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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)

Australian Securities and Investments Commission v Mariner Corporation Ltd (FCA) - corporations - conduct relating to announcement of off-market take-over bid - originating application dismissed (I B)

AAI Ltd, application under the Insurance Act 1973 (Cth) (No 2) (FCA) - insurance - transfer of insurance business - confirmation of scheme (I)

Papantoniou v Brown (NSWCA) - contract - arrangement for purchase of share in property - finding of unjust contract outside pleadings - denial of procedural fairness - appeal allowed (I B)

Endeavour Energy v Precision Helicopters Pty Ltd (NSWCA) - negligence - contract - multiple claims arising from helicopter crash - appeal allowed in part (I)

Landmark Property Enterprise Pty Ltd v Monash Property Developments Pty Ltd (VSC) - contract for sale of land - determination of separate questions - contract was a terms contract under *Sale of Land Act 1962* which plaintiff was permitted to avoid under the Act (Vic)

Re Calder Park Promotions (In Liq) (VSC) - corporations - non-compliance by examinee with requirement to produce documents - examinee ordered to pay wasted costs incurred by liquidators (B)

Nichols Constructions Pty Ltd v Mt Marlow Pty Ltd (QSC) - pleadings - contract - loan - statement of claim embarrassing and struck out with leave to replead (B C)

Summaries With Link (Five Minute Read)

Australian Securities and Investments Commission v Mariner Corporation Ltd [2015] FCA 589

Federal Court of Australia

Beach J

Corporations - proceeding concerning lawfulness of defendants' conduct relating to announcement of off-market takeover bid by company for all issued capital of another company at 10.5 cents per share - ASIC brought proceeding against Mariner and its three directors alleging contraventions of ss180, 631(2)(b) & 1041H *Corporations Act 2001* with respect to takeover announcement - test for 'reckless' - misleading or deceptive conduct - price representation - funding representation - held: ASIC's claims failed - originating application dismissed.

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

AAI Ltd, application under the Insurance Act 1973 (Cth) (No 2) [2015] FCA 617

Federal Court of Australia

Yates J

Insurance - applicant sought order under s17F *Insurance Act 1973 (Cth)* that scheme under Div 3A of Pt III of the Act be confirmed to give effect to transfer of insurance business of MTA Insurance Ltd to AAI (scheme) - formal requirements - actuarial report - no opposition to scheme - held: Court satisfied with applicant's submissions concerning confirmation of scheme pursuant to s17F - scheme should be confirmed - orders made substantially as sought by AAI.

[AAI \(I\)](#)

Papantoniou v Brown [2015] NSWCA 168

Court of Appeal of New South Wales

Beazley P; Macfarlan JA & Sackville AJA

Contract - unjust contracts - procedural fairness - solicitor entered contractual arrangement with two brothers, one of which later died, to purchase sisters' share of co-owned property - brothers agreed solicitor could borrow funds for purchase and provide mortgage of property as security - brothers agreed to provide guarantees to lender - solicitor made purchase with borrowed funds secured over property - brothers provided guarantees - solicitor defaulted - lender took possession - one brother incurred expenses in unsuccessful attempt to resist lender's claim - primary Judge found original contractual arrangement unjust under *Contracts Review Act 1980* and declared it void to extent it required solicitor's liability to be borne by respondents and ordered solicitor to pay compensation to respondents - held: finding that contractual arrangement unjust was outside cross-claims pleaded by respondents - conditions in *Dare v Pulham* for conduct of case outside pleadings not satisfied - solicitor denied procedural fairness - respondents not entitled to claim expenses against solicitor of

unsuccessfully resisting lender's claim for possession - appeal allowed.

[Papantoniou](#) (I B)

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169

Court of Appeal of New South Wales

Basten JA, Macfarlan JA & Sackville AJA

Negligence - contract - apportionment - helicopter owned/operated by company (Precision) crashed while inspecting powerlines pursuant to contract with another company (Endeavour) when skid of helicopter caught wire owned by Telstra - observer in helicopter and employed by Endeavour injured and helicopter damaged - observer was not wearing helmet - observer and family sought damages for personal injury and nervous shock and other parties sought orders for contribution or indemnity - trial judge dismissed claims against Telstra - trial judge found Precision and Endeavour liable to observer and apportioned liability at 85% and 15% - trial judge found Endeavour not entitled to rely on contractual indemnity against Precision - trial judge also found carriage not covered by *Civil Aviation (Carriers' Liability) Act 1967* because observer not a "passenger" - Endeavour and Precision appealed - Pt IA Div 2, ss5B, 5C; 5D, 5E & 35 *Civil Liability Act 2002* - held: primary judge erred in finding Telstra not liable for breach of duty of care to owner and occupants of helicopter - observer was a "passenger" for purposes of Carrier's Liability Act - Endeavour breached contractual and general law duties to observer and to Precision - even if pilot should have conducted high level survey of area it would not have revealed presence of wire - Precision not liable for breach of duty which would not have revealed materialised risk - appeal allowed in part.

[Endeavour](#) (I)

Landmark Property Enterprise Pty Ltd v Monash Property Developments Pty Ltd [2015] VSC 266

Supreme Court of Victoria

Croft J

Contract - sale of land - preliminary hearing - determination of separate questions - whether contract of sale was a terms contract under *Sale of Land Act 1962* (Vic) and, if so, whether plaintiff was permitted to avoid contract under ss29N or 29S(1) - extensions of time for completion - application of Sale of Land Act to transaction between parties - held: excluding consideration of possible application and effect of provisions of *Instruments Act 1958* (Vic) Court found that contract of sale was a terms contract under Sale of Land Act and that plaintiff was permitted to avoid contract under s29N Sale of Land Act but not under s29S(1).

[Landmark](#) (Vic)

Re Calder Park Promotions (In Liq) [2015] VSC 285

Supreme Court of Victoria

Gardiner AsJ

Corporations - external administration - liquidators of company sought that summonses be issued for examination of certain persons in relation to examinable affairs of company summons issued to examinee to attend examination and produce documents - liquidators sought that



examinee pay their costs wasted by reason of his failure to produce the documents - ss596A & 597(9) *Corporations Act 2001* - held: there was serial non-compliance with requirement to produce documents - examinee ordered to pay the costs wasted by reason of the non-compliance with his obligations - Court declined to fix costs.

[ReCalder](#) (B)

Nichols Constructions Pty Ltd v Mt Marlow Pty Ltd [2015] QSC 165

Supreme Court of Queensland

Martin J

Pleadings - plaintiff sought declarations orders against first and second defendants with respect to loan from plaintiff to another company - second defendant sought to strike out claim and statement of claim - rr171 & 293 *Uniform Civil Procedure Rules 1999* - held: pleading was inadequate - pleading relied on at least one allegation which was not properly pleaded and which might not be able to be pleaded - not a fruitful exercise to attempt to excise inadequate parts - pleading was embarrassing and struck out with leave to replead.

[Nichols](#) (B C)

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