

Friday, 21 July 2017

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

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### Executive Summary (1 minute read)

**Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)** (FCAFC) - contract - employment contract - Workplace Harassment and Discrimination Policy - appeal against damages judgment and adverse costs order - appeal dismissed except in respect of partial variation of costs order

**Dinzel Construction System Pty Limited v AFS Systems Pty Ltd (No 2)** (FCA) - patent - alleged infringement of claims of patent: 'Hollow interconnecting panels as lost formwork' - cross-claim for revocation of claims - application and cross-claim dismissed

**Smith v NRMA Insurance Ltd** (NSWCA) - negligence - separate question - small child injured in 2004 when van collided with vehicle in which he was a passenger - no error in primary judge's finding that driver of van was not conscious at time of collision with vehicle - appeal dismissed

**The Owners Strata Plan Number 57164 v Yau** (NSWCA) - stay - costs - strata titles - application for stay of costs order granted - costs assessment to await determination of appeal

**Seven Network (Operations) Limited and Anor v Amber Harrison** (NSWSC) - equity - contract - costs - judgment for plaintiffs in proceedings - defendant to pay plaintiffs' costs on indemnity basis due to unreasonable conduct

**Cisera v Cisera Holdings Pty Ltd** (NSWSC) - equity - trusts and trustees - advantageous dealings - application for orders in relation to Trust Deed under s81(1) *Trustee Act 1925* (NSW) refused - summons dismissed

# Benchmark

**Business Service Brokers v Beveridge** (VSCA) - contract - mobile phone contract between parties - respondent's phone stolen as part of fraud - respondent not obliged to pay applicant for diverted calls - appeal dismissed

**Melbourne City Investments Pty Ltd v Myer Holdings Limited** (VSCA) - stay - abuse of process - applicant's securities class action against respondent permanently stayed as abuse of process - appeal dismissed

**Tallott v City of Stirling** (WASCA) - false imprisonment - misfeasance in public office - trespass to goods - conversion - conspiracy to harm - 'collateral abuse of process' - failure to establish claims - appeal dismissed

**Gemini Energy and Minerals Pty Ltd v Luff** (WASC) - contract - written agreement for purchase by defendant of shares in plaintiff - failure to pay amounts on dates specified in agreement - instalments payable as debts - judgment for plaintiff

## Summaries With Link (Five Minute Read)

### **Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) [2017] FCAFC 102**

Full Court of the Federal Court of Australia

Allsop CJ; Rares & McKerracher JJ

Contract - employment contract - primary judge found Workplace Harassment and Discrimination Policy did not form part of appellant's employment contract and, if it had, respondent did not breach contract or policy, or repudiate contract - Full Court found policy formed part of contract and that respondent had breached it - question of repudiation and damages remitted - costs of remittal hearing reserved for determination by judge determining remittal questions - appellant appealed against primary judge's award of nominal damages only and against adverse costs order - whether erroneous failure to find contractual term which required compliance with Policy was essential - whether erroneous failure to determine whether respondent repudiated contract, and erroneous failure to find breaches insufficiently serious to justify termination - appellant also contended primary judge erred in failing to find losses could 'reasonably be supposed to have been in the contemplation of the parties' when they made the contract as 'probable result of the breaches' - held: appeal dismissed except for partial variation of costs order.

[Romero](#)

[From Benchmark Friday, 21 July 2017]

### **Dincol Construction System Pty Limited v AFS Systems Pty Ltd (No 2) [2017] FCA 791**

Federal Court of Australia

Nicholas J

Patent - applicant commenced proceeding against first respondent for infringement of claims of patent: 'Hollow interconnecting panels as lost formwork' - applicant was patent's exclusive licensee - second respondent was patentee - all relevant claims depended on 'claim 1' - respondent denied infringement and sought by cross-claim revocation of relevant claims - respondent contended that if applicant's construction of claims correct, then invention each claim defined was not novel at priority date, and claims not fairly based on matter which specification described - proper construction of claim - meaning of 'ramp surface' - whether 'AFS product' included ramp surfaces 'as required by claim 1' - validity - novelty - fair basis - held: application and cross-claim dismissed.

[Dinzel](#)

[From Benchmark Wednesday, 19 July 2017]

### **Smith v NRMA Insurance Ltd [2017] NSWCA 172**

Court of Appeal of New South Wales

McCull & Simpson JJA; Sackville AJA

Negligence - motor vehicle collision - separate question - appellant was injured while small child in 2004 - appellant was rear seat passenger in car driven by appellant's father when car was struck by van - appellant's father blameless - van driver pronounced dead at scene - driver's death caused by 'cardiac arrhythmia leading to cardiac arrest' - appellant sued respondent, which was driver's insurer - sole issue was whether driver was conscious and in control of van immediately prior to collision, or already unconscious or incapacitated - if appellant could not prove on balance of probabilities driver was conscious, he would not be able to recover damages from insurer as accident pre-dated 'blameless accident' provisions of *Motor Accidents Compensation Act 1999* (NSW) - primary judge not satisfied driver conscious and gave judgment for respondent - appellant challenged factual findings of primary judge - held: no error in primary judge's critical factual findings - appeal dismissed.

[Smith](#)

[From Benchmark Wednesday, 19 July 2017]

### **The Owners Strata Plan Number 57164 v Yau [2017] NSWCA 176**

Court of Appeal of New South Wales

Simpson JA

Stay - costs - strata titles - applicant sought to set aside consent orders - application was dismissed and applicant ordered to pay respondents' costs - applicant sought stay of costs order against it - s135 *Civil Procedure Act 2005* (NSW) - cl 35 *Legal Profession Uniform Law Application Regulation 2015* - Pt 36.15, 51.44 *Uniform Civil Procedure Rules 2005* (NSW) - held: Court persuaded to order stay, primarily due to respondents' delay in implementing procedures under *Legal Profession Uniform Law* with result that costs assessment procedure would likely not be concluded before delivery of appeal judgment - costs assessment to await appeal's determination.

[The Owners Strata Plan](#)

[From Benchmark Thursday, 20 July 2017]

## **Seven Network (Operations) Limited and Anor v Amber Harrison [2017] NSWSC 952**

Supreme Court of New South Wales

Sackar J

Equity - costs - proceedings concerned alleged breaches of contract of employment and deed of release - plaintiff sought final injunctive and declaratory relief for defendant's breaches of contract and deed - defendant opposed declaratory relief - plaintiffs sought defendant pay their costs of proceedings on indemnity basis - held: Court granted consent orders - Court granted declaratory relief except to declare defendant was in breach of *Corporations Act 2001* (Cth) - judgment for plaintiff - defendant to pay plaintiffs' costs on indemnity basis due to unreasonable conduct.

[Seven](#)

[From Benchmark Wednesday, 19 July 2017]

## **Cisera v Cisera Holdings Pty Ltd [2017] NSWSC 960**

Supreme Court of New South Wales

Parker J

Equity - trusts and trustees - advantageous dealings - plaintiffs sought orders in relation to vesting date in Trust Deed under s81(1) *Trustee Act 1925* (NSW) - identification of 'list of dealings' - 'transaction' - 'disposition' - whether dealing 'expedient' in trust property's 'management or administration' - held: sought orders were beyond authorisation of 'transactions' for purposes of s81 - plaintiffs' proposal was not 'expedient' - summons dismissed.

[Cisera](#)

[From Benchmark Friday, 21 July 2017]

## **Business Service Brokers v Beveridge [2017] VSCA 184**

Court of Appeal of Victoria

Santamaria & Ferguson JJA

Contract - applicant provided mobile phone service to respondent under contract - respondent's mobile phone stolen as part of fraud while he was travelling in Barcelona - phone's SIM card to divert calls and text messages from Australia to mobile phone numbers mainly in Latvia - applicant sued respondent, claiming he owed it \$34,945 for diverted calls - County Court held TeleChoice not entitled to be payment under contract, finding 'simultaneous call forwarding and SMS messages were not part of the value added service' which respondent agreed to pay for under contract - applicant sought to appeal - construction of contract - whether calls diverted or forwarded were made on international roaming service - held: contract did not require respondent to pay for calls and SMS messages forwarded his phone was stolen - appeal dismissed.

[Business Service Brokers](#)

[From Benchmark Tuesday, 18 July 2017]



# Benchmark

## **Melbourne City Investments Pty Ltd v Myer Holdings Limited [2017] VSCA 187**

Court of Appeal of Victoria

Osborn, Whelan & Ferguson JJA

Stay - abuse of process - applicant was created as vehicle to bring class actions for breach of continuous disclosure provisions in *Corporations Act 2001* (Cth) - applicant held small parcels of shares in publicly listed companies - applicant held shares it purchased in respondent - applicant was lead plaintiff in securities class action against respondent - company associated with sole director of applicant (BSLLP) was sole shareholder of applicant - applicant had commenced other class actions against companies in which it held shares - BSLLP had been litigation funder for applicant in other securities class actions in which director had acted as solicitor for plaintiff - primary judge granted permanent stay of current proceeding on basis its predominant purpose was 'to generate income or revenue for interests associated' with director - held: primary judge correct to stay proceeding - proceeding had been instituted to gain 'collateral advantage' - proceeding was abuse of process.

[Melbourne City Investments](#)

[From Benchmark Friday, 21 July 2017]

## **Tallott v City of Stirling [2017] WASCA 126**

Court of Appeal of Western Australia

Buss P; Murphy & Mitchell JJA

False imprisonment - misfeasance in public office - trespass to goods - conversion - conspiracy to harm - 'collateral abuse of process' - three appeals from primary judge's decision in respect of three actions brought by appellant concerning his activities in relation to 'desire to sleep in the general area of Scarborough and Trigg beaches' and interaction with respondent - primary judge dismissed all three actions - standing - statutory interpretation - local law - malice - move on notice - power of arrest - held: trial judge correct to dismiss claims for the reasons he gave, subject to certain qualifications - no reason to doubt ultimate conclusion that appellant did not establish any of the claims against respondent - appeal dismissed.

[Tallott](#)

[From Benchmark Monday, 17 July 2017]

## **Gemini Energy and Minerals Pty Ltd v Luff [2017] WASC 190**

Supreme Court of Western Australia

Le Miere J

Contract - parties made written agreement that defendant would pay amount to plaintiff shares in plaintiff - agreement provided that \$100,000 payable on agreement's execution with balance payable by instalments - defendant did not pay the \$100,000 on execution or instalments on dates agreement specified - plaintiff claimed debt against defendant or damages for breach of contract or specific performance - held: parties intended to create legal relations - defendant was bound to pay amounts on dates specified in agreement - amounts payable as debts - agreement not abandoned - no misleading or deceptive conduct by plaintiff - defendant did not establish loss or damage due to entering agreement or making payments to plaintiff - judgment



for plaintiff for claimed amount and interest.

[Gemini](#)

[From Benchmark Friday, 21 July 2017]



# Benchmark

## The Author to Her Book

By [Anne Bradstreet](#)

Thou ill-form'd offspring of my feeble brain,  
Who after birth didst by my side remain,  
Till snatched from thence by friends, less wise than true,  
Who thee abroad, expos'd to publick view,  
Made thee in raggs, halting to th' press to trudge,  
Where errors were not lessened (all may judg).  
At thy return my blushing was not small,  
My rambling brat (in print) should mother call,  
I cast thee by as one unfit for light,  
Thy Visage was so irksome in my sight;  
Yet being mine own, at length affection would  
Thy blemishes amend, if so I could:  
I wash'd thy face, but more defects I saw,  
And rubbing off a spot, still made a flaw.  
I stretched thy joynts to make thee even feet,  
Yet still thou run'st more hobling then is meet;  
In better dress to trim thee was my mind,  
But nought save home-spun Cloth, i' th' house I find.  
In this array 'mongst Vulgars mayst thou roam.  
In Criticks hands, beware thou dost not come;  
And take thy way where yet thou art not known,  
If for thy Father askt, say, thou hadst none:  
And for thy Mother, she alas is poor,  
Which caus'd her thus to send thee out of door.

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