

Friday, 15 December 2017

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

DWN042 v The Republic of Nauru (HCA) - migration - appeal against refusal of application for refugee status - Supreme Court of Nauru incorrectly struck out two grounds of appellant's appeal but made final judgment without hearing appellant's motion to reinstate the grounds - denial of procedural fairness - appeal allowed - matter remitted

ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association (HCA) - industrial law - enterprise agreements - Full Court of the Federal Court erred in determining 'coverage issue' in respect of enterprise agreement for new enterprise against appellant - appeal allowed in part

Tiuta International Limited (in liquidation) (Respondent) v De Villiers Surveyors Limited (Appellant) (UKSC) - negligence - claim by lender against surveyors - negligent valuations in respect of loan facility - limit of loss - quantum of damages - measure of damages - surveyors' appeal allowed

Regional Express Holdings Limited v Australian Federation of Air Pilots (HCA) - industrial relations - statutory interpretation - standing - refusal of summary dismissal of claim seeking imposition of pecuniary penalty orders for contraventions of under item 11 of table in s539(2) *Fair Work Act 2009* (Cth) - appeal dismissed

Sloven Main Pty Ltd (Trustee) v Hope (FCAFC) - administrative law - primary judge set aside Authority's decision to recommend that appellant be granted approval to supply pharmaceutical benefits - denial of procedural fairness - futility - primary judge's order not set aside

Innes v AAL Aviation Limited (FCAFC) - superannuation - negligence - limitations - no error in dismissal of negligent misstatement and negligence claims - appeal dismissed - notice of contention dismissed

Perazzoli v BankSA, a division of Westpac Banking Corporation Limited (FCAFC) - legal professional privilege - class action - appeal against part-refusal of claim for legal professional privilege in respect of documents - appeal allowed - cross-appeal dismissed

Kreab Gavin Anderson (Australia) Ltd, in the matter of Kreab Gavin Anderson (Australia) Ltd (No 3) (FCA) - corporations - applicants invalidly appointed as liquidators and administrators entitled to remuneration - orders made

Namrood v Ebedeh-Ahvazi (NSWCA) - contract - conveyancing - sale of land - respondent vendor entitled to retain deposit he paid pursuant to contract for sale of land - appeal dismissed

Yarham v Transport Accident Commission of Victoria & Ors (NSWCA) - workers compensation - statutory interpretation - Victorian resident employed by Victorian company injured in course of employment in motor vehicle accident in NSW - law applicable to appellant's claim for damages - appeal allowed

Al Maha Pty Ltd v Coplin (NSWCA) - contract - unjust contract - option agreement was not unjust - appeal allowed - declarations and orders set aside

Minister Administering the Water Management Act 2000 v Sharkey (NSWCA) - water access licences - separate question - proper construction of "the upper limit of the storage of Hume Dam" - appeal dismissed

Isin v Ozen (NSWCA) - equity - assignment - real property - beneficial ownership - no transfer of property to first appellant by gift - appeal dismissed

Robert Huang and Others v Dong Chen and Anor (NSWSC) - contract - equity - Deed of JV Agreement was legally binding - defendants breached agreement - plaintiffs entitled to declaratory relief

Dasreef Developments Pty Ltd v Josiv Velkovski (NSWSC) - contract - conveyancing - contract for sale - purchaser in breach of contract not entitled to repayment of deposit under s55(2A) of *Conveyancing Act 1919* (NSW)

White v Timbercorp Finance Pty Ltd (in liq); Collins v Timbercorp Finance Pty Ltd (in liq) (VSCA) - corporations - managed investment schemes - loan contract - payments made pursuant to loan contract by making of journal entries - appeal dismissed.

Environment Protection Authority v SA Morgan Pty Ltd (SASCFC) - environment and planning - requirements of environment protection order were ultra vires - appeal against decision to quash environment protection order dismissed

Summaries With Link (Five Minute Read)

DWN042 v The Republic of Nauru [2017] HCA 56

High Court of Australia

Keane, Nettle & Edelman JJ

Migration - procedural fairness - appellant arrived at Christmas Island by boat - appellant was from Pakistan and of Sunni Muslim of Pashtun ethnicity - appellant transferred to Republic of Nauru - Secretary of the Department of Justice and Border Control and Refugee Status Review Tribunal refused appellant's application for refugee status under *Refugees Convention Act 2012* (Nr) - respondent accepted Supreme Court of Nauru struck out two grounds of appellant's appeal for incorrect reasons - final judgment delivered without hearing appellant's motion to reinstate grounds - *Appeals Act 1972* (Nr) - *Nauru (High Court Appeals) Act 1976* (Cth) - held: there was denial of procedural fairness to appellant - matter remitted to Supreme Court of Nauru for determination.

[DWN042](#)

[From Benchmark Thursday, 14 December 2017]

ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association [2017] HCA 53

High Court of Australia

Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Industrial law - enterprise agreements - four issues on appeal: Fair Work Commission's power under s186(2)(a) *Fair Work Act 2009* (Cth) to approve enterprise agreement for new enterprise, where agreement made with existing employees who agreed to work, but were not actually working, as employees in new enterprise (coverage issue); whether error by Commission concerning coverage issue was jurisdictional error; whether Commission erroneously satisfied enterprise agreement passed "better off overall test" for s186(2)(d)'s purposes (BOOT issue); whether Commission's decision on BOOT issue was error of law on the face of record, if not jurisdictional error - held: Full Court of Federal Court of Australia erred in determining coverage issue against appellant, but was correct in determination of BOOT issues against appellant - unnecessary to determine other issues - appeal allowed in part.

[ALDI Foods](#)

[From Benchmark Thursday, 14 December 2017]

Tiuta International Limited (in liquidation) (Respondent) v De Villiers Surveyors Limited (Appellant) [2017] UKSC 77

Supreme Court of the United Kingdom

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Lady Hale, President; Lord Kerr, Lord Sumption, Lord Lloyd-Jones & Lord Briggs
Negligence - negligent valuations of property in respect of loan facility - respondent was lender of business finance which went into administration in 2012 - respondent sued appellant surveyors, contending they negligently valued a property over which it sought to 'take a charge to secure a loan' - appeal arose from appellant's application for summary judgment on part of respondent's claim - assumed for appeal's purposes that valuations in respect of 'Second Facility' were negligent and that advances under Second Facility would not have been made but for negligence - no negligence alleged in respect of 'First Valuation' - in summary judgment application appellant argued respondent would have suffered loss in any event because there would have been no sums advanced under Second Facility if not for negligence and, as a result, sums owed to respondent under First Facility would have remained unpaid - thus appellant sought dismissal of part of claim arising from 'refinancing element of the advances under the Second Facility' - Deputy High Court Judge found in appellant's favour - Court of Appeal allowed respondent's appeal - quantum of damages - identification of 'basic measure of damages' - whether respondent's loss limited to 'new money advanced under Second Facility' - held: appeal allowed.

[Tiuta](#)

[From Benchmark Friday, 15 December 2017]

Regional Express Holdings Limited v Australian Federation of Air Pilots [2017] HCA 55

High Court of Australia

Kiefel CJ; Keane, Nettle, Gordon & Edelman JJ

Industrial relations - statutory interpretation - respondent sought that pecuniary penalty orders be imposed on appellant for contraventions under item 11 of table in s539(2) *Fair Work Act 2009* (Cth) - appellant sought summary dismissal of claim on basis respondent lacked standing - Federal Circuit Court refused summary dismissal of claim - Full Court of the Federal Court dismissed appellant's appeal - appeal to High Court concerned question: 'whether the fact that a person is eligible for membership of an industrial association in accordance with its eligibility rules is sufficient to make the industrial association "entitled to represent the industrial interests of" that person within the meaning of s540(6)(b)(ii) of the Fair Work Act 2009 (Cth)' - *Dunlop Rubber* principle - 'entitled to represent the industrial interests of' - whether 540(6) Fair Work Act applied to registered organisations - held: Court concluded that it was sufficient in the case of an industrial association registered as organisation under *Fair Work (Registered Organisations) Act 2009* (Cth) - appeal dismissed.

[Regional Express](#)

[From Benchmark Friday, 15 December 2017]

Sloven Main Pty Ltd (Trustee) v Hope [2017] FCAFC 203

Full Court of the Federal Court of Australia

Griffiths, Mortimer & Bromwich JJ

Administrative law - primary judge set aside decision of first respondent (Australian Community Pharmacy Authority) to recommend to second respondent (Secretary of the Department of

Health), that appellant be granted approval under s90(1) *National Health Act 1953* (Cth) to supply pharmaceutical benefits from premises - appellant contended primary judge erroneously denied appellant procedural fairness in proceedings - appellant contended that primary judge denied appellant opportunity to respond to primary judge's 'adverse findings of fraud in a public law sense by a solicitor acting for the appellant' in a way which might have altered findings - held: appellant was denied procedural fairness - however, primarily due to futility, Court exercised its discretion against granting of relief.

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[From Benchmark Thursday, 14 December 2017]

Innes v AAL Aviation Limited [2017] FCAFC 202

Full Court of the Federal Court of Australia

Tracey, Bromberg & White JJ

Superannuation - negligence - limitations - appellants employed by company (TAA) and then employed by company (Qantas) - appellants retrenched - appellants contended they were given 'incorrect advice and information' about ability to join superannuation schemes with result they had less entitlements than they would have had benefit of - appellants claimed against respondent including for negligent misstatement and negligence, misleading or deceptive conduct, unconscionable conduct, breach employment contracts and deceit - all claims failed - whether primary judge came to erroneous conclusion on negligent misstatement and negligence claims, and also erred indicating he would have found appellants failed to mitigate loss - whether primary judge should have found claims statute-barred - held: appeal and notice of contention dismissed.

[Innes](#)



Sonnet 59

By: William Shakespeare

If there be nothing new, but that which is
Hath been before, how are our brains beguil'd,
Which, labouring for invention, bear amiss
The second burthen of a former child!
O, that record could with a backward look,
Even of five hundred courses of the sun,
Show me your image in some antique book,
Since mind at first in character was done!
That I might see what the old world could say
To this composed wonder of your frame;
Whether we are mended, or whe'r better they,
Or whether revolution be the same.
O! sure I am, the wits of former days
To subjects worse have given admiring praise.

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

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