

Friday, 18 March 2016

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)

Moreton Bay Regional Council v Mekpine Pty Ltd (HCA) - real property - resumption of land - leases and tenancies - sub-division of land - extent of tenant's interest in land under lease of premises - appeal allowed

R v Independent Broad-based Anti-corruption Commissioner (HCA) - statutory interpretation - *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) authorised Independent Broad-based Anti-corruption Commission to examine police officers in relation to "Operation Ross" investigation into police officers' conduct - appeal dismissed

Swift v Wearing-Smith (NSWCA) - negligence - respondent injured in fall from balcony when balustrade gave way - appellant owners not liable

Linfield Developments Pty Ltd v Shuangxing Development Pty Ltd (NSWSC) - contract - development agreement - enforcement of call option - specific performance granted

Bergman v CGU Insurance Ltd (VSC) - insurance - landlord's insurance - fire at property - non-disclosure - misrepresentation - insurer's liability reduced to nil

Dual Homes Pty Ltd v Moores Legal Pty Ltd (VSC) - negligence - solicitors' duties - statutory demands - winding up - negligence and misleading and deceptive conduct - damages

Australian Dream Homes v Stojanovski (VSCA) - security for costs - termination of domestic building contract - evidence of impecuniosity not compelling - matters of public importance - security for costs of appeal refused

Australia and New Zealand Banking Group Ltd v Manasseh (WASCA) - contract - guarantee
- bank not entitled to payment of amount under guarantee - appeal dismissed

Summaries With Link (Five Minute Read)

Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Nettle JJ

Real property - resumption of land - leases and tenancies - respondent was tenant in shopping centre - respondent's lease was over premises on land (former lot 6) - lessor registered plan of subdivision under *Land Title Act 1994* (Qld) (LTA) to amalgamate former lot 6 and an adjacent lot (former lot 1) to form a new lot (new lot 1) - appellant Council resumed part of land - respondent claimed compensation under *Acquisition of Land Act 1967* (Qld) (ALA) - extent of respondent's interest in land under lease of premises - ss2 & 12(5).ALA - Sched 2, ss12, 49, 49A, 50, 64, 65, 182, 183 & 184 LTA (Qld) - Pt 3 Div 2, ss 3, 5, 6, 7(1), 8, 19, 20, 38(2) & 40(1) *Retail Shop Leases Act 1994* (Qld) held: respondent's interest was confined to part of new Lot 1 which previously was within former lot 6 - appeal allowed.

[Moreton](#)

[From Benchmark Friday, 11 March 2016]

R v Independent Broad-based Anti-corruption Commissioner [2016] HCA 8

High Court of Australia

French CJ; Kiefel, Bell, Keane, Nettle & Gordon JJ

Statutory interpretation - appellant police officers summonsed to give evidence at public examination concerning "Operation Ross", an investigation into conduct of police officers - appellants contended *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act) did not authorise Independent Broad-based Anti-corruption Commission to conduct examination or compel answers to questions which might incriminate an examinee where reasonable grounds to suspect examinee guilty - whether Commission empowered by IBAC Act to conduct examination of persons who had not been, but might subsequently be, charged and put on trial for offence relating to examination - whether s144 IBAC Act abrogated examinee's privilege against self-incrimination - held: appellants' contentions failed - Commission authorised by IBAC Act to examine police officers - appeal dismissed.

[IBAC](#)

[From Benchmark Friday, 11 March 2016]

Swift v Wearing-Smith [2016] NSWCA 38

Court of Appeal of New South Wales

Meagher, Hoeben & Simpson JJA

Negligence - respondent injured when he fell from balcony at rear of appellants' premises when

Benchmark

balustrade gave way - respondent alleged appellants negligent by allowing access to balcony - respondent succeeded in claim against appellants - ss5B & 5D(1)(a) *Civil Liability Act 2002* (NSW) - appellants' response to recommendations contained in building inspection report - causation - held: primary judge erred in mechanism of balustrade's failure - primary judge's findings as to content of duty of care went beyond appellants' duty to exercise reasonable care - to extent defect identified appellants had acted reasonably - no reason for appellants to believe further structural work required on balustrade - breach of duty not established - appeal allowed.

[Swift](#)

[From Benchmark Monday, 14 March 2016]

Linfield Developments Pty Ltd v Shuangxing Development Pty Ltd [2016] NSWSC 68

Supreme Court of New South Wales

Pembroke J

Contract - specific performance - plaintiff sought to enforce a call option contained in development agreement - first defendant was in administration - first defendant agreed to purchase land and entered development agreement with third party plaintiff - development agreement contained call option in plaintiff's favour - event of default occurred - plaintiff called for land under option - main dispute was between plaintiff and sixth defendant - sixth defendant claimed its interest as equitable mortgagee had priority over plaintiff's interest in respect of call option - *Australian Consumer Law - Contracts Review Act 1980* (NSW) - credit - contractual construction - contemporaneous notes and documents - held: no genuine dispute about circumstances of plaintiff's exercise of call option - arguments about exercise of option not supportable - plaintiff entitled to relief sought - specific performance granted - judgment for plaintiff.

[Linfield](#)

[From Benchmark Wednesday, 16 March 2016]

Bergman v CGU Insurance Ltd [2016] VSC 81

Supreme Court of Victoria

Hargrave J

Insurance - non-disclosure - misrepresentation - plaintiff obtained landlord's insurance for property he purchased - building on property damaged by fire - .property was vacant in preparation for demolition before commencing building works - plaintiff sought cost of rebuilding or repairing damaged portions of buildings - insurer refused payment on basis plaintiff failed to disclose intention to demolish, gave false answer to specific question and suffered no loss because he intended to demolish buildings - held: plaintiff breached s 21(1) *Insurance Contracts Act 1984* (Cth) by not disclosing matters relevant to risk - plaintiff's answer to question concerning demolition was false and contained misrepresentation-insurer's liability reduced to nil by s28 - unnecessary to decide whether plaintiff suffered loss - judgment for insurer.

[Bergman](#)

[From Benchmark Monday, 14 March 2016]

Dual Homes Pty Ltd v Moores Legal Pty Ltd [2016] VSC 86

Supreme Court of Victoria

J Dixon J

Negligence - solicitors' duties - proportionate liability - first plaintiff builder and developer was trustee of The Roiniotis Family Trust - second and third plaintiffs were family members and creditors/shareholders of first plaintiff - defendants were solicitor and two firms of which solicitor had been principal or employee - plaintiffs sued defendants for breach of retainer, and misleading or deceptive conduct in breach of s18 *Australian Consumer Law* in relation to conduct concerning creditor's statutory demands served on first plaintiff and winding up application against first plaintiff - first plaintiff had been wound up in insolvency as a result of application, which was undefended - first plaintiff alleged it was solvent at all times - Court terminated winding up - first plaintiff claimed it suffered loss in relation to winding up - held: liability imposed for wrongful conduct in respect of second statutory demand - advice in relation to winding up application negligent and involved misleading and deceptive conduct - advocate's immunity had some application but defendants not protected from award of damages - damages assessed - liability apportioned - judgment for plaintiffs.

[Dual Homes](#)

[From Benchmark Tuesday, 15 March 2016]

Australian Dream Homes v Stojanovski [2016] VSCA 38

Court of Appeal of Victoria

Santamaria & McLeish JJA

Security for costs - builder sought to appeal decision in which primary found it was not open to Tribunal to hold owners acted unreasonably in terminating domestic building contract - contract was in form of Master Builders Association of Victoria New Homes Contract (HC-6 Edition 1-2007) - owners sought security for costs - *Domestic Building Contracts Act 1995* (NSW) - termination provisions of contract - r64.38(2) *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - held: evidence of builder's impecuniosity not compelling - there had been delay in seeking security - appeal concerned matters of public importance - security for costs refused.

[Australian Dream Homes](#)

[From Benchmark Wednesday, 16 March 2016]

Australia and New Zealand Banking Group Ltd v Manasseh [2016] WASCA 41

Court of Appeal of Western Australia

McLure P; Buss & Murphy JJA

Contract - guarantee - respondent's husband borrowed money on behalf of company from bank - respondent provided guarantee secured by mortgage - bank contended guarantee continued for subsequent credit contracts offered or made to company - bank sued on one of the subsequent contracts (November 2009 credit contract) - respondent claimed liability came to an end on termination date of extension to guarantee to which she had agreed - respondent did not agree to guarantee November 2009 credit contract - primary judge held there was no



misleading or deceptive conduct by bank and that respondent's obligation could only end when company had performed all of its obligations to bank and discharged its liability in full - primary judge held November 2009 credit contract was in substance a replacement agreement which adversely affected respondent's liability under guarantee - respondent would only become liable if she consented or entered into new guarantee - primary judge dismissed bank's claims under guarantee and mortgage dismissed - construction of guarantee - 'Ankar' principle - held: bank' appeal dismissed.

[Australia and New Zealand Banking Group](#)

[From Benchmark Monday, 14 March 2016]



Benchmark

I would not paint — a picture — (348)

BY EMILY DICKINSON

I would not paint — a picture —
I'd rather be the One
It's bright impossibility
To dwell — delicious — on —
And wonder how the fingers feel
Whose rare — celestial — stir —
Evokes so sweet a torment —
Such sumptuous — Despair —

I would not talk, like Cornets —
I'd rather be the One
Raised softly to the Ceilings —
And out, and easy on —
Through Villages of Ether —
Myself endued Balloon
By but a lip of Metal —
The pier to my Pontoon —

Nor would I be a Poet —
It's finer — Own the Ear —
Enamored — impotent — content —
The License to revere,
A privilege so awful
What would the Dower be,
Had I the Art to stun myself
With Bolts — of Melody!

[EMILY DICKINSON](#)

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