

Monday, 20 April 2015

Daily Insurance A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Rockdale City Council v Simmons (NSWCA) - negligence - cyclist injured in collision with boom gate - council liable - appeal dismissed - cross-appeal allowed in part

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd (NSWCA) - real property - equity - mortgages - entitlement to compensation for resumed land - appeal allowed - matter remitted to Land and Environment Court

Gacic v John Fairfax Publications Pty Ltd (NSWCA) - damages - defamation - action arising out of review of restaurant - appeal and cross-appeal allowed

Kissane Family Pty Ltd as Trustee for the Kissane Family Trust v Burns (NSWSC) - contract - funding of promotional tour by soccer team - funder entitled to return of funds it lent to promotor

Veall v Veall (VSCA) - Wills and estates - refusal to grant probate - testator lacked testamentary capacity when making Will - appeal dismissed

Summaries With Link (Five Minute Read)

Rockdale City Council v Simmons [2015] NSWCA 102

Court of Appeal of New South Wales

Beazley P; McColl & Barrett JJA

Benchmark

Negligence - respondent injured while riding bicycle through carpark adjacent to club when he struck boom gate which was closed across entrance - plaintiff sued council and club - primary judge found council liable - contributory negligence assessed at 20% - s5B *Civil Liability Act 2002* (NSW) - held: primary judge did not err in finding council owed duty of care to respondent or that it breached duty of care - no error in finding of causation or in finding council was not exercising "special statutory power" under s43A - no error in refusal to find club owed duty of care to respondent - primary judge erred in finding of contributory negligence - appeal dismissed - cross-appeal allowed in part.

[Rockdale](#)

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2015] NSWCA 100

Court of Appeal of New South Wales

Macfarlan, Emmett & Gleeson JJA

Real property - equity - corporations - mortgages - applicant was registered proprietor of land resumed by second respondent (Transport NSW) - proceeding concerned entitlement to compensation under *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (JTA) - at time of acquisition applicant had been deregistered under s601AB(2) *Corporations Act 2001* (Cth) - prior to acquisition first respondent contracted to buy resumed land from company (Stacks) which was exercising power of sale under registered mortgage over resumed land granted by applicant (first mortgage) - dispute between applicant and first respondent concerned which of them was entitled to compensation under JTA - part of compensation had been paid by Transport NSW to Stacks and to another company (RTS), which was mortgagee under a second registered mortgage over resumed land granted by applicant - held: trial judge erred in dealing with question whether Stacks breached duty to applicant in exercising power of sale under first mortgage - leave to appeal granted - appeal allowed - matter remitted to Land and Environment Court to determine respective interests that applicant and first respondent had in resumed land.

[Golden](#)

Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99

Court of Appeal of New South Wales

McColl, Macfarlan & Barrett JJA

Damages - defamation - action arising out of review published by respondents of restaurant conducted by appellants - judgment given in respondents' favour (liability judgment) - Court of appeal upheld appellants' appeal - matter remitted for assessment of damages - appellants contended primary judge's award of damages was inadequate and that primary judge erred by not back-dating judgment to date of liability judgment - respondents contended primary judge erred in consideration of plea in mitigation of damages and that award of damages excessive - held: primary judge erred in award of aggravated damages by failing to take into account respondents' failure to apologise and imputations' falsity - primary judge erred in failing to back-date judgment - primary judge erred by not ordering first respondent to pay exemplary damages for continuing publication of review - primary judge erred in failing to conclude certain

statements by reviewer were statements of fact relevant to appellants' reputations and contextual background - compensatory damages and exemplary damages increased - damages reduced for mitigation factors - appeal allowed - cross-appeal allowed.

[Gacic](#)

Kissane Family Pty Ltd as Trustee for the Kissane Family Trust v Burns [2015] NSWSC 423

Supreme Court of New South Wales

Lindsay J

Contract - questions concerning construction and operation of contract relating to funding of promotional tour of Australia by soccer team - plaintiff provided money to promotor but suffered shortfall in financial return - meaning of clause of principal contract between plaintiff, promotor and guarantors which provided that funds provided by plaintiff to cover costs of tour would be repaid to plaintiff "from the distribution of ticket sales" - admissibility of extrinsic evidence - contractual context - competing contentions - *indebitatus assumpsit* - held: amount repaid to plaintiff fell short of "the funds advanced" - plaintiff entitled against promotor to be repaid balance on promotor's default in repaying outstanding balance of "the funds advanced" - entitlement enforceable in debt or under law of restitution - plaintiff entitled to return of funds lent by it to promotor and not repaid but "retained" by promotor - guarantors accepted guarantee obliged them to make good promotor's default - judgment for plaintiff.

[Kissane](#)

Veall v Veall [2015] VSCA 60

Court of Appeal of Victoria

Santamaria, Beach & Kyrrou JJA

Wills and estates - testamentary capacity - appellants were executors of 10 December 2010 will and sought its admission to probate - respondent was deceased's daughter - respondent objected to grant of probate on grounds deceased lacked testamentary capacity and did not know and approve of contents of will - primary judge upheld objection on grounds that although testator had testamentary capacity it was not persuaded testator knew of and approved of contents of Will - appellants appealed - suspicious circumstances - capacity of testator to evaluate claims on bounty - held: deceased lacked testamentary capacity at time of making December Will - notice of contention upheld - Court not persuaded trial judge erred in holding he could not be affirmatively satisfied testator knew and approved the contents of the December will - appeal dismissed.

[Veall](#)

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