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

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Executive Summary (1 minute read)

Hercules St Developments Pty Limited v Ashfield Council (NSWLEC) - planning law - modified development application not substantially the same as original (C)

National Australia Bank Ltd v Swed (No 2) (NSWSC) - banker and customer - wife stole money from husband's account - husband not responsible (B)

Chow v Chow (No 1) (NSWSC) - trustees for sale - disagreement who should be trustees – factors to be considered by the Court (B, C)

Daiwa Can Company v Barokes Pty Ltd (VSC) - anti-suit injunction - company restrained from continuing litigation in Japan (I, B)

Willner v Dept of Economic Development, Jobs, Transport and Resources (VSC) - freedom of information - artist sought CCTV film from train carriage to use in artwork - arguable error of law in refusing film - leave to appeal granted (I G)

Larussa Pastorial Holdings Pty Ltd v Carr (WASCA) - trusts and succession - Master ordered trustee to produce documents to administratrix of deceased estate - stay of orders pending appeal refused (B)

Miles v Campus Living Villages Murdock Pty Ltd (WASC) - tenant sought injunction against eviction - foreshadowed Supreme Court proceedings - injunction granted (I B)

Summaries With Link (Five Minute Read)

Hercules St Developments Pty Limited v Ashfield Council [2015] NSWLEC 1378

Land and Environment Court of New South Wales

Fakes C

Planning law - Ashfield Council granted consent to a development application for the construction of an eight level mixed use development - the applicant lodged a modification application to replace an area set aside for communal open space on residential level 7 with two apartments, and to move the communal open space and associated structures to the roof – deemed refusal – appeal to Land and Environment Court - s97AA *Environmental Planning and Assessment Act 1979* (NSW) - *Ashfield Local Environmental Plan 2013* - Council contended modification application should be refused as it was not substantially the same as the original development - would increase the number of apartments and the overall height of the building - held: the modified development was not substantially the same as the original development - the Court therefore had no jurisdiction to consider the proposal on its merits - s96(2) *Environmental Planning and Assessment Act 1979* (NSW) - appeal dismissed.

[Hercules](#) (C)

National Australia Bank Ltd v Swed (No 2) [2015] NSWSC 1322

Supreme Court of New South Wales

Davies J

Banker and customer - wife stole money from husband's account to support gambling addiction - husband defaulted on mortgage - bank sought possession of property - Electronic Funds Transfer Code of Conduct issued by ASIC - Bank alleged husband had failed to comply with the Telephone Banking Terms and Conditions that formed part of agreement between husband and bank - held: Bank had failed to discharge burden of proving the husband had failed to keep his keycard in a safe place or to provide reasonable protection from theft - husband had not known of the wife's transactions and did not contribute to those transactions - husband had not voluntarily disclosed PIN to wife - husband had not acted with extreme carelessness within the meaning of the Code of Conduct - judgement for husband.

[NAB](#) (B)

Chow v Chow (No 1) [2015] NSWSC 1347

Supreme Court of New South Wales

Young AJA

Trustees for sale - sons became co-owners of real property after death of mother - agreement that trustees be appointed for sale - s66G *Conveyancing Act 1919* (NSW) - disagreement as to who should be trustees - held: when deciding identity of trustees for sale, where the parties do not agree, the Court considers four factors - the Court tends to prefer the preference of a party with a greater interest in the land - trustees should be independent and as free from conflict of interest as possible - trustees should have appropriate skill, expertise, and experience, particularly where they have more active duties than merely selling a piece of real estate - the

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Court should endeavour to get the best value for the parties' money, and, as between two otherwise equal proposals, the cheaper is to be preferred - *Arrow Custodians Pty Limited v Pine Forests of Australia Pty Limited*[2006] NSWSC 341 - considering these factors, the trustees favoured by the plaintiff and first defendant should be appointed.

[Chow](#) (B, C)

Daiwa Can Company v Barokes Pty Ltd [2015] VSC 502

Supreme Court of Victoria

Sifris J

Anti-suit injunctions - Barokes is an Australian company – Daiwa is Barokes' majority shareholder - shareholders' agreement submitted to the jurisdiction of Victorian courts - shareholders dispute - litigation commenced in Victoria - Barokes also commenced patent proceedings in Japan against Daiwa - Daiwa sought an interlocutory injunction from the Victorian Supreme Court restraining Barokes from continuing the Japanese litigation, or commencing proceedings anywhere against Daiwa or regarding any infringement of intellectual property - held: unnecessary to decide appropriate forum for the issues raised in the Japanese litigation - there was a serious question to be tried whether Barokes' managing director had the authority to commence the Japanese proceedings and other infringement proceedings, given the terms of the shareholders' agreement - balance of convenience favoured granting the injunction - injunction granted.

[Daiwa](#) (I, B)

Willner v Dept of Economic Development, Jobs, Transport and Resources[2015] VSC 504

Ierodionou AsJ

Freedom of information - the applicant is a photographer and artist whose artwork explores the boundaries of public space - he requested from the Department 24 hours of CCTV footage that had been recorded in a train carriage - he intended to use that footage in an artwork in a public exhibition - *Freedom of Information Act 1982* (Vic) – deemed refusal - applicant applied to the Victorian Civil and Administrative Tribunal - Tribunal affirmed refusal on basis that release of the footage would involve the *unreasonable disclosure of information relating to the personal affairs of any person* - applicant sought leave to appeal to Supreme Court on questions of law - held: there was a real argument there had been an error of law - that is, it was arguable that the Tribunal's factual finding that pixelating the footage would be prohibitively expensive was not open on the evidence - leave to appeal granted.

[Willner](#) (I G)

Larussa Pastoral Holdings Pty Ltd v Carr [2015] WASCA 194

Supreme Court of Western Australia

Murphy JA

Trusts and succession - administratrix of deceased estate considered the Larussa Pastoral Trust held a beneficiary loan account in the deceased's name - requested certain documents from the trustee, but was unsuccessful - applied to the Supreme Court - Master ordered the trustee to produce the documents - trustee sought stay of Master's orders pending appeal - held: special

circumstances must be shown before the Master's orders would be stayed - Master had found the administratrix had sought the documents for a proper purpose - trustee's evidence to the contrary was vague and lacking in detail - appeal from the Master's orders would not be rendered entirely nugatory if a stay were not granted - trustee had not filed an appellants' case and the Court therefore could not assess the strength of its case on appeal – stay refused.

[Larussa](#) (B)

Miles v Campus Living Villages Murdock Pty Ltd [2015] WASC 350

Supreme Court of Western Australia

Pritchard J

Residential tenancy – student accommodation provider obtained orders against student tenant in Magistrates Court - tenant applied to Supreme Court for injunction against eviction - held: tenant originally sought injunction as a cause of action in and of itself, with no other cause of action or proceedings in the Court - Court's injunctive power is dependent on a pre-existing cause of action arising from an actual or threatened invasion of a legal or equitable right - during the hearing, tenant foreshadowed Supreme Court proceedings to review the Magistrates Court decision - alleged denial of natural justice due to non-service of notice of those proceedings - s36 *Magistrates Court Act 2004 (WA)* – foreshadowed proceedings gave the Court jurisdiction to make the injunction sought - there was a serious case to be tried in the foreshadowed proceedings - balance of convenience favoured granting the injunction - injunction granted on condition the tenant file the foreshadowed proceedings and give the usual undertaking as to damages.

[Miles](#) (I B)

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