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Friday, 22 April 2016

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Botany Bay City Council v Minister for Local Government (NSWCA) - judicial review - dismissal of summons seeking relief in relation to Government proposal for appellant's merger with Council - appeal dismissed

CBX2 Pty Limited v National Australia Bank Ltd (NSWCA) - security for costs - appellant required to pay security for costs - leave to appeal refused

Murray v Sheldon Commercial Interiors Pty Ltd (NSWCA) - negligence - slip and fall from ladder at work - causation not established - erroneous finding of breach of duty - appeal dismissed

Fistar v Riverwood Legion and Community Club Ltd (NSWCA) - equity - fraud - club and appellant were both victims of fraudster - club could not recover amount from appellant - appeal allowed

Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (NSWCA) - pleadings - leases and tenancies - failure to address case pleaded by appellant - substantial miscarriage of justice - new trial - appeal allowed

Allianz Insurance Ltd v Larriera (NSWSC) - judicial review - motor accidents compensation - no error in claims assessor's assessment of damages - proceedings dismissed

AAI Ltd trading as GIO v Cooley (NSWSC) - judicial review - motor accidents compensation - no error in Panel's assessment of whole person impairment - summons dismissed

El-Kabbout v Insurance Australia Ltd t/as NRMA Insurance (NSWSC) - insurance - vehicle driven in area - insurer refused to pay claim - extension of time to appeal against decision in insurer's favour refused

Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd (NSWSC) - professional negligence - contract - solicitors' duties - failure to conduct further ASIC search just before draw down of loan was breach of duty/retainer - causation not established

Laratae v Dean's Pty Ltd (VSCA) - accident compensation - issue estoppel - no issue estoppel arising as result of County Court judge's decision in serious injury application - leave to appeal refused

Hammercall Pty Ltd v Minister for Transport & Main Roads (QCA) - real property - compulsory acquisition of land - refusal of declarations which challenged validity of acquisition of land - appeal dismissed

Tenney v Matthews (SASC) - contract - joint venture - no breach of settlement agreement - breach of loan agreement - judgment for defendants

Hendrex v Keating (TASSC) - negligence - contract - plaintiff injured in fall from ladder while working on defendants' house - defendants liable

Summaries With Link (Five Minute Read)

Botany Bay City Council v Minister for Local Government [2016] NSWCA 74
Court of Appeal of New South Wales
Bathurst CJ, Beazley P & Ward JA
Judicial review - appellant appealed against primary judge's dismissal of summons seeking declaratory and other relief concerning Government proposal for its merger with Rockdale City Council - Council's primary complaint was that there was to be no consideration in delegate's process of Council's alternative proposal - ss218A, 218B, 218D, 218E, 218F, 220, 263, 745 *Local Government Act 1993* (NSW) - procedural fairness - mandatory relevant considerations - proper construction of s263 - scope of delegate's authority - held: grounds of appeal failed - appeal dismissed.
Botany Bay
[From Benchmark Tuesday, 19 April 2016]

CBX2 Pty Limited v National Australia Bank Ltd [2016] NSWCA 79
Court of Appeal of New South Wales

Ward JA & Sackville AJA
Security for costs - primary judge allowed an appeal by respondent against associate judge's dismissal of its motion seeking appellant provide security for costs - applicant sought leave to appeal - *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) - s1335 *Corporations Act 2001* (Cth) - rr42.21. 45.2. 49.8, 49.9 *Uniform Civil Procedure Rules 2005 (*NSW) - held: no error by primary judge - no other matter of principle raised - no substantial injustice if leave to appeal refused - application dismissed.
CBX2
[From Benchmark Wednesday, 20 April 2016]

Murray v Sheldon Commercial Interiors Pty Ltd [2016] NSWCA 77
Court of Appeal of New South Wales
Leeming & Payne JJA; Schmidt J
Negligence - appellant glazier injured in slip and fall from ladder at work at construction site - appellant claimed he slipped because of dust - appellant sued head contractor and occupier of site - primary judge found respondent breached duty of care but causation not established - appellant appealed - ss5B, 5C, 5E *Civil Liability Act 2002* (NSW) - r36.16 *Uniform Civil Procedure Rules 2005 (*NSW) - s151Z *Workers Compensation Act 1987* (NSW) - challenges to factual findings - whether dust played role in accident - challenge to finding on causation - duty and breach - contributory negligence - held: challenges to primary judge's decision not made out - appeal dismissed.
Murray
[From Benchmark Wednesday, 20 April 2016]

Fistar v Riverwood Legion and Community Club Ltd [2016] NSWCA 81
Court of Appeal of New South Wales
Bathurst CJ, Leeming JA & Sackville AJA
Equity - fraud - appellant gave cheque to fraudster who was sole director of company and held herself out as financial adviser who could invest money - most funds provided by appellant dissipated - CEO of respondent club transferred amount from club's bank account to fraudster's company account - fraudster procured bank cheque made out to vendor of property and provided it to appellant's solicitors - solicitors delivered cheque to vendor's representatives - club sued fraudster, fraudster's company, CEO of club and appellant - appeal was against judgment obtained by club against appellant - appellant claimed personal action for money had and received could not be maintained and also challenged findings whether she was recipient of funds and volunteer - whether respondent club could recover against appellant where both were fraudster's victims - whether personal action for money had an received would "outflank" knowing receipt claim under *Barnes v Addy* - held: club's claim turned on whether appellant was a volunteer - appellant did not receive bank cheque as volunteer - appellant by solicitors had received bank cheque as repayment by fraudster's company of existing enforceable debt - appeal allowed.
Fistar

[From Benchmark Thursday, 21 April 2016]

Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2016] NSWCA 82
Court of Appeal of New South Wales
Simpson JA; Sackville & Emmett AJJA
Pleadings - leases and tenancies - self-represented litigant - appellant claimed declarations and orders arising out of lease of first respondent's premises - appellant claimed first respondent wrongfully prevented its access to premises - in first judgment primary judge answered certain questions and identified questions not properly addressed, calling for further submissions - in second judgment primary judge found appellant entitled to judgment against second respondent - second judgment was subject of appeal - grounds of appeal related to claim concerning alleged use of and refusal to return its goods - held: primary judge failed to address case which appellant pleaded and presented resulting in substantial wrong or miscarriage of justice - new trial necessary in interests of justice - appeal allowed.
Palermo
[From Benchmark Thursday, 21 April 2016]

Allianz Insurance Ltd v Larriera [2016] NSWSC 441
Supreme Court of New South Wales
Campbell J
Judicial review - motor accidents compensation - past and future economic loss - plaintiff sought judicial review of certificate of assessment by claims assessor of damages payable to first defendant for injuries suffered in motor accident - plaintiff contended assessor failed to comply with s126 *Motor Accidents Compensation Act 1999* (NSW) and did not give adequate reasons for assessment - held: assessor complied with s126 - no error in relation to assessment of future or past economic loss - no failure to engage with insurer's submissions - claims assessor's reasons were adequate - assessment not irrational or illogical - proceedings dismissed.
Allianz
[From Benchmark Tuesday, 19 April 2016]

AAI Ltd trading as GIO v Cooley [2016] NSWSC 434
Supreme Court of New South Wales
Fullerton J
Judicial review - motor accidents compensation - first defendant injured in motor vehicle accident - plaintiff challenged validity of decision of medical assessor's review panel to certify injuries as giving rise to 11% whole person impairment - s63 *Motor Accidents Compensation Act 1999* (NSW) - s69 *Supreme Court Act 1970* (NSW) - held: Court not persuaded Panel's decision vitiated by legal error - no denial of procedural fairness - Panel's approach to assessment of whole person impairment open to it - even if plaintiff had made out case for error, Court would have refused relief on grounds of plaintiff's conduct and "effective acquiescence" to Panel's approach - summons dismissed.

AAI Ltd
[From Benchmark Wednesday, 20 April 2016]

El-Kabbout v Insurance Australia Ltd t/as NRMA Insurance [2016] NSWSC 417
Supreme Court of New South Wales
Harrison AsJ
Insurance - plaintiff drove vehicle into area affected by flash flooding - plaintiff sued defendant insurer for denying claim for insurance - Magistrate found in favour of defendant - plaintiff sought extension of time to appeal - *Insurance Contracts Act 1984* (Cth) - *Uniform Civil Procedure Rules 2005* (NSW) - held: plaintiff's explanation for delay was not satisfactory - plaintiff's appeal grounds were weak - no actual prejudice demonstrated - extension of time to appeal refused.
El-Kabbout
[From Benchmark Wednesday, 20 April 2016]

Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd [2016] NSWSC 438
Supreme Court of New South Wales
Hoeben CJ at CL
Professional negligence - contract - solicitors' duties - plaintiffs in business of lending money secured by property - plaintiffs were former clients who sued incorporated legal practice for professional negligence and breach of contract in relation to provision of services concerning loans - ss5B, 5D, 5E & 5O *Civil Liability Act 2002* (NSW) - held: plaintiffs made out case for breach of duty/retainer in relation to loan for failure to conduct further ASIC search just before draw down of loan - no defence established under s5O - however causation not established - judgment for defendant.
Richtoll
[From Benchmark Friday, 22 April 2016]

Laratae v Dean's Pty Ltd [2016] VSCA 71
Court of Appeal of Victoria
Warren CJ; Tate & Beach JJA
Accident compensation - issue estoppel - worker brought proceedings for compensation for injury - Magistrate held respondent employer was estopped from contesting injury alleged by worker on basis of an issue estoppel arising as result of decision of County Court judge in application for leave to bring damages proceedings under s134AB(16)(b) *Accident Compensation Act 1985* (Vic) - primary judge held there was no issue estoppel because decision in serious injury application was not final - applicant sought to appeal - held: applicant's contention that County Court judge's finding on causation gave rise to issue estoppel was without substance - proposed appeal; had no prospect of success - leave to appeal refused.
Laratae
[From Benchmark Wednesday, 20 April 2016]

Hammercall Pty Ltd v Minister for Transport & Main Roads [2016] QCA 95
Court of Appeal of Queensland
M McMurdo P; Fraser & Mullins JJ
Real property - compulsory acquisition of land - Court refused appellant's application for declarations which challenged validity of acquisition of its land - ss7, 7(3)(e)(ii), 7(3)(e)(iii), 8(2), 8(2A), 9(1), 9(5), 9(5)(a), 20(1)(a), 20(3) & 36B(2) *Acquisition of Land Act 1967* (Qld) - ss24(1), 24(3), 24(4), 25(1), 25(2), 25(3), 25(8) & s25(12) *Transport Planning and Coordination Act 1994* (Qld) - whether failure to consider material - whether objections not heard by validly appointed or proper hearing officer - whether denial of procedural fairness - whether non-compliance with ss8(2) & 8(2A) Acquisition of Land Act - held: appellant did not succeed in grounds of appeal - appeal dismissed.
Hammercall
[From Benchmark Tuesday, 19 April 2016]

Tenney v Matthews [2016] SASC 34
Supreme Court of South Australia
Bampton J
Contract - joint venture - plaintiff and defendants were joint venturers - following mediation parties executed agreements settling matters in dispute and separating interests - plaintiff alleged breaches of settlement agreement seeking damages from defendants - defendants denied breach of settlement agreement and counterclaimed concerning alleged breaches of vendor loan agreement - defendants sought damages in amount of loan and enforcement of security over plaintiffs mining lease - ss6, 9, 9AA, 20, 21, 22, 26, 34, 35, 39, 73A & 73B *Mining Act 1971* (SA) - regs12 & 29 *Mining Regulations 2012* (SA) - held: no breach of settlement agreement - defendants established breach of loan agreement - defendants entitled to damages - judgment for defendants.
Tenney
[From Benchmark Friday, 22 April 2016]

Hendrex v Keating [2016] TASSC 20
Supreme Court of Tasmania
Blow CJ
Negligence - contract - damages - defendants were married and living together in house - defendant husband arranged for removal and replacement of roof cladding and for friends to help - plaintiff was one of the friends - defendant arranged to pay plaintiff for his work - defendant set up ladder for workers to use to travel to and from roof via roof of carport - plaintiff injured when he fell from ladder - plaintiff sued for negligence, breach of contract and breach of statutory duties under *Workplace Health and Safety Act 1995* (Tas) and *Workplace Health and Safety Regulations 1998* (Tas) - ss11 & 12(a) *Civil Liability Act 2002* (Tas) - held: claim for breach of statutory duties failed - defendants breached duty to take reasonable care to protect plaintiff from harm - damages reduced by 60% for contributory negligence - judgment for plaintiff

in sum of $1,126,904.

Hendrex

[From Benchmark Thursday, 21 April 2016]

The Late Worm
By Kay Ryan

The worms
which had been
thick are thin
upon the ground
now that it's gotten
later. They stick
against the path,
their pink chapped
and their inching
labored. It's a
matter of moisture
isn't it? Time, a
measure of wet,
shrinking, the
drier you get.

Kay Ryan

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