

Friday, 7 December 2018

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Macras v Nulis Nominees (Australia) Limited (FCA) - administrative law - superannuation - appeal against Superannuation Complaints Tribunal's affirmation of decisions of insurer and trustee - appeal dismissed

Kiraig Pty Ltd (Trustee) v Rent the Roo Pty Ltd (FCA) - contract - consumer law - breach of franchise agreements by franchisor established - franchisee entitled to damages and interest - appeal allowed

Cai v Tsang (No 2) (NSWSC) - contract - guarantee and indemnity - defendant liable as guarantor of plaintiff's loan to company of which defendant was director - judgment for plaintiff in sum of \$4,289,593.60

Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd ATF the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds Limited on Behalf of Syndicate 2012 (NSWSC) - evidence - hearsay rule - corporations - insurance - evidence sought to be adduced by plaintiffs was an admission - evidence admissible

Gayle v Fairfax Media Publications Pty Ltd (No 2) Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2) (NSWSC) - defamation - damages - publication of reasons for rulings - plaintiff awarded \$300,000 in damages - application to discharge jury dismissed

Noori v Topaz Fine Foods (VSCA) - accident compensation - fall from stepladder in work

accident - appeal against dismissal of 'serious injury application' - 'narrative test' satisfied - appeal allowed

The State of Western Australia v Cunningham [No 3] (WASCA) - battery - misfeasance in public office - false imprisonment - malicious prosecution - claims upheld against appellant - appeal and cross-appeal dismissed

Lightfoot v Rockingham Wild Encounters Pty Ltd (WASCA) - negligence - appellant injured back on 'dolphin watching tour' which respondent operated - skipper not negligent in navigating through 'Reef Passage' - respondent not liable - appeal dismissed

Summaries With Link (Five Minute Read)

Macras v Nulis Nominees (Australia) Limited [2018] FCA 1867

Federal Court of Australia

Davies J

Administrative law - superannuation - Superannuation Complaints Tribunal affirmed second respondent insurer's decision that it could not determine applicant's entitlement to 'total and permanent disablement and/or income protection benefits', and first respondent trustee's decision not to decide on benefits' payment to applicant until insurer had decided on applicant's claims - Tribunal found decisions "fair and reasonable in the circumstances" - applicant appealed against Tribunal's determination pursuant to s46 *Superannuation (Resolution of Complaints) Act 1993* (Cth) - whether insurer had right under policy 'to ask for further proof or information' from applicant - whether evidence for insurer's position that it 'required further information' - whether trustee had right under trust deed not to make decision until insurer made decision - whether Tribunal made finding concerning whether applicant had made full disclosure - held: grounds of appeal failed - appeal dismissed.

[Macras](#)

[From Benchmark Tuesday, 4 December 2018]

Kiraig Pty Ltd (Trustee) v Rent the Roo Pty Ltd [2018] FCA 1904

Federal Court of Australia

Markovic J

Contract - consumer law - franchise agreements - proceedings concerned two franchise agreements between appellant as 'master franchisee', appellant's director as guarantor and respondent as franchisor - master franchisee and director sought sum and equitable compensation or account of profits against franchisor, alleging franchisor breached franchise agreements, breached *Competition and Consumer Act 2010* (Cth) by failure 'to act in good faith' or engaged in unconscionable conduct under Australian Consumer Law, and breached 'obligation of confidence' - Federal Circuit Court dismissed application - appellant challenged primary judge's findings concerning claims of breach of franchise agreements - respondent, by

notice of contention, conceded two grounds of appeal but contended judgment should be affirmed - whether erroneous failure to find breach of franchise agreements by failure to 'renew the franchises for Area 10 and Area 20' - whether respondent wrongfully terminated franchise agreements amounting to 'repudiatory conduct' - whether erroneous failure to find appellant entitled to damages and interest - held: appeal allowed.

[Kiraig](#)

[From Benchmark Tuesday, 4 December 2018]

Cai v Tsang (No 2) [2018] NSWSC 1860

Supreme Court of New South Wales

Fagan J

Contract - guarantee and indemnity - plaintiff claimed amount from defendant as guarantor of plaintiff's loan to company of which defendant was director - plaintiff alleged defendant was liable under "Loan Agreement and Deed of Guarantee and Indemnity" (loan agreement) - defendant contended loan agreement provided for third-party mortgage security to be provided in plaintiff's favour - defendant contended he was not liable because the third-party mortgage security not provided - construction of loan agreement - whether loan agreement 'drawn in a form' to show 'joint and several guarantors' - whether implied term or 'argument of construction' pursuant to which defendant's liability conditional on provision of 'guarantee mortgages' - whether basis to imply or infer 'common intention' of parties that defendant should be bound as guarantor only if 'third-party guarantee mortgages' provided - .held: judgment for plaintiff in sum of \$4,289,593.60.

[View Decision](#)

[From Benchmark Wednesday, 5 December 2018]

Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd ATF the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds Limited on Behalf of Syndicate 2012 [2018] NSWSC 1706

Supreme Court of New South Wales

Slattery J

Evidence - corporations - insurance - Molan Retirement Solutions Pty Ltd (Moylan) was an 'investment advisor', now deregistered - plaintiffs were former clients of Molan - plaintiffs brought 'three related sets of proceedings' - some proceedings brought in 2012 and 2013 - other proceedings brought after Moylan's deregistration in 2014 - plaintiffs joined underwriters as defendants under 'professional indemnity insurance policies' which Molan held - in proceedings brought in 2015, underwriters were joined directly by plaintiffs - proceedings advanced against underwriters under s601AG *Corporations Act 2001* (Cth) - plaintiffs sought to adduce statements by Molan's principal to some plaintiffs - whether evidence admissible - whether statements were 'admissions' under s81 *Evidence Act 1995* (NSW) - whether to admit evidence as 'evidence of the truth of what is asserted' - whether evidence excluded by hearsay rule - held: Court satisfied statements were an admission - evidence admissible.

[View Decision](#)

[From Benchmark Thursday, 6 December 2018]

Gayle v Fairfax Media Publications Pty Ltd (No 2) Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2) [2018] NSWSC 1838

Supreme Court of New South Wales

McCallum J

Defamation - damages - action arising from publication of newspaper articles which accused plaintiff of 'exposing his genitals to a woman in a change room' - newspapers admitted articles defamatory but raised defences of truth and statutory qualified privilege - defences were defeated - determination of damages - publication of reasons for rulings - consideration of application for discharge of jury - ss22(3), 35, 30 & 38(1)(d) *Defamation Act 2005* (NSW) - damage to plaintiff's reputation - width of articles' readership - whether basis for aggravated damages - necessity of avoiding 'double or triple compensation' - held: plaintiff awarded \$300,000 damages - Court not satisfied to grant injunction to restrain defamation's repetition - application to discharge jury dismissed.

[View Decision](#)

[From Benchmark Friday, 7 December 2018]

Noori v Topaz Fine Foods [2018] VSCA 323

Court of Appeal of Victoria

Maxwell P; Hargrave & T Forrest JJA

Accident compensation - applicant developed pain after falling from stepladder in work accident - no 'organic injury' to explain identified pain levels or function loss - applicant made 'serious injury application' under *Accident Compensation Act 1985* (Vic), contending pain was an 'aggravation or exacerbation' of his pre-existing psychiatric condition, with consequences satisfying 'serious injury' - primary judge accepted genuineness of applicant's account of the pain but rejected application, finding he had 'difficulty in disentangling those work-related symptoms' from totality of plaintiff's 'ongoing condition' - whether 'disentanglement' arose as question in respect of 'serious injury' definition - held: no dispute pain due to work accident - once primary judge accepted account of pain genuine, it 'had to be concluded' applicant had 'severe disturbance' with consequences satisfying 'narrative test' for serious injury - appeal allowed.

[Noori](#)

[From Benchmark Friday, 7 December 2018]

The State of Western Australia v Cunningham [No 3] [2018] WASCA 207

Court of Appeal of Western Australia

Buss P; Murphy & Pritchard JJ

Battery - misfeasance in public office - false imprisonment - malicious prosecution - primary judge upheld tort claims by first and second respondents against appellant, two police officers (third and fourth respondents) and fifth respondent who had ceased to be police officer -

appellant challenged primary judge's findings of joint liability for payment of compensatory and/or aggravated damages where primary judge had also made malice findings - whether primary judge erroneously applied s137 *Police Act 1892* (WA) - whether appellant liable 'only' for 'proportion of damage' which 'acts done without corruption or malice' had caused - whether primary judge erroneously failed to give 'separate judgment' against appellant for 'apportioned damages' - whether primary judge erroneously held appellant 'jointly and severally liable' with third, fourth and fifth respondents - whether principle of 'solidary liability' overridden by s137 *Police Act* - meaning of 'liable' in s137(5) *Police Act* - held: appeal and cross-appeal dismissed.

[The State of Western Australia](#)

[From Benchmark Thursday, 6 December 2018]

Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205

Court of Appeal of Western Australia

Buss P; Murphy & Beech JJA

Negligence - appellant injured her back on 'dolphin watching tour' which respondent operated - applicant sued respondent in negligence - appellant contended that skipper, and therefore respondent, negligently navigated boat into area where it could foreseeably 'encounter large swell/waves which would endanger the safety of passengers' - primary judge dismissed appellant's claim, concluding skipper not unreasonable to navigate through 'Reef Passage' rather than 'South Channel' - question on appeal was whether there had been a breach of duty of care - appellant contended primary judge erred in finding no negligence by skipper in navigating through Reef Passage - held: appellant failed to establish 'foreseeable and not insignificant risk' that boat, if navigated through Reef Passage, could encounter 'large swell or wave' would could injure passengers - appeal dismissed.

[Lightfoot](#)

[From Benchmark Thursday, 6 December 2018]

Benchmark

Dream On

By: David Conolly

A child in a gallery sits,
takes paper and pencil,
and starts to draw.
The paintings around her
disappear.
They have served
their purpose.

womb of
They have sparked in her
the spirit to create –
the spirit formed in her
along with bone and blood
in the mystic dark of
her mother's womb –
humanity's sacred site.

Thus is passed
from age to age
imagination,
Dream
wonder,
passes
dreams.
unborn.

From another womb
in a faraway age
another child emerged
with a dream –
the Great Dream
of a world renewed by
peace and justice,
formed in the

love.

He said that children
show us
what God is like.

No wonder
we celebrate
his birth.

No wonder that
still lives, and
to children yet

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