

Friday, 11 May 2018

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd (FCA) - admiralty - joint venture - referee's report - erroneous calculation of amortisation - section of report remitted for correction of error - report otherwise adopted - procedural directions made

CMP Manufacturing Pty Ltd v Barbieri (FCA) - industrial law - employment contract - applicant entitled to retrenchment payment or, if not entitled to retrenchment payment, entitled to 'payment in lieu of notice' - appeal dismissed

Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd; Plymouth Brethren (Exclusive Brethren) Christian Church v Fairfax Media Publications Pty Ltd (NSWCA) - defamation - separate question - matters complained of were 'reasonably capable' of identifying appellant company - appeal allowed

The Real Thing Food Supplements CC v Media Tag Pty Ltd (NSWSC) - consumer law - misleading and deceptive conduct - passing off - action arising from sale of goods to Woolworths stores - proceedings dismissed

Ku-ring-gai Council v Ichor Constructions Pty Ltd (NSWSC) - commercial arbitration - arbitrator acting as mediator - no written consent given to resumption of arbitration following mediation - summons dismissed

Hoskin v Griffin & Ors (VSC) - execution, seizure and sale - breach of duty by Sheriff to judgment creditor and judgment debtor to obtain fair price for property - parties to be heard on form of relief

Mavridis v Andronescu (VSC) - wills and estates - terms of settlement entered under mistake - application for approval of compromise adjourned

Botsman v Bolitho & Ors (VSCA) - security for costs - application for leave to appeal against settlement of group proceedings - security for costs refused

Bell v Brisbane City Council & Ors (QCA) - planning and environment - challenge to approval of proposed development in conflict with planning scheme upheld - appeal allowed

Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd (QSC) - contract - partnership - applicant failed to establish breach of Co-Owners Deed by respondent - respondent entitled to declaratory relief

Andressen v Bendigo & Adelaide Bank Ltd (SASCFC) - service - private international law - appeal against entry of default judgment based on presumptive service of summons and statement of claim while defendant overseas - appeal dismissed

Stokes v Ragless (No 2) (SASC) - costs - defamation - self-represented litigant - offers of settlement - not in interests of justice to order indemnity costs in favour of successful plaintiff - costs awarded on party/party basis

BHP Billiton Iron Ore Pty Ltd v Treby (WASCA) - workers compensation - respondent injured at work - arbitrator ordered appellant was to pay compensation and statutory allowances to respondent - appeal dismissed

Engine Protection Equipment Pty Ltd v Miller (WASCA) - workers compensation - total incapacity - no error in decision of arbitrator to find worker entitled to weekly payments of compensation for claimed periods - appeal dismissed

Golding v Primavera Holdings Pty Ltd (ACTSC) - trusts and trustees - plaintiffs entitled to declaration of express trust and orders that first defendant perform obligations under trust

Summaries With Link (Five Minute Read)

Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd [2018] FCA 647

Federal Court of Australia

Burley J

Admiralty - joint venture agreement - referee's report - Court appointed referee to inquire into disputes between applicant and second defendant concerning business's 'operating profit' for

certain periods - parties opposed adoption of certain parts of referee's report - r28.67 *Federal Court Rules 2011* (Cth) - 'related party transactions' - 'allowance for amortisation' - 'rental allowance' - 'costs' - 'useful life' of joint venture agreement - held: referee erred in calculation of amortisation - section of report remitted for correction of error - report otherwise adopted - procedural directions made.

[Ozmen](#)

[From Benchmark Thursday, 10 May 2018]

CMP Manufacturing Pty Ltd v Barbieri [2018] FCA 622

Federal Court of Australia

Bromberg J

Industrial law - contract - employment contract - respondent was appellant's former employee - respondent unsuccessfully claimed appellant dismissed him in breach of ss340 & 352 *Fair Work Act 2009* (Cth) (Fair Work Act) - appellant was successful in contractual claim of entitlement to retrenchment payment - primary judge held that if he was wrong concerning entitlement to retrenchment payment, then applicant would have succeeded on entitlement to payment of amount 'in lieu of notice' - whether erroneous that finding respondent's position redundant and respondent contractually entitled to retrenchment payment - whether erroneous finding that retrenchment was not excluded as applicant not offered "alternative position" under contract - whether erroneous finding that respondent, if not entitled to the retrenchment pay under contract, would have been entitled to money in lieu of notice under s117 Fair Work Act - held: grounds of appeal failed - appeal dismissed.

[CMP](#)

[From Benchmark Friday, 11 May 2018]

Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd; Plymouth Brethren (Exclusive Brethren) Christian Church v Fairfax Media Publications Pty Ltd [2018] NSWCA 95

Court of Appeal of New South Wales

Beazley P; McColl & Basten JJA

Defamation - proceedings arose from articles published in The Age newspaper and The Sydney Morning Herald newspaper - articles alleged there had been allegations of child sexual abuse within Plymouth Brethren Church and cover up of complaints by elders - Plymouth Brethren (Exclusive Brethren) Christian Church (company) sued, in separate proceedings, The Age and Fairfax in defamation - The Age and Fairfax sought determination, as a separate question, "the capacity of the matters complained of to identify the plaintiff" - primary judge answered question in the negative and gave judgment for The Age and Fairfax - company appealed - whether primary judge erred in ordering determination of separate question - capacity of publication to defame company - held: no error in ordering determination of separate question - matter complained of was 'reasonably capable' of identifying appellant - appeal allowed - matter remitted.

[View Decision](#)

[From Benchmark Tuesday, 8 May 2018]

The Real Thing Food Supplements CC v Media Tag Pty Ltd [2018] NSWSC 585

Supreme Court of New South Wales

Stevenson J

Consumer law - plaintiff incorporated in South Africa made health foods supplements - plaintiff exported to Australia - first defendant was distributor of plaintiff's products to Woolworths stores - first defendant arranged for products to be manufactured in Australia and sold to Woolworths stores - products were similar to those distributed for plaintiff - plaintiff brought proceedings against first defendant and its two directors - it was alleged that first defendant represented to Woolworths that the goods it was supplying were plaintiff's goods, that the representation was misleading and deceptive under s18 *Australian Consumer Law* and that Woolworths was induced by the representation to purchase the goods - it was also alleged that directors were knowingly involved in the contravention and that first defendant engaged in tort of passing off - held: plaintiff failed in case alleging misleading and deceptive conduct, rendering it unable to establish passing off case - proceedings dismissed.

[View Decision](#)

[From Benchmark Monday, 7 May 2018]

Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610

Supreme Court of New South Wales

McDougall J

Commercial arbitration - second defendant arbitrator heard dispute between plaintiff and first defendant - first defendant contended arbitrator had acted as mediator and had then resumed arbitration without written consent of parties required by s27D(4) *Commercial Arbitration Act 2010* (NSW) - whether arbitrator acted as mediator and, if so, whether parties gave written consents before arbitration resumed - if consents not given, whether first defendant waived right to object to arbitration's resumption, or was estopped from asserting that s27D(4)'s requirements not met - held: arbitrator acted as mediator - first defendant did not give written consent to arbitration being conducted after mediation - estoppel case failed - waiver not established - summons dismissed.

[View Decision](#)

[From Benchmark Wednesday, 9 May 2018]

Hoskin v Griffin & Ors [2018] VSC 216

Supreme Court of Victoria

Quigley J

Execution, seizure and sale - plaintiff was registered proprietor of land - land sold at auction which first defendant officer conducted on second defendant's behalf - plaintiff contended defendants breached 'duty to act reasonably' in both judgment creditor's interests and judgment debtor's interests to 'obtain a fair price' for sale of interest - whether sale price was fair price - process of establishment of reserve - Sheriff's powers and duties under *Sheriff Act*

Benchmark

2009 (Vic) - held: defendants breached duty to plaintiff by proceeding to 'Final Action' and not passing in property after receiving single bid - sale price was not a fair price - property sold at 'significant undervalue' - parties to be heard on appropriate relief

[Hoskin](#)

[From Benchmark Wednesday, 9 May 2018]

Mavridis v Andronescu [2018] VSC 227

Supreme Court of Victoria

Derham AsJ

Wills and estates - defendant sought approval of compromise of plaintiff's claim under Pt IV *Administration and Probate Act 1958* (Vic) - compromise concerned proceeds of sale of estate's 'principal asset' - plaintiff was undischarged bankrupt, but plaintiff had entered compromise believing she was discharged from bankruptcy - plaintiff informed Court she wished to make application to set aside the terms of settlement for mistake - plaintiff sought adjournment of defendant's application - held: advice of defendant's counsel concerning compromise was insufficient to purpose - plaintiff, and likely defendant also, had entered compromise under mistake - plaintiff or defendant may be able to set terms of settlement aside - there was prospect of further claim on deceased's estate - approval of compromise would make it more difficult to pursue further claim - application adjourned.

[Mavridis](#)

[From Benchmark Friday, 11 May 2018]

Botsman v Bolitho & Ors [2018] VSCA 111

Court of Appeal of Victoria

Whelan & Niall JJA

Security for costs - applicant sought to appeal from approval of settlement of group proceeding - group proceeding had arisen from failure of 'non-bank property lender (Banksia)' - first respondent was lead plaintiff in group proceeding - first respondent sought that applicant provide security for costs - public interest - whether application for security was designed to end proceedings - protective jurisdiction - whether application would put 'economic pressure' on 'Bolitho interests' - whether risk that costs order would not be satisfied - impecuniosity - stultification - prospects of success - held: Court not satisfied costs order in first respondent's favour would not be met - security for costs refused.

[Botsman](#)

[From Benchmark Wednesday, 9 May 2018]

Bell v Brisbane City Council & Ors [2018] QCA 84

Court of Appeal of Queensland

Sofronoff P; Philippides & McMurdo JJA

Planning and environment - second respondent obtained Council's approval to develop land by towers' construction - applicant, who lived on adjoining land, unsuccessfully challenged approval in Planning and Environment Court - Planning and Environment Court found that even

though development conflicted with planning scheme, there were 'sufficient grounds' in public interest to grant approval - applicant sought to appeal - whether trial judge erred in determining non-compliance's extent - height limits - 'community and economic needs' - whether 'reasoning inconsistent with *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209 - whether irrelevant considerations and/or failure to take into account relevant considerations - 'public detriment' - s326(1) *Sustainable Planning Act 2009* (Qld) - held: errors of law established - appeal allowed - matter remitted.

[Bell](#)

[From Benchmark Wednesday, 9 May 2018]

Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd [2018] QSC 95

Supreme Court of Queensland

Jackson J

Contract - partnership - Co-Owners Deed - applicant and respondent co-owned land comprising office building - proceedings concerned whether applicant company was obliged to transfer half-interest as co-owner to respondent - applicant contended it was not obliged to transfer the half-interest as it did not breach Co-Owners Deed, or alternatively on basis that a contractual buy-out mechanism was not 'validly engaged' - applicant sought declaratory relief - respondent sought specific performance - whether applicant breached contract - whether buy-out mechanism validly engaged - held: applicant did not establish that respondent breached Co-Owners Deed - respondent entitled to declaratory relief.

[Clarence](#)

[From Benchmark Tuesday, 8 May 2018]

Andressen v Bendigo & Adelaide Bank Ltd [2018] SASCFC 30

Full Court of the Supreme Court of South Australia

Kourakis CJ; Kelly & Blue JJ

Service - private international law - Master made 'presumptive service order' under r69 *District Court Civil Rules 2006* (SA) for service of summons and statement of claim by post and email to appellant's solicitor - appellant contended service was defective because he was not in Court's jurisdiction at time of service - Master dismissed application to restrain default judgment's entry based on presumptive service under the presumptive service order - District Court judge and Supreme Court judge dismissed appeals - held: r69 of the Rules extended to presumptive service on a defendant, whether defendant was in South Australian or overseas - r69 was not ultra vires of power which s51 *District Court Act 1991* (SA) conferred - appellant not permitted to raise for the first time on appeal, contention concerning impracticability of overseas service - appeal dismissed.

[Andressen](#)

[From Benchmark Thursday, 10 May 2018]

Stokes v Ragless (No 2) [2018] SASC 56

Supreme Court of South Australia

Bampton J

Costs - defamation - self-represented litigant - successful plaintiff sought order for indemnity costs basis of s38 *Defamation Act 2005* (SA) - plaintiff contended defendant had unreasonably failed to make settlement offer and to agree to settlement offers - defendant was self-represented - plaintiff's offers of settlement did not explain 'implications of accepting or not accepting each offer' (implications) - held: no rule that represented party must inform unrepresented party of implications, but in this case the interests of justice required costs not to be awarded on indemnity basis - it could not be assumed unrepresented defendant would be aware of Supreme Court Rules concerning offers and s38 of the Act - plaintiff to have costs on party/party basis.

[Stokes](#)

[From Benchmark Monday, 7 May 2018]

BHP Billiton Iron Ore Pty Ltd v Treby [2018] WASCA 60

Court of Appeal of Western Australia

Buss P, Murphy JA & Chaney J

Workers compensation - arbitrator found respondent suffered injury at work - arbitrator ordered appellant to pay respondent weekly compensation for total incapacity and statutory allowances - appellant sought leave to appeal pursuant to s247 *Workers' Compensation and Injury Management Act 1981* (WA) - primary judge refused leave - whether open to arbitrator to accept and rely on one doctor's medical report in preference to another doctor's medical report - .held: grounds of appeal did not have merit - appeal dismissed.

[BHP](#)

[From Benchmark Monday, 7 May 2018]

Engine Protection Equipment Pty Ltd v Miller [2018] WASCA 55

Court of Appeal of Western Australia

Murphy, Mitchell & Beech JJA

Workers compensation - respondent worker sought compensation for knee injury - appellant employer paid compensation until worker reached 'prescribed total amount' - worker suffered subsequent back injury - arbitrator decided worker was entitled to compensation of weekly payments by appellant for total incapacity for back injury for periods claimed - primary judge dismissed appeal - appellant sought to appeal, contending arbitrator erred by 'failing to focus' on which of back injury and knee injury was the 'true cause' of incapacity - whether erroneous finding concerning entitlement to weekly payments - whether erroneous finding as to periods of payment - whether incapacity could have only one cause - 'the real cause' - 'the cause' - *Workers' Compensation and Injury Management Act 1981* (WA) - held: no error in arbitrator not seeking to identify incapacity's 'true cause' - no error in arbitrator's consideration of whether back injury 'materially contributed' to incapacity - grounds of appeal failed - appeal dismissed.

[Engine Protection Equipment](#)

[From Benchmark Tuesday, 8 May 2018]



Golding v Primavera Holdings Pty Ltd [2018] ACTSC 118

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Trusts and trustees - express trust - plaintiffs previously owned land which they sold to first defendant - plaintiff claimed that express trust was created by trust deed over portion of land when contract for sale executed - plaintiff contended they were beneficiaries in equal shares - plaintiffs sought to enforce a condition of trust deed requiring transfer of unit to them for \$1 - plaintiffs sought declaration of express trust, declaration of first defendant's breach of the trust, and order that first defendant perform obligations under trust - held: plaintiffs entitled to declaration of express trust - plaintiff entitled to orders compelling first defendant's performance of obligations under trust - declaration and orders made.

[Golding](#)

[From Benchmark Friday, 11 May 2018]



Benchmark

Moments of Vision

By: Thomas Hardy

That mirror

Which makes of men a transparency,

Who holds that mirror

And bids us such a breast-bared spectacle to see

Of you and me?

That mirror

Whose magic penetrates like a dart,

Who lifts that mirror

And throws our mind back on us, and our heart,

Until we start?

That mirror

Works well in these night hours of ache;

Why in that mirror

Are tincts we never see ourselves once take

When the world is awake?

That mirror

Can test each mortal when unaware;

Yea, that strange mirror

May catch his last thoughts, whole life foul or fair,

Reflecting it—where?

https://en.wikipedia.org/wiki/Thomas_Hardy

Thomas Hardy - Wikipedia

en.wikipedia.org

Thomas Hardy OM (2 June 1840 – 11 January 1928) was

an English novelist and poet. A Victorian realist in the

tradition of George Eliot, he was influenced both in his

novels and in his poetry by Romanticism, especially William

Wordsworth.

[Click Here to access our Benchmark Search Engine](#)