

# Benchmark

Friday, 23 September 2016

## Weekly Construction Law Review

Selected from our Daily  
Bulletins covering Construction

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### Executive Summary (1 minute read)

**Sainsbury's Supermarkets Ltd v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe SA (CAT)** - competition - UK Multilateral Interchange Fee set for MasterCard cards was restriction of competition by effect - Sainsbury's entitled to damages

**Comcare v Farrell** (FCAFC) - administrative law - permanent impairment - Administrative Appeals Tribunal did not misconstrue legislation or make fact finding error - appeal allowed

**Gulic v Boral Transport Ltd** (NSWCA) - negligence - subcontractor's employee injured in course or work for first respondent principal - no breach of principal's duty to employee of subcontractor - appeal dismissed

**Nominal Defendant v Adilzada** (NSWCA) - negligence - motor accidents compensation - appeal against determination of separate questions - appeal allowed in respect of one question

**O'Brien v Australian Broadcasting Corporation** (NSWSC) - defamation - action by journalist arising out of segment on Media Watch programme - trickery - 'creating unnecessary concern in the community' - fair comment on matter of public interest - honest opinion - matter complained of defensible - judgment for defendant

**Malamit Pty Ltd v WFI Insurance Ltd** (NSWSC) - contract - insurance - trusts - insurer entitled to refuse indemnity - declaration refused - proceedings dismissed

**Hamilton v State of New South Wales (No 13)** (NSWSC) - claims arising out of arrest by

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police officer for alleged assault on taxi driver - causes of action made out for false imprisonment and malicious prosecution - judgment for plaintiff in sum of \$582,000

**Flori v Queensland Police Service** (QSC) - privacy - privacy principles did not apply to Executive Briefing Note containing information about applicant - appeal dismissed

**Bowman v Tremaine** (WASC) - real property - adverse possession - plaintiffs' claim to title dismissed - defendant's claim for adverse possession upheld - declaration

## Summaries With Link (Five Minute Read)

### Sainsbury's Supermarkets Ltd v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe SA [2016] CAT 11

Competition Appeal Tribunal

Barling J, Professor John Beath OBE & Marcus Smith QC

Competition - Sainsbury's claimed damages breach of Chapter I *Competition Act 1998* and/or Article 101 Treaty on the Functioning of the European Union due to level at which UK Multilateral Interchange Fee (MIF) was set for MasterCard cards - held: setting of UK MIF was a restriction of competition by effect - bilaterally agreed Interchange Fees would have been agreed in UK MIF's place but for UK MIF - Sainsbury's entitled to recover 'amount equivalent to the extent to which the UK MIF paid by Sainsbury's in the claim period exceeded the amount that Sainsbury's would have been charged absent the UK MIF'- amount was difference between amount of UK MIF for MasterCard cards and bilateral Interchange Fees - for credit card transactions bilateral Interchange Fees would have been 0.50% - for debit card transactions bilateral Interchange Fees would have been 0.27% - Sainsbury's entitled to recover £68,582,245 with damages and/or interest to take account of certain issues.

[Sainsbury's](#)

[From Benchmark Tuesday, 20 September 2016]

### Comcare v Farrell [2016] FCAFC 115

Full Court of the Federal Court of Australia

Jagot, Bromberg & Murphy JJA

Administrative law - respondent sought compensation for permanent impairment under ss14 & 24 *Safety, Rehabilitation and Compensation Act 1988* (Cth) - Comcare challenged primary judge's finding that Administrative Appeals Tribunal failed to make critical finding of fact concerning permanent impairment and misconstrued the Act - ss44(1) & 43(2B) *Administrative Appeals Tribunal Act 1975* (Cth) - ss4(1), 5A(1)(b), 14, 14(1), 24, 24(1), 24(2), 24(5) & 54 Safety, Rehabilitation and Compensation Act - held: no error by Administrative Appeals Tribunal on fact finding issue as found by primary judge - no error in relation to legislation issue - appeal allowed.

[Comcare](#)

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[From Benchmark Tuesday, 20 September 2016]

## **Gulic v Boral Transport Ltd [2016] NSWCA 269**

Court of Appeal of New South Wales

Macfarlan & Gleeson JJA; Garling J

Negligence - appellant employed as driver of prime mover driver owned by company of which appellant was director - appellant injured performing cartage work for first respondent - company had entered cartage agreement with first respondent - appellant sued first respondent for breach of duty of care, and sued company for breach of cartage agreement, indemnity under agreement and indemnity or contribution under *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - primary judge rejected appellant's claim - principal's duty of care to subcontractor's employee - *Civil Liability Act 2002* (NSW) - *Workers Compensation Act 1987* (NSW) - held: first respondent did not breach duty of care it owed to appellant - primary judge erred in findings on causation but no error in entering judgment for first respondent - appeal dismissed.

## **Gulic**

[From Benchmark Friday, 23 September 2016]

## **Nominal Defendant v Adilzada [2016] NSWCA 266**

Court of Appeal of New South Wales

McColl, Meagher & Gleeson JJA

Negligence - motor accidents compensation - respondent brought proceedings in relation to injuries including serious brain injury - Nominal Defendant sought to appeal from determination of separate questions - first question concerned whether 'purposes for which the insurer may make a request that the claimant undergo a medical examination include to assess that person's eligibility for lifetime participation in the Lifetime Care and Support Scheme (Scheme) introduced by the Motor Accidents (Lifetime Care and Support) Act 2006 (NSW)' - second question concerned whether, in certain circumstances, insurer could compel plaintiff to be assessed by doctor of its choosing - third question concerned documents which insurer could rely on in application regarding plaintiff to Lifetime Care and Support Scheme - s127(2)(a) *District Court Act 1973* (NSW) - ss3, 5, 6, 43A, 78, 80, 85, 86, 107, 130A & 141A *Motor Accidents Compensation Act 1999* (NSW) - *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act 2012* (NSW) - ss3, 5, 5A, 6, 7, 8, 9, 10, 11A, 11B, 11C, 48, 49, 54 & 58 *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) - r23.4 *Uniform Civil Procedure Rules 2005* (NSW) - s119 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - held: orders determining second question set aside - question answered - appeal allowed in the negative - appeal allowed.

## **Nominal Defendant**

[From Benchmark Friday, 23 September 2016]

## **O'Brien v Australian Broadcasting Corporation [2016] NSWSC 1289**

Supreme Court of New South Wales

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McCallum J

Defamation - proceedings arising from segment of Media Watch programme - plaintiff was journalist who wrote two articles published in newspaper - articles alleged discovery of toxic substances at levels well above health limits' near industrial site - plaintiff contended Media Watch programme accused her of trickery by misrepresentation of tests' location and of 'creating unnecessary concern in the community by an irresponsible failure to consult experts' in preparing articles - ss22, 25, 26 & 31 *Defamation Act 2005* (NSW) - s14(1)(d) *National Environment Protection Council Act 1994* (Cth) - s90 *Supreme Court Act 1970* (NSW) - held: Court satisfied matter complained defensible as 'fair comment on a matter of public interest and honest opinion' under s31 Defamation Act - judgment for defendant.

[O'Brien](#)

[From Benchmark Monday, 19 September 2016]

## **Malamit Pty Ltd v WFI Insurance Ltd [2016] NSWSC 1306**

Supreme Court of New South Wales

Sackar J

Contract - insurance - trusts - dispute between plaintiff insured and three defendants: insurer, broker, and broker's employee - dispute arose following a landslip - determination of single question - insured sought declaration that insurance policy responded to claim for indemnity - 'for the benefit of' - 'third party' - 'present entitlement' - interpretation of exclusion clauses - held: defendant entitled to refused indemnity - declaration refused - proceedings dismissed.

[Malamit](#)

[From Benchmark Monday, 19 September 2016]

## **Hamilton v State of New South Wales (No 13) [2016] NSWSC 1311**

Supreme Court of New South Wales

Campbell J

Malicious prosecution - false imprisonment - battery - misfeasance in public office - claims against State pursuant to *Law Reform (Vicarious Liability) Act 1983* (NSW) arising from his arrest by police officer for alleged assault on taxi driver - ss3B, 21, 53 & 54 *Civil Liability Act 2002* (NSW) - ss51,58 & 61 *Crimes Act 1900* (NSW) - s21A(2)(l) *Crimes (Sentencing Procedure) Act 1999* (NSW) - s140(2) *Evidence Act 1995* (NSW) - ss99(2), 99(3), 99(3)(a), 99(3)(c), 99(3)(e), 99(4), 105, 201 & 231 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) - *Motor Accidents Compensation Act 1999* (NSW) - cl 112 & 114 *Passenger Transport Regulation 2007* (NSW) - held: plaintiff made out causes of false imprisonment and malicious prosecution - plaintiff failed to establish misfeasance in public office - judgment for plaintiff in sum of \$582,000.

[Hamilton](#)

[From Benchmark Wednesday, 21 September 2016]

## **Flori v Queensland Police Service [2016] QCA 239**

Court of Appeal of Queensland

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Gotterson, Morrison & P McMurdo JJA

Privacy - applicant police officer was aggrieved by his personal details' publication in Executive Briefing Note (EBN) - information concerned search warrant executed at applicant's home address - applicant contended personal information was released to journalist in breach of *Information Privacy Act 2009* (Qld) - Queensland Civil and Administrative Tribunal determined EBN not subject to Privacy Act - appeal division dismissed appeal - issue was whether EBN contained information 'arising out of a complaint, or an investigation of misconduct, under the *Crime and Misconduct Act 2001*' - statutory construction - ss4, 20, 23, 47, 48 & 53 *Crime and Misconduct Act 2001* (Qld) - ss3, 29, 67, sch 3 *Information Privacy Act 2009* (Qld) - s7.2 *Police Service Administration Act 1990* (Qld) - s149(2) *Queensland Civil and Administrative Tribunal Act 2009* (Qld) - s47(3) *Right to Information Act 2009* (Qld) - held: information arose from an investigation of misconduct under *Crime and Misconduct Act* - Tribunal correct to find privacy principles did not apply - appeal dismissed.

[Flori](#)

[From Benchmark Wednesday, 21 September 2016]

## **Bowman v Tremaine [2016] WASC 294**

Supreme Court of Western Australia

Allanson J

Real property - adverse possession - plaintiffs and defendant owned adjacent properties and were in dispute as to who was entitled to strip of land running along border between properties - land was within surveyed boundaries on plaintiffs' title - defendant, who was successor to father, asserted he and father had possessed land for over 50 years and had title due to adverse possession - ss4, 5 & 30 *Limitation Act 1935* (WA) - s68(1A) *Transfer of Land Act 1893* (WA) - held: Court satisfied father had possessed land with intention to treat it as his own from 1958 at the latest - first questioning of possession may have been in 1980 by which time right to bring an action for land had been lost - declaration made - plaintiffs' claim dismissed.

[Bowman](#)

[From Benchmark Thursday, 22 September 2016]

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## Lines Written in Early Spring

By [William Wordsworth](#)

I heard a thousand blended notes,  
While in a grove I sate reclined,  
In that sweet mood when pleasant thoughts  
Bring sad thoughts to the mind.

To her fair works did Nature link  
The human soul that through me ran;  
And much it grieved my heart to think  
What man has made of man.

Through primrose tufts, in that green bower,  
The periwinkle trailed its wreaths;  
And 'tis my faith that every flower  
Enjoys the air it breathes.

The birds around me hopped and played,  
Their thoughts I cannot measure:—  
But the least motion which they made  
It seemed a thrill of pleasure.

The budding twigs spread out their fan,  
To catch the breezy air;  
And I must think, do all I can,  
That there was pleasure there.

If this belief from heaven be sent,  
If such be Nature's holy plan,  
Have I not reason to lament  
What man has made of man?

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