



Thursday 5 December 2013

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement



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Executive Summary (1 minute read)

Richards v Gray (NSWCA) - damages - motor accident - costs of administering verdict - quantum of fund management fees (I B)

BNY Trust Company of Australia Ltd v Banksia Finance and Leasing Co Pty Ltd (NSWSC) - contract - loan agreement - trust and trustees - lenders entitled to default judgment and summary judgment (B)

Eastmark Holdings Pty Ltd v Kabraji (NSWSC) – strata titles – lot owner did not have standing to bring derivative action – proceedings dismissed (B)



Ingram v Y Twelve Pty Ltd (NSWSC) - real property - company in liquidation transferred units and shares with intent to defraud creditors - transfers void (B)

Setka v Abbott (VSCA) - defamation - pleadings - leave to appeal from dismissal of application to strike out defences refused (I)

Liesfield v SPI Electricity Pty Ltd (Ruling No 1) (VSC) – Black Saturday bushfires - scope of discovery (I B C G)

White v Australian Securities and Investments Commission (QCA) - corporations - stay of proceedings until determination of New Zealand prosecution refused (I B G)

Summaries with links (5 minute read)

Richards v Gray [2013] NSWCA 402

Court of Appeal of New South Wales

Bathurst CJ; Beazley, McColl, Basten & Meagher JJA

Damages - motor accident - negligence - costs of fund management – child suffered brain injury in motor accident - proceedings resolved except for issue of fund management fees - s127 *Motor Accidents Compensation Act 1999* (NSW) - held: inappropriate to order amount for *fund management on fund management* which involves speculation - inappropriate to make award for *fund management on fund income* which is contrary to s127 – not appropriate to make deduction for payments to be made early in the life of the fund - reasonable in circumstances to award fund management fees based on rates charged by private trustee rather than lower fees charged by NSW Trustee - appeal allowed in part.

[Richards](#) (I B)

BNY Trust Company of Australia Ltd v Banksia Finance and Leasing Co Pty Ltd

[2013] NSWSC 1776

Supreme Court of New South Wales

Hall J

Contract - loan agreement - lenders sued second defendant and companies controlled by him for debt owing two loan facilities secured by fixed and floating charges, guarantees and mortgages over properties - lenders also sought recovery of amounts under guarantees - lenders sought



default judgment against first defendant company under r16.3 *Uniform Civil Procedure Rules 2005* (NSW) and summary judgment against remaining defendants pursuant to r13.1 - ss127 & 129 *Corporations Act 2001* (Cth) - deeds of forbearance - held: amended grounds of defence seeking to raise breach of trust or other fiduciary obligations had no basis - no real question to be tried - lenders entitled to summary judgment as amended defence did not raise any arguable defence - first defendant company had not filed defence - evidence established lenders were entitled to default judgement - orders made.

[BNY Trust Company of Australia Ltd](#) (B)

Eastmark Holdings Pty Ltd v Kabraji [2013] NSWSC 1763

Supreme Court of New South Wales

Darke J

Corporations – strata titles – real property – derivative action - lot owner in strata plan invoked *interests of justice* exception to rule in *Foss v Harbottle* to complain of wrongs allegedly committed against owners corporation by chairperson of Executive Committee of owners corporation and another committee member - lot owner alleged chairperson and member breached fiduciary duties to owners corporation in relation to making of Project and Management Services Agreement – held: lot owner failed to establish that *interests of justice* exception should apply – no serious injustice would not be suffered if lot owner precluded from pursuing derivative action – claims of breach of fiduciary duty could not be described as strong – doubtful chairperson or committee member breached duties – lot owner did not have standing to bring derivative claims – proceedings dismissed.

[Eastmark Holdings Pty Ltd](#) (B)

Ingram v Y Twelve Pty Ltd [2013] NSWSC 1777

Supreme Court of New South Wales

Stevenson J

Real property - voidable dispositions - plaintiffs sought declaration that transfers of shares and units by company in liquidation to another company constituted alienation of property with intent to defraud creditors within meaning of s37A *Conveyancing Act 1919* (NSW) - plaintiffs also sought that transfers be declared void and that shares and units be transferred back to company in liquidation - s37A(1) - *otherwise have been entitled* - held: company's intention in effecting transfers was predominantly to place assets beyond reach of plaintiffs which might have been available to them were they to succeed in proceedings and obtain favourable costs order - plaintiffs entitled to relief sought.



[Ingram](#) (B)

Setka v Abbott [2013] VSCA 345

Court of Appeal of Victoria

Warren CJ; Ashley & Whelan JJA

Defamation - pleadings - plaintiff sued defendants in defamation in relation to speech by first defendant published by second defendant - plaintiff sought leave to appeal from dismissal of application to strike out defences - only one ground of appeal related to case argued below and arguments raised in first notice of appeal - overarching considerations of *Civil Procedure Act 2010* (Vic) - held: court will not usually entertain appeal on point of law not advanced below, more so in case of interlocutory appeal - principle not abandoned for expediency or overborne by assumed absence of prejudice - just, efficient, timely and cost effective resolution of real issues in dispute could not be facilitated if party and advisers did not take adequate steps to identify issues requiring determination early in life of proceeding - leave to appeal refused.

[Setka](#) (I)

Liesfield v SPI Electricity Pty Ltd (Ruling No 1) [2013] VSC 634

Supreme Court of Victoria

J Forrest J

Discovery – final class action arising out of Black Saturday bushfires - scope of discovery by power company to group members – ss7, 26 & 55 *Civil Procedure Act 2010* (Vic) - rr29.01 & 29.05 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) –staging of discovery – e-discovery – documents discovered in Kilmore East-Kinglake proceeding treated as discoverable in present proceeding - held: minimum of delay and expense essential to just resolution of proceedings – no order for discovery in relation to proposed searches of shared drives – discovery of documents of Bushfire Mitigation Management Committee Document Library permitted – power company to provide electronic and hard copy files of certain employees and head office personnel and certain design documents – discovery on rolling basis – orders made.

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

White v Australian Securities and Investments Commission [2013] QCA 357

Court of Appeal of Queensland

Muir & Gotterson JJA; Applegarth J

Corporations - stay of civil proceedings pending criminal proceedings - ASIC alleged company in liquidation was responsible entity for registered scheme under *Corporations Act 2001* (Cth) and



that it breached duties imposed by s601FC - other defendants were either directors or senior office holders of company and were alleged to have either brought about company's contraventions or to have derivative liability for them - New Zealand Financial Markets Authority subsequently filed two criminal charges in Auckland District Court against two defendants (appellant and fifth respondent) - New Zealand proceedings concerned different allegations of misapplication or misappropriation of money and would not be concluded before mid 2015 - appellant and fifth respondent sought stay of proceedings until determination of New Zealand prosecution - *the right of silence* - privileges against self-incrimination and exposure to penalty - s1317 - s58 *Securities Act 1978* (NZ) - prejudice - public interest - case management principles - held: no appellable error on part of primary judge in refusing to grant a stay - even if primary judge erred Court would have exercised discretion against grant of a stay.

[White](#) (I B G)

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