

Friday, 22 December 2017

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Australian Conservation Foundation Incorporated v Minister for the Environment and Energy (No 2) (FCAFC) - costs - environment and planning - dismissal of appeal against Minister's approval of proposed development of coal mine - departure from general rule that costs follow event not justified - appellant to pay respondents' costs

McGraw-Hill Financial, Inc v Clurname Pty Ltd (FCAFC) - pleadings - permission to add claims for deceit with claims to take effect from date of proceedings' commencement - prejudice - order set aside - leave to appeal otherwise dismissed

Lin v Solomon (NSWCA) - administrative law - bias - contract - evidence - primary judge refused to recuse herself for bias and awarded judgment against appellant guarantor of lessee for lessee's breach of lease - appeal allowed in one respect involving less than \$3000 - appeal allowed in part

Afoa v McBride (NSWCA) - negligence - appellant child injured upon ingesting 'highly corrosive substance' when drinking from glass at barbecue - respondent owner of premises not liable - appeal dismissed

Sutherland Shire Council v Safar (NSWCA) - negligence - occupiers' liability - respondent injured in slip and fall on water on parquet floor - Council liable - appeal dismissed

El-Wasfi v State of New South Wales; Kassar v State of New South Wales (NSWCA) - malicious prosecution - wrongful arrest - two appeals and cross-appeals arising from unsuccessful murder prosecution - no error in failure to find malice or no reasonable and

probable cause - challenge succeeded to finding of wrongful arrest - appeals dismissed - cross-appeal allowed

Upside Property Group Pty Ltd v Tekin (NSWCA) - contract for sale of land - no error in dismissal of purchaser's claim for loss of bargain damages following acceptance of vendor's repudiation - appeal dismissed

Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd (NSWCA) - security of payments - challenge to determination on basis underlying entitlements had been assigned to company - appeal allowed

Mailey v Sutherland Shire Council (NSWCA) - building and construction - building control - Council's order that appellants perform work to 'place land in a safe condition' was not ultra vires - appeal dismissed

Live Group Pty Ltd and Anor v Rabbi Ulman and Ors (NSWSC) - contempt - natural justice - Court did not have jurisdiction to intervene in Beth Din's affairs even though natural justice not afforded to second plaintiff - defendants guilty of two contempt charges

Bridge v Coles Supermarkets Australia Pty Ltd (No 3) (NSWSC) - negligence - occupier's liability - slip and fall in car park - defendant occupier liable - judgment for plaintiff in sum of \$688,071

CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd (NSWSC) - contract - joint venture - estoppel - arbitration 'called sum dispute' - stay refused - defendant bound to execute joint venture board resolution

CB Australia Ltd v Shepherd (NSWSC) - contract - sale of shares in company - claim for adjustment to purchase price in accordance with 'Completion Balance Sheet' succeeded - defendant entitled to relief on cross-claim

Griffiths v Steele (VSC) - negligence - plaintiff's foot crushed when defendant ran over it while driving vehicle - defendant liable

Rowe v Transport Accident Commission (VSCA) - accident compensation - transport accident - serious injury application - refusal of leave to commence action in respect of psychiatric injury - leave to appeal refused

CFI Rentals Pty Ltd v Roussos & Anor (QCA) - loan - guarantee - dismissal of proceedings seeking equitable charge over first respondent's interest in land and improvements under guarantee - appeal allowed

Appleyard & Anor v Westpac Banking Corporation (QCA) - contract - possession - National Credit Code - appellants ordered to deliver possession of land to bank - costs order varied - appeal otherwise dismissed

Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd & Anor (QSC) - contract - sale of goods - claim arising from sale of yacht - breach of implied terms that yacht would be fit for purpose and of merchantable quality - breach of express warranty - plaintiff buyer succeeded against both seller and manufacturer

McCourt v National Australia Bank Ltd [No 2] (WASC) - contract - claims' arising from facility's termination and enforcement of securities over properties - claims without merit - claims dismissed

Cockburn v Jacobsen (ACTSC) - negligence - collision between taxi driver carrying passengers and light pole - physical interference by passenger with driver - driver's conduct not unreasonable in the circumstances - no breach of duty by driver

Summaries With Link (Five Minute Read)

Australian Conservation Foundation Incorporated v Minister for the Environment and Energy (No 2) [2017] FCAFC 216

Full Court of the Federal Court of Australia

Dowsett, McKerracher & Robertson JJ

Costs - second respondent sought to develop coal mine in Central Queensland - respondent Minister approved proposed development under *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) - Full Court of the Federal Court of Australia upheld primary judge's dismissal of appellant's application for review - respondents sought that appellant pay their costs of appeal - parties accepted that 'general expectation' was that costs follow event - appellant submitted that Court should depart from general rule - held: Court did not accept appellant had reason to believe Minister failed to comply with Act's requirements - not relevant that appellant's prosecution of appeal not motivated by financial gain - appeal not clearly arguable - not justified to depart from general rule - appellant to pay respondents' costs of appeal.

[Australian Conservation Foundation](#)

[From Benchmark Tuesday, 19 December 2017]

McGraw-Hill Financial, Inc v Clurname Pty Ltd [2017] FCAFC 211

Full Court of the Federal Court of Australia

Allsop CJ; Jagot & Yates JJ

Pleadings - deceit - prejudice - primary judge permitted amendments to application and

statement of claim to add claims for deceit, and ordered that amendments take effect from date of proceedings' commencement - primary judge's attention not drawn to fact that second applicant 'would or might be precluded' from contending deceit claim statute barred - prejudice - held: there was error by oversight - trial could miscarry because evidence going to discoverability of deceit before certain date 'would be irrelevant' - there was error in overlooking prejudice - respondent consented to order being set aside on basis leave to appeal be otherwise dismissed - Court satisfied to set aside order - leave to appeal otherwise dismissed. -

[McGraw-Hill Financial](#)

[From Benchmark Tuesday, 19 December 2017]

Lin v Solomon [2017] NSWCA 328

Court of Appeal of New South Wales

Meagher, Payne & White JJA

Administrative law - bias - contract - appellant was guarantor of lessee - District Court Judge refused to recuse herself due to apprehended bias and proceeded to award respondents amount for lessee's breaches of lease - appellant's cross-claim for misleading or deceptive conduct by respondents' leasing agent dismissed - alleged apprehended bias - alleged errors in admission of evidence, quantification of damages for breach of lease, and in respect of cross-claim - non-hearsay purpose - business record - *Evidence Act 1995* (NSW) - *Fair Trading Act 1987* (NSW) - held: appellant's success limited to one respect as to cost of air conditioner's removal - matter involved less than \$3000 - appellant to pay \$602,178.35 to respondents - appeal allowed in part.

[View Decision](#)

[From Benchmark Monday, 18 December 2017]

Afoa v McBride [2017] NSWCA 323

Court of Appeal of New South Wales

Macfarlan & Payne JJA; Sackville AJA

Negligence - appellant child injured upon ingesting 'highly corrosive substance' when drinking from glass at barbeque - appellant by tutor claimed damages against respondent who owned premises but was not at barbeque - appellant contended that prior to barbeque, respondent had used caustic product to unblock sink in kitchen at premises, had left a glass containing product on bench, that some water was 'unwittingly put in the glass' at barbeque, that the glass was given to appellant in kitchen, that appellant left glass on table in garden and was injured when he drank from glass later - primary judge found in respondent's favour, finding that appellant did not discharge onus to prove events occurred in alleged manner - whether 'glaringly improbable' findings by primary judge - credit - *Fox v Percy* (2003) 214 CLR 118 - held: challenge to primary judgment failed - appeal dismissed.

[View Decision](#)

[From Benchmark Monday, 18 December 2017]

Sutherland Shire Council v Safar [2017] NSWCA 203

Court of Appeal of New South Wales

Macfarlan & White JJA; Harrison J

Negligence - respondent injured on rainy day when she slipped on water on parquetry floor while walking from auditorium - respondent sued Council, as premises' occupier, in negligence - primary judge found in respondent's favour - whether erroneous finding Council negligently failed to take precautions against risk of person slipping and being injured on wet floor - whether respondent established she would not have slipped and been injured if precautions taken - whether erroneous conclusion risk of harm was obvious risk - ss5B, 5G, 5D & 5H *Civil Liability Act 2002* (NSW) - held: appellant breached its duty of care by failing to take reasonable steps to prevent, or minimise instances of, patrons 'bringing wet umbrellas and coats into the auditorium' - appeal dismissed.

[View Decision](#)

[From Benchmark Tuesday, 19 December 2017]

El-Wasfi v State of New South Wales; Kassas v State of New South Wales [2017] NSWCA 332

Court of Appeal of New South Wales

Leeming, Simpson & Payne JJA

Malicious prosecution - wrongful arrest - two appeals and cross-appeal arising from unsuccessful murder prosecution - whether primary judge erroneously failed to find malice by prosecutors, in not finding no reasonable and probable cause for prosecutions in respect of three appellants, and in finding one appellant wrongly arrested when charged with concealing evidence - *A v State of New South Wales* (2007) 230 CLR - held: appeals dismissed in respect of failure to find malice and failure to find no reasonable and probable cause - challenge succeeded to finding of wrongful arrest - cross-appeal allowed.

[View Decision](#)

[From Benchmark Wednesday, 20 December 2017]

Upside Property Group Pty Ltd v Tekin [2017] NSWCA 336

Court of Appeal of New South Wales

McColl, Macfarlan & Meagher JJA

Contract - respondent vendor repudiated contract for sale of land - appellant purchaser accepted repudiation - appellant claimed loss of bargain damages following acceptance of respondent vendor's repudiation - primary judge dismissed purchaser's claim - whether, when contract was terminated for anticipatory breach, appellant was 'sufficiently ready and willing to perform that contract' - whether appellant established loss for which damages recoverable - 'readiness and willingness' - held: Court not persuaded that, at time of termination, appellant was not 'substantially incapacitated from completing' - appellant failed to establish element of cause of action - appeal dismissed.

[View Decision](#)

[From Benchmark Wednesday, 20 December 2017]

Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd [2017] NSWCA 337

Court of Appeal of New South Wales

Macfarlan JA; Gleeson & Leeming JJA

Security of payments - applicant engaged respondent to undertake works respondent at substations (Canterbury substation and Leichardt substation) - respondent sent invoices to applicant contending they were payments claims under s13 *Building and Construction Industry Security of Payment Act 1999* (NSW) - adjudicator rejected applicant's challenge to claims on basis respondent had assigned entitlements to company - primary judge rejected assignment argument but found applicant was denied procedural fairness in respect of one determination (Leichardt substation determination) - applicant sought to appeal against rejection of its challenge to the two determinations on basis of the assignment argument - - held: grant of leave confined only to Canterbury substation determination as applicant had been successful in respect of Leichardt substation determination due to denial of procedural fairness - appeal allowed

[View Decision](#)

[From Benchmark Wednesday, 20 December 2017]

Mailey v Sutherland Shire Council [2017] NSWCA 343

Court of Appeal of New South Wales

Macfarlan & Meagher JJA; Preston CJ of LEC

Building and construction - building control - three appellants owned land - appellants challenged, in Land and Environment Court, validity of Council's order to perform work to 'place land in a safe condition' - primary judge dismissed proceeding, finding that order was not ultra vires, either in narrow sense by not conforming to s124 *Local Government Act 1993* (NSW), or in wide sense by being uncertain or 'issued for an improper purpose' - having found the order was not invalid, primary judge did not proceed to determine appellants' damages claim - held: appellants did not establish order was ultra vires - primary judge correct to dismiss proceedings - appeal dismissed.

[View Decision](#)

[From Benchmark Friday, 22 December 2017]

Live Group Pty Ltd and Anor v Rabbi Ulman and Ors [2017] NSWSC 1759

Supreme Court of New South Wales

Sackar J

Contempt - natural justice - proceeding arose from 'observant Jew's refusal to answer the summons of a Rabbinic Court' - plaintiffs sought to restrain Beth Din from hearing commercial dispute between first plaintiff and company (SalesPort) and from threatening imposition of religious sanctions on second plaintiff for failure to attend Sydney Beth Din - plaintiffs claimed Sydney Beth Din had no jurisdiction to conduct arbitration proceedings and could not hear dispute due to apprehension of bias - plaintiff also alleged contempt of court due to application of 'calculated pressure' on second plaintiff - held: Court did not have jurisdiction to intervene in

affairs of Beth Din, even though Court satisfied Beth Din had not afforded natural justice to second plaintiff - Beth Din's threat of sanctions was 'improper pressure' tending to interfere with administration of justice - defendants guilty of two contempt charges - Court to hear party on appropriate relief and question of penalty.

[View Decision](#)

[From Benchmark Monday, 18 December 2017]

Bridge v Coles Supermarkets Australia Pty Ltd (No 3) [2017] NSWSC 1800

Supreme Court of New South Wales

Campbell J

Negligence - occupier's liability - plaintiff sued defendant in negligence for damages arising from slip and fall in store car park - occupier was lessee of car park - identification and foreseeability of risk - whether risk not insignificant - whether 'reasonable occupier' would have taken precautions - whether obvious risk - causation - contributory negligence - *Civil Liability Act 2002* (NSW) - held: defendant negligently failed to 'treat smoothed polished surface with non-slip material' - causation established - no contributory negligence - judgment for plaintiff in sum of \$688,071.

[View Decision](#)

[From Benchmark Thursday, 21 December 2017]

CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd [2017] NSWSC 1798

Supreme Court of New South Wales

Ward CJ in Eq

Contract - estoppel - arbitration - stay - dispute between parties to unincorporated joint venture for works concerning M4 motorway in Sydney - dispute was in relation to whether defendant bound to pay 'Called Sum' for joint venture's purposes - issue raised in defendant's motion seeking stay was whether plaintiff entitled to invoke Court's jurisdiction to determine 'Called Sum Dispute' or bound to refer dispute to arbitration in accordance with joint venture agreement - construction of 'urgent injunctive or declaratory relief' in clause of joint venture deed - s248G *Corporations Act 2001* (Cth) - s7(2) *International Arbitration Act 1974* (Cth) - held: stay refused - plaintiff did not obtain precise relief it sought - defendant bound to execute joint venture board resolution - orders made.

[View Decision](#)

[From Benchmark Thursday, 21 December 2017]

CB Australia Ltd v Shepherd [2017] NSWSC 1768

Supreme Court of New South Wales

Parker J

Contract - proceedings concerned sale of shares in company (SGS) - plaintiff was purchaser and defendant was vendor - claim for adjustment of purchase price arising from procedure concerning service of balance sheet after completion - whether proper completion - whether breach of contract - cross-claim for relief concerning parties' arrangement that certain debts

owed to SGS were assigned to company (LS Bell) - contractual requirement for plaintiff to account to defendant for payments to LS Bell - held: plaintiff's claim against defendant for adjustment to purchase price in accordance with plaintiff's 'Completion Balance Sheet' succeeded - defendant entitled to specific performance requiring plaintiff to cause SGS to pay amount on account of money SGS received after Completion - orders made.

[View Decision](#)

[From Benchmark Thursday, 21 December 2017]

Griffiths v Steele [2017] VSC 795

Supreme Court of Victoria

Keogh J

Negligence - parties were part of crew engaged concreting work on bridge - plaintiff's foot crushed when defendant drove vehicle over it - plaintiff sued defendant in negligence, contending his negligent driving caused accident and injury - disputed factual issues - whether defendant beckoned plaintiff to approach vehicle and steady load - whether defendant aware of plaintiff approaching vehicle - which side of formwork defendant was standing on when plaintiff approached vehicle - which side of formwork plaintiff was standing on when vehicle driven forward - held: defendant breached duty by his driving of vehicle - defendant's negligence caused accident and plaintiff's injuries - no contributory negligence - judgment for plaintiff.

[Griffith](#)

[From Benchmark Friday, 22 December 2017]

Rowe v Transport Accident Commission [2017] VSCA 377

Court of Appeal of Victoria

Osborn, Priest & Beach JJA

Accident compensation - serious injury application - applicant driver of truck collided with police van in 2007 - applicant not injured - in 2014 applicant sought leave under s93(4)(d) *Transport Accident Act 1986* (Vic) to claim damages for injuries in 2007 collision in respect of 'severe long-term mental or severe long-term behavioural disturbance or disorder' - primary judge dismissed applicant's claim - primary judge found that collision played 'but a relatively minor role' in psychiatric condition - applicant sought to appeal - held: applicant's proposed appeal had did not have prospects of success - leave to appeal refused.

[Rowe](#)

[From Benchmark Wednesday, 20 December 2017]

CFI Rentals Pty Ltd v Roussos & Anor [2017] QCA 308

Court of Appeal of Queensland

Fraser, Philippides & McMurdo JJA

Loan - guarantee - first and second respondent were owners as joint tenants of land and improvements - appellant sought declaration it had equitable charge over first respondent's interest in land and improvements under Secured Guarantee between appellant and first respondent - appellant also sought appointment of statutory trustees under *Property Law Act*

1974 (Qld) - guarantee given concerning company's obligation under loan agreement with appellant and associated agreement for lease - primary judge found no money owing by first respondent to appellant under guarantee until it was demanded from first respondent - as no demand proved, primary judge dismissed proceeding entirely - on appeal, appellant challenged construction of guarantee, arguing no demand required and that it was denied procedural fairness in dismissal of proceedings where respondents had sought no such dismissal - whether order for dismissal justified by ground arising after order made - whether commencement of proceedings amounted to election which ended appellant's right to appeal - whether prejudice - whether abuse of process - held: appeal allowed

[CFI Rentals](#)

[From Benchmark Wednesday, 20 December 2017]

Appleyard & Anor v Westpac Banking Corporation [2017] QCA 316

Court of Appeal of Queensland

Fraser, Philippides & McMurdo JJA

Possession - contract - appellants owned land as joint tenants - appellants appealed against primary judge's order that they deliver possession of land to respondent bank - bank's mortgage secured obligations under loan contracts - one loan contract regulated by National Credit Code - bank relied on default under loan contract which Code didn't regulate - whether National Credit Code precluded bank from enforcing mortgage - whether Code's restrictions on enforcement of mortgages applied - *National Consumer Credit Protection Act 2009* (Cth) - schedule 1, ss5, 7(2) & 88 *National Credit Code* - held: no error in primary judge's decision to order appellants to give possession of land to bank - costs order varied such that appellants were to pay costs on standard, rather than indemnity basis - appeal otherwise dismissed.

[Appleyard](#)

[From Benchmark Thursday, 21 December 2017]

Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd & Anor [2017] QSC 306

Supreme Court of Queensland

Atkinson J

Contract - sale of goods - claim arising from sale of yacht - plaintiff buyer claimed damages against first defendant seller for breach of terms implied into contract by ss19(1) & 19(2) *Sale of Goods Act 1923* (NSW) and s71 *Trade Practices Act 1974* (Cth) (TPA) - second defendant was manufacturer of yacht - plaintiff claimed damages, against second defendant for breach of the warranty it gave, compensation under TPA, and damages in negligence - held: plaintiff succeeded against first defendant for breach of implied terms that yacht would be fit for purpose and of merchantable quality - plaintiff also succeeded against second defendant for breach of express warranty.

[Tarangau](#)

[From Benchmark Monday, 18 December 2017]

McCourt v National Australia Bank Ltd [No 2] [2017] WASC 370

Supreme Court of Western Australia

Tottle J

Contract - bank terminated finance facility it availed to plaintiff and former wife - plaintiff claimed damages arising from facility's termination and bank's enforcement of securities over properties - plaintiff contended bank breached oral agreement, that bank officer made representations to him on which he relied, that bank unconscionably denied him opportunity to refinance with other bank, and that bank had 'wilfully and recklessly sacrificed' plaintiff's interests in exercising power of sale - plaintiff also contended bank had conceded liability at hearing before Master - held: plaintiff's claims did not have merit - claim dismissed.

[McCourt](#)

[From Benchmark Tuesday, 19 December 2017]

Cockburn v Jacobsen [2017] ACTSC 380

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Negligence - proceedings arising from collision of taxi with light pole - first defendant was driver - second defendant was taxi's compulsory third party insurer - plaintiffs were three passengers - passengers affected by alcohol - defendants accepted that first defendant's loss of control of taxi would constitute a breach of duty of care by him in an ordinary course of events - however defendants contended course of events was extraordinary due to passenger's physical interference with driver, and surrounding circumstances of behaviour towards driver while he was driving - defendants contended driver's driving was reasonable in the circumstances he was faced with - *Civil Law (Wrongs) Act 2002 (ACT)* - held: plaintiffs did not succeed in establishing defendants' liability - first defendant did not act unreasonably in the circumstances - no breach of duty - judgment for defendants.

[Cockburn](#)

[From Benchmark Monday, 18 December 2017]



Benchmark

Empty Manger

By: David Conolly

Once a church,
the little building
gathers dust.

Has he finally
abandoned us?

Is this the end
of
the lovely dream?

Look
at the hot, silent land -
and remember:

it was to planet earth
he came,
not to bricks
and crumbling mortar.

And to earth's inhabitants.

Wherever his Way
still lives -
and in whom -

he is present.

Always will be.

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