



Tuesday, 21 April 2015

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

 Follow @Benchmark\_Legal

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**Luo v Zhai (FCA)** - contract - breach of share acquisition agreement - damages (I B)

**State of New South Wales v Shaw (NSWCA)** - contract - no term of mutual trust and confidence or duty of good faith implied in employment contracts - appeal allowed (I B)

**Benton v QBE Workers Compensation (NSW) Ltd (NSWCA)** - summary dismissal - workers compensation - abuse of process - leave to appeal refused (I)

**Raviolos v Sydney Local Health District (NSWSC)** - pleadings - medical negligence - defendant not entitled to particulars of amended statement of claim (I)

**Vincent v Woolworths Ltd and Vincent v Counterpoint Marketing & Sales Pty Ltd (NSWSC)** - negligence - work injury damages - collision with trolley at supermarket - neither occupier nor employer liable (I)

**Morel v Bank of Queensland (QCA)** - loans and mortgages - extension of time within which to appeal from default judgment in bank's favour refused (B)

**BGC Australia Pty Ltd v Minspec Pty Ltd (WASC)** - freezing orders - orders ancillary to prospective freezing orders made (B C)

# Benchmark

## Summaries With Link (Five Minute Read)

### **Luo v Zhai [2015] FCA 350**

Federal Court of Australia

Perram J

Contract - restitution - consumer law - proceedings arising from share acquisition agreement - first respondent's company imported office chairs and sold them wholesale - applicant agreed to buy a 40% stake in company from first respondent for amount - agreement also contemplated stake would be lifted to 55% - applicant paid amount but did not receive any shares - applicant paid further amount to company to assist with its expenses - first respondent obliged to transfer shares to applicant by 30/6/12 but did not do so - applicant sued for return of money - held: first respondent breached contract - there was total failure of consideration but there could not be double recovery - first respondent did not engage in misleading or deceptive conduct - judgment for applicant.

[Luo](#) (I B)

### **State of New South Wales v Shaw [2015] NSWCA 97**

Court of Appeal of New South Wales

Beazley P; Ward & Gleeson JJA

Contract - respondents appointed as probationary teachers assigned to school - NSW deemed to be employer under s42 *Teaching Services Act 1980* (NSW) - respondents' probationary appointments annulled pursuant to s48(2) - determination made pursuant to s48(4) that they ceased to be employed by NSW Education Teaching Service - respondents claimed damages against NSW for breach of employment contracts - primary judge found NSW breached term of mutual trust and confidence implied into the contracts of employment but awarded no damages - primary judge rejected appellants' claim contracts were repudiated and found that even if they were repudiated, respondents' conduct was inconsistent with acceptance of repudiation - primary judge awarded costs in respondents' favour - parties appealed and cross-appealed - held: no term of mutual trust and confidence or duty of good faith implied into contracts - primary judge erred in finding provisions of Teacher's Handbook incorporated into contracts - appeal allowed - cross-appeal dismissed.

[Shaw](#) (I B)

### **Benton v QBE Workers Compensation (NSW) Ltd [2015] NSWCA 101**

Court of Appeal of New South Wales

Meagher & Ward JJA; Adamson J

Workers compensation - worker sued former employer's workers' compensation insurer for damages for injuries in slip and fall while attempting to alight from cabin of prime mover - District Court summarily dismissed claim on basis proceedings were abuse of process because worker was seeking to re-litigate matters conclusively determined against him in previous proceedings he brought against truck owner - held: no error in *House v The King* sense in exercise of primary judge's discretion to summarily dismiss proceedings - appellate intervention not

warranted - no error in primary judge's conclusion proceedings were abuse of process - any appeal on that basis bound to fail - leave to appeal refused

[Benton](#) (I)

## **Raviolos v Sydney Local Health District [2015] NSWSC 439**

Supreme Court of New South Wales

Harrison J

Pleadings - medical negligence - plaintiff claimed defendant breached duty of care to him by failing to follow up on his condition to exclude existence of lung cancer or to diagnose it - defendant sought particulars of amended statement of claim concerning plaintiff's employment history - plaintiff objected to providing particulars on basis they were not relevant to current issue in proceedings - held: in the circumstances it was irrelevant whether malignancy was result of work related exposure to asbestos or cigarette smoking or other possible cause or causes - defendant not entitled to particulars sought - application dismissed.

[Raviolos](#) (I)

## **Vincent v Woolworths Ltd and Vincent v Counterpoint Marketing & Sales Pty Ltd [2015] NSWSC 435**

Supreme Court of New South Wales

Campbell J

Negligence - work injury damages - plaintiff part-time merchandiser sued Woolworths and employer in separate proceedings for injuries suffered in course of employment in collision with trolley at supermarket - Woolworths and employer cross-claimed against the other - 5B *Civil Liability Act 2002* (NSW) - held: no breach of duty of care by Woolworths as occupier - collision occurred because neither customer or plaintiff looked where they were going as ordinary care usually required - employer not negligent - plaintiff's accident resulted from failure of her and customer to see each other - judgment for defendants.

[Vincent](#) (I)

## **Morel v Bank of Queensland [2015] QCA 58**

Court of Appeal of Queensland

Holmes, Fraser & Morrison JJA

Default judgment - loans and mortgages - applicant borrowed money from bank with six loans secured over properties held in applicant's other name - applicant defaulted - bank sought to recover outstanding amount - Registrar entered default judgment in favour of bank - applicant's application to set aside default judgment dismissed - applicant sought extension of time to appeal - delay - merits of proposed appeal - held: no adequate explanation for delay in bringing application - no good reason to relieve applicant from consequences of not filing in time - default judgment regularly entered - no arguable defence to resist bank's claim - application for extension of time refused.

[Morel](#) (B)

## **BGC Australia Pty Ltd v Minspec Pty Ltd [2015] WASC 134**



Supreme Court of Western Australia

Mitchell J

Freezing orders - plaintiff sought orders under O52A r3 *Rules of the Supreme Court 1971 (WA)* requiring defendants and third defendant's wife to swear affidavits providing information about assets they allegedly controlled - order sought to enable plaintiff to obtain information relevant to prospective freezing order for which it anticipated it would apply - confidentiality - held: there was proper basis for apprehending there might be grounds for making application for freezing orders in future - sufficient concern to justify ancillary order - Court also satisfied that prospect of potential claim under s89 *Property Law Act 1969 (WA)* in relation to property held by wife sufficient to justify requiring her to swear affidavit - orders ancillary to prospective freezing orders made - defendants and non-party required to file affidavits

[BGC](#) (B C)

[Click Here to access our Benchmark Search Engine](#)