

Thursday 27 November 2014

Banking

A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

DH MB Pty Ltd v Manning Motel Pty Ltd (NSWCA) - leases - breach of collateral contract and covenant to repair - damages - appeal dismissed

Bartlett v Australia and New Zealand Banking Group Ltd (NSWSC) - contracts - serious misconduct by employee of bank - bank entitled to terminate contract

Executors of the Estate of the late Valerie Marshall Olsen v Second East Holdings Pty Ltd t/as Sotheby's Australia (NSWSC) - conversion - injunction restraining auction house from disposing selling or transferring painting refused

Poole v Barrow (VSC) - succession - testator's family maintenance - de facto partner of deceased granted life interest in home

Shorten v Bell-Gallie (QCA) - administrative law - no error in appointment of administrator of permanently disabled woman - leave to appeal refused

Margush v Maddeford (SASCFC) - contract for sale of house - special conditions - invalid termination of contract - damages refused - appeal dismissed

Summaries with links (5 minute read)

DH MB Pty Ltd v Manning Motel Pty Ltd [2014] NSWCA 396

Court of Appeal of New South Wales

Meagher, Barrett & Gleeson JJA

Contract - first appellant (DHMB) owned motel - DHMB leased motel to respondent - lease terminated - second appellant (DHBI) owned and operated lodge - third appellant (Mr Duffy) was sole director of and shareholder in DHMB and DHBI - respondent sued appellants for breach of collateral contract and covenant to keep premises in good state of repair - primary judge found Mr Duffy on behalf of DHBI had promised lessee that if it lessee entered lease, DHBI would purchase accommodation from lessee - primary judge awarded damages to lessee for breach of collateral agreement - primary judge also held that there was a breach of covenant in relation to external wooden staircase and awarded damages for the breach - held: collateral contract formed between DHBI and lessee constituted by offer and subsequent acceptance - DHBI bound to terms of its offered promise to purchase accommodation - primary judge did not err in determining the measure of damages to be awarded for breach of the covenant to repair - appeal dismissed.

[DH MB Pty Ltd](#)

Bartlett v Australia and New Zealand Banking Group Ltd [2014] NSWSC 1662

Supreme Court of New South Wales

Adamson J

Contracts - damages - bank purported to terminate plaintiff's employment without notice on basis of serious misconduct - plaintiff sued bank for damages for breach of contract alleging he was not guilty of serious misconduct and that bank not entitled to terminate his employment without notice - held: Court satisfied person who was relevant mind of bank held opinion that plaintiff was responsible for sending doctored email to journalist - common ground that this amounted to serious misconduct within meaning of contract - bank entitled to terminate plaintiff's employment without notice - bank not required to establish underlying fact of serious misconduct - even if it were so required bank had established to requisite standard that the plaintiff was responsible for the doctored email to journalist - bank entitled to terminate contract - judgment for bank.

[Bartlett](#)

Executors of the Estate of the late Valerie Marshall Olsen v Second East Holdings Pty Ltd t/as Sotheby's Australia [2014] NSWSC 1675

Supreme Court of New South Wales

Stevenson J

Conversion - proceedings concerning painting by Dr John Olsen - plaintiffs were children of Olsen's late wife and executors of her estate - defendant was auction house - plaintiffs claimed estate owned painting - plaintiffs sought to bring action for conversion against person in

possession of painting and to seek delivery up of painting - plaintiffs sought an injunction restraining auction house from disposing, selling or in any way transferring painting until further order - held: Court not satisfied plaintiffs established prima facie case or serious question such as would warrant grant of an interlocutory injunction - plaintiffs granted a chance to adduce further evidence from Dr Olsen and seek to renew application in the light of evidence - interlocutory injunction refused - application adjourned.

[Executors of the Estate of the late Valerie Marshall Olsen](#)

Poole v Barrow [2014] VSC 576

Supreme Court of Victoria

McMillan J

Succession - testator's family maintenance - deceased died intestate - plaintiff de facto partner of deceased sought further provision from deceased's estate for her proper maintenance and support pursuant to s91 *Administration and Probate Act 1958* (Vic) - defendant accepted deceased had a responsibility to provide for plaintiff and that the extent of her provision under intestacy laws was not sufficient to satisfy responsibility - extent and nature of further provision to be ordered - held: life interest in home was sufficient further provision for plaintiff - parties to be heard on appropriate form of orders.

[Poole](#)

Shorten v Bell-Gallie [2014] QCA 300

Court of Appeal of Queensland

Fraser JA; North & Flanagan JJ

Administrative law - guardianship - applicant was fiancée of permanently disabled woman - members of woman's family appointed as her administrators under *Guardianship and Administration Act 2000* (Qld) - family members replaced with Public Trustee by QCAT - Public Trustee replaced with respondent - applicant's application for review of respondent's appointment dismissed without hearing in accordance with practice direction - applicant appealed to Appeal Division of QCAT and unsuccessfully sought to introduce new evidence - appeal dismissed - applicant sought leave to appeal on basis he was denied natural justice - that there was failure to take into account relevant considerations - that irrelevant considerations were taken into account - that Appeal Tribunal misconstrued s146 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) - held: no arguable error of law established on the part of the Appeal Tribunal - leave to appeal refused - application to adduce fresh evidence refused.

[Shorten](#)

Margush v Maddeford [2014] SASCFC 129

Full Court of the Supreme Court of South Australia

Vanstone, Peek & Parker JJ

Contract - purchaser signed contract to purchase vendor's property - special conditions provided sale subject to purchaser obtaining finance by certain date and that either party could terminate after that certain date, with purchaser only being liable for damages if she had failed to use best endeavours - purchaser unable to obtain finance - vendor terminated contract and sold property for less than contract price - vendor claimed difference in sale price, together with costs associated with second sale - primary judge dismissed claim - primary judge found purchaser had used best endeavours and appeal conduct on that basis - held: special conditions did not constitute condition precedent to operation of contract - providing purchaser used best endeavours, contract at all times remained conditional upon approval for finance being obtained - inability of purchaser to obtain finance did not bring contract to an end - rather, it became voidable at instance of either party - since neither party had validly terminated contract, it remained on foot - special conditions were operative - purchaser free to attempt to obtain finance - appeal dismissed.

[Margush](#)

[Click Here to access our Benchmark Search Engine](#)