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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)

Australian Securities and Investments Commission v Wellington Capital Limited (FCAFC) – corporations - managed investment scheme - transfer of fund's assets to unit holders not authorised by constitution (B, G)

Field v Dettman (NSWCA) – judicial review - decision of Consumer, Trader and Tenancy Tribunal - no entitlement to restitution or repayment from builder - summons dismissed (I, C, G)

Bootle v Barclay (NSWCA) - negligence - findings of negligence not supported by evidence – one defendant liable under *Damage by Aircraft Act 1999* (Cth) (I)

Boral Transport Pty Ltd v Gulic (NSWCA) – negligence - damages - previous injury - order that injured person submit to MRI scan of lumbar spine (I)

Nazloomian v Commonwealth Bank of Australia Pty Limited and ors (NSWSC) – application to set aside default judgment refused (I, B)

Westpac Banking Corporation v Perri (VSC) – loan – fraud – forgery defence – elderly defendant – default judgment set aside (I, B)



Koufos v NTA (NTSC) – negligence – landlord’s breach of duty did not cause infant’s continuing exposure to lead – symptoms not caused by lead – claim dismissed (I, C)

Summaries with links (5 minute read)

Australian Securities and Investments Commission v Wellington Capital Limited

[2013] FCAFC 52

Full Court of the Federal Court of Australia

Jacobson, Gordon & Robertson JJ

Corporations - trusts – respondent, managing entity of managed investment scheme (fund), sold assets of fund to company - consideration comprised transfer to fund of company shares - respondent distributed shares *in specie* to unit holders of fund - ASIC contended respondent had no power under constitution of fund to transfer assets of fund to unit holders and sought declaratory relief - construction of constitution - provisions of *Ch5C Corporations Act 2001* (Cth) - held: distribution of shares in company to unit holders of fund was contrary to constitution and was done without power - appeal allowed - declarations made.

[Australian Securities and Investments Commission](#) (B, G)

Field v Dettman [2013] NSWCA 147

Court of Appeal of New South Wales

Beazley P, Meagher JA & Preston CJ of LEC

Judicial review - plaintiffs sought to quash dismissal by District Court of appeal from Consumer, Trader and Tenancy Tribunal - plaintiffs appealed on grounds: that CTTT erred in failing to find they were entitled to claim restitution from defendant builder and in dismissing claim for reimbursement of money paid to builder - held: first ground of appeal failed because plaintiffs did not raise it before District Court – no statutory right of action under *Home Building Act 1989* (NSW) to recover money paid to contractor who performed uninsured residential building work and who received payment in contravention of s92(2) of the Act - summons dismissed.

[Field](#) (I, C, G)

Bootle v Barclay [2013] NSWCA 142

Court of Appeal of New South Wales

Meagher JA, Sackville AJA & Ball J

Negligence - primary judge found four defendants liable in negligence to owners/occupiers of property for damage to crops caused by aerial spray drift - held: findings of negligence against all



four defendants not supported by evidence - verdict against owner and occupier of adjacent estate set aside - aerial spraying company liable under *Damage by Aircraft Act 1999* (Cth) - primary judge erred in finding pilot not an employee for purposes of exception under s7 of the Act - pilot not liable in damages under the Act – verdict against pilot set aside.

[Bootle](#) (I)

Boral Transport Pty Ltd v Gulic [2013] NSWCA 150

Court of Appeal of New South Wales

Basten & Meagher JJA

Negligence - respondent claimed damages for injury suffered while lifting at work including damages for economic loss and domestic assistance - respondent had suffered previous injury to back - applicant applied for an order (refused at first instance) under r23.4 *Uniform Civil Procedure Rules 2005* (NSW) that respondent submit to MRI of lumbar spine to determine extent to which his disability diminished earning capacity and capacity to look after himself flowed from previous injury - held: medical condition of respondent a live issue and examination was relevant to resolving dispute - primary judge's dismissal of applicant's motion erroneous – leave to appeal granted and appeal allowed.

[Boral Transport](#) (I)

Nazloomian v Commonwealth Bank of Australia Pty Limited and ors [2013] NSWSC 681

Supreme Court of New South Wales

Bellew J

Contract - loan agreement - application to set aside default judgment under r36.16 *Uniform Civil Procedure Rules 2005* (NSW) - held: defendant was properly served with originating process under s109X *Corporations Act 2001* (Cth) - director of defendant was on notice of proceedings from time of commencement - no adequate explanation for default - minimal delay in bringing application with no demonstrated prejudice to plaintiff - defendant had not established *bona fide* defence on the merits - motion dismissed.

[Nazloomian](#) (I, B)

Westpac Banking Corporation v Perri [2013] VSC 290

Supreme Court of Victoria

Derham AsJ

Loan – default judgment - bank claimed possession of property on basis of default under mortgage – defendant, an elderly widow who spoke little English, sought to set aside judgment in



default of delivery of defence – allegations of fraud – forgery defence - held: no basis at present stage to bring home any fraud to plaintiff to give rise to exception to indefeasibility of mortgage – defendant an elderly widow not currently in position to know facts which might bear on fraud - risk of injustice - appropriate to give defendant opportunity to investigate - balance of hardship or prejudice overwhelmingly in favour of setting aside the judgment – judgment set aside.

[Westpac Banking Corporation](#) (I, B)

Koufos v NTA [2013] NTSC 25

Supreme Court of the Northern Territory

Blokland J

Negligence – landlord’s duty of care - action brought by mother on behalf of infant son – alleged Northern Territory was negligent as landlord of child’s family residence resulting in injury arising from lead exposure – medical evidence - held: defendant breached its duty of care to ensure premises were safe after being notified of potential hazard in soil sample results – breach did not result in child continuing to be exposed to lead contamination as mother declined offer of alternative accommodation or excavation of soil - no proven correlation between level of lead in soil and blood lead levels - exposure to lead did not cause or contribute to plaintiff’s medical conditions - plaintiff’s symptoms not consistent with lead poisoning – plaintiff did not suffer from lead poisoning or lead intoxication – claim dismissed.

[Koufos](#) (I, C)

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