

Friday, 15 June 2018

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Trkulja v Google LLC (HCA) - defamation - summary dismissal - Court of Appeal erred in setting aside proceeding on basis it had no real prospect of success - appeal allowed

Rozenblit v Vainer (HCA) - stay - leave to amend statement of claim granted on condition proceedings stayed pending payment of costs of earlier unsuccessful applications - primary judge erred in staying proceedings - appeal allowed

Lewis Securities Ltd (in liq) v Carter (NSWCA) - corporations - equity - directors' duties - claims arising from transactions - appeal allowed in part

Horseshoe Pastoral Co Pty Ltd v Rixon (NSWCA) - real property - easements - declaration of equitable right of carriageway over applicant's land - leave to appeal refused

Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited (NSWCA) - contract - service kill agreement - claims for breach of agreement for 'failure to pay' - appeal dismissed

Wattie v Industrial Relations Secretary on behalf of the Secretary of the Department of Justice (No 2) (NSWCA) - administrative law - industrial relations - unfair dismissal - primary judge found Commissioner's decision to reinstate appellant vitiated by jurisdictional error - appeal allowed

Dimmi v RestaurantDiary.com (NSWSC) - contract - licence agreement - termination of right of exclusivity was invalid - declaration granted

WFI Insurance Ltd v Mantowoq Platinum Pty Ltd (WASCA) - insurance - insured breached term of policy - insurer not obliged to indemnify insured for its liability to respondents - appeal allowed

Summaries With Link (Five Minute Read)

Trkulja v Google LLC [2018] HCA 25

High Court of Australia

Kiefel CJ; Bell, Keane, Nettle & Gordon JJ

Defamation - summary dismissal - respondent sought to set aside defamation proceeding which appellant brought against it, and appellant's service on respondent out of jurisdiction - primary judge dismissed application on basis it was not satisfied proceeding had no real prospect of success - Court of Appeal of Victoria allowed respondent's appeal, finding proceeding had no real prospect of success - whether primary judge correct to refuse to set aside proceeding - assessment of 'capacity to defame' - held: Court of Appeal of Victoria erroneously found matters on which appellant relied not capable of conveying pleaded defamatory imputations - Court of Appeal of Victoria erroneously found proceeding had no prospects of success - appeal allowed.

[Trkulja](#)

[From Benchmark Friday, 15 June 2018]

Rozenblit v Vainer [2018] HCA 23

High Court of Australia

Kiefel CJ; Bell, Keane, Gordon & Edelman JJ

Judgments and orders - stay - appellant brought proceedings against respondents in Supreme Court of Victoria - appellant, by three summonses, sought to amend statement of claim - leave refused twice - respondents' costs ordered to be taxed immediately - consent orders made to fix respondents' costs - costs not paid - on third occasion respondent sought to amend statement of claim, respondents sought stay pending costs' payment - application to amend was granted on condition proceedings be stayed until payment of costs - exercise of discretion under r63.03(3)(a) *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - whether open to Court to permit appellant to amend claim on condition of costs' payment - held: exercise of discretion miscarried - Court could not be satisfied stay pending costs' payment was the "only practical way to ensure justice between the parties" - appeal allowed.

[Rozenblit](#)

[From Benchmark Friday, 15 June 2018]

Lewis Securities Ltd (in liq) v Carter [2018] NSWCA 118

Court of Appeal of New South Wales

Leeming JA; Sackville AJA & Emmett AJJA

Corporations - equity - directors' duties - first appellant was company in liquidation (LSL) -

Benchmark

second appellant was company in liquidation (Holdings) - appeal arose from two proceedings ('Property Proceedings' and 'Bass Proceedings') concerning transactions which appellants' director (Mr Lewis) instigated - first respondent was director's wife and first appellant's company secretary - second respondent was a director of first appellant - first respondent was sole defendant in Property Proceedings, and was sued for knowingly receipt of property acquired through Mr Lewis's breach of fiduciary duty, or assistance in Mr Lewis's breach - first and second respondents were defendants in Bass Proceedings, and were sued for assisting arrangements they knew involved breaches of duty which Mr Lewis owed - in Bass Proceedings, first respondent was also sued for knowingly receipt of funds, and second respondent was also sued for breach of fiduciary duty - primary judge found in respondents' favour in both proceedings - issues on appeal concerned manner in which primary judge dealt with account of client of LSL (Mrs Malone), transactions involving two companies (Bass Holdings and Byrne Investments), and conclusion that claims were time-barred - ss79 & 1317K *Corporations Act 2001* (Cth) - s11, 14, 15 & 23 *Limitation Act 1969* (NSW) - laches - informed consent - knowing assistance - liability of third parties for assistance of breach of fiduciary duties - held: grounds of appeal concerning transfer of amount from Mrs Malone's account dismissed - primary judge erred in characterising 'Bass transactions' a "sham" and finding they were a nullity - primary judge erred in finding Mr Lewis indebted to appellants notwithstanding Bass transactions - first and second respondent not entitled to rely on limitations defence - appeal allowed in part.

[View Decision](#)

[From Benchmark Tuesday, 12 June 2018]

Horseshoe Pastoral Co Pty Ltd v Rixon [2018] NSWCA 121

Court of Appeal of New South Wales

Macfarlan, Meagher & White JJA

Real property - easements - primary judge declared respondent entitled to equitable right of carriageway over applicant's land - easement valued at less than \$100,000 - no serious dispute that if easement along track over which existence of easement was declared, \$30,000 compensation would be allowed - whether to grant leave to appeal - whether erroneous assessment of evidence - whether 'the estoppel case' which primary judge found was not pleaded - "error of principle which, if uncorrected, will result in substantial injustice" - s88K *Conveyancing Act 1919* (NSW) - held: no question of general public importance or principle raised by appeal - there would be no injustice arising from error, even if it were established - leave to appeal refused.

[View Decision](#)

[From Benchmark Wednesday, 13 June 2018]

Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited [2018] NSWCA 126

Court of Appeal of New South Wales

McColl & White JJA; Barrett AJA

Contract - appeal arising from contract between parties known as 'Service Kill Agreement' -

primary judge upheld respondent's claims against appellant for breach of agreement for failure to pay 'Total Product Fee' for non-performance periods - appellant contended primary judge erred in finding that respondent had performed obligations under contract in non-performance periods, and erroneously rejected its defence of frustration of contract - appellant contended respondent, due to its 'complete failure' to perform contract, was not entitled to terminate contract or recover damages - whether respondent 'ready, willing and able' to perform obligations under contract - validity of respondent's termination of contract - whether proper characterisation of claim as unliquidated damages claim for breach of contract - whether appellant's breach caused respondent's loss - held: grounds of appeal failed - appeal dismissed.

[View Decision](#)

[From Benchmark Thursday, 14 June 2018]

Wattie v Industrial Relations Secretary on behalf of the Secretary of the Department of Justice (No 2) [2018] NSWCA 124

Court of Appeal of New South Wales

McColl & Macfarlan JJA; Emmett AJA

Administrative law - industrial relations - proceedings arose from appellant's dismissal from position as Senior Correctional Office - respondent was appellant's nominal employer - appellant sought reinstatement on basis dismissal was harsh - Commissioner ordered reinstatement - Full Bench refused leave to appeal against Commissioner's decision - respondent sought relief under s69 *Supreme Court Act 1970* (NSW) - primary judge found Commissioner's decision vitiated by jurisdictional error - whether cl131 *Crimes (Administration of Sentences) Regulation 2014* (NSW), and s13.7 CSNSW Operations Procedure Manual, were mandatory relevant considerations - whether Commissioner failed to consider 'regulatory context' - whether decision of Full Bench erroneously set aside without separate finding of jurisdictional error in approach of Full Bench - held: appeal allowed.

[View Decision](#)

[From Benchmark Friday, 15 June 2018]

Dimmi v RestaurantDiary.com [2018] NSWSC 846

Supreme Court of New South Wales

McDougall J

Contract - licence agreement - defendant gave plaintiff written notice terminating exclusivity of plaintiff's rights under licence agreement - defendant gave notice on basis of its view that plaintiff had failed to meet agreed 'key performance indicator targets' - whether contractual right to terminate enlivened - whether defendant estopped from asserting right enlivened - construction of licence agreement - held: contractual right to terminate was not enlivened - termination was invalid - declaration granted.

[View Decision](#)

[From Benchmark Tuesday, 12 June 2018]



WFI Insurance Ltd v Mantowq Platinum Pty Ltd [2018] WASCA 89

Court of Appeal of Western Australia

Martin CJ; Murphy JA & Chaney J

Insurance - first respondent and second respondent conducted business from premises - premises had been fitted out by company under contract with them - respondents sued company in relation to water damage at premises - company had insurance policy with appellant - company claimed indemnity from appellant - company went into liquidation and was deregistered - respondents sued insurer under s601AG *Corporations Act 2001* (Cth) - appellant denied it was obliged to indemnify company because company had breached condition of policy that it 'comply with legislation and Australian Standards' (relevant term), and that breach of relevant term was 'causally connected' with company's liability to respondent - trial judge found in favour of respondents - construction of policy - held: company had breached relevant term - insurer was entitled to refuse to indemnify company due to breach - appeal allowed.

[WFI Insurance](#)

[From Benchmark Tuesday, 12 June 2018]

Benchmark

Elegy V: His Picture

By: John Donne

Here take my picture; though I bid farewell
Thine, in my heart, where my soul dwells, shall dwell.
'Tis like me now, but I dead, 'twill be more
When we are shadows both, than 'twas before.
When weather-beaten I come back, my hand
Perhaps with rude oars torn, or sun beams tann'd,
My face and breast of haircloth, and my head
With care's rash sudden storms being o'erspread,
My body'a sack of bones, broken within,
And powder's blue stains scatter'd on my skin;
If rival fools tax thee to'have lov'd a man
So foul and coarse as, oh, I may seem then,
This shall say what I was, and thou shalt say,
"Do his hurts reach me? doth my worth decay?
Or do they reach his judging mind, that he
Should now love less, what he did love to see?
That which in him was fair and delicate,
Was but the milk which in love's childish state
Did nurse it; who now is grown strong enough
To feed on that, which to disus'd tastes seems tough."

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

[Click Here to access our Benchmark Search Engine](#)