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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)

NSW v Talovic (NSWCA) - false imprisonment - trespass - mental health - statutory construction - *mentally disturbed* - appeal allowed (I)

McLennan v Nominal Defendant (NSWCA) - negligence - injuries not caused by motor vehicle - Nominal Defendant not liable - appeal dismissed (I)

Belcastro v Nakhil (NSWSC) - corporations - leave to proceed against corporations in liquidation - leave to replead against insurers (I B C)

Tagget v McLean Austquip Pty Ltd (NSWSC) - contract - parties entered contract for repair work - claim not a restitutionary claim - appeal dismissed (I B C)

Ozden and Ozden v Commonwealth Bank of Australia (VSCA) - possession - stay pending application for special leave to appeal to High Court refused (B)

Artcraft Pty Ltd v Dickson (No 2) (SASC) - costs - obduracy - successful plaintiff entitled to indemnity costs from commencement of trial (I)

Kowalski v R J Cole & Partners (SASC) - solicitors' costs - abuse of process - application for taxation of bill of costs struck out - appeal dismissed (I)

Summaries with links (5 minute read)

NSW v Talovic [2014] NSWCA 333

Court of Appeal of New South Wales

Basten & Emmett JJA; Tobias AJA

False imprisonment - trespass - mental health - respondent apprehended by police officers who arranged removal from home to mental health facility - respondent successfully sued NSW for damages for wrongful arrest, false imprisonment and trespass - NSW sought leave to appeal - scope of s22 *Mental Health Act 2007* (NSW) - *mentally disturbed* - held: trial judge misconstrued chapeau to s22 requiring an objective test that respondent appeared to be mentally disturbed or mentally ill, when he should have applied a subjective test - s22 was available to police officers who took respondent to facility - no basis for order for exemplary damages - no error in finding police's search of rooms constituted trespass - appeal allowed - judgment for respondent set aside - respondent entitled to award of \$5,000 compensatory damages for trespass - respondent not entitled to award of exemplary damages - retrial of claim for compensatory damages for false imprisonment - matter remitted.

[NSW](#) (I)

McLennan v Nominal Defendant [2014] NSWCA 332

Court of Appeal of New South Wales

Basten & Emmett JJA; Simpson J

Negligence - appellant injured in car park on way to work - appellant sued Nominal Defendant in District Court under s 34 *Motor Accidents Compensation Act 1999* (NSW) on basis injuries were result of being struck by motor vehicle, the identity of which could not be ascertained after due enquiry and search - appellant obtained verdict which Court then overturned - matter remitted to District Court - appellant appealed from decision in favour of Nominal Defendant - held: no error in not being persuaded appellant's injuries were caused by motor vehicle accident - trial judge correct to find appellant failed to carry out due enquiry and search - appeal dismissed.

[McLennan](#) (I)

Belcastro v Nakhli [2014] NSWSC 1305

Supreme Court of New South Wales

Campbell J

Corporations - joinder - pleadings - plaintiffs sought leave pursuant to s500(2) *Corporations Act 2001*(Cth) to proceed against three corporations in liquidation, and joinder of professional liability insurers of one corporation under r6.24 *Uniform Civil Procedure Rules 2005* (NSW) - held: pleadings against insurers did not state material facts such that insurers could understand how earlier facts were material to corporation's cause of action against insurers - plaintiffs given leave to re-plead against insurers - subject to re-pleading liability of corporation's insurer's to indemnify

it, Court satisfied plaintiffs had made case for joining insurers - Court satisfied it should grant leave to plaintiffs to commence and proceed with proceedings against the three corporations.

[Belcastro](#) (I B C)

Tagget v McLean Austquip Pty Ltd [2014] NSWSC 1310

Supreme Court of New South Wales

Hidden J

Contract - restitution - appellant supplied bulldozing and excavator services - respondent brought proceedings in Local Court for recovery of money owed by appellant for work done and materials supplied for repair of excavator and bulldozer - Magistrate awarded respondent amount sought - appellant claimed Magistrate erred in finding respondent's pleaded case was based on contract and in finding that implied promise to pay a debt between parties constituted a contract - appellant contended claim was an indebitatus count, a restitutionary claim based on unjust enrichment - held: open to Magistrate to conclude that a contract had been entered into by parties and to find that amount claimed was reasonable - no error of law established - appeal dismissed.

[Tagget](#) (I B C)

Ozden and Ozden v Commonwealth Bank of Australia [2014] VSCA 234

Court of Appeal of Victoria

Santamaria JA & Garde AJA

Stay - applicants sought to restrain Sheriff from executing warrant of possession over property or stay execution of orders until determination of application for special leave to appeal to High Court of Australia - applicants alleged bank wrongfully retained marina birth certificate of title which impeached its claim for payment of money - held: very unlikely grounds of appeal would attract grant of special leave by High Court - prospects of success low even if leave granted - even if applicants successful on point raised they would still owe bank very large sum of money - insufficient prospects of success to justify stay - no special circumstances - balance of convenience favoured bank having access to its security - summons dismissed.

[Ozden](#) (B)

Artcraft Pty Ltd v Dickson (No 2) [2014] SASC 144

Supreme Court of South Australia

Kelly J

Costs - Court gave judgment for plaintiffs - plaintiffs wholly successful against first defendant and partly successful against second defendant - plaintiff sought costs from first defendant on party/party basis and indemnity costs from date of Calderbank letter - plaintiff sought costs on party/party basis from second defendant - held: Calderbank offer incapable of acceptance - however, plaintiffs entitled to costs on indemnity basis from commencement of trial due to obduracy of first defendant or legal advice he received which resulted in plaintiffs incurring



unnecessary costs of a trial that ought never to have been defended - plaintiffs entitled to award of two thirds of party/party costs of action against second defendant.

[Artcraft Pty Ltd](#) (I)

Kowalski v R J Cole & Partners [2014] SASC 137

Supreme Court of South Australia

Peek J

Solicitors' costs - appellant was former client of firm of solicitors - client disputed firm's right to receive or retain amount for costs or disbursements - after various litigation client instituted fresh proceedings in 2013 purporting to apply for taxation of bill of costs pursuant to s42(1) *Legal Practitioners Act 1981* (SA) - Master granted firm's application to strike out client's application as abuse of process - client appealed - held: firm not precluded from making an abuse of process application on basis client's documents had not been rejected pursuant to r53 *Supreme Court Rules 2006* (SA) - s42 did not abolish inherent power of the Court to control its own processes - ample material before Master justifying his conclusion that 2013 action was abuse of process - none of the 34 grounds of appeal made out - appeal dismissed.

[Kowalski](#) (I)

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