

Friday, 1 May 2015

Daily Composite Insurance, Banking, Construction & Government 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.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Henderson v McSharer (FCA) - consumer law - unconscionable conduct and deceit by provider of business consultancy services - declarations and orders (I B)

Re Application of Fowler (NSWSC) - guardianship - private financial manager entitled to remuneration for management for protected estate (B)

The Owners Strata Plan No 72381 v Meriton Apartments Pty Ltd (NSWSC) - referee's report - whole of report adopted - verdict and judgment for owners corporation (B C)

Millington v Waste Wise Environmental Pty Ltd (VSC) - damages - motor vehicle collision - failure to properly apply compensatory principle - breach of "once-and-for-all" rule - misapplication of law relating to mitigation of loss - appeal allowed (I B)

Re Sobey & Anor as T'ees of Will of Cummins (deceased) (QSC) - equity - trusts and trustees - meaning of "appointor" - directions (B)

Re Magistrate T Watt; Ex Parte The Housing Authority (WASC) - residential tenancy - termination of tenancy - jurisdictional error - matter remitted (B G)

Scott v Second Skin Pty Ltd (WASC) - costs - indemnity costs sought on basis of improper or unreasonable conduct - application dismissed (I B)

Summaries With Link (Five Minute Read)

Henderson v McSharer [2015] FCA 396

Federal Court of Australia

Gilmour J

Consumer law - deceit - commercial dishonesty - applicants conducted sheep farming enterprise - applicants were in financial difficulty - applicants claimed first respondent induced them to accept him as provider of business consultancy services and to transfer flock of sheep to a company controlled by him - applicants claimed first respondent engaged in misleading or deceptive conduct in contravention of s18 *Competition and Consumer Act 2010* or unconscionable conduct in contravention of s21 Australian Consumer Law - ss12CA, 12CB & 12DA *Australian Securities and Investments Commission Act 2001* - held: first respondent represented he had capacity to assist applicants in ways beyond actual capacities - first respondent engaged in misconduct for personal financial advantage - applicants relied on first respondent's false representations to engage his services and transfer flock of sheep which was then sold with applicants never receiving proceeds - unconscionable conduct and tort of deceit established - loss and damage established - declarations and orders

[Henderson](#) (I B)

Re Application of Fowler [2015] NSWSC 466

Supreme Court of New South Wales

White J

Guardianship - private financial manager sought order authorising him to charge fees for performance of functions as manager of protected estate managed under *NSW Trustee and Guardian Act 2009* - NSW Trustee sought clarification of manager's insurance position in relation to professional indemnity insurance - held: Trustee justified in requiring manager to satisfy it that he had appropriate insurance cover - purpose of orders sought was to allow NSW Trustee to determine appropriate quantum of remuneration to be allowed once Court had made order authorising manager to charge fees - manager entitled to just and reasonable remuneration out of estate on conditions and with liberty to apply

[Fowler](#) (B)

The Owners Strata Plan No 72381 v Meriton Apartments Pty Ltd [2015] NSWSC 442

Supreme Court of New South Wales

Ball J

Referee's report - parties sought orders concerning adoption of referee's report - owners corporation sought that whole report be adopted and consequential orders including verdict and judgment in accordance with the report - Meriton sought that certain paragraphs report be rejected - Meriton contended expert laboured under a misunderstanding of what his role as an expert was - interests of justice - held: whole of report adopted by Court pursuant to r20.24

Uniform Civil Procedure Rules 2005 - verdict and judgment for owners corporation.

[TheOwners](#) (B C)

Millington v Waste Wise Environmental Pty Ltd [2015] VSC 167

Supreme Court of Victoria

Croft J

Damages - motor vehicle collision - appeal from final orders in Magistrate's Court - Court ordered appellant to pay amount to respondent together with costs and interest stayed for 30 days - orders further provided further that on or before certain date respondent was to pay certain amount back to appellant - whether award for damages should be GST inclusive - mitigation - taxable supply - s109 *Magistrates' Court Act 1989* - held: Magistrate failed to properly apply compensatory principle - orders were in breach of "once-and-for-all" rule - Magistrate misapplied law relating to mitigation of loss - appeal allowed - orders to be brought in to give effect to reasons.

[Millington](#) (I B)

Re Sobey & Anor as T'ees of Will of Cummins (deceased) [2015] QSC 104

Supreme Court of Queensland

P McMurdo J

Equity - trusts and trustees - succession - applicants were trustees under trust from Will of deceased - trustees sought directions under s96 *Trusts Act 1973* in relation to meaning of term "appointor" under Will and identification of person or persons entitled to exercise appointor's power - application of clauses of Will to required disposition of trust property - held: in respect of certain trusts in Will, office of "appointor" was held by the trustees for time being - another clause of Will which defined "appointor" did not apply for purpose of those trusts.

[Sobey](#) (B)

Re Magistrate T Watt; Ex Parte The Housing Authority [2015] WASC 140

Supreme Court of Western Australia

Mitchell J

Residential tenancy - Authority sought to terminate tenant's tenancy on basis of breach of tenancy agreement - Authority appealed from Magistrate's orders - Authority contended Magistrate acted without jurisdiction by ordering that applicant transfer tenant by grant of a new social housing tenancy - Authority also alleged Magistrate acted without jurisdiction by determining tenancy should not be terminated until after tenant transferred despite being satisfied of matters referred to in s71(2) *Residential Tenancies Act 1987* - held: Magistrate misapprehended powers conferred on Court by Act - Magistrate asserted jurisdiction to require Authority to grant new tenancy to tenant where power did not exist - jurisdictional error established - not appropriate to make substituted decision - matter remitted to Magistrate's Court.

[ReMagistrate](#) (B G)

Scott v Second Skin Pty Ltd [2015] WASC 126

Supreme Court of Western Australia

Pritchard J

Indemnity costs - Court made orders by consent that legal and beneficial owner of one of two equal shares in first defendant company and various ancillary orders - plaintiff sought indemnity costs against defendant on basis company's conduct was unreasonable - whether cause of action hopeless - held: Court not satisfied indemnity costs should be ordered as mark of disapproval for improper or unreasonable conduct - application dismissed.

[Scott](#) (I B)

CRIMINAL

Executive Summary

R v Seller; R v McCarthy (NSWCCA) - criminal law - conspiracy to dishonestly influence Commissioner of Taxation - exclusion of evidence of ATO officer present at accuseds' examinations - stay refused - appeals dismissed

Summaries With Link

R v Seller; R v McCarthy [2015] NSWCCA 76

Court of Criminal Appeal of New South Wales

Bathurst CJ, Fullerton & Bellew JJ

Criminal law - Australian Crime Commission (ACC) investigated tax minimisation schemes promoted by respondents - transcripts of respondents' examinations disseminated to Commonwealth Director of Public Prosecutions (CDPP) in contravention of directions under *Australian Crime Commission Act 2002* (Cth) - respondents charged with conspiracy to dishonestly influence Commissioner of Taxation - CDPP sought to allow officer of Australian Tax Office to give evidence in criminal proceedings - Supreme Court prohibited officer from giving evidence and refused stay of criminal proceedings - held: no error in prohibiting officer from giving evidence - officer was present at compulsory examination of accuseds - evidence informed by compulsory examinations - if officer permitted to adduce proposed evidence this would alter accusatorial process inherent in criminal trial in fundamental sense described in *X7 v Australian Crime Commission* [2013] HCA 29 and *Lee v R* [2014] HCA 20 - prosecution had satisfied prosecutorial duties - Crown had not waived legal professional privilege in relation to documents - no unfairness in maintenance of privilege - mere fact of dissemination did not warrant stay - new prosecution team had been appointed - only potential witness privy to material had been excluded - appeals dismissed.

[RvSeller;RvMcCarthy](#)

Benchmark

Constancy

By George Herbert

Who is the honest man?

He that doth still and strongly good pursue,
To God, his neighbour, and himself most true:
Whom neither force nor fawning can
Unpin, or wrench from giving all their due.

Whose honesty is not
So loose or easy, that a ruffling wind
Can blow away, or glittering look it blind:
Who rides his sure and even trot,
While the world now rides by, now lags behind.

Who, when great trials come,
Nor seeks, nor shuns them; but doth calmly stay,
Till he the thing and the example weigh:
All being brought into a sum,
What place or person calls for, he doth pay.

Whom none can work or woo
To use in any thing a trick or sleight;
For above all things he abhors deceit:
His words and works and fashion too
All of a piece, and all are clear and straight.

Who never melts or thaws
At close temptations: when the day is done,
His goodness sets not, but in dark can run:
The sun to others writeth laws,
And is their virtue; Virtue is his Sun.

Who, when he is to treat
With sick folks, women, those whom passions sway,
Allows for that, and keeps his constant way:
Whom others' faults do not defeat;
But though men fail him, yet his part doth play.

Whom nothing can procure,
When the wide world runs bias from his will,
To writhe his limbs, and share, not mend the ill.
This is the Marksman, safe and sure,



Benchmark

Who still is right, and prays to be so still.

[George Herbert](#)

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