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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)

**Zurich Insurance PLC UK Branch v International Energy Group Ltd (UKSC)** - negligence - insurance - employee with mesothelioma - insurer's liability to indemnify employer - rule of proportionate recovery - appeal allowed (I B C)

**Adisan Pty Ltd v Irwin (NSWCA)** - contract - loan agreement - consumer law - guarantee did not extend to cover amended loan facility - appeal dismissed (I B)

**Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 3) (NSWSC)** - pleadings - class action - flood - plaintiff permitted to file further amended statement of claim (I C)

**Carolan v Fairfax Media Publications Pty Ltd (No 2) (NSWSC)** - defamation - interlocutory applications - directions concerning statutory defence of qualified privilege - permission to file a notice of election for a trial by jury refused (I)

**National Australia Bank v McCarthy (NSWSC)** - stay - stay of writ of possession of property in bank's favour refused (B)

**Sullivan v Greyfriars Pty Ltd (VSCA)** - summary dismissal - application for summary dismissal of application for leave to appeal - applicant given final opportunity to comply with Court orders - application adjourned (B)

**Hall v ASIC (VSC)** - corporations - company restored to register of companies (B C)

**Coles Group Ltd v Costin (QCA)** - limitation of actions - prejudice - extension of limitation to stand provided plaintiff provide undertaking not to prosecute aspect of claim (I)

## Summaries With Link (Five Minute Read)

### **Zurich Insurance PLC UK Branch v International Energy Group Ltd [2015] UKSC 33**

Supreme Court of the United Kingdom

Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath & Lord Hodge

Negligence - insurance - employee was negligently exposed to asbestos dust by employer - employee contracted mesothelioma - before his death from mesothelioma employee sued respondent as successor in title of employer and recovered compensation - during the 27 years of employee's exposure employer had two identifiable liability insurances one of which was with Midland Assurance Ltd - appellant (Zurich) was successor to Midland - appellant maintained it was only liable to meet 22.08% of respondent's loss and defence costs because Midland only insured employer for 6/27ths of 27 year period - trial judge ordered Zurich to meet 22.08% of compensation but 100% of defence costs - Court of Appeal ordered Zurich to pay 100% of both compensation and defence costs - Zurich appealed - appeal was from Guernsey where there was no equivalent of *Compensation Act 2006*, which had reversed ruling in *Barker v Corus* [2006] UKHL 20 that each employer was only liable pro rata to period which exposure by it bore to total of all periods of exposure - held: rule of proportionate recovery established in *Barker* remained part of common law in Guernsey - Zurich's appeal allowed in respect of compensation but dismissed in relation to defence costs - trial judge's order restored.

[Zurich](#) (I B C)

### **Adisan Pty Ltd v Irwin [2015] NSWCA 217**

Court of Appeal of New South Wales

Beazley ACJ, Meagher & Gleeson JJA

Contract - guarantee and indemnity - loan agreement between appellant lender and borrower - loan agreement guaranteed by six co-guarantors including respondent - borrower failed to pay money on agreed date - terms of loan renegotiated - proposed amendments included provision of mortgage over property owned by company and guarantee from company - lender, borrower and company agreed that company's liability as guarantor limited to amount realised from sale of property - Deed of Variation executed by appellant, borrower, guarantors and company - agreement as to company's liability not disclosed in Deed or otherwise - borrower failed to pay money due - appellant required payment from guarantors - respondent contended he was discharged from liability as guarantor because of agreement to cap company's liability - primary judge found in favour of respondent - held: respondent not liable as guarantor for money not paid in accordance with original loan facility - guarantee provided for extension of its application to cover amended facility with guarantor's consent - respondent's execution of Deed not

effective to extend guarantee to cover moneys due under loan contract as varied as lender, in obtaining respondent's consent by execution of Deed, did not disclose that 'proposed new loan contract' included agreement to cap company's liability - statement in Deed reasonably to be understood as representing that company agreed to guarantee whole obligations of borrower, which was a misleading representation - however respondent not likely to suffer damage from conduct as guarantee did not extend to cover amended facility - appeal dismissed.

[Adison](#) (I B)

**Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 3) [2015] NSWSC 838**

Supreme Court of New South Wales

Beech-Jones J

Pleadings - class action - flood - claim arising from alleged negligent operation of dams - plaintiff sought leave to file further amended statement of claim - consideration of objections to grant of leave by certain defendants including alleged disparity between definition of class and the pleaded case, alleged failure to sufficiently identify alleged acts and admissions of flood engineer, deficiency of pleaded breaches of "Flood Mitigation Manual" by flood engineers, and complaint concerning cross referencing between particulars of various breaches and parts of expert report - hydrolic expert evidence - held: plaintiff granted leave to file further amended statement of claim.

[Rodriguez](#) (I C)

**Carolan v Fairfax Media Publications Pty Ltd (No 2) [2015] NSWSC 1010**

Supreme Court of New South Wales

McCallum J

Defamation - two interlocutory applications - plaintiff sought directions concerning defence of statutory qualified privilege - defendant sought orders to permit them to file notice of election for trial by jury where no notice filed within time under rules - ss14, 56, 57, 58 59, 61 & 63 *Civil Procedure Act 2005* (NSW) - ss21 & 30 *Defamation Act 2005* (NSW) - s126K *Evidence Act 1995* (NSW) - held: plaintiff granted directions as sought - defendants to notify plaintiff in writing whether they maintained defence under s30 *Defamation Act* and, if so, the identity of any confidential sources relied upon by them, or statement they did not propose to disclose identities - plaintiff to give notice whether he intended to apply under s126K(2) *Evidence Act* in relation to confidential sources relied on by defendants or any other application in defence of statutory qualified privilege - Court not persuaded it had power to grant relief sought by defendants.

[Carolan](#) (I)

**National Australia Bank v McCarthy [2015] NSWSC 1040**

Supreme Court of New South Wales

Adamson J

Stay - possession - defendant sought stay of writ of possession of property in respect of which bank had obtained default judgment - interests of justice - delay - whether arguable defence on

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the merits - *Contracts Review 1980* (NSW) - abuse of process - held: no arguable defence on the merits established - no proper basis to set aside default judgment - notice of motion dismissed.

[National](#) (B)

## **Sullivan v Greyfriars Pty Ltd [2015] VSCA 196**

Court of Appeal of Victoria

Whelan & McLeish JJA

Summary dismissal - respondent owned company title block of units in which applicant owed shares entitling him to occupy unit - series of disputes arose - associate judge dismissed appeal on question of law from order of Magistrate's Court that applicant pay sum to respondent - respondent sought dismissal of application for leave to appeal - held: there had been repeated non-compliance with Court orders for filing draft notice of appeal - grounds on which applicant sought to prosecute any appeal entirely unclear - applicant's defaults not inordinate - difficult personal circumstances excused defaults - respondent had not sought to establish prejudice - grounds raised before Court which might be embraced by applicant not fanciful - applicant granted one last opportunity to comply with Court orders - application for summary dismissal adjourned.

[Sullivan](#) (B)

## **Hall v ASIC [2015] VSC 362**

Supreme Court of Victoria

Sifris J

Corporations - plaintiffs sought order pursuant to s230 *Companies Act 1928* (Vic) (1928 Act) that company be restored to register because its deregistration as preventing a multi-lot property development - if company re-registered under 1928 Act plaintiffs would seek to have company brought within current Corporations legislation - held: application was many decades after deregistration but not out of time and specifically permitted and reserved - Court's jurisdiction survived repeal of 1928 Act - it was just that the company be restored to register - company restored to register of companies.

[Hall](#) (B C)

## **Coles Group Ltd v Costin [2015] QCA 140**

Court of Appeal of Queensland

Holmes & Gotterson JJA; Applegarth J

Limitation of actions - respondent injured her left knee on 31/7/05 when working for Coles - in 2009 respondent consulted lawyers who issued urgent notice of claim for damages on 3/9/09 - limitation period had expired - new lawyers sought extension of time - Coles conceded that material fact of decisive character relating to respondent's right of action not within respondent's means of knowledge before June 2009 - other requirements of s31(2) *Limitation of Actions Act 1974* (Qld) met - whether primary judge erred in exercising discretion to grant extension exercised in respondent's favour - held: exercise of discretion miscarried in circumstances in which respondent did not undertake to avoid material prejudice to Coles



arising from witnesses' having no recollection of detail of training and instruction provided to her - leave to appeal granted to correct injustice to Coles - relevant prejudice related to only one aspect of claim - unjust to prevent respondent from litigating other aspects of her claim - injustice to Coles could be addressed by respondent providing undertaking to not prosecute relevant aspect of claim - if undertaking provided order extending limitation period should stand [Coles \(I\)](#)

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