

Friday 5 September 2014

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

BlueScope Steel Ltd v Gram Engineering Pty Ltd (FCAFC) - registered design - obvious imitation of fencing sheet design - no fraudulent imitation (I C)

Hannaford v Commonwealth Bank of Australia (NSWCA) - mortgage - no miscarriage of discretion in decisions in bank's favour (B)

Chua v The Owners - Strata Plan No 40301 (NSWCA) - strata titles - finding that notice was served on unit owner was question of fact - leave to appeal refused (B)

Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (NSWCA) - stay of money judgments and orders for possession pending appeal by thirty-six appellants (B)

Dailhou v Kelly; State of NSW v Kelly (No 3) (NSWSC) - costs - valid offers of compromise - defendants entitled to indemnity costs (I)

YMCA v Nillumbik (VSCA) - negligence - occupiers' liability - contract - insurance - joint tortfeasors - accident compensation - appeal and cross-appeal allowed (I)



O'Loughlin v Arnott (VSC) - administration and probate - solicitors' duties - conflict - solicitor restrained from acting (I B)

Summaries with links (5 minute read)

BlueScope Steel Ltd v Gram Engineering Pty Ltd [2014] FCAFC 107

Full Court of the Federal Court of Australia

Besanko, Middleton & Yates JJ

Design - appellant (BlueScope) was manufacturer of flat steel products - respondent (Gram) produced and sold steel fencing panel sheets in competition with BlueScope - Gram registered fencing sheet design pursuant to *Designs Act 1906* (Cth) - BlueScope launched own fencing panel (Smartascreen) - Gram sued BlueScope claiming BlueScope's fencing panel was either an 'obvious' or 'fraudulent imitation' of its design - primary judge upheld validity of design - primary judge found Smartascreen applied an obvious imitation but that there was insufficient evidence to support a finding of fraudulent imitation - parties appealed and cross-appealed - held: primary judge correct to find Smartascreen product was an obvious imitation - primary judge correct in approach to determining scope of monopoly - findings of primary judge in relation to fraudulent imitation upheld - appeal and cross-appeal dismissed.

[BlueScope Steel Ltd](#) (I C)

Hannaford v Commonwealth Bank of Australia [2014] NSWCA 297

Court of Appeal of New South Wales

Beazley P, Emmett JA & Tobias AJA

Loan agreement - guarantee - appellant was director of company that borrowed money from respondent bank pursuant to agreement - loan secured by mortgage over home of director and daughter and by guarantees given by each of them - company defaulted - bank commenced proceedings against director and daughter - director's defence did not put in issue loan, mortgage or default - bank granted possession - director challenged interlocutory decisions dismissing her application to amend defence to include claim under *Contracts Review Act 1980* (NSW) and refusing to adjourn or stay of hearing - director also challenged final judgment bank's favour - held: in relation to interlocutory decisions, director failed to demonstrate that material errors of fact were taken into account, or that there was failure to take into account a material consideration - discretion had not miscarried - in relation to final judgment, director failed demonstrate any error in the exercise of discretion justifying appellate intervention - appeal dismissed.

[Hannaford](#) (B)

Chua v The Owners - Strata Plan No 40301 [2014] NSWCA 306

Court of Appeal of New South Wales

Basten & Meagher JJA



Real property - strata titles - applicant owned unit in strata scheme - applicant did not pay special levy imposed by owners' corporation - service of written notice pursuant to s78(1) *Strata Schemes Management Act 1996* (NSW) of contribution payable was essential element of liability - magistrate upheld application for judgment against applicant on basis that the elements of his liability had been established - magistrate found notice was probably sent by post to applicant's unit address - primary judge found there had been an error of law in approach adopted by magistrate, but dismissed appeal - held: magistrate and primary judge did not misapply burden of proof - there was evidence capable of providing support for conclusion that applicant had been served - finding was a question of fact - decision that applicant had been properly served with notice was not a decision which could be reviewed by Court on appeal limited to question of law - application for leave to appeal refused.

[Chua](#) (B)

Traderight (NSW) Pty Ltd v Bank of Queensland Ltd [2014] NSWCA 304

Court of Appeal of New South Wales

Leeming JA

Stay - thirty-six appellants appealed from money judgments and in some cases orders for possession of mortgaged property - appellants sought stays of the judgments and orders - appellants claimed that, given the protection of the bank's position as to costs, undertakings as to non-dissipation of assets and relative proximity of hearing of the appeal, they had established a proper basis for a stay - bank contended appellants had not shown any arguable grounds of appeal - balance of convenience - held: Court not satisfied appellants' case so weak that it was not arguable - stays granted.

[Traderight \(NSW\) Pty Ltd](#) (B)

Dailhou v Kelly; State of NSW v Kelly (No 3) [2014] NSWSC 1220

Supreme Court of New South Wales

Adamson J

Costs - defendants successful in two proceedings - defendants applied for special costs orders against plaintiff in each proceeding on basis of offers of compromise - held: in first proceeding, offer which contained an offer that costs be agreed or assessed was valid in accordance with newly amended r20.26(3)(b) *Uniform Civil Procedure Rules 2005* (NSW) - offer provided for a judgment for the plaintiff but was not ambiguous - defendants entitled to order against plaintiff that costs be paid on indemnity basis from date of offer of compromise - in second proceedings, offer of compromise which provided for payment upon the later to occur of specified events was also in accordance with r20.26 - defendants entitled to costs on indemnity basis from date of offer.

[Dailhou](#) (I)

YMCA v Nillumbik [2014] VSCA 197

Court of Appeal of Victoria

Nettle, Ashley & Hansen JJA



Negligence - plaintiff employed by YMCA injured in fall from pool deck at centre - Council owned centre - YMCA was operator of centre by contract with Council - plaintiff sued YMCA and Council - YMCA and Council denied liability and contribution notices issued between them (contribution proceeding) - Victorian WorkCover Authority (VWA) made claim on Council pursuant to s138 *Accident Compensation Act 1985* (Vic) (recovery proceeding) - plaintiff obtained judgment against YMCA and Council - no appeal from judgment in favour of plaintiff - YMCA appealed against judge's order that it was liable to indemnify Council against its liability to plaintiff and against judgment in recovery proceeding - YMCA's contractual obligation to have public liability insurance - held: trial judge erred in conclusion that YMCA breached its contract with Council, such breach being causative of loss and damage to Council - Council could not maintain claim to be indemnified against liability to plaintiff and to VWA - trial judge erred in ruling Council precluded from discharging duty it owed as occupier - resolution of contribution proceeding flawed - determination in contribution proceedings could not stand - appeal and cross-appeal allowed.

[YMCA](#) (I)

O'Loughlin v Arnott [2014] VSC 416

Supreme Court of Victoria

Sifris J

Solicitors' duties - conflict - administration and probate - plaintiff made claim under Part IV *Administration and Probate Act 1958* (Vic) - plaintiff's solicitor had been deceased's solicitor - solicitor had drawn prior Will of deceased - defendants sought injunction restraining solicitor from acting for plaintiff - held: neither appropriate nor desirable for solicitor to continue acting for plaintiff - a sense of unease in solicitor acting for plaintiff against estate of his former client - position exacerbated by fact that relief claimed by plaintiff accorded with penultimate Will prepared by solicitor, but was not in accord with final Will prepared by other solicitors - solicitor was in effect acting against former client - solicitor in real conflict situation - real and sensible possibility of misuse of confidential information - solicitor in untenable position and must cease acting.

[O'Loughlin](#) (I B)

Sonnet 23

By William Shakespeare

As an unperfect actor on the stage,
Who with his fear is put beside his part,
Or some fierce thing replete with too much rage,
Whose strength's abundance weakens his own heart;
So I, for fear of trust, forget to say
The perfect ceremony of love's rite,
And in mine own love's strength seem to decay,
O'ercharg'd with burthen of mine own love's might.



O! let my books be then the eloquence
And dumb presagers of my speaking breast,
Who plead for love, and look for recompense,
More than that tongue that more hath more express'd.
O! learn to read what silent love hath writ:
To hear with eyes belongs to love's fine wit.

[William Shakespeare](#)

[Click Here to access our Benchmark Search Engine](#)