

Friday, 21 December 2018

## Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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### Executive Summary (1 minute read)

**Stallion Eight Shipping Co. S.A. v Natwest Markets PLC (formerly known as The Royal Bank of Scotland plc)** (EWCA) - maritime law - admiralty - appellant owners sought ship's release from arrest unless respondent bank 'provided a cross-undertaking in damages' - Teare J dismissed application - no error in exercise of discretion by Teare J - appeal dismissed

**Muriniti; Newell v Lawcover Insurance Pty Ltd (No 2)** (NSWCA) - insurance - indemnity insurance policy - appellants restrained from pursuing appeal against Land and Environment Court decision in which personal costs orders made against them - appeal dismissed

**Tasoulas v Tasoulas** (NSWCA) - land law - transfer of property - appellant sought that transfer be set aside on basis his signature was forged - primary judge not satisfied appellant had not signed transfer - appeal dismissed

**Bruce v Apex Software Pty Limited t/as Lark Ellen Aged Care** (NSWCA) - negligence - appellant injured in trip and fall outside entrance to aged care facility - aged care facility's operator not liable - appeal dismissed

**Vannini v Worldwide Demolitions Pty Ltd** (NSWCA) - administrative law - workplace injury - appeal against dismissal of summons seeking judicial review of assessment of whole person impairment - appeal dismissed

**State of New South Wales v Naaman (No 2)** (NSWCA) - judgments and orders - dismissal of appellant's application for 'extended supervision order' under *Terrorism (High Risk Offenders) Act 2017* (NSW) - appeal dismissed

**Ibrahimi v Commonwealth of Australia** (NSWCA) - negligence - representative proceedings - separate questions - proceedings arising from deaths of 50 people travelling on boat to Australia - appeal against primary judge's determination of 18 separate questions - appeal dismissed

**Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd** (NSWCA) - corporations - statutory demand - applicant sought extension of time to comply with statutory demand until determination of its summons seeking leave to appeal from dismissal its application to set demand aside - extension of time granted

**Crown Sydney Property v Barangaroo Delivery Authority; Lendlease (Millers Point) v Barangaroo Delivery Authority** (NSWSC) - contract - Crown and Lendlease succeeded on 'construction and application' of 'Sight Lines Clauses' in development agreements with Authority - declarations and orders

**R v Douglass (No 3)** (NSWSC) - contempt - journalist entered jury room during murder trial - Court satisfied journalist had shown cause why she should not be referred to Prothonotary to be dealt with for contempt

**Spedding v Dailymail.com Australia Pty Ltd** (NSWSC) - limitations - defamation - plaintiff granted extension of time to bring proceedings in respect of two articles published in newspaper in 2016

**McLachlan v Browne & Fairfax Media Publications Pty Ltd; McLachlan v Browne & Australian Broadcasting Corporation (No 5)** (NSWSC) - defamation - 'media applications' - non-party members of press sought access to documents in Court's file - applications refused

**Di Stasio Pty Ltd v R & K Services Pty Ltd** (VSCA) - judgments and orders - contract - respondent granted leave to amend pleading, re-open case and adduce evidence - appeal dismissed

**Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd** (QCA) - summary judgment - pleadings - action for 'price of goods' - no error in refusal to grant summary judgment - erroneous refusal of application to strike out part of defence - appeal allowed in part

**Nanosecond Corporation Pty Ltd & Anor v Glen Carron Pty Ltd & Anor (No 2)** (SASC) - contract - consumer law - unlawful conspiracy to cause harm - plaintiffs' claims against defendants dismissed

**Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd** (WASCA) - planning and development - State Administrative Tribunal granted conditional

approval for development under 'Scheme' - erroneous failure to have 'due regard' to 'Scheme Amendment' - appeal allowed - cross-appeal dismissed

## Summaries With Link (Five Minute Read)

### **Stallion Eight Shipping Co. S.A. v Natwest Markets PLC(formerly known as The Royal Bank of Scotland plc) [2018] EWCA Civ 2760**

England and Wales Court of Appeal

Sir Terence Etherton MR, Lord Justice Gross & Lord Justice Flaux

Maritime law - admiralty - appellant (owners) sought release of ship ('M.V. Alkyon') from arrest unless respondent (bank) 'provided a cross-undertaking in damages' (cross-undertaking) 'for the loss flowing from the arrest' - Teare J dismissed application - owners appealed - whether Teare J, in refusing to order M.V Alkyon's release without requiring bank to provide cross-undertaking, erred in exercise of discretion under r61.8(4)(b) *Civil Procedure Rules* (CPR) - whether Court should exercise power under r61.8(4)(b) CPR to release M.V. Alkyon unless cross-undertaking provided by bank - whether Court should depart from 'existing law and practice' concerning 'maritime arrests as of right', non-recoverability of damages for 'wrongful arrest' without 'bad faith' or 'gross negligence', and 'requiring security as the price' for release from arrest of a vessel - whether owners demonstrated 'risk of injustice' or 'hardship' - whether owners established 'alternative security' could not be provided - held: no error in Teare J's exercise of discretion - appeal dismissed.

[Stallion](#)

[From Benchmark Tuesday, 18 December 2018]

### **Muriniti; Newell v Lawcover Insurance Pty Ltd (No 2) [2018] NSWCA 311**

Court of Appeal of New South Wales

Bathurst CJ; Beazley P & White JA

Insurance - appellants were legal practitioners - respondent issued indemnity insurance policy (policy) to appellants - respondent brought proceedings arising from dispute concerning the policy - respondent sought declaration concerning policy's proper construction and injunction restraining appellants from bringing appeal against Land and Environment Court decision in which personal costs orders made against appellants - primary judge granted declarations and injunctions - primary judge declared appellants had consented to respondent's decision not to pursue appeal and made order permanently restraining appellants from pursuing appeal in own names - appellants appealed -whether primary judge erred in construction of policy - whether appellants entitled to appeal in own names - 'bad faith' issues - whether contravention of s52 *Insurance Contracts Act 1984* (Cth) by 'independent lawyer clauses' - adequacy of reasons - bias - held: appeal dismissed.

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[From Benchmark Monday, 17 December 2018]

## **Tasoulas v Tasoulas [2018] NSWCA 309**

Court of Appeal of New South Wales

Basten, Payne & White JJA

Land law - appellant was respondent's son - parties became property's registered proprietors - appellant transferred his half-share to respondent - appellant sought that transfer be set aside on basis his signature was forged - primary judge was not persuaded appellant had not signed transfer - appellant appealed - whether 'misunderstanding' concerning production of 'contemporaneous records' - whether erroneous reasoning in relation to signing of 'impugned transfer' - whether basis for inference that 'unseen documentary material' could demonstrate signature forged - whether erroneous exclusion of evidence - whether matters concerning appellant's self-representation and/or appellant's fatigue during cross-examination provided grounds to overturn judgment - whether denial of fair trial - whether 'substantial wrong or miscarriage' which warranted new trial - held: appeal dismissed.

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[From Benchmark Monday, 17 December 2018]

## **Bruce v Apex Software Pty Limited t/as Lark Ellen Aged Care [2018] NSWCA 330**

Court of Appeal of New South Wales

Meagher, Leeming & White JJA

Negligence - appellant injured in trip and fall outside entrance to Lark Ellen Aged Care Facility (facility) - appellant tripped due to 'height differential' between concrete slab and bricks - respondent was facility's operator - appellant brought proceedings in negligence against respondent, contending it negligently failed 'to eliminate any level differentials' - primary judge found no breach of duty by respondent, finding 'risk of tripping' was "obvious risk" pursuant to s5F *Civil Liability Act 2002* (NSW) - appellant challenged primary judge's failure to find risk of harm 'not insignificant', finding of 'low probability' of occurrence of harm, and finding that height differential 'did not create a dangerous situation' - appellant also challenged conclusion that a 'reasonable person' would not have acted to reduce unevenness and 'implicit finding' that inspections were 'reasonably and adequately conducted' - appellant also contended primary judge erred in weight given to opinions and finding of obvious risk - held: appeal dismissed.

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[From Benchmark Wednesday, 19 December 2018]

## **Vannini v Worldwide Demolitions Pty Ltd [2018] NSWCA 324**

Court of Appeal of New South Wales

Macfarlan & Gleeson JJA; Barrett AJA

Administrative law - workplace injury - appellant worker injured while working for first respondent (2009 injury) - appellant had been previously injured in April 2008 while working for different employer (2008 injury) - appellant served 'intention to commence common law proceedings' on first respondent's insurer in 2016 - dispute arose concerning 'degree of permanent impairment' which appellant suffered as result of 2009 injury and extent 2008 injury contributed

to impairment - approved medical specialist assessed appellant's whole person impairment at 22 percent, finding it to be in no part due to 'previous injury or pre-existing condition or abnormality' - Appeal Panel assessed permanent impairment at 12 percent, having deducted 50 percent of 24 percent impairment due to previous injury and pre-existing condition - appellant sought judicial review - primary judge dismissed summons - appellant sought to appeal - whether Appeal Panel found error by approved medical specialist - whether Appeal Panel expressed 'different opinion' - whether 'demonstrable error' - adequacy of reasons - s323 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - held: appeal dismissed.

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[From Benchmark Wednesday, 19 December 2018]

### **State of New South Wales v Naaman (No 2) [2018] NSWCA 328**

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Judgments and orders - 'extended supervision order' - criminal law - primary judge dismissed appellant's application for 'extended supervision order' under *Terrorism (High Risk Offenders) Act 2017* (NSW) - whether appellant established there was 'unacceptable risk', if supervision order not made, of 'respondent committing a serious terrorism offence' - intentions required by paragraphs (b) and (c) of definition of 'terrorist act' in Criminal Code (Cth) - held: appeal dismissed.

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[From Benchmark Thursday, 20 December 2018]

### **Ibrahimi v Commonwealth of Australia [2018] NSWCA 321**

Court of Appeal of New South Wales

Meagher & Payne JJA; Simpson AJA

Negligence - representative proceedings - separate questions - 50 people travelling on boat to Australia died when boat smashed on rocks - representative proceedings brought on behalf of 'Passenger Claimants', 'Nervous Shock Claimants', 'Compensation to Relatives Claimants', 'Property Damage Claimants' and 'Property Damage Estate Claimants' - primary judge answered 18 separate questions - appellant appealed - whether erroneous findings concerning duty of care - whether erroneous findings concerning causation, and loss or damage - 'established category of duty' - 'novel duty of care' - admissibility of expert report - *Civil Liability Act 2002* (WA) - held: appeal dismissed.

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[From Benchmark Friday, 21 December 2018]

### **Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWCA 336**

Court of Appeal of New South Wales

Beazley P

Corporations - statutory demand - applicant sought extension of time to comply with statutory

demand which respondent served on it - applicant sought extension of time until determination of its summons seeking leave to appeal from dismissal of its application to set demand aside - applicant contended primary judge 'failed to grapple' with question concerning 'time at which' offsetting claim 'had to have crystallised' in order for it to be available - applicant also challenged assessment of 'likely damages' - prospects of success - whether, unless extension granted, appeal would be rendered nugatory - prejudice - delay - *Building and Construction Industry Security of Payment Act 1999* (NSW) - ss459C, 459F, 459G & 459H *Corporations Act 2001* (Cth) - held: extension of time granted.

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[From Benchmark Friday, 21 December 2018]

## **Crown Sydney Property v Barangaroo Delivery Authority; Lendlease (Millers Point) v Barangaroo Delivery Authority [2018] NSWSC 1931**

Supreme Court of New South Wales

McDougall J

Contract - proceedings concerned 'Sight Lines Clauses' in development agreements between Crown and Authority, and Lendlease and Authority - Crown and Lendlease (plaintiffs) contended Sight Lines Clauses' operation triggered by 'initial Grocon bid' or 'Grocon's subsequent bids', or bids' refinements - Authority (defendant) denied Sight Lines Clauses triggered - Crown and Lendlease also contended, and Authority denied, that Authority had 'never negotiated in good faith' in accordance with Sight Lines Clauses' terms - 'construction and application' of Sight Lines Clauses - held: plaintiffs succeeded on construction and application of Sight Lines Clauses - 'at least' from time Grocon became 'preferred bidder', Sight Lines Clauses' operation was attracted and Authority required to undertake 'process of good faith discussion and negotiation' which Sight Lines Clauses provided for - declarations and orders made.

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[From Benchmark Monday, 17 December 2018]

## **R v Douglass (No 3) [2018] NSWSC 1939**

Supreme Court of New South Wales

Schmidt J

Contempt - journalist entered jury room during murder trial - Court gave journalist opportunity to show cause 'why she should not be dealt with for contempt' - process in *Prothonotary of the Supreme Court of NSW v Dangerfield* [2015] NSWSC 1895 - whether journalist's conduct could involve contempt - whether Court satisfied journalist had intended 'to interfere with the trial' - whether any 'adverse consequences' for trial - whether 'significant interference' with justice's administration - held: submissions and apologies by journalist and employer accepted - Court satisfied journalist had shown cause why she should not be referred to Prothonotary to be dealt with for contempt.

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[From Benchmark Monday, 17 December 2018]

## **Spedding v Dailymail.com Australia Pty Ltd [2018] NSWSC 1963**

Supreme Court of New South Wales  
McCallum J

Limitations - defamation - proceedings arising from publication in newspaper of two articles concerning plaintiff - articles published in 2016 (2016 articles) - plaintiff sought extension of time to bring defamation proceedings - s56A *Limitation Act 1969* (NSW) - 'principal contest' concerned "not reasonable test" - explanation for delay - advice given to plaintiff by counsel that he should not commence the defamation proceedings until conclusion of criminal proceedings brought against him for 'child sexual offences' - held: Court satisfied to extend time for commencement of proceedings in respect of the 2016 articles - extension of time refused in respect of an article published in 2015.

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[From Benchmark Tuesday, 18 December 2018]

## **McLachlan v Browne & Fairfax Media Publications Pty Ltd; McLachlan v Browne & Australian Broadcasting Corporation (No 5) [2018] NSWSC 1976**

Supreme Court of New South Wales  
McCallum J

Defamation - 'media applications' - non-party members of press sought access to documents, including pleadings, in Court's file - media applications' purpose was to access defences - whether Court should grant access for reasons Einstein J stated in *Tuqiri v Australian Rugby Union Ltd* [2009] NSWSC 781 - r36.12 *Uniform Civil Procedure Rules 2005* (NSW) - Practice Note No SC Gen 2 "Access to Court Files" - whether Court satisfied of 'exceptional circumstances' warranting grant of access to pleadings in 'interlocutory stages' - held: Court not satisfied to grant access to documents - 'non-party access' refused.

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[From Benchmark Wednesday, 19 December 2018]

## **Di Stasio Pty Ltd v R & K Services Pty Ltd [2018] VSCA 340**

Court of Appeal of Victoria  
Tate, McLeish & Niall JJA

Judgments and orders - contract - appellant owner of restaurant entered 'costs plus' contract with respondent 'building and construction company' for performance of works ('Stage 1 works') - parties entered 'fixed-price contract for works ('Stage 2 works') - respondent brought proceedings against appellant for 'unpaid progress claims' - trial judge upheld some of respondent's claims - primary judge found second progress claim failed because respondent had not served tax invoice on appellant which was 'equal in value to the certificate issued by the architect as the contract required' - before pronouncement and authentication of orders respondent sought to amend pleading, re-open case and adduce evidence of 'new invoice' - judgment given in respondent's favour - whether proper exercise of discretion in permitting respondent to amend pleading, reopen case and adduce evidence - whether appellant

established *House v The King* error - whether any error in costs order in respondent's favour - held: appeal dismissed.

[Di Stasio](#)

[From Benchmark Friday, 21 December 2018]

## **Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd [2018] QCA 353**

Court of Appeal of Queensland

Holmes CJ; Philippides JA & Henry J

Summary judgment - pleadings - appellant brought action for 'price of goods' brought against respondent - primary judge dismissed appellant's summary judgment application - primary judge also refused appellant's application to strike out part of defence in which respondent contended that, on terms of parties' agreement, respondent held 'unsold goods' in respect of which appellant had 'right of immediate possession' as bailee, giving it right of set-off - appellant appealed - appellant contended respondent made 'sufficient admissions' as to agreement's existence and that respondent's failure to make payment entitled appellant to recovery of amount as debt - respondent contended appellant elected to retake unsold goods' possession, that appellant was limited to recovering damages and that appellant was obliged to mitigate - held :no error in primary judge's refusal to award summary judgment - primary judge erred in dismissing strike-out application - appeal allowed in part.

[Garmin](#)

[From Benchmark Thursday, 20 December 2018]

## **Nanosecond Corporation Pty Ltd & Anor v Glen Carron Pty Ltd & Anor (No 2) [2018] SASC 188**

Supreme Court of South Australia

Doyle J

Contract - consumer law - unlawful conspiracy to cause harm - defendants provided 'bulk transport and haulage services' - defendants 'used the plaintiffs' services' - plaintiffs contended that defendants, in 'withdrawing work from' plaintiffs, breached 'contractual arrangements' with plaintiffs - plaintiff also contended other misconduct by defendants which involved 'injurious falsehood, defamation, misleading and deceptive conduct, and an unlawful conspiracy to cause harm' - plaintiff sought damages against defendants for losses which they contended to have arisen from defendants' alleged misconduct - held: plaintiffs' claims against defendants dismissed.

[Nanosecond](#)

[From Benchmark Wednesday, 19 December 2018]

## **Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd [2018] WASCA 213**

Court of Appeal of Western Australia

Buss P; Murphy & Mitchell JJA

Planning and development - Southern Joint Development Assessment Panel (Panel) refused





development approval for development proposed by respondent - respondent sought review - State Administrative Tribunal found, on determination of 'preliminary matter', that respondent's proposed use 'properly classified' under Scheme as 'Convenience Store' not 'Service Station' ('Preliminary Decision') - Tribunal, after Preliminary Decision, heard application for review - a 'Scheme Amendment', which amended 'Service Station' definition 'came into force' after hearing, but before delivery of Tribunal's decision - Tribunal, unaware of Scheme Amendment, gave decision, granting conditional approval under Scheme - appellant appealed - primary judge dismissed appeal - held: Tribunal erroneously failed to have 'due regard' to the Scheme Amendment - appeal allowed - cross-appeal dismissed.

[Presiding Member](#)

[From Benchmark Friday, 21 December 2018]



# Benchmark

**To Mrs K\_\_\_\_, On Her Sending Me an English  
Christmas Plum-Cake at Paris**

**By:** Helen Maria Williams

What crowding thoughts around me wake,  
What marvels in a Christmas-cake!  
Ah say, what strange enchantment dwells  
Enclosed within its odorous cells?  
Is there no small magician bound  
Encrusted in its snowy round?  
For magic surely lurks in this,  
A cake that tells of vanished bliss;  
A cake that conjures up to view  
The early scenes, when life was new;  
When memory knew no sorrows past,  
And hope believed in joys that last! —  
Mysterious cake, whose folds contain  
Life's calendar of bliss and pain;  
That speaks of friends for ever fled,  
And wakes the tears I love to shed.  
Oft shall I breathe her cherished name  
From whose fair hand the offering came:  
For she recalls the artless smile  
Of nymphs that deck my native isle;  
Of beauty that we love to trace,  
Allied with tender, modest grace;  
Of those who, while abroad they roam,  
Retain each charm that gladdens home,  
And whose dear friendships can impart  
A Christmas banquet for the heart!

[https://en.wikipedia.org/wiki/Helen\\_Maria\\_Williams](https://en.wikipedia.org/wiki/Helen_Maria_Williams)

Helen Maria Williams (17 June 1759 – 15 December 1827) was a British novelist, poet, and translator of French-language works. A religious dissenter, she was a supporter of abolitionism and of the ideals of the French Revolution; she was imprisoned in Paris during the Reign of Terror, but nonetheless spent much of the rest of her life in France.. A controversial figure in her own time, the ..

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