

Friday 4 July 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Dimitrijevic v Dimitrijevic** (NSWSC) - equity - father and son entitled to half-shares in residence they purchased for common benefit (B)

**RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni** (NSWSC) - possession - loan agreements unjust and set aside (B)

**Zraika v Walsh (No. 4)** (NSWSC) - evidence - motor vehicle accident - police officer's opinion concerning position of road sign admitted (I)

**Velissaris v Fitzgerald** (VSCA) - trustee's claims against liquidator for sale of land and equipment at under-value - stay - abuse of process - *Anshun* estoppel (B)

**Subway Systems v Ireland** (VSCA) - arbitration - VCAT was *court* under *Commercial Arbitration Act* - VCAT required to refer franchise dispute for arbitration (I B G)

**Belgravia Nominees Pty Ltd v Lowe Pty Ltd** (WASC) - joinder - dissolution of partnership - partner had no authority to commence action - joinder of former partner refused (B C)



**McLean v DID Piling Pty Ltd (SASC)** - corporations - share recapitalisation - minority oppression claim dismissed (B C)

## Summaries with links (5 minute read)

### **Dimitrijevic v Dimitrijevic [2014] NSWSC 863**

Supreme Court of New South Wales

Lindsay J

Equity - trusts - family dispute - beneficial ownership of residential property - plaintiff father contributed bulk of funds to purchase house for parties to live in - defendant son borrowed remainder of money - arrangements not reduced to writing - nature of *family arrangement* - conveyancer's evidence - conflicting evidence - held: Court satisfied parties' common intention was that property was to be purchased as home for benefit of both of them living together indefinitely with no calculation of respective interests by respective financial contributions - parties had purchased property effectively as owners of it in equal shares not imagining that relationship would break down - unconscionable for either party to deny the other's entitlement to half share in property.

[Dimitrijevic](#) (B)

### **RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni [2014] NSWSC 849**

Supreme Court of New South Wales

Davies J

Possession - unjust contracts - lender claimed possession of properties pursuant to loans defendants entered into for benefit of son, ex-wife and companies - before entering loan agreements, defendants had given guarantees supported by mortgages over properties for borrowings of son, ex-wife and company - held: defendants were never told they were to become borrowers rather than continuing as guarantors - transactions converted them from guarantors/mortgagors with contingent liability limited to value of properties to borrowers/mortgagors with no limit on liability or rights of recourse as guarantors - mortgage broker not lender's agent but lender on notice further inquiries ought to have been made - defendants' age, language, background and limited business experience contributed to them having special disadvantage - lender engaged in unconscionable conduct - loan agreements unjust and set aside - mortgages discharged.

[RHG Mortgage Corporation Ltd](#) (B)

### **Zraika v Walsh (No. 4) [2014] NSWSC 895**

Supreme Court of New South Wales

Campbell J

Evidence - admissibility - plaintiff was unborn child at time of motor vehicle accident - plaintiff sued drivers, Roads and Traffic Authority and Council - defendants sought to tender lay opinion of police officer who investigated accident concerning positioning of sign - ss76, 78 & 135 *Evidence Act 1995* (NSW) - held: Court satisfied opinion of police officer was relevant - opinion was prima facie excluded by opinion rule in s76 - police officer's opinion based on what she saw about matter or event - evidence of police officer's opinion necessary to obtain adequate account or understanding of her perception of sign's location - opinion fell within exception created by s78 - opinion admitted.

[Zraika](#) (I)

## **Velissaris v Fitzgerald [2014] VSCA 139**

Court of Appeal of Victoria

Ashley & Mandie JJA

Stay - summary judgment - abuse of process - *Anshun* estoppel - trust was beneficial owner of property, plant and equipment - trustee alleged liquidator of previous trustee breached duty by selling property, plant and equipment at under-value - trustee sought leave to appeal from order permanently staying proceedings - liquidator contended propositions essential to case were subject of binding determinations by Supreme Court of Victoria and Federal Court and it would be abuse of process to re-litigate those matters - held: no issue estoppels or res judicata arose but order for permanent stay correct in relation to claim for sale of land at undervalue because commencement of proceeding in County Court was patent attempt to avoid orders made in Supreme and Federal Court requiring leave to commence proceedings - *Anshun* estoppel available in relation to claim for sale of plant - summary judgment for liquidator in lieu of stay of that claim - primary judge also correct to make a restraining order - orders made.

[Velissaris](#) (B)

## **Subway Systems v Ireland [2014] VSCA 142**

Court of Appeal of Victoria

Maxwell P, Beach JA & Kyrou AJA

Commercial arbitration - parties entered franchise agreement which included arbitration clause - franchisees brought proceeding in VCAT alleging franchisor breached agreement, acted negligently and engaged in misleading or deceptive conduct - franchisor contended disputes were within scope of arbitration clause and that VCAT must refer parties to arbitration pursuant to s8 *Commercial Arbitration Act 2011* (Vic) - franchisor sought to appeal from primary judge's decision that VCAT was not a court for purpose of s8 - whether VCAT was a court before which an action [has been] brought - held (by majority): word court in s8 included VCAT - clear policy of Act and model law which it enacted was that when parties agreed to have disputes determined by private arbitration, neither party at liberty to litigate matter in dispute through State's adjudicative mechanisms - VACT indistinguishable from other adjudicative bodies of State which bore title court - appeal allowed.

[Subway Systems](#) (I B G)





## **Belgravia Nominees Pty Ltd v Lowe Pty Ltd [2014] WASC 225**

Supreme Court of Western Australia

Registrar Boyle

Joinder - partnership - partnership engaged in land trading business entered agreement with service provider for provision of services in respect of land - partnership made payments to service provider - partnership dissolved - plaintiff sued service provider claiming it was prevented by *Real Estate and Business Agents Act 1978* (WA) from receiving payments - partner sought leave under O18 r6(2)(b) *Rules of the Supreme Court 1971* (WA) to join former partner as defendant - authority of partners after dissolution of partnership - ss26 & 49(1) *Partnership Act 1893* (WA) - held: after dissolution, a partner had authority to bind firm only by acts necessary to wind up affairs of partnership and to complete transactions begun but unfinished at dissolution - action not of either type - plaintiff did not have authority under s49(1) to commence action - want of authority could not be cured by joining former partner as defendant - application refused.

[Belgravia Nominees Pty Ltd](#) (B C)

## **McLean v DID Piling Pty Ltd [2014] SASC 76**

Supreme Court of South Australia

Nicholson J

Corporations - minority oppression claim - parties incorporated company to conduct business - interests associated with two parties each held 24.5% minority interest - interest associated with other held 51% interest - relationships between parties broke down - board resolved to issue additional shares to obtain working capital - plaintiff chose not to take entitlement which was then offered to and taken up by other parties - after recapitalisation, plaintiff's interest reduced to negligible level - plaintiff alleged company's actions in obtaining additional capital was act of oppression within s232 *Corporations Act 2001*. (Cth) and that conduct of defendants was oppressive and in breach of directors' fiduciary duties - held: no improper conduct or acts of oppression by any defendants were established - share recapitalisation not shown to have been for an improper purpose or oppressive - claim dismissed.

[McLean](#) (B C)

## **To Shakespeare**

by Frances Anne Kemble

Oft, when my lips I open to rehearse  
Thy wondrous spell of wisdom, and of power,  
And that my voice, and thy immortal verse,  
On listening ears, and hearts, I mingled pour,  
I shrink dismayed – and awful doth appear  
The vain presumption of my own weak deed;



Thy glorious spirit seems to mine so near,  
That suddenly I tremble as I read –  
Thee an invisible auditor I fear:  
Oh, if it might be so, my master dear!  
With what beseeching would I pray to thee,  
To make me equal to my noble task,  
Succor from thee, how humbly would I ask,  
Thy worthiest works to utter worthily.

[Frances Anne Kemble](#)

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