

Friday, 9 March 2018

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

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### Executive Summary (1 minute read)

**Digital Realty Trust, Inc. v Somers No. 16–1276** (United) - corporations - whistleblowers - individual who did not report suspected violation of securities laws to Securities and Exchange Commission was not a 'whistleblower' under *2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*

**District of Columbia et. al. v Wesby et al.** (USCADCC) - constitutional law - fourth amendment - false arrest - petitioners were two police officers, who, together with other officers, arrested partygoers for unlawful entry - probable cause to make arrest established - petitioners entitled to qualified immunity

**Sharma v LGSS Pty Ltd** (FCA) - superannuation - insurance - duty of disclosure - erroneous reliance on to s29(2) *Insurance Contracts Act 1984* (Cth) in refusing applicant's claim - appeal allowed

**Friends of Leadbeater's Possum Inc v VicForests** (FCA) - environmental law - statutory interpretation - separate question - whether respondent's operations had benefit of exemption in s38(1) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) - question answered in qualified affirmative - no final orders made

**BNMB Transport Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd** (FCA) - consumer law - contract - dispute arising from purchase of second hand vehicle - rear suspension failed during warranty period - dismissal of claim - cross-claim allowed - appeal dismissed

**Gomez v Carrafa (Trustee)** (FCA) - bankruptcy - trusts and trustees - equity of exoneration not

established - refusal of adjournment - appeal dismissed

**Council of the City of Ryde v Sally Haddad executor of the estate of the late Dr Jim Haddad** (NSWCA) - environment and planning - conditional development consent to use premises as business premises - erroneous construction of "business premises" in *Standard Instrument (Local Environmental Plans) Order 2006* - appeal allowed

**Egan v Egan** (NSWSC) - contract - unjust contract - estoppel - equity - loan agreement - mortgage - arrangement was not a sham - contract was unjust - parties to bring in short minutes

**Swiss Re International SE v David Simpson** (NSWSC) - consumer law - misleading or deceptive conduct - claim by insurers against former officers of company (Forge) who sought recovery of amounts paid to company (Samsung) under bonds they issued to Forge - misleading or deceptive conduct not established - appeal dismissed

**Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd** (NSWSC) - security of payments - absence of reference date under subcontract - progress claim invalid as payment claim - adjudicator lacked jurisdiction to make determination - determination quashed

**The Owners Strata Plan No 68976 v Nicholls** (NSWSC) - administrative law - strata titles - dismissal of application for removal of spa, decking and works from lot and common property - leave to appeal refused - proceedings dismissed

**Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd** (NSWSC) - security of payments - failure to give reasons concerning decision on amount to allowed for liquidated damages - adjudication void - declaration made

**McDermott v Manley & Anor** (QSC) - insurance - motor vehicle accident - 'mandatory final offer' - application for declaration that insurer's offer was a grossed up offer - declaration refused

**Souz v CC Pty Ltd** (QSC) - negligence - causation - employer's duty of care - worker injured in incident in course of employment - breach of duty by employer - causation established - employer liable - judgment for worker in sum of \$1,125,949.04

**Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd** (TASFC) - environment and planning - mixed-use development - revision to condition concerning construction management plan - appeal dismissed - cross-appeal allowed

## Summaries With Link (Five Minute Read)

## **Digital Realty Trust, Inc. v Somers No. 16–1276**

The United States Court of Appeals for the Ninth Circuit

Justice Ginsburg

Corporations - whistleblowers - respondent contended petitioner terminated his employment after he reported 'suspected securities-law violations' by company to management - petitioner claimed whistleblower retaliation under *2010 Dodd-Frank Wall Street Reform and Consumer Protection Act* - petitioner claimed respondent, because he did not alert Securities and Exchange Commission (SEC) before termination, was not a whistleblower under §78u–6(h) - Court of Appeals found §78u–6(h) did not 'necessitate recourse to the SEC' before gaining status as "whistleblower" - held: anti-retaliation provision in *2010 Dodd-Frank Wall Street Reform and Consumer Protection Act* did not extend to individual who had not reported violation of securities laws to SEC - respondent was not a whistleblower - reversed and remanded.

[Digital Realty Trust](#)

[From Benchmark Tuesday, 6 March 2018]

## **District of Columbia et. al. v Wesby et al. No. 15–1485.**

United States Court of Appeals for the District of Columbia Circuit

Justice Thomas

Constitutional law - Fourth Amendment - false arrest - petitioners were two police officers who, with other police officers, responded to complaint about 'loud music and illegal activities' in house - two partygoers identified woman named "Peaches" as house's tenant, claiming she permitted partygoers to have party - officers spoke with Peaches by telephone and she admitted she had no permission to use house - owner confirmed he did not permit anyone to at house - partygoers arrested for unlawful entry - some partygoers sued for false arrest under Fourth Amendment and also sued under District law - whether officers lacked probable cause to arrest partygoers - whether the two petitioners were entitled to qualified immunity - held: officers had probable cause - petitioners entitled to qualified immunity - reversed and remanded.

[District of Columbia](#)

[From Benchmark Wednesday, 7 March 2018]

## **Sharma v LGSS Pty Ltd [2018] FCA 16**

Federal Court of Australia

Gleeson J

Insurance - superannuation - applicant appealed under s46 *Superannuation (Resolution of Complaints) Act 1993* (Cth) against decisions of Superannuation Complaints Tribunal - Tribunal's decisions had affirmed second respondent's decisions to avoid applicant's voluntary "Death and Total and Permanent Disability cover" (TPD) and "Salary Continuance Cover Long term (to age 65 benefit period)" (SC) and to cease salary continuance payments on basis of applicant's 'fraudulent misrepresentation and non-disclosure' pursuant to s29(2) *Insurance Contracts Act 1984* (Cth) (ICA) - Tribunal's decisions had also affirmed first respondent's decisions to affirm second respondent's decisions - whether misconstruction of

s21 ICA as imposing duty of disclosure on applicant as 'third party beneficiary and life insured under the TPD policy or the SC policy' - whether applicant owed duty of disclosure to insurer - held: first respondent was not entitled to refuse applicant's claim on basis of s29(2) of the Act - Tribunal erred in concluding respondents' decisions were fair and reasonable - appeal allowed.

[Sharma](#)

[From Benchmark Monday, 5 March 2018]

## **Friends of Leadbeater's Possum Inc v VicForests [2018] FCA 178**

Federal Court of Australia

Mortimer J

Environmental law - statutory interpretation - separate question - applicant contended forestry operations had, would have or were likely to have 'significant impact on two threatened species' listed under s178 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) - applicant sought to restrain respondent from undertaking forestry operations in 'identified coupes' and mitigation orders concerning past operations - separate question was whether respondent's operations had benefit of exemption in s38(1) of the Act - held: Court did not accept arguments concerning operation of s38(1) put forward either by applicant or respondent - Court concluded that first intervener (Commonwealth) proposed correct interpretation - respondent's operations had benefit of exemption under s38(1) - separate question not answered with simple 'yes' but qualified 'yes' - simple 'yes' would grant exemption in circumstances not under Court's consideration - no final orders made.

[Friends of Leadbeater's](#)

[From Benchmark Wednesday, 7 March 2018]

## **BNMB Transport Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd [2018] FCA 223**

Federal Court of Australia

Murphy J

Consumer law - contract - dispute arising from first appellant's purchase of second-hand vehicle - first appellant financed purchase through a hire agreement - vehicle's rear suspension collapsed during warranty period - first respondent contended suspension failed due to 'driver misuse' and refused to make repairs - first appellant claimed damages against respondents pursuant to Australian Consumer Law and breach of vehicle sale contract - primary judge dismissed claim and allowed cross-claim for recovery of money under hire purchase agreement - whether breach of guarantees under Australian Consumer Law - whether breach of statutory warranties under s54 *Motor Car Traders Act 1986* (Vic) - whether apprehended bias - *Jones v Dunkel* - held: appeal dismissed.

[BNMB](#)

[From Benchmark Wednesday, 7 March 2018]

## **Gomez v Carrafa (Trustee) [2018] FCA 201**

Federal Court of Australia

Bankruptcy - respondent was trustee in bankruptcy of estate of Mrs Gomez - first appellant was

Mrs Gomez's husband (Mr Gomez) - second appellant was company associated with son of Mrs Gomez and Mr Gomez - respondent sought declarations under s120 & 121 *Bankruptcy Act 1966* (Cth) - sequestration order made against Mrs Gomez's estate - proceeding concerned transfers of property - whether Mr Gomez entitled 'equity of exoneration' - primary judge found requirements of s120 Bankruptcy Act satisfied - primary judge found claim of equity of exoneration could not be maintained - Court declared that transfers of property were under s120 and ordered that certain amount held in account in second appellant's name to be paid to respondent - appellants challenged primary judge's factual findings and finding that equity of exoneration not established - first appellant also challenged refusal of adjournment application - held: no error made out with respect to primary judge's findings or refusal of adjournment - appeal dismissed.

[Gomez](#)

[From Benchmark Thursday, 8 March 2018]

## **Council of the City of Ryde v Sally Haddad executor of the estate of the late Dr Jim Haddad [2018] NSWCA 35**

Court of Appeal of New South Wales  
McCull & Gleeson JJA; Sackville AJA

Environment and planning - Dr Haddad sought Council's consent to use premises as business premises, having previously use premises as doctor's surgery - Council rejected development application - Council found that use of the premises as business premises was not permitted under *Ryde Local Environmental Plan 2014* (Ryde LEP 2014) - Dr Haddad appealed in reliance on cl 41(1)(e) *Environmental Planning and Assessment Regulation 2000* (NSW) (Regulation) - Commissioner upheld appeal and granted conditional development consent - applicant sought to appeal against primary judge's dismissal of its appeal against Commissioner's decision - proper construction of "business premises" in *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) - held: primary Judge erred in upholding Commissioner's construction of "business premises" in (Standard Instrument) - leave to appeal granted - appeal allowed.

[View Decision](#) (I B C G W WI WB WC WG))

[From Benchmark Friday, 9 March 2018]

## **Egan v Egan [2018] NSWSC 202**

Supreme Court of New South Wales  
Davies J

Contract - unjust contract - estoppel - equity - plaintiff was defendant's mother - plaintiff sought possession of property - defendant owned the property but had executed mortgage to secure loan from plaintiff to purchase it - notice served on defendant under s57(2)(b) *Real Property Act 1900* (NSW) - plaintiff alleged no money paid - defendant contended parties intended loan agreement and mortgage to be sham - defendant and husband were divorcing at time property purchased - defendant contended purpose of loan agreement and mortgage was to protect defendant against husband being able to obtain property or any proceeds of its sale - defendant

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contended plaintiff was estopped, by the sham, from enforcing mortgage and contended she acted to detriment by not seeking legal advice - defendant contended mortgage unenforceable because no loan made to her 'in first instance' and no directions given in respect of payments - defendant sought, pursuant to *Contracts Review Act 1980* (NSW) to set aside arrangement - plaintiff also claimed she special disability and that arrangement should be set aside for unconscionability - defendant also contended she executed arrangement under parents' undue influence - onus - unclean hands - held: arrangement was not a sham - contract was unjust - parties to bring in short minutes of order.

[View Decision](#)

[From Benchmark Monday, 5 March 2018]

## **Swiss Re International SE v David Simpson [2018] NSWSC 233**

Supreme Court of New South Wales

Hammerschlag J

Consumer law - misleading or deceptive conduct - company (Forge) had subcontract with company (Samsung) concerning iron ore project - plaintiffs were two insurers who sought to recover money paid to Samsung under bonds they had issued to Forge in favour of Samsung - plaintiffs claimed defendants, who were Forge's former officers, misled them concerning Forge's financial position - plaintiffs contended they issued the bonds due to defendants' misleading and deceptive conduct - 'specific and discreet instances of misrepresentation' - 'misleading non-disclosure' - whether plaintiffs induced to issue bonds - *Competition and Consumer Act 2010* (Cth) - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - held: plaintiffs failed to establish misleading or deceptive conduct by defendants - even if misleading or deceptive conduct had been established, such conduct did not cause plaintiffs' loss - proceedings dismissed.

[View Decision](#)

[From Benchmark Tuesday, 6 March 2018]

## **Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd [2018] NSWSC 239**

Supreme Court of New South Wales

McDougall J

Security of payments - construction contract - dispute between plaintiff and first defendant concerned second defendant adjudicator's determination under *Building and Construction Industry Security of Payment Act 1999* (NSW) - whether underlying payment claim was made 'on or from a reference date under a construction contract' - identification of construction contract - ss8(1) & 13(1) of the Act - held: work subject of progress claim performed under two subcontracts; a written subcontract, and a 'fresh contract' - no reference date to support progress claim to extent it was made under written subcontract - 'work in question' not performed under fresh subcontract - there was absence of reference date under 'relevant subcontract' - progress claim invalid as payment claim - adjudicator lacked jurisdiction to make determination in respect of first defendant's application - adjudication determination was void - determination quashed.

[View Decision](#)

[From Benchmark Wednesday, 7 March 2018]

**The Owners Strata Plan No 68976 v Nicholls [2018] NSWSC 270**

Supreme Court of New South Wales

Rothman J

Administrative law - strata titles - defendants owned lot in building - dispute arose from building of spa and decking which defendants performed - plaintiff, under s138 *Strata Schemes Management Act 1996* (NSW), sought that defendants remove 'spa, deck and ancillary works installed on Lot 1 and common property' - plaintiff also sought that defendants 'repair and reinstate' lot and common property - adjudicator of New South Wales Civil and Administrative Appeals Tribunal dismissed application due to failure to be satisfied of any 'significant breach' of by-laws - adjudicator also found spa in keeping with building's appearance - plaintiff sought leave to appeal - held: grounds of appeal were either unarguable or did not raise 'question of law' - leave to appeal refused - summons dismissed.

[View Decision](#)

[From Benchmark Thursday, 8 March 2018]

**Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSC 264**

Supreme Court of New South Wales

Ball J

Security of payments - judicial review - plaintiff head contractor entered subcontract with first defendant for works - first defendant served payment claim - plaintiff sought declaration that adjudication determination under *Building and Construction Industry Security of Payment Act 1999* (NSW) was void - whether adjudicator failed to perform statutory function - whether adjudicator advanced reason which could not 'rationally support' conclusion that claim for preliminaries was to be 'valued on a time basis' - whether adjudicator failed to comply with s22(3)(b) of the Act - consideration of plaintiff's claim for liquidated damages in payment schedule - held: adjudicator failed to give reasons 'for a critical part of her decision' concerning amount to be allowed for liquidated damages - determination was void - declaration made.

[View Decision](#)

[From Benchmark Friday, 9 March 2018]

**McDermott v Manley & Anor [2018] QSC 35**

Supreme Court of Queensland

Mullins J

Insurance - applicant injured in motor vehicle accident - liability not in dispute - second respondent was first respondent's compulsory third party insurer - second respondent paid expenses for applicant's rehabilitation and other treatment - second respondent did not give notice under s51(4) *Motor Accident Insurance Act 1994* (Qld) - applicant's claim not resolved at compulsory conference with second respondent - 'mandatory final offers' exchanged between applicant and second respondent - applicant characterised second respondent's offer as gross

# Benchmark

offer - second respondent disputed applicant's characterisation of its offer - applicant accepted offer - applicant sought declaration that second respondent's offer amounted to gross offer in certain amount - whether applicant's characterisation of offer was wrong, with result acceptance conditional - whether offer was contractually binding - ss51A & 51C of the Act - held: scheme in s51 of the Act and decision in *Aldridge v Allianz Australia Insurance Ltd* [2009] QSC 257 did not support applicant's claim to gross up mandatory final offer - declaration refused - application dismissed.

[McDermott](#)

[From Benchmark Tuesday, 6 March 2018]

## **Souz v CC Pty Ltd [2018] QSC 36**

Supreme Court of Queensland

McMeekin J

Negligence - causation - employer's duty of care - plaintiff claimed damages for injury suffered in course of employment with defendant - not in dispute that incident occurred, that plaintiff injured, and that due to physical injury plaintiff had psychiatric illness, opioid dependency and no earning capacity - it was 'beyond argument' defendant breached duty - issue was causation - whether injury was caused by incident - damages - *Civil Liability Act 2003* (Qld) - *Workers' Compensation and Rehabilitation Act 2003* (Qld) - 'reasonably be considered to have some greater degree of likelihood' - held: Court satisfied that hypothesis that disc prolapse caused by incident satisfied balance of probabilities test - causation established - judgment for plaintiff in sum of \$1,125,949.04.

[Souz](#)

[From Benchmark Tuesday, 6 March 2018]

## **Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd [2017] TASFC 14**

Full Court of the Supreme Court of Tasmania

Pearce & Brett JJ; Porter AJ

Environment and planning - appellant sought approval from Council for "mixed use development" - Council granted conditional permit - Resource Management and Planning Appeal Tribunal varied condition concerning construction management plan - proposed excavation works proposed for carparking development were subject of revised condition - Supreme Court set aside Tribunal's decision - appeal and cross-appeal - dispute concerned 'noise and vibration' from excavation - whether Tribunal erred in determining that *Sullivans Cove Planning Scheme 1997* did not provide bases for proposal's refusal - whether primary judge misconstrued Scheme - whether 'the decision-making in which the Tribunal did engage in' was 'overlooked or misunderstood' by primary judge - 'prerequisite requirements' - whether erroneous failure to address whether Tribunal's errors as identified by primary judge were 'material vitiating legal errors' - *Land Use Planning and Approvals Act 1993* (Tas) - *Environmental Management and Pollution Control Act 1994* (Tas) - held: appeal dismissed - cross-appeal allowed.

[Sultan](#) (B C G W WI WB WC WG)



[From Benchmark Tuesday, 6 March 2018]



# Benchmark

## **That Bright Chimeric Beast**

**By:** Countee Cullen

That bright chimeric beast  
Conceived yet never born,  
Save in the poet's breast,  
The white-flanked unicorn,  
Never may be shaken  
From his solitude;  
Never may be taken  
In any earthly wood.  
That bird forever feathered,  
Of its new self the sire,  
After aeons weathered,  
Reincarnate by fire,  
Falcon may not nor eagle  
Swerve from his eyrie,  
Nor any crumb inveigle  
Down to an earthly tree.

That fish of the dread regime  
Invented to become  
The fable and the dream  
Of the Lord's aquarium,  
Leviathan, the jointed  
Harpoon was never wrought  
By which the Lord's anointed  
Will suffer to be caught.

Bird of the deathless breast,  
Fish of the frantic fin,  
That bright chimeric beast  
Flashing the argent skin, –  
If beasts like these you'd harry,  
Plumb then the poet's dream;  
Make it your aviary,  
Make it your wood and stream.

There only shall the swish  
Be heard of the regal fish;  
There like a golden knife  
Dart the feet of the unicorn,



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And there, death brought to life,  
The dead bird be reborn.

[https://en.wikipedia.org/wiki/Countee\\_Cullen](https://en.wikipedia.org/wiki/Countee_Cullen)

Countee Cullen - Wikipedia

en.wikipedia.org

Early life Childhood. Countee Cullen was born on May 30, 1903, but due to a lack of records of his early childhood, it has been difficult to pinpoint his city of birth.

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