



Thursday 4 September 2014

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Cash Converters International Ltd v Gray** (FCAFC) - representative proceedings properly constituted - appeal from refusal to strike out pleadings dismissed (B)

**Sherrin Hire Pty Ltd v Tidd Ross Todd Ltd** (FCA) - negligence - limitations - defective working platforms - prospects of success - proceedings not dismissed (I C)

**McLennan v Insurance Australia Ltd** (NSWCA) - fire insurance - onus - insured not required to prove fire not deliberately lit - appeal allowed (I B C)

**Tarar v Denwol Pty Ltd** (NSWCA) - negligence - injury caused by ceiling collapse - claim dismissed - interpreter not required - leave to appeal refused (I)

**Dailhou v Kelly; State of NSW v Kelly (No 2)** (NSWSC) - negligence - plaintiff failed to prove how or why he fell at bookshop - shop owner not liable (I)

**Downes v Rhys & Co Pty Ltd (in liq)** (VSCA) - loans and mortgages - self-represented litigants - denial of procedural fairness - appeal allowed (B)



**Acebrook Corporation Pty Ltd v McEwan (WASCA)** - workers compensation - worker refused extension of date to elect to retain right to seek damages (I)

## Summaries with links (5 minute read)

### **Cash Converters International Ltd v Gray [2014] FCAFC 111**

Full Court of the Federal Court of Australia

Jacobson, Middleton & Gordon JJ

Pleadings - representative proceedings commenced in relation to two types of 'Cash Converters' loans - respondents sought leave to appeal from interlocutory orders declining to strike out whole or part of statement of claim in each proceeding - Cash Converters contended s33C(1) *Federal Court of Australia Act 1976* (Cth) required that each group member must have claim against each respondent and that both proceedings were not properly constituted because requirement not met - proper construction of s33C(1) - held: leave to appeal granted because question of proper construction of s33C was a matter necessary to be addressed by Full Court - both proceedings properly constituted - appeal dismissed.

[Cash Converters International Ltd](#) (B)

### **Sherrin Hire Pty Ltd v Tidd Ross Todd Ltd [2014] FCA 939**

Federal Court of Australia

Edmonds J

Negligence - limitations - applicant purchased elevated working platforms from respondents which developed structural defects - originating application filed against architects and designers in 2014, more than six years after first noticing defect - respondents sought declaration proceedings were statute-barred pursuant to s10(1)(a) *Limitation of Actions Act 1974* (Qld) and/or s14(1)(b) *Limitation Act 1969* (NSW) - parties agreed respondents were seeking final relief in form of summary judgment in reliance on s31A *Federal Court of Australia Act 1976* (Cth) - held: insufficient evidence for Court to come to informed view as to whether physical consequences of defects were sufficiently manifest prior to 2008 to lead reasonable person to make inquiry and discover the defects - Court not satisfied that, by reason of statutory limitation provisions, proceedings had no reasonable prospects of success - interlocutory application dismissed.

[Sherrin Hire Pty Ltd](#) (I C)

### **McLennan v Insurance Australia Ltd [2014] NSWCA 300**

Court of Appeal of New South Wales

Beazley P; Meagher & Ward JJA

Insurance - appellant's home and contents insured under Home Insurance, Buildings and Content policy - insured's home and contents severely damaged by fire - policy provided insurer would not cover loss or damage caused by fire deliberately lit - insurer denied liability on basis insured had



not proved fire not deliberately started - primary judge held insured had to establish fire was not started with intention of causing damage by her or someone who had entered property with her consent - primary judge found insured had not discharged onus - held: primary judge erred in concluding insured had burden of proving fire not deliberately lit - once insured had established claim was within scope of insurer's promise, burden was on insurer to prove it fell within exception relied upon - insurer's promise was to indemnify appellant against *loss or damage caused by fire* - in order to establish entitlement to indemnity, insured had to prove there was loss or damage to home and contents caused by the fire - qualification relied upon by insurer operated as an exception to exclude particular loss or damage from that promise - insurer had to prove that qualification applied - appeal allowed.

[McLennan](#) (I B C)

### **Tarar v Denwol Pty Ltd [2014] NSWCA 301**

Court of Appeal of New South Wales

Emmett JA & Tobias AJA

Negligence - applicant injured when ceiling of kitchen collapsed on ground floor of building - applicant sued building's managing agent, building's owners, and head lessee from whom applicant had sub-lease of ground floor - primary judge rejected applicant's claim - applicant sought to appeal on grounds he had needed an interpreter - applicant claimed his incompetence with English caused him not to be believed by primary judge, who made adverse credibility findings against him - held: applicant represented by experienced counsel and solicitors - it was not suggested that any application made to primary judge for an interpreter - it could be inferred from experience of the legal representatives that they did not consider applicant's English was so poor as to justify use of an interpreter - primary judge did not misuse position in assessing credibility of applicant's evidence - no matters relied upon by applicant justified appellate intervention - leave to appeal refused.

[Tarar](#) (I)

### **Dailhou v Kelly; State of NSW v Kelly (No 2) [2014] NSWSC 1207**

Supreme Court of New South Wales

Adamson J

Negligence - workers compensation - plaintiff employed as assistant principal at school - plaintiff injured in fall at bookshop - plaintiff sued bookshop owner- employer claimed against bookshop owner for recovery of workers compensation payments made to plaintiff - credit - s15 *Civil Liability Act 2002* (NSW) - ss9A, 60, 151Z *Workers Compensation Act 1987* (NSW) - s74 *Workplace Injury Management And Workers Compensation Act 1998* (NSW) - credit - held: plaintiff not credible witness - plaintiff failed to prove his case as he did not prove how, or why, he fell - factual findings were sufficient to dispose of liability - plaintiff failed to establish why he fell or any relevant negligent act or omission attributable to defendants that caused him to fall - had defendants been liable, State would have been entitled to recover pursuant to statutory indemnity limited to



amounts paid to or on behalf of payments prior to date of subsequent work related fall - judgment for defendants.

[Dailhou](#) (I)

## **Downes v Rhys & Co Pty Ltd (in liq) [2014] VSCA 19**

Court of Appeal of Victoria

Osborn, Whelan & Beach JJA

Loans and mortgages - self-represented litigants appealed against judgment ordering them to pay respondent amount and grant possession of farm land - appeal made on grounds of lack of procedural fairness - held: primary judge did not reiterate distinction between submissions and evidence at critical point where appellants elected not to give evidence - primary judge did not identify or explain the consequences that might follow in terms of *Jones v Dunkel* reasoning - appellants did not receive procedural fairness - it could not be said trial judge's conclusion was inevitable - appellants had consented to tender of affidavit on limited basis only - affidavit should not have been relied on for other purposes without further ruling as to its admissibility in the absence of its maker - unlikely that evidence in issue materially affected decision but it was sufficient to establish relevant miscarriage of justice if it may have done so - trial miscarried - appeal allowed - proceeding remitted for new trial.

[Downes](#) (B)

## **Acebrook Corporation Pty Ltd v McEwan [2014] WASCA 162**

Court of Appeal of Western Australia

McLure J, Newnes P & Edelman J

Workers compensation - worker injured when she fell off or through roof in course of employment with appellant - primary judge quashed delegate's refusal of worker's application for extension of date by which worker required under s93K *Workers' Compensation and Injury Management Act 1981* (WA) to elect to retain right to seek common law damages - employer appealed - whether extension sought by worker exceeded maximum period permitted under Act - calculation of *'last day of the period of one year after termination day* - held: primary judge erred in construction of ss93M(1) & 93M(6) - primary judge erred in finding that decision of delegate as to termination day was wrong - appeal allowed.

[Acebrook Corporation Pty Ltd](#) (I)

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