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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

S & K Investments Pty Ltd v Cerini (WASC) - contract - lease - lease did not give plaintiff right to utilise site after certain date - claim dismissed (I B C G) ()

Spratt v Perilya Broken Hill Ltd; Spratt v Rowe (NSWCA) - motor accidents compensation - workers compensation - issue estoppel - refusal of applications for review of Medical Assessor's determination and for further assessment - summons seeking leave to appeal dismissed (I B C G)

Yara Pilbara Fertilisers Pty Ltd v Oswal (VSC) - evidence - admissibility of evidence - determination whether four questions could be put to witness called by plaintiff concerning assets and services (I B C G)

Westpac Banking Corporation v Schwerdtfeger (QSC) - contract - guarantee - defendants liable for amounts owing to bank pursuant to guarantee and indemnity (I B C G)

Woolnough v Isaac Regional Council (QSC) - summary judgment - pleadings - statement of claim inadequately pleaded - statement of claim struck out with leave to replead (I B C G)

Butler v Tiburzi (SASC) - succession - family provision order granted in favour of adult daughter of deceased (B)

Bricknell v Motor Accidents Insurance Board (TASSC) - traffic law - motor accidents compensation and liabilities - erroneous finding that house rental was not a medical benefit - appeal allowed (I B C G)

Summaries With Link (Five Minute Read)

S & K Investments Pty Ltd v Cerini [2016] WASC 233

Supreme Court of Western Australia

Martin CJ

Contract - parties entered written agreement for lease of site (2007 lease) - dispute concerned whether plaintiff continued to have right to use site under agreement, which plaintiff contended should be augmented by oral agreement - defendant contended 2007 lease required parties to enter further agreements as to any renewed term and rent to be paid by plaintiff to defendant - defendant also contended that from 1 July 2016 there was no agreement as to renewed term or rent payable - held: Court accepted defendant's arguments - lease agreement did not give plaintiff right to use site after 30 June 2016 - plaintiff's claim dismissed.

[S & K \(\)](#)

Spratt v Perilya Broken Hill Ltd; Spratt v Rowe [2016] NSWCA 192

Court of Appeal of New South Wales

McColl, Gleeson & Leeming JJA

Workers compensation - motor accidents compensation - appellant injured at work by motor vehicle driven by fellow employee - appellant claimed lump sum compensation under s 66 *Workers Compensation Act 1987* (NSW) - Workers Compensation Commission determined appellant injured spine in course of employment - appellant also claimed under *Motor Accidents Compensation Act 1999* (NSW) (Motor Accidents Compensation Act) - appellant refused review of Medical Assessor's determination '[t]here was no likelihood of the cervical spine injury in the accident as described' - appellant's application to District Court for further assessment also refused - appellant challenged refusals on basis Workers Compensation Commission's determination resulted in issue estoppel binding Assessor - held: there was no issue estoppel - even if there was issue estoppel as to causation it did not bind Assessor - summons seeking leave to appeal dismissed.

[Spratt \(I B C G\)](#)

Yara Pilbara Fertilisers Pty Ltd v Oswal [2016] VSC 440

Supreme Court of Victoria

Dodds-Streeton JA

Evidence - first defendant contended that answers would be inadmissible to four questions 'put or proposed to be put to a witness' called by plaintiff concerning assets and services - determination whether questions should be put - opinions - statements of observed fact - ss76 - 79, 135 - 136 *Evidence Act 2008* (Vic) - held: responses to two questions would be

inadmissible as opinions which were not exempt from prohibition in s76 - one question could be put if it was clarified, subject to appropriate direction under s136 - one question was ambiguous but could be put if clarified.

[Yara Pilbara Fertilisers](#) (I B C G)

Westpac Banking Corporation v Schwerdtfeger [2016] QSC 173

Supreme Court of Queensland

Atkinson J

Contract - guarantee - each of defendants entered contract guaranteeing payment of debts to plaintiff - plaintiff claimed amount against each defendant pursuant to guarantee as varied after default by debtor - defendants contended they were not liable because contract subject of guarantee was varied - defendants also claimed guarantee entered as result of plaintiff's misrepresentations - held: defendants had consented to variations - defences on basis of misrepresentation or estoppel would not succeed as pleaded representations not made - defendants liable to pay amount to plaintiff - judgment for plaintiff.

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

Woolnough v Isaac Regional Council [2016] QSC 172

Supreme Court of Queensland

McMeekin J

Summary judgment - pleadings - trespass - plaintiffs contended defendant entered their land unauthorised and constructed faulty sewage lines resulting in escape of sewage - defendant sought summary judgment - *Acquisition of Land Act 1967* (Qld) - *Civil Liability Act 2003* (Qld) - *Local Government Act 1993* (Qld) - s1070 *Local Government Act 2009* (Qld) - s141 *Personal Injury Proceedings Act 2002* (Qld) - rr149, 155, 157, 158, 171, 292, 293 & 374 *Uniform Civil Procedure Rules 1999* (Qld) - held: statement of claim was inadequately pleaded - there were reasons for Court to think viable cause of action could be pleaded - statement of claim struck out with leave to replead.

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

Butler v Tiburzi [2016] SASC 108

Supreme Court of South Australia

Lovell J

Succession - family provision - adult daughter of deceased father sought further provision from deceased's estate pursuant to s7 *Inheritance (Family Provision) Act 1972* (SA) - whether plaintiff left without adequate provision for proper maintenance, education or advancement in life - if so what provision should be made for plaintiff - held: testator had made Will not knowing 'extent of the plaintiff's health and financial position' - Court satisfied plaintiff had been left without adequate provision for proper maintenance, education or advancement in life - provision order made.

[Butler](#) (B)

Bricknell v Motor Accidents Insurance Board [2016] TASSC 40

Supreme Court of Tasmania

Brett J

Traffic law - motor accidents compensation and liabilities - appellant injured in motor vehicle accident - after release from hospital appellant required treatment from service providers in Hobart - appellant advised by doctor to stay in Hobart during convalescence - appellant claimed cost of house rental as medical benefit pursuant to schedule of *Motor Accidents (Liabilities and Compensation) Regulations 2010* (Tas) - Board refused claim - Motor Accidents Compensation Tribunal agreed with Board on basis proper construction of 'medical benefits' limited to benefits 'directly incurred in the delivery, supply or servicing of the treatment required by the injured person' - appellant appealed - held: Commissioner erred in finding rent was not a medical benefit within cl (1) (1), Pt 2 of the Act - appeal allowed.

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

CRIMINAL

Executive Summary

R v Jordan (SCC) - criminal law - delay - right to trial within a reasonable time (s11(b) *Canadian Charter of Rights and Freedoms*) - trial was delayed 49.5 months-new framework for s11(b) cases - delay beyond 18 months for Provincial trials and 30 months for superior court trials, is presumptively unreasonable and breaches s11(b) - onus upon Crown to prove delay reasonable - here delay unreasonable - appeal allowed, stay ordered

R v Cruz (QCA) - criminal law - conviction appeal - failure of lawyers to take proper instructions - importing a marketable quantity of cocaine, possessing drug-sentenced to 9 years (NPP 4.5 years), plus one month concurrent - 19 year old Brazilian with limited English ability - sentenced on the basis that he was heavily involved in the importation without being afforded the opportunity to contest that finding-appeal allowed, remitted for rehearing

Summaries With Link

R v Jordan [2016] SCC 27

Supreme Court of Canada

McLachlin CJ, Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Cote & Brown JJ
Criminal law - delay-right to trial within a reasonable time (s11 *Canadian Charter of Rights and Freedoms*) - appellant's trial was delayed 49.5 months - trial judge found the delay was not unreasonable - on appeal to the Supreme Court, held: the right to be tried within a reasonable time is central to the administration of Canada's criminal justice system - that right is an

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essential commitment to protecting the rights of presumptively innocent accused persons-the present system has lost its way within a culture of complacency - s11 requires a new framework - at the heart of that framework is a ceiling beyond which delay is presumptively unreasonable-that ceiling is set at 18 months for cases going to trial in a Provincial Court and 30 months for cases going to trial in a superior court - where the total delay exceeds the ceiling the onus is upon the Crown to rebut the presumption of unreasonable delay (and violation of the accused's s11 right under the Charter for trial within a reasonable time) - if that presumption is not rebutted, then the delay is unreasonable and a stay will follow - where the total delay falls below the ceiling the onus is upon the defence to demonstrate that the delay is unreasonable - the presumptive ceiling is not an aspirational target - here the total delay was 49.5 months - the bulk of that delay (32.5 months) was attributable to institutional delay (19 months at the Provincial Court & 13.5 months at the Supreme Court) and the appellant's liberty was restricted during this time - the delay was unreasonable and the appellant's s11 right was infringed - appeal allowed - convictions set aside-stay of proceedings entered.[Editor's note: see *R v Williamson* [2016] SCC 28, applying *R v Jordan* [2016] SCC 27]

[Jordan](#)

R v Cruz [2016] QCA 183

Court of Appeal of Queensland

Margaret McMurdo P, Fraser JA, Douglas J

Criminal law-conviction appeal-importing a marketable quantity of cocaine, possessing drug-sentenced to 9 years (NPP 4.5 years),plus one month concurrent - 19 year old Brazilian with limited English ability - no prior record-alleged failure of lawyers to take proper instructions - appellant signed statement of facts without full understanding- sentenced on the basis that he was heavily involved in the importation without being afforded the opportunity to contest that finding-application to adduce further evidence - held: this court will only receive evidence not before the sentencing court where that will result in a different sentence - the further evidence shows that while the applicant had conferences with his lawyers, his language difficulties prevented him for appreciating the significance of factual matters placed before the judge-had he appreciated the significance of the prosecutions assertion as to his role, he would have contested it as he believed he was only a courier - it was incumbent upon his lawyers to take careful instructions with the assistance of a competent interpreter and to fully explain to him how his understanding of his role different to that of the prosecution-the failure to do so meant there was a real prospect of a miscarriage of justice - application to adduce further evidence and to appeal granted, appeal allowed and matter remitted for rehearing.

[Cruz](#)



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“Blow, blow, thou winter wind”

By [William Shakespeare](#)

Blow, blow, thou winter wind,
Thou art not so unkind
As man’s ingratitude;
Thy tooth is not so keen,
Because thou art not seen,
Although thy breath be rude.

*Heigh-ho! sing, heigh-ho! unto the green holly:
Most friendship is feigning, most loving mere folly:
Then, heigh-ho, the holly!
This life is most jolly.*

Freeze, freeze, thou bitter sky,
That dost not bite so nigh
As benefits forgot:
Though thou the waters warp,
Thy sting is not so sharp
As friend remembered not.

Heigh-ho! sing, heigh-ho! unto the green holly...

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