



Monday, 14 March 2016

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

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### Executive Summary (1 minute read)

**Crescent Capital Partners Management Pty Ltd v Crescent Funds Management (Aust) Ltd** (FCA) - trade practices - financial services - respondents engaged in misleading and deceptive conduct - applicant entitled to relief

**Swift v Wearing-Smith** (NSWCA) - negligence - respondent injured in fall from balcony when balustrade gave way - appellant owners not liable

**Sellak v Sellak, estate of late Corrado Simon Sellak; Sellak v Sellak** (NSWSC) - succession - family provision - claim by sons of deceased - directions given in relation to grandchildren obtaining independent legal advice

**Bergman v CGU Insurance Ltd** (VSC) - insurance - landlord's insurance - fire at property - non-disclosure - misrepresentation - insurer's liability reduced to nil

**Edwards v State Trustees Ltd** (VSCA) - Wills and estates - forfeiture rule - widow who killed deceased not entitled to benefit from deceased's death - appeal dismissed

**ABC Constructions No 1 Pty Ltd v Bonelli Constructions Pty Ltd** (QSC) - corporations - statutory demand - genuine dispute established - demand set aside

**Australia and New Zealand Banking Group Ltd v Manasseh** (WASCA) - contract - guarantee - bank not entitled to payment of amount under guarantee - appeal dismissed

# Benchmark

## Summaries With Link (Five Minute Read)

### **Crescent Capital Partners Management Pty Ltd v Crescent Funds Management (Aust) Ltd [2016] FCA 229**

Federal Court of Australia

Bennett J

Trade practices - misleading and deceptive conduct - financial services - applicant contended respondent entities' names ('Crescent Wealth') were misleadingly or deceptively similar to its name and that respondents falsely or misleadingly made representations that services and products were connected to applicant - applicant sought relief under ss18 & 29 *Australian Consumer Law* and ss12DA & 12DB *Australian Securities and Investments Commission Act 2001* (Cth) - applicant also contended respondents were accessories to other respondents' contraventions - ss79, 761G *Corporations Act 2001* (Cth) - held: Crescent Wealth had engaged in conduct likely to mislead or deceive - position of individual respondents considered - applicant entitled to certain relief.

[Crescent](#)

### **Swift v Wearing-Smith [2016] NSWCA 38**

Court of Appeal of New South Wales

Meagher, Hoeben & Simpson JJA

Negligence - respondent injured when he fell from balcony at rear of appellants' premises when balustrade gave way - respondent alleged appellants negligent by allowing access to balcony - respondent succeeded in claim against appellants - ss5B & 5D(1)(a) *Civil Liability Act 2002* (NSW) - appellants' response to recommendations contained in building inspection report - causation - held: primary judge erred in mechanism of balustrade's failure - primary judge's findings as to content of duty of care went beyond appellants' duty to exercise reasonable care - to extent defect identified appellants had acted reasonably - no reason for appellants to believe further structural work required on balustrade - breach of duty not established - appeal allowed.

[Swift](#)

### **Sellak v Sellak, estate of late Corrado Simon Sellak; Sellak v Sellak [2016] NSWSC 213**

Supreme Court of New South Wales

Slattery J

Succession - family provision - directions - plaintiffs were brothers sought provision from late father's estate - plaintiffs' sister was executrix who resisted relief sought - issue in proceedings was that it was possible grandchildren's shares of residuary estate under Will might be reduced - directions - held: parties to arrange for deceased's three grandchildren to be independently advised - parties to provide relevant materials to legal adviser - Court to be informed on grandchildren's behalf whether they wished to make submission in proceedings and for provision of relevant material to Court.

[Sellak](#)

## **Bergman v CGU Insurance Ltd [2016] VSC 81**

Supreme Court of Victoria

Hargrave J

Insurance - non-disclosure - misrepresentation - plaintiff obtained landlord's insurance for property he purchased - building on property damaged by fire - .property was vacant in preparation for demolition before commencing building works - plaintiff sought cost of rebuilding or repairing damaged portions of buildings - insurer refused payment on basis plaintiff failed to disclose intention to demolish, gave false answer to specific question and suffered no loss because he intended to demolish buildings - held: plaintiff breached s 21(1) *Insurance Contracts Act 1984* (Cth) by not disclosing matters relevant to risk - plaintiff's answer to question concerning demolition was false and contained misrepresentation-insurer's liability reduced to nil by s28 - unnecessary to decide whether plaintiff suffered loss - judgment for insurer.

[Bergman](#)

## **Edwards v State Trustees Ltd [2016] VSCA 28**

Court of Appeal of Victoria

Whelan, Santamaria & Kyrou JJA

Wills and estates - State Trustees sought Court's directions on how to distribute assets of deceased's estate in circumstances where primary beneficiary under Will had killed deceased - appellant widow pleaded guilty to offence of defensive homicide - primary judge found Court had no discretion to grant relief from forfeiture rule on basis of widow's tragic circumstances and very low moral culpability, that widow had forfeited her interest in deceased's estate, that it was inappropriate to impose a constructive trust for the benefit of beneficiaries to be determined by Court, that gift-over provisions could not take effect, that estate fell on an intestacy and was to be distributed to deceased's daughter - held: appellant's criminal culpability required that widow should not benefit from deceased's death - forfeiture rule applied - appeal dismissed.

[Edwards](#)

## **ABC Constructions No 1 Pty Ltd v Bonelli Constructions Pty Ltd [2016] QSC 35**

Supreme Court of Queensland

Boddice J

Corporations - applicant sought to set aside respondent's statutory demand pursuant to s459G *Corporations Act 2001* (Cth) - whether there was genuine dispute as to existence or amount of debt - whether genuine off-setting claim - contemporaneous documentation - surrounding circumstances - held: progress payment on which demand based contained items significantly inconsistent with surrounding documentation - clear dispute regarding entitlement to payment for delay costs - applicant established a genuine dispute - unnecessary to determine whether off-setting claim established - demand set aside.

[ABC](#)

## **Australia and New Zealand Banking Group Ltd v Manasseh [2016] WASCA 41**



Court of Appeal of Western Australia

McLure P; Buss & Murphy JJA

Contract - guarantee - respondent's husband borrowed money on behalf of company from bank - respondent provided guarantee secured by mortgage - bank contended guarantee continued for subsequent credit contracts offered or made to company - bank sued on one of the subsequent contracts (November 2009 credit contract) - respondent claimed liability came to an end on termination date of extension to guarantee to which she had agreed - respondent did not agree to guarantee November 2009 credit contract - primary judge held there was no misleading or deceptive conduct by bank and that respondent's obligation could only end when company had performed all of its obligations to bank and discharged its liability in full - primary judge held November 2009 credit contract was in substance a replacement agreement which adversely affected respondent's liability under guarantee - respondent would only become liable if she consented or entered into new guarantee - primary judge dismissed bank's claims under guarantee and mortgage dismissed - construction of guarantee - 'Ankar' principle - held: bank' appeal dismissed.

[Australia and New Zealand Banking Group](#)

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