



Thursday 2 October 2014

## Insurance

# A Daily Bulletin listing Decisions of Superior Courts of Australia

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## Executive Summary (1 minute read)

**Ekes v Commonwealth Bank of Australia** (NSWCA) - estoppel - earlier Federal Court proceedings - guarantor permitted to file defence and cross-claim

**Kino v Prestige Philately** (VSC) - conversion - sale of goods - misappropriated stamps on-sold to innocent purchaser - estoppel not established

**Bill Express Ltd v Pitcher Partners (a Firm)** (VSC) - corporations - negligence - no order referring questions to expert accountant as special referee

## Summaries with links (5 minute read)

### **Ekes v Commonwealth Bank of Australia [2014] NSWCA 336**

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Emmett JA

Estoppel - bank sued guarantor for company's debt - primary judge struck out guarantor's defence, refused leave to file amended defence, and entered judgment for Bank - earlier Federal Court proceedings were set down for hearing but dismissed by agreement - held: primary judge erred in striking out defence and refusing leave to file proposed defence and cross-claim - not so obviously untenable that it could not possibly succeed - issue estoppel, Anshun estoppel, and abuse of

process did not apply - loss from loan advances a separate and distinct loss from loss suffered by company - guarantor demonstrated extraordinary dilatory conduct and flagrant disregard for Court's directions - however, because defence should not have been struck out, relative prejudice in allowing additional claims in cross-claim would be limited.

[Ekes](#)

## **Kino v Prestige Philately [2014] VSC 469**

Supreme Court of Victoria

Vickery J

Conversion - Kino was sole beneficiary of deceased's residual estate - Will provided for stamp collection to form part of residual estate - stamp collection distributed to Kino - Kino claimed art dealer misappropriated stamps and certificates - art dealer had sold stamps and certificates to collector - stamps were to be offered for sale through auctioneer - Kino claimed ownership and sought delivery up of stamps - collector claimed that, because plaintiff did not report stamps were missing to Australian Philatelic Traders Association, she was estopped from denying art dealer's authority to sell stamps - s27 *Goods Act 1958* (Vic) and/or s26 *Sale of Goods Act 1923* (NSW) - held: art dealer misappropriated stamps and purported to on-sell them - nemo dat rule would apply unless estoppel established - estoppel not established - collector's and auctioneer's cross-claims against art dealer succeeded - Court to hear parties on appropriate orders including delivery up of stamps, and quantum of damages to be paid to Kino, auctioneer and collector.

[Kino](#)

## **Bill Express Ltd v Pitcher Partners (a Firm) [2014] VSC 482**

Supreme Court of Victoria

Macaulay J

Corporations - negligence - auditors - company in liquidation sued former auditors who audited company's financial statements in different financial years - company in liquidation claimed damages from each firm due to their allegedly defective audits - company sought order referring questions to a special referee for determination concerning correct application of the Australian Accounting Standards made pursuant to s334 *Corporations Act 2001* (Cth) to accounting treatment of particular computer terminals in company's financial statement - held: Court not persuaded it was appropriate to refer questions to special referee - real risk that process would cause more delay and cost than it would avoid - issue which company sought to have decided by expert accountant involved question of law of proper construction of Accounting Standards - more appropriate that a judge determine question rather than a special referee.

[Bill Express Ltd](#)

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