

Friday, 18 September 2015

## Weekly Construction Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd** (FCAFC) - contract - franchise agreement - rights and obligations in relation to operation of franchise businesses - two appeals - one appeal allowed - other appeal allowed in part

**Workers' Compensation Dust Diseases Board of NSW v Cook** (NSWCA) - workers compensation - *Workers' Compensation (Dust Diseases) Act 1942* (NSW) did not permit Board to refuse claim for compensation because claimant recovered damages - appeal dismissed

**Shift2Neutral Pty Ltd v Fairfax Media Publications Pty Ltd** (NSWCA) - defamation - no error in upholding defence of justification - appeal dismissed

**Anderson v Ausgrid** (NSWSC) - negligence - fire which damaged house caused by defendant's negligent installation of replacement meter - judgment for house owners

**The New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd** (NSWSC) - security of payments - payment claims arising in respect of same reference date - adjudicator's decision in excess of jurisdiction and a nullity - determination quashed

**Westpac Life Insurance Services Ltd v Guirgis** (VSCA) - insurance - life insurance policy - no fraudulent non-disclosure or fraudulent misrepresentation - insurer's appeal dismissed

**Bowesco Pty Ltd v Westpoint Management Ltd** (WASCA) - third party lent funds to complete development - no subrogation to rights of primary lender - appeal dismissed

## Summaries With Link (Five Minute Read)

### **Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd [2015] FCAFC 127**

Full Court of the Federal Court of Australia

Middleton, Foster & Gleeson JJ

Contract - franchise agreement - Marmax Investments Pty Ltd (Marmax) and Spanline Weatherstrong Building Systems Pty Ltd (Spanline) appealed from two decisions of single judge - dispute between Spanline, Marmax and RPR Maintenance Pty Ltd (RPR) over parties' rights and obligations in connection with Spanline franchise businesses operated by Marmax and RPR - Marmax and Spanline ordered to pay RPR damages for breach of contract - Marmax ordered to indemnify RPR for costs incurred to bring proceeding against it - Spanline to pay RPR additional damages and damages for RPR's costs of proceedings against it - held: primary judge erred in finding contractual relationship between Marmax and RPR under sub-franchise agreement after certain date - Marmax's conduct working in RPR's territory during certain period did not breach sub-franchise agreement - Marmax's "incursions" into RPR's territory did not breach transfer of business agreement - Marmax not liable to pay damages to RPR - Marmax's appeal allowed on certain grounds - primary judge erroneously found Spanline breached contractual obligations to RPR by not taking "reasonable and available" steps to ensure RPR's territory remained exclusive - Spanline did not breach obligations to RPR by failing to adequately investigate RPR's complaints about Marmax's activities - Spanline did not breach contract by failing to demand Marmax give full disclosure of work done in RPR's territory - permission given by Spanline to Marmax to perform work in RPR's territory was breach of contract which caused RPR loss - Spanline's appeal allowed in part.

[Marmax](#)

[From Benchmark Friday, 11 September 2015]

### **Workers' Compensation Dust Diseases Board of NSW v Cook [2015] NSWCA 270**

Court of Appeal of New South Wales

Basten & Macfarlan JJA; Sackville AJA

Workers compensation - statutory interpretation - employee contracted pleural mesothelioma from exposure to asbestos in course of employment - employee sued company (Amaca) in Supreme Court of Victoria for damages for negligence - employee accepted offer of compromise served by Amaca - prior to settlement employee applied to Workers' Compensation Dust Diseases Board of New South Wales for compensation under s8 *Workers' Compensation (Dust Diseases) Act 1942* (NSW) - Board refused application on basis that awarding employee compensation under Act would "amount to a double recovery" of compensation - employee appealed to District Court but died prior to judgment - District Court allowed appeal and made awards under Act for weekly payments for total disablement and for medical and other expenses - Board appealed - held: Act did not permit Board to refuse claim for compensation because claimant had recovered damages - appeal dismissed.

[Workers'](#)

[From Benchmark Friday, 11 September 2015]

## **Shift2Neutral Pty Ltd v Fairfax Media Publications Pty Ltd [2015] NSWCA 274**

Court of Appeal of New South Wales

McColl & Basten JJA; Simpson J

Defamation - second appellant incorporated first appellant (Shift2Neutral) - first appellant claimed to conduct “environmental audits” and “issue certificates representing credits under a carbon offset scheme” - newspaper published by first respondent published two articles prepared by second respondent - appellants sued respondents for defamation - trial judge found imputations conveyed and were defamatory - however trial judge upheld respondents’ defence of justification pursuant to s25 *Defamation Act 2005* (NSW) and gave judgment for respondents - appellants contended that trial judge should have found it had not been established certificates not valuable or genuine or available to offset emissions - whether trial judge reversed onus of proof with respect to defence - held: appellants failed to demonstrate error by trial judge in upholding defence of justification - appeal dismissed.

[Shift2Neutral](#)

[From Benchmark Monday, 14 September 2015]

## **Anderson v Ausgrid [2015] NSWSC 1308**

Supreme Court of New South Wales

Adamson J

Negligence - plaintiffs owned and lived in residential house on property - while plaintiffs on holiday fire started in or around the meter box on property - fire spread and damaged house - agreed that damage amounted to \$819,676.50 (agreed figure) - about a month before fire defendant replaced one faulty meter - plaintiffs claimed agreed figure from defendant on basis of negligence - principal issue was cause of fire - ss5B, 5C, 5D, 5E & 5O *Civil Liability Act 2002* (NSW) - whether fire caused by defective installation of meter - held: more probable than not that fire caused when resistance at joint where wire screwed to replacement meter generated sufficient heat to ionise surrounding gases - plaintiffs discharged onus of proving fire caused by defendant’s negligence - plaintiffs proved factual causation - if scope of liability had not been accepted by defendant Court would have found it was appropriate that responsibility for harm should be imposed on defendant - judgment for plaintiffs.

[Anderson](#)

[From Benchmark Friday, 11 September 2015]

## **The New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd [2015] NSWSC 1339**

Supreme Court of New South Wales

Stevenson J

Security of payments - first defendant sought declaration adjudicator’s determination of relevant “adjudicated amount” pursuant to *Building and Construction Industry Security of Payment Act 1999* (NSW) with respect to payment claim (payment claim 24) served by first defendant on plaintiff was void - payment claim 24 and an earlier payment claim (payment claim 23), if it was a valid payment claim, arose under same reference date - held: determination made in excess

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of jurisdiction and was a nullity - payment claim 23 was valid payment claim - common ground that if payment claim 23 was valid then both it and payment claim 24 arose in respect of same reference date - payment claim 24 was served in contravention of s13(5) - adjudicator had no jurisdiction to deal with payment claim 24 - adjudicator's determination quashed - plaintiff's claim for damages quashed.

[Netball](#)

[From Benchmark Tuesday, 15 September 2015]

## **Westpac Life Insurance Services Ltd v Guirgis [2015] VSCA 239**

Court of Appeal of Victoria  
Hansen, Beach & Kaye JJA

Insurance - life insurance - respondent took out insurance policy with applicant which provided for payment of a monthly total disability benefit in event respondent suffered total disability within meaning of policy - policy also provided for payment of monthly partial disability benefit in event respondent became partially disabled under policy - respondent claimed on policy - respondent claimed she reduced working hours due to her fibromyalgia and that her arm and shoulder pain prevented her working - respondent subsequently advised applicant conditions producing asserted total disability had expanded to include 'depressed mood - applicant contended respondent failed to comply with duty of disclosure under s21 *Insurance Contracts Act 1984* (Cth) and advised applicant had avoided policy from inception in accordance with s29(2) - respondent claimed applicant breached policy - County Court gave judgment for respondent - applicant sought leave to appeal - held: no basis for attack on trial judge's finding he could not conclude respondent 'was aware of the fibromyalgia diagnosis in August 2007' - no error in trial judge's conclusion he was not satisfied there was any fraudulent non-disclosure or fraudulent misrepresentation by respondent - no error in trial judge not being satisfied applicant established no policy would have been entered into had respondent disclosed existence of fibromyalgia - leave to appeal granted - appeal dismissed.

[Westpac](#)

[From Benchmark Friday, 11 September 2015]

## **Bowesco Pty Ltd v Westpoint Management Ltd [2015] WASCA 184**

Court of Appeal of Western Australia  
McLure P; Buss & Newnes JJA

Mortgage - guarantee - Suncorp lent funds to Lanepoint to purchase and develop land - loan secured by mortgage and guaranteed by Bowesco - Westpoint lent additional funds to Lanepoint secured by second ranking charge - ASIC interim stop order prevented Westpoint from providing further funds - Bowesco lent Lanepoint \$550,000 to enable it to complete development - Suncorp appointed receivers to Lanepoint - development completed and units sold - Lanepoint's debt to Suncorp paid - surplus funds from sale of units paid to Westpoint - Bowesco claimed Westpoint held \$550,000 of excess funds on constructive trust for it because it was subrogated to Suncorp's rights, which required Suncorp to account to it from surplus funds - Bowesco alleged Westpoint had accepted surplus funds with knowledge of Bowesco's rights - trial judge held Bowesco paid \$550,000 to Lanepoint to enable it to pay off unsecured creditors - money



was used for that purpose - payment did not reduce Lanepoint's debt to Suncorp - no basis on which Bowesco could be subrogated to Suncorp's rights - Westpoint did not receive surplus funds with knowledge of failure by Suncorp to account in breach of fiduciary duty - trial judge dismissed claim - construction of guarantee - right to complete development - construction of Suncorp letter - subrogation - held: certain grounds of appeal upheld - Bowesco failed to identify any error capable of altering outcome - appeal dismissed.

[Bowesco](#)

[From Benchmark Tuesday, 15 September 2015]

# Benchmark

## The Wood-Pile

By Robert Frost

Out walking in the frozen swamp one gray day,  
I paused and said, 'I will turn back from here.  
No, I will go on farther—and we shall see.'  
The hard snow held me, save where now and then  
One foot went through. The view was all in lines  
Straight up and down of tall slim trees  
Too much alike to mark or name a place by  
So as to say for certain I was here  
Or somewhere else: I was just far from home.  
A small bird flew before me. He was careful  
To put a tree between us when he lighted,  
And say no word to tell me who he was  
Who was so foolish as to think what he thought.  
He thought that I was after him for a feather—  
The white one in his tail; like one who takes  
Everything said as personal to himself.  
One flight out sideways would have undeceived him.  
And then there was a pile of wood for which  
I forgot him and let his little fear  
Carry him off the way I might have gone,  
Without so much as wishing him good-night.  
He went behind it to make his last stand.  
It was a cord of maple, cut and split  
And piled—and measured, four by four by eight.  
And not another like it could I see.  
No runner tracks in this year's snow looped near it.  
And it was older sure than this year's cutting,  
Or even last year's or the year's before.  
The wood was gray and the bark warping off it  
And the pile somewhat sunken. Clematis  
Had wound strings round and round it like a bundle.  
What held it though on one side was a tree  
Still growing, and on one a stake and prop,  
These latter about to fall. I thought that only  
Someone who lived in turning to fresh tasks  
Could so forget his handiwork on which  
He spent himself, the labor of his ax,  
And leave it there far from a useful fireplace  
To warm the frozen swamp as best it could

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With the slow smokeless burning of decay.

[RobertFrost](#)

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