

Tuesday, 19 March 2024

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

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### Executive Summary (One Minute Read)

**Skycity Adelaide Pty Ltd v Treasurer of South Australia & Anor (No 2)** (SASCA) - Court of Appeal answered questions of law regarding construction of instrument governing imposition of duty on casino operator

**Australian Securities and Investments Commission v Finder Wallet Pty Ltd** (FCA) - ASIC case failed, as it had not shown that a cryptocurrency product was a debenture within the meaning of the *Corporations Act 2001* (Cth)

**Brylewski v Maclean (No 2)** (NSWSC) - successful applicants for possession awarded costs

**Karam Group Pty Ltd ATF The Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors** (QSC) - part of an adjudication under the *Building and Construction Industry Payments Act 2004* (Qld) was affected by jurisdictional error and void, but the Court exercised its discretion to allow the only unaffected part of the decision to remain binding on the parties

**Aurenne Mt Ida Pty Ltd v Central West Concrete Pty Ltd** (WASC) - Court set aside statutory demand on the basis of a genuine dispute regarding a gold mining project

### Summaries With Link (Five Minute Read)

**Skycity Adelaide Pty Ltd v Treasurer of South Australia & Anor (No 2) [2024] SASCA 14**  
Court of Appeal of South Australia

Livesy P, Lovell, & Bleby JJA

Taxation - SkyCity operates the SkyCity Casino pursuant to a licence granted under the *Casino Act 1997* (SA) - s16 of the *Casino Act* provides for an Approved Licensing Agreement between the licensee and the Minister - s51 imposes liability on SkyCity, as licensee, to pay casino duty - duty is calculated under a Casino Duty Agreement ("CDA") that exists pursuant to s17 - there was a dispute as to the correct interpretation of the current CDA and the duty payable in accordance with it, and the parties agreed that SkyCity would commence proceedings in the Supreme Court - with the consent of the parties, a Master ordered that questions of law be reserved for determination by the Court of Appeal, namely: (1) do "Converted Credits", being electronic gaming credits arising from the conversion of loyalty points by the casino's customers, when played by customers, constitute an "amount received by the Licensee during the period for or in respect of consideration for gambling in the Casino premises" within the meaning of "gross gambling revenue" within the definition in the CDA? (2) do loyalty points received by customers for gambling using electronic gaming machines and automated table games constitute "monetary prizes" within the definition of "net gambling revenue" in the Current CDA? (Monetary Prizes Issue); and (3) if these two questions are decided in such a way that Skycity is liable for unpaid casino duty, then as a matter of law, do the common law or equitable principles concerning penalty clauses apply to the relevant clause of the current CDA? - held: the rights and liabilities of parties to a contract are to be determined objectively, which is done by reference to the text, context and purpose of the document - words in a contract are, prima facie, to be given their plain meaning - credits were fundamentally different from points - customers use credits, not points for gambling - question (1) answered "yes" - question (2) answered "no" - question (3) answered "yes".

[Skycity Adelaide Pty Ltd](#)

## **Australian Securities and Investments Commission v Finder Wallet Pty Ltd [2024] FCA 228**

Federal Court of Australia

Markovic J

Corporations - ASIC sought declarations that Finder Wallet has contravened s727 of the *Corporations Act 2001* (Cth) by making an offer of a debenture, that requires disclosure to investors under Pt 6D.2 without lodging a disclosure document with ASIC; s994B of the *Corporations Act* because it failed to make a target market declaration as required by before it engaged in retail product distribution conduct; and s911A of the *Corporations Act* because it has carried on a financial services business without holding an Australian Financial Services Licence covering the provision of financial services with respect to its product - ASIC also sought that Finder Wallet pay a pecuniary penalty - held: the critical issue was whether the Finder Earn product was a debenture - s9 of the *Corporations Act* relevantly defines a "debenture" of a body as a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body, and the chose in action may (but need not) include a security interest over property of the body to secure repayment of the money - at common law a debenture has two characteristics: it is issued by a company; and it

acknowledges or creates a debt - online terms and conditions will bind a party, even if unsigned, provided the party had a reasonable opportunity to consider the terms and by his or her conduct indicated acceptance of them - there did not appear to be any dispute between the parties that a customer who acquired the Finder Earn product had a chose in action, at least at common law - Finder Wallet's obligation, as set out in the Terms, was to repay cryptocurrency called TrueAUD allocated or transferred to it by the customer plus a return in TrueAUD, to convert that amount to Australian currency and pay the Australian currency equivalent amount into the customer's Finder Wallet account - there were no moneys deposited or lent, and there was equally no undertaking by Finder Wallet to repay any moneys as a debt - ASIC had not established that the Finder Earn product was a debenture within the meaning of a s9 of the *Corporations Act* - proceedings dismissed.

[Australian Securities and Investments Commission](#)

## **Brylewski v Maclean (No 2) [2024] NSWSC 227**

Supreme Court of New South Wales

Basten AJ

Bankruptcy - the plaintiffs had sought an order for possession of a residential unit in Canterbury - they held a 50% interest in the property and claimed an entitlement pursuant to a 2013 deed to the remaining 50% interest held by the uncle of one of them, who had died - there were concurrent proceedings in the Equity Division with respect to probate of a 2010 will, the validity of a marriage between the testator and the active defendant, and the validity of a subsequent 2020 will in favour of the defendant - orders for possession were made in favour of the plaintiffs, subject to certain conditions including an undertaking as to the steps to be taken with respect to the property pending determination of proceedings in the succession list in the Equity Division - the Court granted leave to the parties to seek a variation of the orders, if not by consent, within 14 days of entry of the orders - three days later, the plaintiffs' solicitors sent an email to the trial judge's Associate, seeking the orders be amended by adding an order for costs - because Chambers were unattended over the Court vacation, there was no contact with the Court Registry until more than a month later - held: the Court was satisfied that an application was made within 14 days, both pursuant to the leave reserved in the orders and pursuant to r36.16(3A) of the *Uniform Civil Procedure Rules 2005 (NSW)* - in so far as the email was not in the form of a notice of motion as required by r36.16(3A), the Court waived compliance with that aspect of the rule - the plaintiffs had been broadly successful, as whether or not the orders were not, or could not be, subsequently enforced did not affect the nature of the orders, nor the success of the party in obtaining them - the point that no issue estoppel arose from the present proceeding as to the validity of the 2013 Deed, that not having been an issue in the hearing, did not render the orders subject to reversal - the evidence did not demonstrate that the delay had caused unfairness or relevant prejudice to the defendant - while it was undoubtedly unfortunate that the duplication of proceedings between the two Divisions of the Court had increased the complexity of the litigation, that was not a reason to decline to deal with the costs of the possession proceedings - defendant to pay the plaintiffs' costs on the ordinary basis as an identified gross sum.



[View Decision](#)

**Karam Group Pty Ltd ATF The Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors [2024] QSC 34**

Supreme Court of Queensland

Bradley J

Security of payments - Karam and HCA contracted for HCA to design and construct the Maasra Apartments, a mixed-use development of residential apartments and commercial space located in the inner Brisbane suburb of Coorparoo - HCA was close to achieving practical completion under the contract and that most of the remaining work related to rectification of defects and preparation of as-built drawings - HCA served a payment claim under the *Building and Construction Industry Payments Act 2004* (Qld) in an amount of over \$15 million - the Superintendent then issued Karam with a payment certificate in the sum of nearly \$24 million - HCA lodged an adjudication application in respect of the payment claim and payment certificate, and said that the amount should be about \$4.6 million - the parties agreed HCA should be restrained from again agitating a part of the payment claim for a progress payment seeking the repayment of liquidated damages - Karam also challenged the adjudicator's decision - held: Karam and HCA agreed that the adjudicator made jurisdictional errors in the parts of the decision where the adjudicator: (a) expounded his own theory of the application of the prevention principle to the contract; (b) expressed his own views about what the role and the obligations of the superintendent should be under the contract; and (c) expressed views about whether the parties' amendments to the standard form contract amounted to an attempt to "contract out" of the Act - the Court was satisfied that these parts of the decision should be declared to be void - the Court should exercise the discretion to allow the only unaffected part of the decision to remain binding on the parties.

[Karam Group Pty Ltd ATF The Karam \(No. 1\) Family Trust](#)

**Aurenne Mt Ida Pty Ltd v Central West Concrete Pty Ltd [2024] WASC 51**

Supreme Court of Western Australia

Forrester J

Corporations law - the plaintiff owns a new mining operation at Mt Ida, which required the construction and development of a gold processing plant, associated mining operation, and a camp for workers - as part of the project, concrete works were required, and the defendant was contracted to provide those works - in due course the defendant served a statutory demand on the plaintiff - the plaintiff commenced proceedings, seeking that the statutory demand be set aside on the ground that there was a genuine dispute about the debt, or alternatively because the plaintiff had an offsetting claim - held: the Court's function was to determine whether there is a genuine dispute, and the Court was not expected to undertake an extended inquiry or attempt to weigh the merits of the dispute, and it was not part of the Court's function to resolve the dispute - it suffices if there is a 'plausible contention' requiring 'further investigation', or something that may be equated to the criterion of whether there is a 'serious question to be tried' - the applicant must establish that: (a) the dispute is bona fide and truly exists in fact; and



(b) the grounds alleging the existence of the dispute are real and not spurious, hypothetical, illusory or misconceived - the onus is on the recipient of the statutory demand to establish the offsetting claim - the expression 'genuine claim' connotes a plausible contention requiring investigation and raises similar considerations as 'the serious question to be tried' criterion on an interlocutory injunction - the Court was satisfied that a genuine dispute had been established as to whether the plaintiff was entitled to withhold the payment of the invoices on the basis of the relevant clause of the contract - were it necessary to do so, the Court would also have been satisfied that the plaintiff had established a genuine claim sufficiently quantified to give rise to an offsetting amount - statutory demand set aside.

[Aurenne Mt Ida Pty Ltd](#)

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