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## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**McCarthy v National Australia Bank Ltd** (NSWCA) - real property - possession - application to set aside default judgment dismissed - leave to appeal refused (B)

**Mohareb v Palmer** (NSWCA) - perjury - defamation - refusal of leave to prosecute respondent for perjury - leave to appeal refused (I)

**Charan v Commonwealth Bank of Australia** (NSWCA) - loans and mortgages - possession - bankruptcy - proceedings against bank not tenable - leave to appeal against dismissal of statements of claim refused (I B)

**Arora Supermarkets Pty Ltd v Franklins Pty Ltd** (NSWSC) - landlord and tenant - option for renewal of sublease - order refused requiring defendant to exercise option of renewal of head lease (I B)

**Saville v Hallmarc Construction Pty Ltd** (VSCA) - security of payments - adjudicator's determination that appellant was within time when he purported to serve first payment claim void - appeal dismissed (I B C G)

**Zweck v Town of Gawler** (SASCFC) - environment and planning - refusal to determine application for development plan consent for division of land - limb of clause of land management agreement invalid - appeal allowed (I B C G)

**Benson v Seven Network (Operations) Ltd** (SASC) - costs - interim injunction - claim for

breach of confidence - defendant to pay plaintiff's costs of interim injunction taxed and paid immediately (I)

## Summaries With Link (Five Minute Read)

### **McCarthy v National Australia Bank Ltd [2015] NSWCA 370**

Court of Appeal of New South Wales

Meagher JA; Bergin CJ in Eq

Default judgment - real property - possession - bank obtained judgment for possession of applicant's property - primary judge dismissed application for stay of execution of writ of possession on basis of arguable defence to claim - primary judge had also treated that application as an application to set aside default judgment - earlier applications to set aside default judgment had been dismissed on basis there was no arguable defence to claim - applicant sought leave to appeal - procedural fairness - ASIC Regulatory Guide 209 - held: proposed appeal had no prospects of success - application for leave to appeal dismissed.

[McCarthy](#) (B)

### **Mohareb v Palmer [2015] NSWCA 369**

Court of Appeal of New South Wales

Meagher JA; Bergin CJ in Eq

Perjury - defamation - applicant sought leave to appeal from refusal of leave pursuant to s338(1)(c) *Crimes Act 1900* (NSW) to prosecute respondent for perjury - primary judge had dismissed proceedings on basis of failure to identify with precision false statement allegedly made on oath in connection with proceedings - elements of offence of perjury - s327 - held: primary judge did not err in dismissing application in absence of clear identification of perjury charge - proposed appeal had no reasonable prospects of success - leave to appeal refused.

[Mohareb](#) (I)

### **Charan v Commonwealth Bank of Australia [2015] NSWCA 364**

Court of Appeal of New South Wales

Basten JA & Tobias AJA

Loans and mortgages - bankruptcy - possession - first applicant made claims for compensation against bank and trustees in bankruptcy - first applicant also made a claim, which was abandoned, for return of properties of which bank had obtained possession - White J dismissed proceedings without prejudice to right to claim account or equitable damages against bank in relation to its conduct as mortgagee, its power of sale, or net proceeds of sale - present proceedings were commenced in Equity division - primary judge dismissed statements of claim - applicant sought leave to appeal - s116 *Bankruptcy Act 1966* (Cth) - ss9 & 420A *Corporations Act 2001* (Cth) - s90 *Real Property Act 1900* (NSW) - held: proceedings before primary judge not tenable - no error in disposal of proceedings - application for leave to appeal dismissed.

[Charan](#) (I B)

## **Arora Supermarkets Pty Ltd v Franklins Pty Ltd [2015] NSWSC 1766**

Supreme Court of New South Wales

White J

Landlord and tenant - plaintiff operated supermarket it occupied under sublease defendant - plaintiff claimed it had exercised option for renewal of sublease and sought order requiring defendant to exercise option of renewal of head lease - under sublease exercise of option only effective if defendant exercised option to renew head lease - whether defendant estopped from relying on discretion in clause of sublease - whether defendant engaged in misleading and deceptive conduct in contravention of s18 of *Australian Consumer Law* and mandatory injunction should be granted - whether unconscionable conduct engaged in contravention of *Australian Consumer Law* - held: plaintiffs' arguments rejected - Court would reach same conclusion if plaintiff's claim was for mandatory interlocutory injunction - application for relief sought refused.

[Arora](#) (I B)

## **Saville v Hallmarc Construction Pty Ltd [2015] VSCA 318**

Court of Appeal of Victoria

Warren CJ; Kaye & Tate JJA

Security of payments - judicial review of adjudication determination under *Building and Construction Industry Security of Payment Act 2002* (VSCA) - whether appellant was out of time when he purported to serve first payment claim - whether primary judge was correct to hold adjudicator's determination that appellant was within time was void - scope of reviewability of decision by adjudicator - held: fixing of reference date by adjudicator was reviewable - no error in primary judge's conclusion that reference date fixed by adjudicator was wrong and therefore adjudicator ought not to have assumed jurisdiction - no error in finding adjudication determination was of no legal effect - primary judge's reasons were adequate - appeal dismissed.

[Saville](#) (I B C G)

## **Zweck v Town of Gawler [2015] SASCF 172**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Nicholson JJ

Environment and planning - appellant appealed against Environment, Resources and Development Court's dismissal of his appeal against Corporation of the Town of Gawler's refusal to determine application for development plan consent for land division - land was subject of a land management agreement under s57 *Development Act 1993* (SA) which contained clause precluding division of land or any application for development authorisation to divide it - held: Environment Court had power to determine validity of clause and no discretion to decline to determine question - second limb of clause which prevent lodgement of application for development authorisation was invalid - first limb, which precluded division related to "development of land" was valid - proposed development was not hypothetical such that Environment Court was entitled to refuse to consider it - appeal allowed - application remitted to



Development Assessment Panel for determination.

[Zweck](#) (I B C G)

**Benson v Seven Network (Operations) Ltd [2015] SASC 185**

Supreme Court of South Australia

Stanley J

Costs - Court granted plaintiff interim injunction restraining defendant from broadcasting video or audio of plaintiff relevant to subject matter - plaintiff sought costs of interim injunction - defendant submitted costs of application should be costs in the cause - rr263(1), 263(2) & 265 *Supreme Court Civil Rules 2006 (SA)* - s40(1) *Supreme Court Act 1935 (SA)* - r101.01 *Supreme Court Rules 1987 (SA.)*- held: Court doubted matter would proceed to trial - plaintiff had established that balance of convenience favoured grant of relief - plaintiff had strong case for breach of confidence - Court satisfied that exercise of its discretion and justice of case warranted an order that plaintiff have her costs - defendant to pay plaintiff's costs, taxed and paid immediately.

[Benson](#) (I)

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