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

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Executive Summary (1 minute read)

McCarthy v National Australia Bank Ltd (NSWCA) - real property - possession - application to set aside default judgment dismissed - leave to appeal refused

Charan v Commonwealth Bank of Australia (NSWCA) - loans and mortgages - possession - bankruptcy - proceedings against bank not tenable - leave to appeal against dismissal of statements of claim refused

Arora Supermarkets Pty Ltd v Franklins Pty Ltd (NSWSC) - landlord and tenant - option for renewal of sublease - order refused requiring defendant to exercise option of renewal of head lease

Saville v Hallmarc Construction Pty Ltd (VSCA) - security of payments - adjudicator's determination that appellant was within time when he purported to serve first payment claim void - appeal dismissed

Zweck v Town of Gawler (SASCFC) - environment and planning - refusal to determine application for development plan consent for division of land - limb of clause of land management agreement invalid - appeal allowed

Summaries With Link (Five Minute Read)

McCarthy v National Australia Bank Ltd [2015] NSWCA 370

Court of Appeal of New South Wales

Meagher JA; Bergin CJ in Eq

Default judgment - real property - possession - bank obtained judgment for possession of applicant's property - primary judge dismissed application for stay of execution of writ of possession on basis of arguable defence to claim - primary judge had also treated that application as an application to set aside default judgment - earlier applications to set aside default judgment had been dismissed on basis there was no arguable defence to claim - applicant sought leave to appeal - procedural fairness - ASIC Regulatory Guide 209 - held: proposed appeal had no prospects of success - application for leave to appeal dismissed.

[McCarthy](#)

Charan v Commonwealth Bank of Australia [2015] NSWCA 364

Court of Appeal of New South Wales

Basten JA & Tobias AJA

Loans and mortgages - bankruptcy - possession - first applicant made claims for compensation against bank and trustees in bankruptcy - first applicant also made a claim, which was abandoned, for return of properties of which bank had obtained possession - White J dismissed proceedings without prejudice to right to claim account or equitable damages against bank in relation to its conduct as mortgagee, its power of sale, or net proceeds of sale - present proceedings were commenced in Equity division - primary judge dismissed statements of claim - applicant sought leave to appeal - s116 *Bankruptcy Act 1966* (Cth) - ss9 & 420A *Corporations Act 2001* (Cth) - s90 *Real Property Act 1900* (NSW) - held: proceedings before primary judge not tenable - no error in disposal of proceedings - application for leave to appeal dismissed.

[Charan](#)

Arora Supermarkets Pty Ltd v Franklins Pty Ltd [2015] NSWSC 1766

Supreme Court of New South Wales

White J

Landlord and tenant - plaintiff operated supermarket it occupied under sublease defendant - plaintiff claimed it had exercised option for renewal of sublease and sought order requiring defendant to exercise option of renewal of head lease - under sublease exercise of option only effective if defendant exercised option to renew head lease - whether defendant estopped from relying on discretion in clause of sublease - whether defendant engaged in misleading and deceptive conduct in contravention of s18 of *Australian Consumer Law* and mandatory injunction should be granted - whether unconscionable conduct engaged in contravention of *Australian Consumer Law* - held: plaintiffs' arguments rejected - Court would reach same conclusion if plaintiff's claim was for mandatory interlocutory injunction - application for relief sought refused.

[Arora](#)



Saville v Hallmarc Construction Pty Ltd [2015] VSCA 318

Court of Appeal of Victoria

Warren CJ; Kaye & Tate JJA

Security of payments - judicial review of adjudication determination under *Building and Construction Industry Security of Payment Act 2002* (VSCA) - whether appellant was out of time when he purported to serve first payment claim - whether primary judge was correct to hold adjudicator's determination that appellant was within time was void - scope of reviewability of decision by adjudicator - held: fixing of reference date by adjudicator was reviewable - no error in primary judge's conclusion that reference date fixed by adjudicator was wrong and therefore adjudicator ought not to have assumed jurisdiction - no error in finding adjudication determination was of no legal effect - primary judge's reasons were adequate - appeal dismissed.

[Saville](#)

Zweck v Town of Gawler [2015] SASCF 172

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Nicholson JJ

Environment and planning - appellant appealed against Environment, Resources and Development Court's dismissal of his appeal against Corporation of the Town of Gawler's refusal to determine application for development plan consent for land division - land was subject of a land management agreement under s57 *Development Act 1993* (SA) which contained clause precluding division of land or any application for development authorisation to divide it - held: Environment Court had power to determine validity of clause and no discretion to decline to determine question - second limb of clause which prevent lodgement of application for development authorisation was invalid - first limb, which precluded division related to "development of land" was valid - proposed development was not hypothetical such that Environment Court was entitled to refuse to consider it - appeal allowed - application remitted to Development Assessment Panel for determination.

[Zweck](#)

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