

Friday, 19 May 2017

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Lewis et al v Clarke (SCOTUS) - sovereign immunity - jurisdiction - petitioners struck from behind by vehicle driven by respondent - respondent was employee of Mohegan Tribal Gaming Authority - tribal sovereign immunity did not bar suit against respondent - reversed and remanded

Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited (FCAFC) - equity - fiduciary duties - corporations - contract - knowing involvement in breaches of fiduciary duty - primary judge erred in relation to causation - respondent to provide an account of the profits - appeal allowed

Murad v Assistant Minister for Immigration and Border Protection (FCAFC) - migration law - cancellation of Class AH Subclass 101 Child visa on character grounds under *Migration Act 1958* (Cth) - no procedural unfairness or jurisdictional error - appeal dismissed

Bauer Consumer Media Limited v Evergreen Television Pty Ltd (FCA) - trade marks - two proceedings - appeal against decision to allow registration of trade mark - non-use proceedings - respondent owned trade mark - grounds of opposition not made out - appeal dismissed - non-use proceeding dismissed

Port Macquarie-Hastings Council v Diveva Pty Limited (NSWCA) - contract - damages - breach of contract between Council and successful tenderer - no error in construction of option or award of damages - appeal dismissed

Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v

Linfield Developments Pty Ltd (NSWCA) - contract - specific performance - two appeals arising from disputes concerning acquisition of land by company (Shuangxing Development Pty Ltd) - one appeal upheld in part - other appeal dismissed

Denshire v Newcastle City Council (NSWSC) - real property - easements - order made for extinguishment of three easements

Hobson v Northern Sydney Local Health District (NSWSC) - medical negligence - plaintiff rendered paraplegic during surgery - surgeon and anaesthetist negligently failed to abandon surgery - judgment for plaintiff in sum of \$3,828,075

MLC Nominees Pty Ltd v Daffy (VSCA) - insurance policy - total and permanent disability benefit - proper construction of policy - erroneous finding there was a relevant accrued benefit as at termination of employment - appeal allowed

White v Hertz Australia Pty Ltd (QSC) - damages - psychiatric injury arising from needle-stick incident - liability admitted - damages assessed - judgment for plaintiff

Captain v Wosomo & Anor (QSC) - negligence - joint criminal enterprise - motor vehicle accident - plaintiff, defendant and two others stole car - plaintiff passenger injured when car driven by defendant crashed into pole - plaintiff had not withdrawn from joint criminal enterprise at time of incident - defendant owed no duty of care to plaintiff - claim dismissed

Eclipse Resources Pty Ltd v The Minister for Environment [No 2] (WASCA) - environment and planning - appellant liable to pay waste levy in respect of material deposited in voids - appeal dismissed

Bernie Howe Pty Ltd v Motor Accidents Insurance Board (TASSC) - workers' compensation - PTSD was disease under *Workers Rehabilitation and Compensation Act 1988* (Vic) - employment was not 'the major or most significant factor in the causation of the PTSD' - claim for indemnity for payments failed

Hartigan v Commissioner for Social Housing in the ACT (ACTSC) - negligence - infant plaintiff injured when attacked by dog which tenant kept on premises leased from Commissioner - Commissioner not liable

O'Connor v Motor Accidents (Compensation) Commission (NTSC) - motor accidents compensation - motor accident - applicant injured while seated on stationary motorbike when vehicle collided with her - applicant was not driving at the time of accident - applicant not precluded from receiving compensation

Perry Park Pty Ltd v City of Darwin (No 2) (NTSC) - landlord and tenant - lease - plaintiff

obliged to perform 'Alternate Upgrade Works' under lease - declaration refused

Summaries With Link (Five Minute Read)

Lewis et al v Clarke Docket No 15-1500

Supreme Court of the United States

Coram: Roberts CJ, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor & Kagan JJ

Sovereign immunity - jurisdiction - petitioners driving on Connecticut interstate struck from behind by vehicle driven by respondent - respondent was a Mohegan Tribal Gaming Authority employee transporting patrons - respondent contended that because he was employed by Gaming Authority, which was an arm of the Mohegan Tribe, he was entitled to sovereign immunity - Supreme Court of Connecticut held tribal sovereign immunity barred suit against respondent because respondent was acting in scope of employment at time of accident - held: where tribal employee was sued in individual capacity it was the employee, not the tribe, who was the real party in interest - tribe's sovereign immunity not implicated - respondent unable to assert sovereign immunity - reversed and remanded.

[Lewis et al](#)

[From Benchmark Thursday, 18 May 2017]

Lifepan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited [2017] FCAFC 74

Full Court of the Federal Court of Australia

Allsop CJ; Middleton & Davies JJ

Equity - fiduciary duties - corporations - confidential information - causation - first and second respondents were employees of first appellant (Lifepan) who left and became employees of respondent Foresters - Lifepan claimed first and second respondents breached fiduciary duties, that Foresters was liable for knowing assistance and that profits allegedly made by Foresters due to its knowing involvement were required to be accounted for - primary judge found Foresters was involved in employees' breaches of fiduciary duty but no causal connection sufficient to maintain an account of profits - ss9, 79, 180, 181, 182, 183, 1317E & 1317H *Corporations Act 2001* (Cth) - held: primary judge erred in relation to causation - Foresters to provide an account of the profits.

[Lifepan](#)

[From Benchmark Tuesday, 16 May 2017]

Murad v Assistant Minister for Immigration and Border Protection [2017] FCAFC 73

Full Court of the Federal Court of Australia

Griffiths, Mortimer & Perry JJ

Migration - Assistant Minister for Immigration and Border Protection cancelled appellant's Class AH Subclass 101 Child visa on character grounds under s501(2) *Migration Act 1958* (Cth) on basis of substantial criminal record - appellant was stateless - Minister found that if appellant's

visa cancelled 'he would face prospect of indefinite immigration detention' pursuant to ss189 & 196 - appellant sought judicial review and writ of habeas corpus - application dismissed - whether primary judge should have found Minister failed to consider best interests of appellant's children as primary consideration - challenge to High Court's decision in *Al-Kateb v Godwin* [2004] HCA 37 - whether procedural fairness or jurisdictional error - held: leave refused to amend ground of appeal in relation to *Al-Kateb v Godwin* - grounds of appeal failed - appeal dismissed.

[Murad](#)

[From Benchmark Wednesday, 17 May 2017]

Bauer Consumer Media Limited v Evergreen Television Pty Ltd [2017] FCA 507

Federal Court of Australia

Perry J

Trade marks - applicants commenced two proceedings - first proceeding was appeal from decision of delegate of Register of Trademarks to allow application for trade mark to proceed to registration - second proceeding sought removal of trade mark from Register on grounds of non-use - ss56, 92(4)(a), 100(3)(c) & 101(2) *Trade Marks Act 1995* (Cth) - held: respondent owned Mark - no grounds of opposition established - appeal dismissed - non-use proceedings dismissed.

[Bauer](#)

[From Benchmark Thursday, 18 May 2017]

Port Macquarie-Hastings Council v Diveva Pty Limited [2017] NSWCA 97

Court of Appeal of New South Wales

Beazley A/CJ; Simpson & Payne JJA

Contract - damages - parties entered contract in 2011 under which respondent, who was successful tenderer, contracted to provide services in relation to asphalt for two years with one year option - respondent undertook works which failed - common ground respondent not responsible for works' failure - respondent provided further services which also failed - in 2013, appellant had advised respondent of its determination that option to extend agreement would not be exercised - respondent sought to exercise option - appellant contended option could be extended only by mutual agreement - primary judge found Council had breached agreement and awarded respondent damages - contractual construction - loss of opportunity - lost profits - held: no error in primary judge's construction of option, or error in assessment of damages - appeal dismissed.

[Port Macquarie-Hastings](#)

[From Benchmark Tuesday, 16 May 2017]

Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd [2017] NSWCA 99

Court of Appeal of New South Wales

McColl, Ward & Gleeson JJA

Benchmark

Contract - specific performance - appeals arising from disputes concerning acquisition of land by Shuangxing Development Pty Ltd (SXG) - Linfield sought to enforce a call option contained in development agreement - SXG was in administration - SXG agreed to purchase land and entered development agreement with third party - development agreement contained call option in Linfield's favour - event of default occurred - Linfield called for land under option - Australia Capital Financial Management Pty Limited (ACFM) claimed its interest as equitable mortgagee had priority over Linfield's interest in respect of call option - primary judge found in favour of Linfield - ACFM, and Ms Guan, who controlled SXG at time of purchase of land and various companies which guaranteed SXG's obligations, appealed - date on which Linfield's equitable interest arose - whether primary judge erroneously drew adverse inferences resulting in denial of procedural fairness - whether ACFM engaged in disentitling conduct - time of assessment of allegedly penal nature of call option - use of expert evidence - whether call option unenforceable - whether SXG entitled to relief against forfeiture - held: ACFM's appeal allowed in part - Ms Guan's appeal dismissed.

[Australia Capital Financial Management](#)

[From Benchmark Friday, 19 May 2017]

Denshire v Newcastle City Council [2017] NSWSC 577

Supreme Court of New South Wales

Darke J

Real property - easements - application for extinguishment of three easements under s89 *Conveyancing Act 1919* (NSW) to 'facilitate satisfaction of a condition of approval' for subdivision of land which second plaintiff owned - first plaintiff was owner of lot in deposited plan - easements were for right of carriageway, drainage of water and right of access - whether easements should be deemed obsolete - whether extinguishing easements would cause substantial injury to those entitled to easement - held: Court satisfied that easements should be extinguished - orders made.

[Denshire](#)

[From Benchmark Tuesday, 16 May 2017]

Hobson v Northern Sydney Local Health District [2017] NSWSC 589

Supreme Court of New South Wales

Harrison J

Medical negligence - plaintiff with Noonan syndrome rendered paraplegic during surgery on spine - plaintiff sued surgeon and anaesthetist in negligence - *Civil Liability Act 2002* (NSWSC) - intraoperative emergency - spinal cord monitoring - held: defendants negligently failed to abandon surgery - if surgery had not continued after certain time, plaintiff would not have been rendered paraplegic - defendants breached duty to plaintiff by failing to 'terminate, or to recommend or advise the termination of the surgery' - judgment for plaintiff in sum of \$3,828,075.

[Hobson](#)

[From Benchmark Thursday, 18 May 2017]

MLC Nominees Pty Ltd v Daffy [2017] VSCA 110

Court of Appeal of Victoria

Beach & McLeish JJA; Keogh J

Insurance - a total and permanent disability benefit under policy of insurance - respondent was 'third party beneficiary' of policy - applicants were parties to policy - one applicant (MLC Nominees Pty Ltd) was policy holder and other applicant (MLC Limited) was insurer - main issue at trial was whether respondent's claim for TPD benefit was to be determined in accordance with TPD clause in policy's First Schedule, or policy's Sixth Schedule - trial judge gave judgment for respondent, finding that the claim was to be assessed under First Schedule, and that respondent satisfied TPD definition - applicants sought to appeal - proper construction of policy - whether TPD benefit which respondent claimed was a benefit that had already accrued at time of termination of employment - held: trial judge erred in finding there was a relevant accrued benefit as at employment's termination - appeal allowed - notice of contention rejected.

[MLC Nominees](#)

[From Benchmark Tuesday, 16 May 2017]

White v Hertz Australia Pty Ltd [2017] QSC 82

Supreme Court of Queensland

Daubney J

Damages - psychiatric injury - plaintiff employed by defendant as 'vehicle services attendant and leading hand' - plaintiff sued defendant for psychological injury when he received needle-stick injury while reaching into car pocket - defendant admitted breach of duty but denied incident caused injury of magnitude plaintiff claimed - whether needle-stick injury ceased to be contributing factor to ongoing psychiatric disorder - onus - impact of pre-existing shoulder condition on assessment of damages - whether plaintiff satisfied burden to demonstrate that the 'needle stick incident was causative of his ongoing mental health issues' - held: judgment for plaintiff - damages assessed in sum of \$312,506.45.

[White](#)

[From Benchmark Thursday, 18 May 2017]

Captain v Wosomo & Anor [2017] QSC 86

Supreme Court of Queensland

Daubney J

Negligence - joint criminal enterprise - motor vehicle accident - plaintiff was passenger in vehicle driven by first defendant - plaintiff injured when vehicle crashed into pole - defendant, plaintiff, and two other boys had stolen the car - determination of liability - plaintiff conceded potential application of "s45 ('Criminals not to be awarded damages') of the Civil Liability Act 2003 (Qld)" but argued plaintiff had withdrawn from joint criminal activity at time of incident, or Court should find application of exclusion 'would operate harshly and unjustly' - defendants contended there was no duty owed by defendant to plaintiff so s45 did not arise for

consideration - contributory negligence arising from plaintiff not wearing seatbelt - held: as long as parties were complicit in joint illegal enterprise, defendant did not owe plaintiff duty to take reasonable care - Court not satisfied plaintiff had withdrawn from joint criminal enterprise at time of accident - claim dismissed.

[Captain](#)

[From Benchmark Friday, 19 May 2017]

Eclipse Resources Pty Ltd v The Minister for Environment [No 2] [2017] WASCA 90

Court of Appeal of Western Australia

Buss P; Newnes & Murphy JJA

Environment and planning - proceedings concerned respondents' contention that appellant was liable to pay waste levy in respect of materials from third parties which it deposited and compacted in voids - primary judge found in favour of respondents - whether purpose for which material was accepted was relevant to determining whether 'waste... is accepted for burial' under Category 63 in Sch 1 to EP Regulations - whether material used to fill voids constituted 'waste disposed of to landfill' - validity of CEO's estimates - whether tax imposed on appellants concerning materials received at sites was an excise which was invalid under s90 Commonwealth Constitution - *Environmental Protection Act 1986 (WA)* - *Waste Avoidance and Resource Recovery Act 2007 (WA)* - *Waste Avoidance and Resource Recovery Levy Act 2007 (WA)* - held: appeal dismissed.

[Eclipse](#)

[From Benchmark Tuesday, 16 May 2017]

Bernie Howe Pty Ltd v Motor Accidents Insurance Board [2017] TASSC 27

Supreme Court of Tasmania

Blow CJ

Workers' compensation - employee of plaintiff involved in collision of motorcycle while driving home from induction session at premises of plaintiff's customer - motorcyclist died at scene - employee developed post-traumatic stress disorder (PTSD) and claimed compensation under *Workers Rehabilitation and Compensation Act 1988* (TASSC). - plaintiff sought indemnity under s134(1) in respect of payments of workers compensation it made in respect of employee's PTSD - whether PTSD was a 'disease' under s3(1) - held: PTSD constituted a 'disease' under the Act, however it was motorcyclist's negligence, not employment, which was 'the major or most significant factor in the causation of the PTSD' - plaintiff not obliged to pay compensation under the Act - action failed.

[Bernie Howe](#)

[From Benchmark Monday, 15 May 2017]

Hartigan v Commissioner for Social Housing in the ACT [2017] ACTSC 100

Supreme Court of the Australian Capital Territory

Penfold J

Negligence - infant plaintiff taken to house managed by Commissioner and occupied by tenant -

tenant kept two dogs on premises - one of the dogs attacked plaintiff - plaintiff injured - plaintiff by litigation guardian brought action in negligence against Commissioner - plaintiff claimed Commissioner owed breached duty of care to plaintiff - whether Commissioner had duty of care to protect infant plaintiff from attack by dangerous dog on premises it leased to tenant - held: defendant did not owe duty of care arising from 'conventional occupiers' liability' - Court unable to identify any other duty of care owed which Commissioner owed - even if duty existed, plaintiff did not show defendant failed to discharge it - Commissioner not liable under *Civil Law (Wrongs) Act 2002* (ACT) - Commissioner did not share liability under *Domestic Animals Act 2000* (ACT) with dog's keeper - judgment for Commissioner.

[Hartigan](#)

[From Benchmark Monday, 15 May 2017]

O'Connor v Motor Accidents (Compensation) Commission [2017] NTSC 36

Supreme Court of the Northern Territory

Riley J

Motor accidents compensation - applicant was seated on stationary motorcycle - applicant seriously injured when vehicle driven by drunk driver collided with her - respondent conceded collision was an accident under *Motor Accidents (Compensation) Act* but determined applicant precluded pursuant to s9C from receiving compensation for loss of earning capacity or lump sum compensation for permanent impairment because accident had occurred while she was unlicensed and driving motorcycle - held: applicant was not driving at relevant time - exclusion in s9C did not apply in the circumstances - parties to be heard on appropriate orders.

[O'Connor](#)

[From Benchmark Wednesday, 17 May 2017]

Perry Park Pty Ltd v City of Darwin (No 2) [2017] NTSC 37

Supreme Court of the Northern Territory

Kelly J

Landlord and tenant - contract - lease between parties provided that plaintiff was to perform 'Upgrade Works' - plaintiff sought declarations that defendant unreasonably withheld consent to Stages 2 and 3 Upgrade Works and that plaintiff was not liable to perform 'Alternate Upgrade Works' - Court decided preliminary point concerning defendant's withholding of consent in defendant's favour - whether, on proper construction of clause 9.7(g) of the Lease, plaintiff was not liable to perform Alternate Upgrade Works - held: plaintiff obliged to perform Alternate Upgrade Works in accordance with clause's provisions - declaration refused.

[Perry Park](#)

[From Benchmark Wednesday, 17 May 2017]



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The Arrow and the Song

By [Henry Wadsworth Longfellow](#)

I shot an arrow into the air,
It fell to earth, I knew not where;
For, so swiftly it flew, the sight
Could not follow it in its flight.

I breathed a song into the air,
It fell to earth, I knew not where;
For who has sight so keen and strong,
That it can follow the flight of song?

Long, long afterward, in an oak
I found the arrow, still unbroke;
And the song, from beginning to end,
I found again in the heart of a friend.

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