

Tuesday, 16 December 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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## Executive Summary (1 minute read)

**ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (No 2)** (NSWCA) - reliance on fresh evidence in appeal books - fresh evidence not before primary judge - no effect on outcome - no further orders made (I B)

**Welsh v Carnival PLC trading as Carnival Australia** (NSWCA) - damages - negligence - inadequacy of reasons - miscarriage of justice - retrial (I)

**Saba v Moit Projects** (NSWSC) - banking - real estate agent authorised to fill up cheque - condition on delivery of cheque satisfied - vendor entitled to amount of cheque (B)

**Weekes v Barlow** (NSWSC) - succession - lump sum family provision order granted to de facto partner of deceased (B)

**Merhi v Ford Motor Company Australia Ltd** (VSCA) - accident compensation - fresh evidence required *serious injury* question to be redetermined - appeal allowed (I G)

**Play Australia Pty Ltd v Papadimitriou** (VSC) - trade practices - investment in development project - no misleading or deceptive conduct - claim dismissed (I B C)

**Murabito v Conspect Construction Pty Ltd** (WASC) - oppression - oppressive conduct by company against minority shareholder - order for purchase of shares (B C)

## Summaries with links (5 minute read)

### **ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (No 2) [2014] NSWCA 431**

Court of Appeal of New South Wales

Beazley P; Macfarlan & Leeming JJA

Court unanimously dismissed appeal - appellants contended primary judge erred in accepting one valuer's report over another's - appellants relied on curricula vitae of valuers which, although included in appeal books, had not been in evidence before primary judge - one document contained a date well after conclusion of trial - documents not before primary judge were inserted by appellants into appeal books without application being made for tender of fresh evidence - held: appellants placed express reliance on documents - serious irregularity in connection with preparation and conduct of appeal - no effect on outcome of appeal or material effect on parties - not appropriate to refer matter for further investigation - appropriate that there be a public record of Court's conclusion that solicitor had not adhered to the standards it expects of those who appear before it - no further orders made.

[ACES Sogutlu Holdings Pty Ltd \(in liq\) \(I B\)](#)

### **Welsh v Carnival PLC trading as Carnival Australia [2014] NSWCA 430**

Court of Appeal of New South Wales

McColl JA, Sackville AJA & Adamson J

Damages - negligence - appellant injured when part of ceiling fell on head on cruise ship operated by respondent - respondent admitted liability - matter proceeded as an assessment of damages - primary judge assessed damages - appellant submitted primary judge's reasons did not indicate basis on which claim for substantial damages was effectively rejected - appellant claimed evidence that arguably supported claim not considered and that there was substantial miscarriage of justice - appellant sought retrial - held: primary judge's reasons inadequate to fulfil judicial function of giving reasons amounting to error of law - substantial wrong or miscarriage within r51.53 *Uniform Civil Procedure Rules 2005* (NSW) - undoubted and substantial prejudice to respondent in being required to conduct a new trial did not militate against an order for a re-trial - appeal allowed.

[Welsh \(I\)](#)

### **Saba v Moit Projects [2014] NSWSC 1759**

Supreme Court of New South Wales

McDougall J

Banking - plaintiff was proprietor of property - property went to auction - purchaser signed cheque form on business account and handed form to real estate agent - real estate agent filled up cheque with plaintiff's name as payee and gave it to her - cheque not met on presentation - account closed - plaintiff sued for value of cheque - held: purchaser handed over form of cheque

to real estate agent on communicated basis it was to be filled up as required for payment of deposit - condition on delivery of cheque was accepted and honoured - plaintiff made good her claim to amount of cheque - judgment for plaintiff.

[Saba](#) (B)

## **Weekes v Barlow [2014] NSWSC 1776**

Supreme Court of New South Wales

Hallen J

Succession - plaintiff sought family provision order pursuant to s59 *Succession Act 2006* (NSW) out of deceased's estate - plaintiff was person with whom deceased was living in a de facto relationship at the time of death - defendant was child of deceased and one of two executors of deceased's Will - competing financial claims of beneficiaries - held: no dispute plaintiff was an *eligible person* under s57(1)(b) - Court satisfied for purposes of s59(1)(c) that deceased did not make adequate provision for proper maintenance or advancement in life of plaintiff - Court satisfied provision should be made for plaintiff out of estate - provision should be expressed in terms of lump sum.

[Weekes](#) (B)

## **Merhi v Ford Motor Company Australia Ltd [2014] VSCA 328**

Court of Appeal of Victoria

Neave, Tate & Santamaria JJ

Accident compensation - appeal from decision in which County Court judge held spine injury suffered by appellant did not amount to serious injury under s134AB(37)(a) *Accident Compensation Act 1985* (Vic) and that mental disorder was not a serious injury under s134AB(37)(c) - held: no failure to give proper weight to medical evidence - no failure to give adequate reasons - leave to admit fresh evidence granted - Court accepted that fresh evidence required question of whether appellant had a *serious injury* to be re-determined - appeal allowed - matter remitted.

[Merhi](#) (I G)

## **Play Australia Pty Ltd v Papadimitriou [2014] VSC 608**

Supreme Court of Victoria

Daly AsJ

Trade practices - plaintiff claimed damages against first and second defendants arising out of investment it made in third defendant - plaintiff claimed first and second defendants engaged in misleading or deceptive conduct by making representations to its sole director to induce him to make investment of money in third defendant which in turn would invest in multiunit apartment development - development project never proceeded - third defendant went into liquidation - plaintiff lost its investment - s159 *Fair Trading Act 1999* (Vic) - Pt IV *Wrongs Act 1958* (Vic) -



capabilities and financial standing of defendants - held: plaintiff failed to establish defendants liable for misleading or deceptive conduct - proceeding dismissed.

[Play Australia Pty Ltd](#) (I B C)

**Murabito v Conspect Construction Pty Ltd [2014] WASC 474**

Supreme Court of Western Australia

Master Sanderson

Oppression - plaintiff was minority shareholder in first defendant - plaintiff sought order under s232(e) *Corporations Act 2001* (Cth) first defendant's affairs were being conducted in an oppressive fashion - plaintiff sought order under s233(e) that company purchase his shares - held: plaintiff had been victim of oppressive conduct - plaintiff's forced removal as a director of company and failure of directors to provide plaintiff with relevant financial information as to company's affairs was conduct which was unfair - orders made for purchase of plaintiff's shares.

[Murabito](#) (B C)

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