

Tuesday, 25 August 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)

Rossi v Living Choice Australia Ltd (NSWCA) - environment and planning - consents for development - breaches of *Environmental Planning and Assessment Act 1979* (NSW) - first notification of determination of consent invalid - relief - appeal allowed in part (I B C G)

Fairfax Media Publications Pty Ltd v Pedavoli (NSWCA) - defamation - claim against newspaper - aggravated damages - appeal dismissed (I)

Beckett v State of New South Wales (NSWSC) - malicious prosecution - claim for damages - elements of tort established - damages assessed - verdict for plaintiff in sum of \$2,310,350 plus interest (I)

Shree Shirdi Sai Sansthan Sydney Ltd v Nirmal Taluja (No 2) (NSWSC) - easements - lease - term "right of use" in lease construed as granting an easement (B)

Pereira v Siemens Ltd (NSWSC) - judicial review - workplace injury - hearing loss - permanent impairment - decision of Medical Appeal Panel set aside (I G)

Fabfloor and Danfoss v BNY Trust Company (VSC) - joinder - insufficient evidence to sustain claims against proposed added defendants - applications refused (I C)

Cossens v Petta [No 2] (WASC) - contempt - defendant convicted of contempt for failure to comply with Court order - warrant issued for defendant's arrest to have him brought before Court for sentence (B)

Summaries With Link (Five Minute Read)

Rossi v Living Choice Australia Ltd [2015] NSWCA 244

Court of Appeal of New South Wales

Basten, Ward & Emmett JJA

Environment and planning - first respondent obtained development approval (Stage 2 consent) for development - first respondent also obtained another consent (Retaining Walls consent) in relation to development - appellant commenced proceedings against first respondent, second respondent Council and third respondent Planning Panel seeking declarations consents void and of no effect - appellant also claimed orders for demolition of units and remedial orders - primary judge made declaration of invalidity in relation to Retaining Walls consent and made remedial orders - primary judge refused to make an order of invalidity in respect of Stage 2 consent - appellant appealed - second respondent Council cross-appealed - first respondent filed notice of contention supporting orders made by the primary judge and has also sought leave to file a cross-appeal - principal questions concerned relief to be ordered when development consent granted under *Environmental Planning and Assessment Act 1979* (NSW) found invalid and development is carried out without required development consent - held: Council's assessment function was not amenable to judicial review - only determination of Panel was amenable to judicial review - Council and Panel breached s79C - declaration of invalidity in respect of first notification of determination of Stage 2 consent - Stage 2 consent not declared invalid - work to be carried out to obviate adverse consequences for appellant's land from removal of vegetation without appellant's consent and without development consent - appeal allowed in part.

[Rossi](#) (I B C G)

Fairfax Media Publications Pty Ltd v Pedavoli [2015] NSWCA 237

Court of Appeal of New South Wales

McColl & Simpson JJA; Sackville AJA

Defamation - newspaper published article incorrectly identifying respondent as female teacher who resigned from school amidst allegations of unlawful sexual misconduct - primary judge found respondent entitled to damages in sum of \$350,000 - appellant contended primary judge erred in finding publication conveyed imputation respondent was sexual predator and that publication implicitly invited readers to ascertain teacher's identity from school's website - appellant also contended primary judge erred in finding cross-examination of respondent exacerbated hurt occasioned by publication and in finding aggravated damages should be awarded - Pt 3, Pt 4, ss18, 34 & 35 *Defamation Act 2005* (NSW) - s7 *Court Suppression and Non-Publication Orders Act 2010* (NSW) - held: no error in findings of primary judge - appeal dismissed.

[Fairfax](#) (I)

Beckett v State of New South Wales [2015] NSWSC 1017

Supreme Court of New South Wales

Harrison J

Malicious prosecution - claim for damages for malicious prosecution - whether plaintiff established that criminal proceedings were initiated against plaintiff by defendant, that the proceedings were terminated in favour of plaintiff, that the defendant acted maliciously in initiating or maintaining proceedings, and that the defendant acted without reasonable and probable cause - s140 *Evidence Act 1995* (NSW) - 'nolle prosequi' - held: little if any contest in respect of institution of charges by State and termination of charges favourably to plaintiff - Court satisfied plaintiff succeeded in two respects on absence of reasonable and probable cause aspect of claim - Court satisfied plaintiff established malice component - damages assessed - verdict for plaintiff in sum of \$2,310,350 plus interest.

[Beckett](#) (I)

Shree Shirdi Sai Sansthan Sydney Ltd v Nirmal Taluja (No 2) [2015] NSWSC 1180

Supreme Court of New South Wales

Sackar J

Easements - plaintiff and defendant entered lease agreement which included option to renew - primary dispute concerned whether plaintiff exercised option to purchase - whether term "right of use" in lease should be construed as granting easement - construction of lease - held: Court satisfied phrase "right of use" apt to be construed as granting easement - "right of use" in question no different to right to use particular parts of servient tenement for parking or similar - "right of use" construed as granting an easement.

[Shree](#) (B)

Pereira v Siemens Ltd [2015] NSWSC 1133

Supreme Court of New South Wales

Garling J

Judicial review - workplace injury - industrial deafness - plaintiff sought to quash Certificate and Statement of Reasons of Medical Appeal Panel which recorded plaintiff's permanent impairment at 8% - plaintiff contended methodology of direct proportion of time in employment outside NSW compared with time worked in NSW not appropriate basis for calculating deduction under s323 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - plaintiff also contended there was no evidence of any previous injury or condition or abnormality for purposes of s323 - held: whole person impairment not properly considered according to law - errors included failure to identify existence of pre-existing injury, or to consider whether, if there was pre-existing injury, it caused or contributed to whole person impairment - errors sufficient to warrant setting aside of Appeal Panel's decision - matter remitted.

[Pereira](#) (I G)

Fabfloor and Danfoss v BNY Trust Company [2015] VSC 434

Supreme Court of Victoria

Derham AsJ

Joinder - second defendant in two proceedings concerning fire at warehouse sought to add same proposed defendants in each of the proceedings as concurrent wrongdoers pursuant to s24AL(1) *Wrongs Act 1958* (Vic) - proportionate liability regime - r9.06(b)(ii) *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - held: affidavits in support of applications did not provide sufficient evidence to sustain arguably viable claims against proposed defendants to be added - there was no evidence to support claim against three of the proposed defendants and evidence to support claims of the other defendants was insufficient - applications refused.

[Fabfloor](#) (I C)

Cossens v Petta [No 2] [2015] WASC 313

Supreme Court of Western Australia

Jenkins J

Contempt - plaintiff sought pursuant to O55 r4(ii) *Rules of the Supreme Court 1971* (WA) that defendant be fined, ordered to perform community service work or imprisoned for failing to comply with Court order - held: defendant's failure to comply with orders was deliberate and voluntary - Court satisfied beyond reasonable doubt defendant was guilty of contempt of court - defendant convicted of contempt of court - appropriate to issue warrant for defendant's arrest to have him brought before Court for sentence - given seriousness of penalties which Court could impose it was appropriate that defendant be before Court and able to make any plea in mitigation - warrant issued for defendant's arrest.

[Cossens](#) (B)

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