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Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Katter v Melhem (No 2) (FCA) - bankruptcy - no basis for Court to *go behind* District Court judgment on which bankruptcy notice was based (B)

Tovir Investments Pty Ltd v Waverley Council (NSWCA) - environment and planning - use of premises as backpackers accommodation in breach of consent orders - contempt (I)

Thelander v Sydney Ferries Corporation (NSWSC) - negligence - ferry worker injured foot when he tripped over sill - employer failed to paint sill to show height - employer liable (I)

Kolundzic v Quickflex Constructions Pty Ltd (NSWSC) - judicial review - no error in decisions of Workers Compensation Commission - proceedings dismissed (I C G)

Corby v Network Ten Pty Ltd (NSWSC) - pleadings - defamation - objections to imputations - rulings (I)

Kennett Pty Ltd v Janssen (SASC) - subcontract between builder and bricklayers - repudiation by bricklayers - builder entitled to damages (I B C)

Worksafe Western Australia Commissioner v Australian Countertop Pty Ltd (in liq) (WASC) - corporations - Commissioner granted leave to commence proceeding against company in liquidation (I C G)

Summaries with links (5 minute read)

Katter v Melhem (No 2) [2014] FCA 1176

Federal Court of Australia

Wigney J

Bankruptcy - applicants sought order setting aside bankruptcy notice issued on basis of judgment of District Court of NSW - judgment had not been set aside or varied - applicants submitted Court should go behind the judgment and conclude they were not indebted to respondent - applicants also submitted judgment exceeded jurisdictional limit of District Court and was based on terms of settlement that operated as a penalty - applicants submitted judgment debt was not enforceable by way of bankruptcy notice - held: no substantial reasons for Court to go behind judgment - compelling discretionary reasons for not going behind judgment - judgment was satisfactory evidence of the debt - no other basis for setting aside bankruptcy notice - application dismissed.

[Katter](#) (B)

Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Environment and planning - appellants consented to orders made by Land and Environment Court restraining them from using premises they owned and managed as *backpackers accommodation* within the meaning of Waverley Council Environmental Plan - Council commenced contempt proceedings in Land and Environment Court against appellants for failing to comply with consent orders by continuing to use premises as *backpackers accommodation* - appellants found guilty of contempt - appellants argued the consent orders could only be contravened if the accommodation was provided for no more than two months - held: there was overwhelming evidence that the premises were still being used as *backpackers accommodation* within the meaning of the Waverley Local Environmental Plan - statements made by appellants on website that they did not provide accommodation for less than three months did not accord with how the premises actually operated - appeal dismissed.

[Tovir Investments Pty Ltd](#) (I)

Thelander v Sydney Ferries Corporation [2014] NSWSC 1530

Supreme Court of New South Wales

Adams J

Negligence - plaintiff worked for Sydney Ferries as general purpose hand on Manly ferries - plaintiff injured his foot when moving into crew's mess from a vestibule tripped on a raised sill forming part of the doorway - plaintiff thought the vessel was Queenscliff, but it was in fact Narrabeen, on which relevant sill was significantly higher than that on Queenscliff - plaintiff claimed sill should have been marked to draw attention to its height - Sydney Ferries claimed sill

sufficiently marked and that it was not reasonably foreseeable that experienced crew member such as plaintiff would not be aware that sills were of various heights throughout vessels - held: Court satisfied Sydney Ferries was in breach of its duty to the plaintiff by not painting the step in a way which made its height evident, even on a passing glance - plaintiff's injury resulted from Sydney Ferries' negligence - no contributory negligence - judgment for plaintiff.

[Thelander](#) (I)

Kolundzic v Quickflex Constructions Pty Ltd [2014] NSWSC 1523

Supreme Court of New South Wales

Campbell J

Judicial review - plaintiff challenged legality of three decisions of Workers' Compensation Commission - two decisions of approved medical specialist (AMS) - decision refusing plaintiff's application to appeal from the decision of MAS - legal status of Work Cover Guidelines - held: AMS did not disregard, or mistake, limits of his function or powers imposed by WorkCover Guides - Court not persuaded Medical Assessment Certificate vitiated by jurisdictional error or error on the face of the record - refusal of AMS to reconsider assessment not vitiated by jurisdictional error or error on the face of the record - no error in Registrar's refusal of application to appeal - proceedings dismissed.

[Kolundzic](#) (I C G)

Corby v Network Ten Pty Ltd [2014] NSWSC 1431

Supreme Court of New South Wales

McCallum J

Pleadings - defamation - actions by members of Schapelle Corby's family arising out of television broadcast - defendants objected that two imputations relied upon each plaintiff did not differ in substance - plaintiff objected to contextual imputations sought to be relied upon by the defendants in proposed amended defence to claim - s26 *Defamation Act 2005* (NSW) - held: there was really only one substantial meaning conveyed by television programme, the components of which were presently captured in imputations - plaintiffs should have leave to amend their pleadings accordingly - objections to contextual imputations upheld.

[Corby](#) (I)

Kennett Pty Ltd v Janssen [2014] SASC 164

Supreme Court of South Australia

Blue J

Contract - builder (Kennett) entered subcontract with bricklayers (Janssen) to undertake bricklaying for facility - Janssen wrote to Kennett alleging it was in breach of contract by not paying progress and variation claims and changing scope of work - Janssen stated it had suspended work and would only resume after all invoices paid and revised scope of work and variations were

agreed - Kennett issued notice terminating subcontract for repudiation - Kennett sued Janssen for damages for breach of contract - held: repudiatory conduct may be comprised of acts or omissions in breach of contract or of statements of intention as to future acts or omissions, provided that the conduct evinced an unwillingness or inability to render substantial performance of the contract - adoption by one party of an erroneous view as to the construction of a contract or another relevant matter apparent to a reasonable observer in the position of the other party was one factor to be taken into account in assessing whether a party's conduct was repudiatory - objectively from perspective of reasonable observer in the position of Kennett, Janssen's conduct was repudiatory - judgment for Kennett.

[Kennett Pty Ltd](#) (I B C)

Worksafe Western Australia Commissioner v Australian Countertop Pty Ltd (in liq) [2014]

WASC 413

Supreme Court of Western Australia

Master Sanderson

Corporations - Commissioner sought leave under s471B *Corporations Act 2001* (Cth) to commence proceedings against company in liquidation under *Occupational Safety and Health Act 1984* (WA) (OSHA) in relation to accident at company's premises in which employee of company died - Commissioner claimed that company failed to take Commissioner's recommendations as to safe system of work in breach of the OSHA - liquidator claimed company had no assets and questioned worth of issuing proceedings - held: leave to issue proceedings was justified - there was real prospect that company may have breached OSHA - under s553B(1) *Corporations Act*, any penalty imposed by a court was not provable in the insolvency - no creditor would suffer as a result of leave being granted.

[Worksafe Western Australia Commissioner](#) (I C G)

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