum paid by second plaintiff to defendant - 'unfair preference' - whether 'good faith defence' in s588FG(2) of the Act established - whether 'reasonable grounds' defendant to suspect second plaintiff insolvent - held: application dismissed.

[Daniel Johannes Bredenkamp](#)

[From Benchmark Thursday, 14 March 2019]



# Benchmark

## **Upon the Mountain's Distant Head**

**By:** William Cullen Bryant

Upon the mountain's distant head,  
With trackless snows for ever white,  
Where all is still, and cold, and dead,  
Late shines the day's departing light.

But far below those icy rocks,  
The vales, in summer bloom arrayed,  
Woods full of birds, and fields of flocks,  
Are dim with mist and dark with shade.

'Tis thus, from warm and kindly hearts,  
And eyes where generous meanings burn,  
Earliest the light of life departs,  
But lingers with the cold and stern.

[https://en.wikipedia.org/wiki/William\\_Cullen\\_Bryant](https://en.wikipedia.org/wiki/William_Cullen_Bryant)

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