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# Benchmark

Friday, 14 December 2018

# Weekly Insurance Law Review

## Selected from our Daily Bulletins covering Insurance

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## Executive Summary (1 minute read)

**Carbone v Metricon Homes Pty Ltd** (NSWCA) - contract - 'option deeds' - respondent entitled to rescind option deed and recover 'call option fees' - appeal dismissed

**ZXC v YPOL Pty Ltd** (NSWCA) - contempt - criminal contempt conviction - vacation of suppression orders - 'fitness to plead' - 'substantial miscarriage of justice' - appeal allowed in part - summons for leave to appeal dismissed

**MetLife Insurance Ltd v Hellessey** (NSWCA) - insurance - life insurance - total and permanent disablement - no error in primary judge's finding that appellant's dismissal of respondent's claim was invalid - appeal dismissed

**Anthony v Morton** (NSWSC) - contract - negligence - estoppel - agency agreement - claim against author by former agent for book royalties dismissed - author's cross-claim in negligence upheld in part - judgment for author in sum of $514,558.19

**Cudgegong Australia Pty Limited v Sydney Metro** (NSWSC) - judgments and orders - acquisition of land - estoppel - erroneous summary disposal of proceedings seeking declaration acquisition of land was invalid - appeal allowed

**Ko v CKAS Enterprises Pty Ltd** (NSWSC) - real property - lease - common assumption - tenant did not exercise option to renew - landlord estopped from giving notice terminating tenancy until payment of 'equitable compensation'

**Burke v Ash Sounds Pty Ltd** (VSC) - damages - negligence - consumer law - group

proceeding - separate question - Pts VB & VBA *Wrongs Act 1958* (Vic) applied to claim for non-compliance with guarantees if services subject of ss61(1) or 61(2) Australian Consumer Law 'supplied pursuant to a contract between the group member and the defendant'

**UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)** (VSC) - arbitration - international arbitration - application for 'Recognition and Enforcement of the Award' granted

**Tomasevic v State of Victoria** (VSCA) - work injury - issue estoppel - accident compensation - claim for damages for psychological injury in course of employment - no issue estoppel arising from earlier County Court claim for same injury under *Accident Compensation Act 1985* (Vic) - leave to appeal refused

**James v State of Queensland** (QSC) - negligence - plaintiff claimed damages for psychiatric injury in course of employment against employer - breach of duty of care not established - claim dismissed

**Morton Seed & Grain Pty Ltd v Phillbourne Manufacturing Pty Ltd** (WASC) - consumer law - contract - action arising from failure of 'tarping system' - breach of agreement not established - misleading representations not established - claim dismissed

## Summaries With Link (Five Minute Read)

**Carbone v Metricon Homes Pty Ltd [2018] NSWCA 296**
Court of Appeal of New South Wales
Meagher, Payne & White JJA
Contract - 'option deeds' - appellant vendor and respondent purchaser under 'thirty identical deeds' granted 'call and put options' over land - each deed provided either party could rescind if, within 15 months of deed's execution, a 'draft plan of subdivision and a draft instrument' under s88B *Conveyancing Act 1919* (NSW) were not registered - respondent purported to rescind 'ab initio' 9 deeds containing un-exercised call and put options - primary judge found respondent was entitled to rescind and to recover 'call option fees' - appellant appealed - whether clause empowered respondent 'merely to terminate each deed prospectively' - whether call option fees recoverable - contractual construction - meaning of 'rescind' - whether primary judge should have taken 'extrinsic material' into account in construing contract - held: appeal dismissed.
View Decision
[From Benchmark Tuesday, 11 December 2018]

**ZXC v YPOL Pty Ltd [2018] NSWCA 306**
Court of Appeal of New South Wales

Beazley P, Meagher JA & Simpson AJA
Contempt - criminal contempt - suppression orders - appellant convicted of criminal contempt in civil proceedings against respondent solicitors' firm - appellant was found, on basis of expert reports, to be a person under legal incapacity - tutor appointed - appellant deemed unfit to defend sentence proceeding - no penalty imposed except for conviction's entry - appellant appealed against conviction and against vacation of suppression orders - appellant also sought leave to appeal against restraining order, appointment of tutor and costs orders - challenge to contempt proceedings' characterisation as criminal - challenge to conviction and sentence - challenge to sentence under s10A *Crimes (Sentencing Procedure) Act 1999* (NSW) - 'appellate function in relation to questions of fitness to plead' - whether primary judge 'could not reasonably have found' appellant 'unfit to plead' - r51.53 *Uniform Civil Procedure Rules 2005* (NSW), whether miscarriage of justice - held: appeal allowed in part - leave to appeal refused.
View Decision
[From Benchmark Friday, 14 December 2018]

**MetLife Insurance Ltd v Hellessey [2018] NSWCA 307**
Court of Appeal of New South Wales
McColl, Meagher & White JJA
Insurance - respondent police officer claimed benefits under First State Superannuation scheme (scheme) on basis she was 'totally and permanently disabled' - appellant was 'group life insurer' under scheme - primary judge found that appellant's 'third rejection' of respondent's claim was invalid and concluded that respondent met the definition of total and permanent disablement - whether primary judge applied 'incorrect legal test as to the "first-stage" question' - whether primary judge erroneously had regard to 'considerations and evidence' irrelevant to first stage - whether primary judge erred in finding appellant's determination unreasonable - whether 'reversal of onus' - held: no error in primary judge's finding that appellant's third rejection was invalid - appeal dismissed.
View Decision
[From Benchmark Friday, 14 December 2018]

**Anthony v Morton [2018] NSWSC 1884>**
Supreme Court of New South Wales
Ward CJ in Eq
Contract - negligence - estoppel - defendant/cross-claimant was author - plaintiff/cross-defendant was plaintiff's 'former literary agent' - plaintiff claimed payment of commission on royalties of books even though 'agency relationship' and 'publishing agreements' had been terminated - defendant cross-claimed against plaintiff and company with which plaintiff was associated - defendant contended breach of fiduciary duty and breach of contract - defendant also claimed in negligence concerning certain advice plaintiff had given to her - whether plaintiff entitled to 'ongoing commission' - consideration of agency agreement's terms - whether plaintiff entitled to commission after agency agreement's termination - 'conventional estoppel' - held: plaintiff's claim dismissed - Court upheld cross-claim in negligence in part - certain

claims statute-barred and 'fraud exception' did not apply - judgment for cross-claimant in sum of $514,558.19.
View Decision
[From Benchmark Tuesday, 11 December 2018]

**Cudgegong Australia Pty Limited v Sydney Metro [2018] NSWCA 298**
Court of Appeal of New South Wales
Meagher & Leeming JJA; Sackville AJA
Judgments and orders - summary disposal - acquisition of land - estoppel - respondent's predecessor (Transport NSW) by notice in Government Gazette, under s19(1) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), acquired land for purpose of rail link's construction - applicant sought declaration acquisition invalid - Transport NSW sought dismissal of proceedings under r13.4(1)(b) *Uniform Civil Procedure Rules 2005* (NSW) on basis no reasonable cause of action disclosed - primary judge upheld Transport NSW's argument on basis of estoppel, finding applicant's compensation claim 'amounted to an acceptance' of acquisition's validity and that Transport NSW had 'acted to its detriment' - primary judge granted summary disposal - applicant appealed - Transport NSW, by notice of contention, sought dismissal of appeal as incompetent on basis applicant needed leave to appeal - Transport NSW, by notice of contention, sought to uphold order for summary dismissal on basis proceedings "time-barred" - held: appropriate to dismiss appeal as incompetent - primary judge erred in granting summary disposal - leave to appeal granted - Court not satisfied there was 'high degree of certainty' that 'estoppel by representation' defence would succeed - appeal allowed.
View Decision
[From Benchmark Monday, 10 December 2018]

**Ko v CKAS Enterprises Pty Ltd [2018] NSWSC 1876**
Supreme Court of New South Wales
Emmett AJA
Real property - lease - plaintiff/cross-defendant (tenant) claimed defendant/cross-claimant (landlord) was estopped from denying she validly exercised option to renew lease (option) of premises ('Demised Premises') - landlord by cross-claim sought declaration tenant had failed to exercise option and that 'purported notice' of option's exercise was ineffective - whether lessors had waived requirement for 'strict compliance' with terms of lease - whether tenant occupied 'Demised Premises' on basis of 'common assumption' by tenant and landlord that tenant's occupation was under 'renewed lease' - held: there was common assumption that tenant entitled to occupy premises under 'substantial leasehold term' - unconscionable for landlord to resile from common assumption without giving 'equitable compensation' for tenant's expenses in reliance on common assumption - tenant did not exercise option to renew but landlord estopped from terminating tenancy unless it paid 'reasonable compensation' to tenant for certain incurred costs.
View Decision

[From Benchmark Friday, 14 December 2018]

**Burke v Ash Sounds Pty Ltd [2018] VSC 771**
Supreme Court of Victoria
McDonald J
Damages - negligence - consumer law - group proceeding - claim arising from injuries allegedly suffered at festival - plaintiff made 'breach of duty' claims and claims for breach of guarantees in ss60 & 61 Australian Consumer Law - liability admitted - separate questions - first question was whether Pts VB & VBA *Wrongs Act 1958* (Vic) (Wrongs Act) applied to claim for non-compliance with guarantees if services subject of ss61(1) or 61(2) Australian Consumer Law 'were supplied pursuant to a contract between the group member and the defendant' - second question was whether claimants precluded from non-economic loss damages regardless of whether 'purpose and guarantee claims' required 'proof of fault' and regardless of any contract's nature and existence, due to 'long arm operation' of s28LE Wrongs Act - held: first question determined in the affirmative - Court declined to answer second question as it was not 'raised in the proceedings.
Burke
[From Benchmark Friday, 14 December 2018]

**UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2) [2018] VSC 741**
Supreme Court of Victoria
Croft J
Arbitration - international arbitration - two applications concerning Arbitrator's Interim Award and Final Award ('Award') - Award made pursuant to arbitration agreement which specified that arbitration's seat was Australia - arbitration was an 'international arbitration' because second respondent's place of business was Hong Kong - application under Art 35, Sch 2 *International Arbitration Act 1974* (Cth) for 'Recognition and Enforcement of the Award' - application, in reliance on articles 34(2)(a)(ii) and (b)(ii) of 'UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)' to set Award aside - Court granted orders for recognition and enforcement and made "self-executing provision" for enforcement - self-executing provision stayed pending determination of application to set aside Award - held: application to set aside Award dismissed - orders for recognition and enforcement of Award granted.
UDP Holdings
[From Benchmark Monday, 10 December 2018]

**Tomasevic v State of Victoria [2018] VSCA 325**
Court of Appeal of Victoria
Kaye & Emerton JJA; Almond AJA
Work injury - issue estoppel - accident compensation - applicant claimed damages for

psychological injury sustained in course of employment with respondent - applicant had previously, in County Court, successfully claimed compensation for same injury under *Accident Compensation Act 1985* (Vic) - proceedings concerned whether issue estoppel arose concerning findings made in County Court - primary judge found there was no issue estoppel and dismissed application to strike out paragraph of defence - applicant sought to appeal - held: no error in primary judge's find that no issue estoppel arose - leave to appeal refused.
Tomasevic
[From Benchmark Wednesday, 12 December 2018]

**James v State of Queensland [2018] QSC 188**
Supreme Court of Queensland
Henry J
Negligence - 'employer's duty of care' - plaintiff worked as paramedic - plaintiff claimed damages for psychiatric injury 'caused by his exposure to traumatic events' during work - plaintiff claimed defendant did not respond reasonably to risk of injury - whether failure to provide 'safe system of work' - whether failure 'to take reasonable care to avoid psychiatric injury' plaintiff' - adequacy of 'Priority One programme' - whether defendant failed to activate 'critical incident stress debriefing' and/or failed to respond to 'training incident' - held: breach of duty not established - claim dismissed.
James
[From Benchmark Friday, 14 December 2018]

**Morton Seed & Grain Pty Ltd v Phillbourne Manufacturing Pty Ltd [2018] WASC 386**
Supreme Court of Western Australia
Pritchard J
Consumer law - contract - action arising from failure of 'tarping system' - parties entered oral agreement (agreement) under which defendant was to 'supply and install a bunker' at facility - plaintiff contended that, in negotiation of agreement, defendant, through its director, made representations concerning tarping system and 'joins in the tarpaulins' - plaintiff also contended agreement contained express or implied term concerning tarping system's suitability for purpose and fitness for purpose - plaintiff contended representations were false and that defendant breached alleged term of agreement - held: plaintiff did not establish agreement contained express term, but did establish it was an implied of agreement that tarping system 'would be reasonably fit for the purpose of storing oats and grain' - plaintiff did not establish breach of term, or that representations made or were misleading - claim dismissed.
Morton Seed
[From Benchmark Wednesday, 12 December 2018]

**Summer Wind**
**By:** William Cullen Bryant
It is a sultry day; the sun has drunk
The dew that lay upon the morning grass;
There is no rustling in the lofty elm
That canopies my dwelling, and its shade
Scarce cools me. All is silent, save the faint
And interrupted murmur of the bee,
Settling on the sick flowers, and then again
Instantly on the wing. The plants around
Feel the too potent fervors: the tall maize
Rolls up its long green leaves; the clover droops
Its tender foliage, and declines its blooms.
But far in the fierce sunshine tower the hills,
With all their growth of woods, silent and stern,
As if the scorching heat and dazzling light
Were but an element they loved. Bright clouds,
Motionless pillars of the brazen heaven–
Their bases on the mountains–their white tops
Shining in the far ether–fire the air
With a reflected radiance, and make turn
The gazer's eye away. For me, I lie
Languidly in the shade, where the thick turf,
Yet virgin from the kisses of the sun,
Retains some freshness, and I woo the wind
That still delays his coming. Why so slow,
Gentle and voluble spirit of the air?
Oh, come and breathe upon the fainting earth
Coolness and life! Is it that in his caves
He hears me? See, on yonder woody ridge,
The pine is bending his proud top, and now
Among the nearer groves, chestnut and oak
Are tossing their green boughs about. He comes;
Lo, where the grassy meadow runs in waves!
The deep distressful silence of the scene
Breaks up with mingling of unnumbered sounds
And universal motion. He is come,
Shaking a shower of blossoms from the shrubs,
And bearing on their fragrance; and he brings
Music of birds, and rustling of young boughs,
And sound of swaying branches, and the voice
Of distant waterfalls. All the green herbs

Are stirring in his breath; a thousand flowers,
By the road-side and the borders of the brook,
Nod gayly to each other; glossy leaves
Are twinkling in the sun, as if the dew
Were on them yet, and silver waters break
Into small waves and sparkle as he comes.
https://en.wikipedia.org/wiki/William_Cullen_Bryant

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