



Tuesday 1 July 2014

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.

Executive Summary (1 minute read)

GM Amalgamated Investments (Dulwich Hill) Pty Ltd v Mills (NSWCA) - easements - dominant tenement owners who failed to restore land to original condition liable to pay damages to servient tenement owner (B C)

Beck v Henley (NSWCA) - trusts and trustees - judicial advice - *Saunders v Vautier* - no prejudice in splitting of parcel of shares between beneficiaries - appeal dismissed (B)

Hammond v Stern (NSWSC) - costs - claim against solicitors for failure to pursue personal injury claim - costs limitation provision in *Legal Profession Act* applied (I)

Nefiko Pty Ltd v Statewide Form Pty Ltd (No 2) (NSWSC) - security of payments - jurisdictional facts - identification of parties to contract - no error in adjudication (C G)

Smith v Gould (VSCA) - de facto relationship - adjustment of property interests not manifestly inadequate - appeal dismissed (B)

Lower Murray Urban and Rural Water Corporation v Di Masi, Belbin & Marciano (No 2) (VSCA) - costs - defamation - offers of compromise - indemnity costs of appeals refused (I)



Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam (ACTCA) - negligence - passenger injured leaving mini-bus when clothes caught on interior - mini-bus operator liable - appeal dismissed (I)

Summaries with links (5 minute read)

GM Amalgamated Investments (Dulwich Hill) Pty Ltd v Mills [2014] NSWCA 202

Court of Appeal of New South Wales

Emmett & Gleeson JJA; Sackville AJA

Real property - easements - limitation of actions - easement to drain water over strip of servient tenement along common boundary - primary judge ordered owners of dominant tenement to pay damages to owner of servient tenement for costs of repair of paving damaged by replacement of drainage pipes - construction of easement - obligation to restore land to its *original condition* - ss88B, 181A, 195A, 195B & 195G *Conveyancing Act 1919* (NSW) - ss11(1), 14 & 16 *Limitation Act 1969* (NSW) - held: incumbent on dominant owners to restore surface to original condition within reasonable time following completion of work - servient owner's cause of action for failure to discharge obligation accrued less than six years before commencement of proceedings - no error by primary judge in concluding respondent not barred from recovering damages - appeal dismissed.

[GM Amalgamated Investments \(Dulwich Hill\) Pty Ltd](#) (B C)

Beck v Henley [2014] NSWCA 201

Court of Appeal of New South Wales

Beazley P, Leeming JA & Sackville AJA

Trusts and trustees - rights of beneficiaries - judicial advice - two sibling beneficiaries absolutely and indefeasibly entitled to trust property including two of four voting shares in private company - beneficiary requested trustee to transfer half of shares to him - other beneficiary opposed transfer - trustee sought judicial advice pursuant to s63 *Trustee Act 1925* (NSW) - primary judge found no *special circumstances* to prevent application of *rule in Saunders v Vautier* and directed trustee to transfer shares as requested - other beneficiary appealed - held: *rule in Saunders v Vautier* amounted to power on part of beneficiaries which prevailed over terms of trust instrument so it was irrelevant that the trust was a trust for sale - in absence of *special circumstances* no breach of trustee's duty of impartiality to accede to request - even where there was a loss of value by splitting of controlling parcel of shares, an unequal outcome was required to defeat the rule - no actual prejudice from splitting parcel - appeal dismissed.

[Beck](#) (B)

Hammond v Stern [2014] NSWSC 864

Supreme Court of New South Wales



Button J

Costs - professional negligence - worker injured while working on tunnel for airport train line - worker's claim in negligence became statute-barred due to lawyers' negligence - claim for lump sum pursuant to *Workers Compensation Act 1987* (NSW) foregone - worker sued lawyers in professional negligence - claim settled - costs dispute as to whether s338 *Legal Profession Act 2004* (NSW) limited amount of costs recoverable because claim against lawyers was for damages that *relate to the death of or injury to a person* - associate judge determined s338 limited costs available - r49.8(4) *Uniform Civil Procedure Rules 2005* (NSW) - ss3 & 3B, Pt 2 *Civil Liability Act 2002* (NSW) (CLA) - ss301, 337 & 338 *Legal Profession Act 2004* (NSW) (LPA) - meaning of *personal injury damages* imported into s338 LPA from CLA - held: *damages that relate to the death of or injury to a person* extended to damages recovered in professional negligence claim for failure to pursue claims based on personal injury - s338 LPA restricted costs available to worker - appeal dismissed.

[Hammond](#) (I)

Nefiko Pty Ltd v Statewide Form Pty Ltd (No 2) [2014] NSWSC 840

Supreme Court of New South Wales

Ball J

Administrative law - security of payments - plaintiff challenged validity of adjudication of payment claim made against it by first defendant - plaintiff claimed adjudicator had no jurisdiction to determine issue of who parties to contract were and that there was no contract between it and first defendant - whether identity of parties to construction contract was a jurisdictional fact - held: not entirely clear that question of who contracted to do work was a jurisdictional fact - there was unquestionably a construction contract for purposes of *Building and Construction Industry Security of Payment Act 1999* (NSW) - even if identity of parties was a jurisdictional fact, Court satisfied contracting party was first defendant - plaintiff had admitted first defendant was contracting party during adjudication proceedings which was compelling evidence first defendant was the contracting party - adjudicator took into account relevant matters - no denial of natural justice - proceedings dismissed.

[Nefiko Pty Ltd](#) (C G)

Smith v Gould [2014] VSCA 138

Court of Appeal of Victoria

Warren CJ; Osborn & Beach JJA

Domestic relationships - adjustment of property interests - parties were partners in domestic relationship within meaning of Pt IX *Property Law Act 1958* (Vic) - plaintiff sought order adjusting parties' interests pursuant to s285 - appellant appealed from valuation of his entitlement to adjustment of divisible property of relationship and of adjustments since separation - primary judge awarded appellant 13% of divisible pool of assets- appellant sought order for adjustment of 40% - held: Court accepted that views might differ as to precise quantification of entitlement but decision did not go beyond *generous ambit within which reasonable disagreement is possible* - Court must



give appropriate weight to particular factors and overall synthesis which was just and equitable - primary judge explicitly recognised ultimate need for a holistic value judgment - Court not persuaded award of primary judge was manifestly inadequate - appeal dismissed.

[Smith](#) (B)

Lower Murray Urban and Rural Water Corporation v Di Masi, Belbin & Marciano (No 2) [2014] VSCA 133

Court of Appeal of Victoria

Warren CJ; Tate & Beach JJA

Indemnity costs - defamation - successful respondents in defamation proceedings recovered indemnity costs because judgments were more favourable than offers of compromise rejected by appellant - Court dismissed appeals - respondents sought costs of appeal on indemnity basis pursuant to r63.31 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - respondents contended appeals should be regarded as continuation of proceedings below and that offers of compromise were relevant considerations - s40 *Defamation Act 2005* (Vic) - merits of grounds of appeal - Pt3, O26 r26.12.16 of the Rules - held: offers of compromise were also relevant that, at time appeals pending, Rules provided for offers to be made to compromise appeals - Court not persuaded respondents should receive costs of appeals on indemnity basis - justice best served by making order for costs on standard basis in favour of each respondent for whole of appeal.

[Lower Murray Urban and Rural Water Corporation](#) (I)

Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Rares JJ

Negligence - damages - appellant operated fleet of mini-buses which transported flight crew to accommodation - flight attendant injured when her clothing caught on lever when leaving mini-bus - primary judge found operator negligent for failing to put in place system of inspection for safety risks in its passenger vehicles - ss40, 42, 43, 44 & 45 *Civil Law (Wrongs) Act 2002* (ACT) - held: standard of care required operator to assess whether work performed by bodyworks installer required precautions which reasonable person would have taken against foreseeable not insignificant risk of harm - risk of a passenger's clothes catching on vehicle's interior was obvious risk requiring precautions - appeal dismissed

[Dallarooma Pty Ltd](#) (I)

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