



Friday, 22 December 2017

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

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CIVIL (Banking)

Executive Summary (1 minute read)

Capic v Ford Motor Company of Australia Limited (No 4) (FCA) - judgments and orders - representative proceedings - leave to apply under §1782 Title 28 United States Code to seek discovery from company (Ford US) granted

Mailey v Sutherland Shire Council (NSWCA) - building and construction - building control - Council's order that appellants perform work to 'place land in a safe condition' was not ultra vires - appeal dismissed

Twelve Walker Street Pty Ltd v Lee (NSWSC) - land law - easements - imposition of easement granted over defendants' land to permit installation of rock anchors, subject to qualification that order stayed until approvals obtained

Griffiths v Steele (VSC) - negligence - plaintiff's foot crushed when defendant ran over it while driving vehicle - defendant liable

P & JM De Leo Pty Ltd v Alphonso (VSC) - contract - Victorian Civil and Administrative Tribunal ordered builder to pay owner amount for faulty construction - appeal dismissed

Levingston v Lola May Levingston as Executrix Of The Will OF Robert Ian Edwin Partridge (WASC) - succession - family provision - application by de facto wife for provision from deceased's estate - application dismissed

Modscape Pty Ltd v Sive (TASSC) - security of payments - contract - jurisdictional error by adjudicator - determination quashed

Summaries With Link (Five Minute Read)

Capic v Ford Motor Company of Australia Limited (No 4) [2017] FCA 1575

Federal Court of Australia

Perram J

Judgments and orders - representative proceedings - applicant in class action sued Ford Australia over vehicle allegedly defective due to gearbox - applicant sought leave to apply under §1782 Title 28 United States Code to seek discovery from company (Ford US) - whether material sought bore sufficiently on proceeding's issues - whether to endorse application - *Lavecky v Visa Inc* [2017] FCA 454 - held: Court satisfied to grant leave - application granted.

[Capic](#)

Mailey v Sutherland Shire Council [2017] NSWCA 343

Court of Appeal of New South Wales

Macfarlan & Meagher JJA; Preston CJ of LEC

Building and construction - building control - three appellants owned land - appellants challenged, in Land and Environment Court, validity of Council's order to perform work to 'place land in a safe condition' - primary judge dismissed proceeding, finding that order was not ultra vires, either in narrow sense by not conforming to s124 *Local Government Act 1993* (NSW), or in wide sense by being uncertain or 'issued for an improper purpose' - having found the order was not invalid, primary judge did not proceed to determine appellants' damages claim - held: appellants did not establish order was ultra vires - primary judge correct to dismiss proceedings - appeal dismissed.

[View Decision](#)

Twelve Walker Street Pty Ltd v Lee [2017] NSWSC 1807

Supreme Court of New South Wales

Darke J

Land law - easements - plaintiffs sought imposition of easement over defendants' land under s88K *Conveyancing Act 1919* (NSW) to permit access to it in order to install rock anchors - s62 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) - held: Court satisfied to impose easement sought subject to qualification concerning agreement that orders should be stayed until plaintiffs obtained approvals for rock anchors' installation.

[View Decision](#)

Griffiths v Steele [2017] VSC 795

Supreme Court of Victoria

Keogh J

Negligence - parties were part of crew engaged concreting work on bridge - plaintiff's foot crushed when defendant drove vehicle over it - plaintiff sued defendant in negligence, contending his negligent driving caused accident and injury - disputed factual issues - whether defendant beckoned plaintiff to approach vehicle and steady load - whether defendant aware of plaintiff approaching vehicle - which side of formwork defendant was standing on when plaintiff approached vehicle - which side of formwork plaintiff was standing on when vehicle driven forward - held: defendant breached duty by his driving of vehicle - defendant's negligence caused accident and plaintiff's injuries - no contributory negligence - judgment for plaintiff.

[Griffith](#)

P & JM De Leo Pty Ltd v Alphonso [2017] VSC 786

Supreme Court of Victoria

Ginnane J

Contract - respondent owner contracted with applicant builder for construction of units - respondent sued applicant for damages for breach of warranties in s8 *Domestic Building Contracts Act 1995* (Vic) - Victorian Civil and Administrative Tribunal ordered applicant to pay respondent amount for faulty construction of units - whether Tribunal erred in ordering builder to pay damages - applicant, in previous proceedings had sued respondent for unpaid fees - proceedings settled - meaning and effect of Terms of Settlement - adequacy of reasons - identification of defect - held: error of law not established - appeal dismissed.

[P & JM De Leo Pty Ltd](#)

Levingston v Lola May Levingston as Executrix Of The Will OF Robert Ian Edwin Partridge [2017] WASC 371

Supreme Court of Western Australia

Smith AJ

Succession - family provision - plaintiff sought pursuant to ss6 & 7 *Family Provision Act 1972* (WA) provision from deceased estate of de facto husband - deceased left entire estate to only son - creditability of evidence - deceased's testamentary intentions - son's relationship with deceased - financial circumstances of plaintiff and deceased's son - held: Court not satisfied that deceased, at time of death, did not make adequate provision for plaintiff's proper maintenance, support or advancement in life - application dismissed.

[Levingston](#)

Modscape Pty Ltd v Sive [2017] TASSC 71

Supreme Court of Tasmania

Blow CJ

Security of payments - contract - applicant challenged respondent's adjudication determination under *Building and Construction Industry Security of Payment Act 2009* (Tas) - applicant contended respondent, in breach of obligation to act in good faith and contravention of s 25(2) of the Act, failed to determine issues parties put forward, denied parties natural justice by basing determination on findings neither party contended for, and which they were not invited to

address, and failed to give adequate reasons - applicant contended determination was a nullity - held: respondent erred in failing to consider applicant's adjudication response, in failing to act 'good faith' in sense of *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, and denied applicant natural justice - jurisdictional error established - adjudication quashed.

[Modscape](#)

CRIMINAL

Executive Summary

Yun v R (NSWCCA) - criminal law - murder - sentence appeal - 'Muldrock error' not established - appeal dismissed

CF v R (NSWCCA) - criminal law - sexual assault - provision of complainant's recorded evidence to jury in jury room - appeal against conviction and sentence dismissed

Summaries With Link

Yun v R [2017] NSWCCA 317

Court of Criminal Appeal of New South Wales

Latham, Bellew & Campbell JJ

Criminal law - sentence appeal - appellant found guilty of murder - appellant sentenced to 20 years non-parole period in prison, with additional term of 6 years and 8 months imprisonment - appellant sought to appeal, contending he was sentenced contrary to the principles in *Muldrock v R* (2011) 244 CLR 120 - whether sentencing judge erred by applying *R v Way* [2004] 60 NSWLR 168, by imposing 'neatly arithmetical' sentence, and/or by taking matters personal to appellant into account when assessing offending's objective seriousness - held: appeal dismissed.

[View Decision](#)

CF v R [2017] NSWCCA 318

Court of Criminal Appeal of New South Wales

Gleeson, Rothman & Hamill JJ

Criminal law - sexual assault - applicant pleaded not guilty to four charges of sexual assault offences against same complainant - jury unable to return a verdict in first trial and discharged - applicant subsequently tried by jury which found applicant guilty - applicant appealed against conviction on ground that miscarriage of justice had arisen by provision to jury of access in jury room to complainant's recorded evidence - applicant also contended sentence was manifestly excessive - whether 'irregularity at trial' - whether to grant leave to appeal under r4 Criminal



Appeal Rules - whether miscarriage of justice - whether sentence manifestly excessive - held:
appeal dismissed.

[View Decision](#)



Benchmark

Empty Manger

By: David Conolly

Once a church,
the little building
gathers dust.

Has he finally
abandoned us?

Is this the end
of
the lovely dream?

Look
at the hot, silent land -
and remember:

it was to planet earth
he came,
not to bricks
and crumbling mortar.

And to earth's inhabitants.

Wherever his Way
still lives -
and in whom -

he is present.

Always will be.

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