

Friday 19 September 2014

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**ACCC v Safe Breast Imaging Pty Ltd (No 2)** (FCA) - consumer law - misleading or deceptive conduct by company and director - declarations, injunctions, pecuniary penalties, and banning orders made (I)

**Mooney v MS Magdalene Schiffahrtsgesellschaft mbH** (NSWSC) - negligence - nuisance - *Marine Pollution Act 1987* (NSW) - Court declined to resolve issues regarding applicability of an international convention as separate questions (I B)

**Bendigo and Adelaide Bank v Stamatis** (NSWSC) - unconscionable conduct - son forged immigrant parents' signature - parents estopped from denying loan - unconscionable to enforce loan - special disadvantage (I B)

**Mainieri v Cirillo** (VSCA) - equity - mother partially paid son's debt secured over son's property - parol evidence rule not applicable - son's property subject to equitable lien in mother's favour (B)

**Western Australian Land Authority v Meadowcroft** (WASC) - sale of land - Land Authority's right to repurchase where no development within 30 months - specific performance granted (B)



**WQube Port of Dampier Pty Ltd v Philip Loots of Kahlia Nominees Ltd (WASC)** - application for judicial review of adjudicators' decisions under *Construction Contracts Act 2004 (WA)* - alleged errors either not jurisdictional or not made out (C G)

**Allen v Chadwick (SASFC)** - motor vehicle accident - reliance on skill and care of intoxicated driver - not wearing seatbelt - damages not reduced (I)

## Summaries with links (5 minute read)

### **ACCC v Safe Breast Imaging Pty Ltd (No 2) [2014] FCA 998**

Federal Court of Australia

Barker J

Consumer law - the Court earlier found a company had contravened s18 *Australian Consumer Law (Cth)* and s52 *Trade Practices Act 1974 (Cth)* - director also found liable as accessory - misleading or deceptive representations about the risk of breast cancer and alternatives to mammography - Court now to decide appropriate relief - held: no real dispute declarations should be made - injunctions appropriate to communicate to the respondents and the public generally the misleading or deceptive conduct was serious and should not be repeated - pecuniary penalties should be high enough to be more than an acceptable cost of doing business, but not crushing - company should send corrective letters to its customers - director remained defensive about the contraventions - she should be banned from managing companies - banning order was punitive, as well as protective of the public.

[ACCC](#) (I)

### **Mooney v MS Magdalene Schiffahrtsgesellschaft mbH [2014] NSWSC 1277**

Supreme Court of New South Wales

Rein J

Admiralty law - negligence - nuisance - applicability of international conventions - a ship leaked oil into the Hunter River - damage to oyster farms - claim under s 51 *Marine Pollution Act 1987 (NSW)* for breach of s8 of that Act - claims in negligence and nuisance - claim under Art3(1) *International Convention on Civil Liability for Bunker Oil Pollution*, allegedly having force under s11 *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth)* - direct claim against ship's insurer under Art7(10) of International Convention, on basis insurer provided financial security for ship owner's liability for pollution - owner and insurer asked Court to resolve issues under International Convention as separate questions - held: answering separate questions favourably to owner and insurer would not dispose of the proceedings - limitation issues may depend on further evidence - undesirable to determine limitation questions as separate questions - undesirable to determine applicability of International Convention without all evidence - Court not



persuaded separate questions would be in the interests of justice or would save much cost or time.

[Mooney](#) (I B)

### **Bendigo and Adelaide Bank v Stamatis [2014] NSWSC 1233**

Supreme Court of New South Wales

R S Hulme AJ

Unconscionable conduct - defendants born in Greece, had limited education, limited understanding of English - defendants' son borrowed money on the security of defendants' home - son forged defendants' signatures - Bank sued defendants for breach of loan agreement and mortgage - held: son had no authority to sign the defendants' names - a forged signature cannot be ratified - however, defendants had continued to make repayments after son arrested for supply of large commercial quantity of drugs, and had delayed denying liability to Bank's detriment - defendants were therefore estopped from denying they had signed and were bound by the loan agreement - nonetheless, loan agreement and mortgage should be set aside - defendants were at a special disadvantage - Bank should have been aware there was a substantial risk that son would take advantage of his parents - unconscionable for the Bank to enforce loan agreement - loan agreement may also have been unjust under s9 *Contracts Review Act 1980* (NSW).

[Bendigo and Adelaide Bank](#) (I B)

### **Mainieri v Cirillo [2014] VSCA 227**

Court of Appeal of Victoria

Nettle AP, Hansen & Santamaria JJA

Equity - husband and wife had pressing debt - husband's mother sold her home and applied proceeds to reducing the debt - written document between the parties described payment as a *gift* - husband and wife said the mother could live with them indefinitely - relationship broke down and cohabitation became impossible - trial judge held mother had benefit of constructive trust over the husband and wife's home - held: primary judge correct to rule evidence of prior oral communications admissible - evidence of events before execution of written document showed parties did not intend document to contain all the terms of their agreement - parol evidence rule therefore did not apply - although the written document used the word *gift*, evidence showed the parties did not intend the payment to be a gift - declaration of constructive trust was excessive - mother's equity best satisfied by an equitable lien or charge to secure repayment with interest.

[Mainieri](#) (B)

### **Western Australian Land Authority v Meadowcroft [2014] WASC 333**

Supreme Court of Western Australia

Heenan J

Contract - Land Authority responsible for release and timely development of Port Hedland land - lot sold under contract of sale containing condition that, if purchaser failed to construct a home

within 30 months, Land Authority could repurchase land for original price less costs of repurchase - no building on land within 30 months - Land Authority exercised option to repurchase and sought specific performance - held: notice to repurchase had been validly served - alleged implied term that the option to repurchase be made within a reasonable time was inconsistent with the express terms of the contract - in any event, no basis to find Land Authority had exercised repurchase option outside a reasonable time - specific performance of right of repurchase ordered.

[Western Australian Land Authority](#) (B)

## **WQube Port of Dampier Pty Ltd v Philip Loots of Kahlia Nominees Ltd [2014] WASC 331**

Supreme Court of Western Australia

Construction contracts - WQube sought prerogative relief against adjudicators' determinations under *Construction Contracts Act 2004* (WA) - held: test for whether adjudicator's error of law is *jurisdictional error* is the same as for an inferior court - to be jurisdictional error, arbitrator must be in error as to whether jurisdiction exists, or regarding nature or limits of that jurisdiction - two grounds of review involved allegations of mere errors of law - even if established, would not be jurisdictional errors - two other grounds did involve allegations of jurisdictional error - these grounds not made out - applications for review dismissed.

[WQube Port of Dampier Pty Ltd](#) (C G)

## **Allen v Chadwick [2014] SASCF 100**

Full Court of the Supreme Court of South Australia

Kourakis CJ, Gray & Nicholson JJ

Motor accident - plaintiff was backseat passenger not wearing seatbelt - defendant driver intoxicated - plaintiff sustained spinal injuries resulting in permanent paraplegia - trial judge declined to reduce damages by 50% due to plaintiff relying on skill and care of an intoxicated person - s47 *Civil Liability Act 1936* (SA) - trial judge did reduce damages by 25% due to plaintiff's failure to wear seatbelt - s49 *Civil Liability Act 1936* (SA) - appeal and cross-appeal - held (by majority, Kourakis CJ dissenting): test for relying on the skill and care of intoxicated person under s47 is objective - in objective circumstances, defendant could not reasonably be expected to have done anything except get into the vehicle - trial judge therefore correct not to reduce damages - held (by the whole Court): trial judge erred in reduction for not wearing seatbelt - defendant prevented from putting on seatbelt by plaintiff's manner of driving - trial judge's assessment of damages also altered regarding future housing and accommodation, and cost of owning a motor vehicle.

[Allen](#) (I)

From: **'Spring Day'**

by Amy Lowell

### **Midday and Afternoon**

Swirl of crowded streets. Shock and recoil of traffic. The stock-still brick façade of an old church, against which the waves of people lurch and withdraw. Flare of sunshine down side-streets. Eddies of light in the windows of chemists' shops, with their blue, gold, purple jars, darting colours far into the crowd. Loud bangs and tremors, murmurings out of high windows, whirring of machine belts, blurring of horses and motors. A quick spin and shudder of brakes on an electric car, and the jar of a church-bell knocking against the metal blue of the sky. I am a piece of the town, a bit of blown dust, thrust along with the crowd. Proud to feel the pavement under me, reeling with feet. Feet tripping, skipping, lagging, dragging, plodding doggedly, or springing up and advancing on firm elastic insteps. A boy is selling papers, I smell them clean and new from the press. They are fresh like the air, and pungent as tulips and narcissus.

The blue sky pales to lemon, and great tongues of gold blind the shop-windows, putting out their contents in a flood of flame.

[Amy Lowell](#)

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