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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)

Perpetual Trustees Victoria Ltd v Cox (NSWCA) - mortgages - lender advanced funds - funds were fraudulently misappropriated by borrowers' broker - lender unable to enforce mortgage (B)

Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd (NSWCA) - corporations - constitution required payment of dividend to B class shareholders - directors decided not to pay - oppression (B)

Goldsmith v Bissett (NSWSC) - conclave of experts - defendant's solicitors did not agree parties should formulate questions for experts - Practice Note required they do so - questions formulated by Court (I)

Chidiac v Bhatt, Vaidya and Rosybarb Pty Ltd (NSWSC) - corporations - purported transfer of shares and replacement of director - changes ineffective - breach of contract (I B)

Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd (VSC) - confidential information - Morgan Stanley used Vasco's confidential information in formulating recapitalisation plan - payment of quantum meruit ordered (I B)

Mazzoni Plant Hire Pty Ltd v HBU Holdings Pty Ltd (QSC) - shareholder sought to have company wound up - unsuccessful due to shareholders' agreement requiring it to buy other shareholder's shares (B C)

Moran v Schwartz Publishing Pty Ltd (WASC) - injunction sought against book allegedly accusing Moran of murdering girlfriend - balance of convenience - public interest in freedom of speech - injunction refused (I)

Summaries with links (5 minute read)

Perpetual Trustees Victoria Ltd v Cox [2014] NSWCA 328

Court of Appeal of New South Wales

Macfarlan, Emmett & Leeming JJA

Mortgages - Mr and Mrs Cox borrowed money from Perpetual and gave mortgages over their properties - some of the money was transferred to a mortgage broker who fraudulently disbursed it to herself - this money was not repaid - Perpetual attempted to enforce the mortgage - the primary judge dismissed Perpetual's proceedings - held: the mortgage, on its correct interpretation, did not extend to funds fraudulently disbursed by the broker - Mr and Mrs Cox had not ratified the fraudulent disbursement - the primary judge had correctly found that neither Mr nor Mrs Cox had signed the direction authorising the disbursement - appeal dismissed.

[Perpetual Trustees Victoria Ltd](#) (B)

Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd [2014] NSWCA 326

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Barrett JA

Corporations - Sumiseki held B class shares in Wambo - an article was inserted into Wambo's constitution as part of a restructure agreement giving B class shareholders a right to receive a certain dividend - Wambo's directors decided not to pay this dividend - Sumiseki sued - primary judge held failure to pay dividend was oppression - *s232 Corporations Act 2001* (Cth) - ordered amendment of constitution to better secure Sumiseki's rights - refused to rectify constitution or the restructure agreement - Wambo appealed and Sumiseki cross-appealed - held: on proper construction of constitution, payment of the dividend was mandatory - decision not to pay dividend was oppressive - no equitable jurisdiction to amend a company's constitution - restructure agreement should not be rectified as this would not produce any result beyond the order under *s232* - equity does not act in vain - appeal and cross-appeal dismissed.

[Wambo Coal Pty Ltd](#) (B)

Goldsmith v Bissett [2014] NSWSC 1272

Supreme Court of New South Wales

Garling J

Expert evidence - Goldsmith - seriously injured when struck by a car driven by Bissett while riding her bicycle - Registrar ordered that expert witnesses on the issue of liability were to confer and report on matters agreed and disagreed, setting out the reasons for disagreement - plaintiff's solicitors prepared a draft letter of instructions to the experts - defendant's solicitors disagreed with the letter, and said there was no need to ask specific questions of the experts - held: *Practice Note No SC Gen 11* required parties to agree on questions to be answered by experts at conclave - open to experts to consider any other question they believe is appropriate - defendant's solicitors had ignored the Practice Note - an expert witness generally should not be asked to consider two accounts and indicate which he or she prefers - Court formulated questions that should be put to the experts.

[Goldsmith \(I\)](#)

Chidiac v Bhatt, Vaidya and Rosybarb Pty Ltd [2014] NSWSC 1253

Supreme Court of New South Wales

Black J

Corporations - Chidiac acquired all the shares in Rosybarb and was appointed a director - shares were later purportedly transferred to Hastas, who was purportedly appointed a director - Chidiac said he still owned the shares - held: no transfer shown to have been executed or provided to Rosybarb - Chidiac still owned the shares - purported decision at Board meeting not effective to transfer the shares - Chidiac had not resigned as a director - directors can only be appointed in compliance with the company's constitution and the *Corporations Act 2001* (Cth) - Hastas not validly appointed as director - Chidiac had not given authority to Bhatt and Vaidya to amend Rosybarb's share register and ASIC's database - in any event, such authority would not excuse factually incorrect amendments - orders that register of members and directors of Rosybarb be corrected - breach of contract also established - parties to have an opportunity to agree on quantum of loss.

[Chidiac \(I B\)](#)

Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd [2014] VSC 455

Supreme Court of Victoria

Vickery J

Confidential information - Morgan Stanley recapitalised Orchard, a large fund manager - Vasco shared details of its own Orchard recapitalisation plan with Morgan Stanley - Vasco claimed it was entitled to be paid - held: Vasco's plan was sufficiently developed and complete to attract equitable protection of confidentiality - Vasco's plan possessed the required quality of confidence - Vasco's plan was disclosed to Morgan Stanley in circumstances which imported an obligation of confidence - Morgan Stanley had no permission to use Vasco's plan without payment - Morgan Stanley used Vasco's plan as the starting point for its recapitalisation - Morgan Stanley's changes to Vasco's plan did not prevent equity protecting Vasco's confidential information - Morgan Stanley

made unauthorised use of Vasco's confidential information - evidence was insufficient to support any entitlement to equitable compensation or an account of profits - however, it was unjust for Morgan Stanley to accept Vasco's services without payment - payment of quantum meruit ordered.

[Vasco Investment Managers Ltd](#) (I B)

Mazzoni Plant Hire Pty Ltd v HBU Holdings Pty Ltd [2014] QSC 228

Supreme Court of Queensland

Phillip McMurdo J

Contracts - Mazzoni and HBU each owned half the shares in Aurora - shareholder's dispute - Mazzoni applied to have Aurora wound up - HBU opposed application on basis of a shareholders' agreement which it said obliged Mazzoni to purchase HBU's shares in the circumstances - held: dispute between the parties was a *continuing unresolved dispute in relation to the management of the Company* within the meaning of the shareholders' agreement - HBU's transfer notice to Mazzoni requiring Mazzoni to purchase HBU's shares was effective - application for winding up dismissed - declaration of a binding contract between the parties for the transfer of HBU's shares.

[Mazzoni Plant Hire Pty Ltd](#) (B C)

Moran v Schwartz Publishing Pty Ltd [2014] WASC 334

Supreme Court of Western Australia

Kenneth Martin J

Defamation - Moran sought an urgent injunction to restrain publication of book about the death of his former girlfriend - Moran contended book carried a clear imputation he had murdered girlfriend - previous media reports had asserted Moran had murdered girlfriend - foreshadowed defence was that publisher would justify lesser imputation that there were reasonable grounds to suspect Moran had murdered girlfriend - held: not possible to mop up all the reputational spilt milk flowing from other media reports accusing Moran of murder - Moran retained the right to seek damages at trial after publication - publisher would suffer a potentially non-recoupable economic loss if publication were restrained - balance of convenience favoured refusing injunction - in the light of the foreshadowed defence of justification, public interest in freedom of speech also an important consideration - application for injunction dismissed.

[Moran](#) (I)

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