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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Commissioner of Taxation v MBI Properties Pty Ltd (HCA) - GST - company assessed to increasing adjustment under s135-5 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) - appeal allowed (I B)

Cantarella Bros Pty Limited v Modena Trading Pty Ltd (HCA) - trademark - trademarks inherently adapted to distinguish use - appeal allowed (B)

Nelson v Commissioner of Taxation (FCAFC) - administrative law - deduction claims for expenditure incurred in a primary production business disallowed - appeal dismissed (B G)

Alexandria 1 Pty Ltd v Echelon Property Management Pty Ltd (NSWCA) - security for costs - real property - special circumstances established - orders made (B)

Construction Technologies Australia Pty Ltd v Doueihi (NSWSC) - contract - lease - defendants estopped from denying existence of lease (B C)

Matsoukatidou v Commonwealth Bank of Australia (VSCA) - possession - no breach of natural justice in summary judgment in bank's favour (B)

Re Kerbside Waste Services Pty Ltd (VSC) - corporations - oppression by director against member - orders for access to financial records and purchase of director's shares (I B)

Summaries with links (5 minute read)

Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49

High Court of Australia

French CJ; Hayne, Keifel, Gageler & Keane

Taxation - GST - respondent MBI acquired apartments in hotel - each apartment subject to lease between vendor and operator of hotel - on acquiring rights of lessor, MBI became recipient of supply of going concern - Commissioner assessed MBI to GST on basis of it having increasing adjustment under s135-5 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) - Commissioner argued continuation of apartment leases resulted in continuation of an input taxed supply of residential premises by way of lease from vendor to operator - *GST - increasing adjustment - price - supply of a going concern* - held: each apartment lease, as an executory contract, obliged MBI to give operator use and occupation of apartment throughout term of lease in consideration for payment of rent - MBI's observance of obligation was an intended supply of residential premises by way of lease by MBI to operator which was input taxed under s40-35 - conditions for operation of s135-5 were met - Commissioner correct to assess MBI to an increasing adjustment - appeal allowed.

[Commissioner of Taxation](#) (I B)

Cantarella Bros Pty Limited v Modena Trading Pty Ltd [2014] HCA 48

High Court of Australia

French CJ, Hayne, Crennan, Kiefel & Gageler JJ

Trade mark - parties advertised and sold coffee products - appellant claimed respondent infringed its registered trade marks "ORO" and "CINQUE STELLE" - respondent cross-claimed registration of trade marks should be cancelled on basis trade marks were not inherently adapted to distinguish goods for which they were registered - appellant succeeded in Federal Court - Full Court of Federal Court upheld respondent's appeal - *inherently adapted to distinguish - ordinary signification* - held: trade marks "ORO" and "CINQUE STELLE" were inherently adapted to distinguish the goods for which they were registered from the goods of other persons, within the meaning of s41 *Trade Marks Act 1995* (Cth) - appeal allowed.

[Cantarella Bros Pty Limited](#) (B)

Nelson v Commissioner of Taxation [2014] FCAFC 163

Full Court of the Federal Court of Australia

Greenwood, Rares & Davies JJ

Administrative law - taxation - primary judge dismissed appeal from AAT's affirmation of Commissioner's decision to disallow appellant's objection to deduction claims for expenditure incurred in a *primary production* business - Commissioner objected to competency of appeal on ground notice of appeal did not raise any relevant question of law that would have enlivened

jurisdiction of Court under s44 *Administrative Appeals Tribunal Act 1975* (Cth) - held: certain grounds did not raise questions of law but sought to challenge findings of fact on which AAT based its decision that activities carried out by appellant did not amount to the carrying on of a business - ground of appeal concerning alleged breach of s39 of the Act raised question of law capable of founding appeal - no breach of s39 - appeal dismissed.

[Nelson](#) (B G)

Alexandria 1 Pty Ltd v Echelon Property Management Pty Ltd [2014] NSWCA 413

Court of Appeal of New South Wales

Ward JA

Costs - appeal from decision determining compensation payable to respondents pursuant to s74P *Real Property Act 1900* (NSW) - grounds of appeal asserted error in finding that affidavit material put to Court established that respective respondents had suffered pecuniary loss because of lodgement of caveat over property subject of court proceedings - two applications for security for costs - first application by first to third respondents in appeal proceedings - second application by fourth respondent in appeal proceedings - held: applications for security for costs well founded - Court satisfied special circumstances established for order for security for costs to be made in favour of respective respondents.

[Alexandria 1 Pty Ltd](#) (B)

Construction Technologies Australia Pty Ltd v Doueihi [2014] NSWSC 1717

Supreme Court of New South Wales

White J

Contract - estoppel - plaintiff alleged it was entitled to occupy part of premises owned by first to fourth defendants under agreement for lease - alternatively plaintiff contended it was entitled to occupy premises pursuant to agreement between it and fifth defendant whereby it would lease premises from first to fourth defendants and grant it sublease - alternatively plaintiff contended defendants estopped from denying existence of such an equitable lease or sublease - held: plaintiff entitled to enforce an equity arising by estoppel - appropriate equitable relief was to make good assumption that plaintiff was induced to adopt - orders that first to fourth defendants execute a lease on terms - parties to bring in short minutes to give effect to orders.

[Construction Technologies Australia Pty Ltd](#) (B C)

Matsoukatidou v Commonwealth Bank of Australia [2014] VSCA 307

Court of Appeal of Victoria

Bongiorno, Beach & Kyrou JJA

Possession - natural justice - County Court judge granted summary judgment in favour of bank for recovery of possession of property registered appellants' names as tenants in common - Court also ordered appellants to pay certain amount to bank - appellants appealed - appellants contended procedure adopted by judge constituted a denial of natural justice - held: Court not

satisfied that, had appellants been granted adjournment to obtain legal representation and an interpreter, they would have been in any better position to resist bank's application for summary judgment - no error in granting bank adjournment to enable it to file further evidence - no breach of hearing rule of natural justice - grounds of appeal concerning disclosure of information and investigations by regulatory authorities rejected - appeal dismissed.

[Matsoukatidou](#) (B)

Re Kerbside Waste Services Pty Ltd [2014] VSC 607

Supreme Court of Victoria

Gardiner AsJ

Corporations - oppression - plaintiff sought orders pursuant to *Corporations Act 2001* (Cth) arising from alleged wrongful conduct of second defendant in her capacity as the director of first defendant company - held: Court satisfied there had been oppression on the part of director over some considerable period of time - director had continually refused to inform plaintiff about company's financial affairs - director failed to maintain proper and up to date financial records and attend to payment of company's creditors - director's conduct was 'contrary to the interests of the members as a whole' or was 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members' namely the plaintiff - it seemed inevitable that an unpaid creditor would seek to have company wound up in insolvency - situation had been brought about by the conduct of director - orders made giving access to financial records for purpose of valuing shares in company - orders made that plaintiff purchase shares of director for value to be determined by expert.

[Re Kerbside Waste Services Pty Ltd](#) (I B)

The Cliffside Path

(from A Midsummer Holiday and Other Poems, 1884)

By Algernon Charles Swinburne

Seaward goes the sun, and homeward by the down
 We, before the night upon his grave be sealed.
 Low behind us lies the bright steep murmuring town,
 High before us heaves the steep rough silent field.
 Breach by ghastlier breach, the cliffs collapsing yield:
 Half the path is broken, half the banks divide;
 Flawed and crumbled, riven and rent, they cleave and slide
 Toward the ridged and wrinkled waste of girdling sand

Deep beneath, whose furrows tell how far and wide
Wind is lord and change is sovereign of the strand.

Star by star on the unsunned waters twirling down,
Golden spear-points glance against a silver shield.
Over banks and bents, across the headland's crown,
As by pulse of gradual plumes through twilight wheeled,
Soft as sleep, the waking wind awakes the weald.
Moor and copse and fallow, near or far descried.
Feel the mild wings move, and gladden where they glide:
Silence, uttering love that all things understand,
Bids the quiet fields forget that hard beside
Wind is lord and change is sovereign of the strand.

Yet may sight, ere all the hoar soft shade grow brown,
Hardly reckon half the rifts and rents unhealed
Where the scarred cliffs downward sundering drive and drown,
Hewn as if with stroke of swords in tempest steeled,
Wielded as the night's will and the wind's may wield.
Crowned and zoned in vain with flowers of autumn-tide,
Soon the blasts shall break them, soon the waters hide,
Soon, where late we stood, shall no man ever stand.
Life and love seek harbourage on the landward side:
Wind is lord and change is sovereign of the strand.

Friend, though man be less than these, for all his pride,
Yet, for all his weakness, shall not hope abide?
Wind and change can wreck but life and waste but land:
Truth and trust are sure, though here till all subside
Wind is lord and change is sovereign of the strand.

[Algernon Charles Swinburne](#)

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