

Friday 7 June 2013

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

State of NSW v Kable (HCA) - constitutional law - false imprisonment - court's detention order valid until set aside - order provided lawful authority for detention - appeal allowed (I, G)

Kakavas v Crown Melbourne Ltd (HCA) - equity - unconscionable conduct - pathological gambler not susceptible to exploitation by casino operator - appeal dismissed (I, B, G)

Taylor v Owners - Strata Plan No 11564 (No 2) (NSWCA) - costs - multiple respondents - appellant only required to pay one set of costs (I, B, C)

Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd (NSWSC) - security of payments - construction contract - contractor entitled to recover unpaid portion of claim from principal (I, C)

Permanent Custodians Ltd v Geagea (NSWSC) - apprehended bias - application refused for disqualification of judge on basis of previous relationship with defendant (I, B)

Pollard v Registrar of Titles (VSC) - real property - restrictive covenant did not identify land intended to benefit from covenant - covenant unenforceable (B, C)



Barker v GE Mortgage Solutions Ltd (QCA) - loan - appeal refused from grant of summary judgment in lender's favour (B)

Zurich Australian Insurance Ltd t/a Zurich New Zealand (NZCA) - commercial arbitration - insurance - whether court could refuse a stay to permit arbitration if there were grounds for summary judgment (I)

Summaries with links (5 minute read)

State of NSW v Kable [2013] HCA 26

High Court of Australia

French CJ; Hayne, Crennan, Kiefel, Bell, Gageler & Keane JJ

Constitutional law - judicial power - false imprisonment - *Community Protection Act 1994* (NSW) empowered court to order preventive detention of respondent - court ordered detention for 6 months - detention order set aside by Court of Appeal on basis Act was unconstitutional - respondent sued NSW for abuse of process, malicious prosecution and false imprisonment - Court of Appeal held respondent should receive damages for false imprisonment - held: detention order valid until set aside and provided lawful authority for respondent's detention - appeal allowed.

[State of NSW](#) (I, G)

Kakavas v Crown Melbourne Ltd [2013] HCA 25

High Court of Australia

French CJ; Hayne, Crennan, Kiefel, Bell, Gageler & Keane JJ

Equity - unconscionable conduct - appellant lost \$20.5 million playing baccarat at casino operated by respondent - appellant submitted that due to his pathological gambling urge he was unable to make decisions in his own interest while gambling and that respondent had exploited this inability by allowing him to gamble - allegation of unconscionable conduct contrary to s51AA *Trade Practices Act 1974* (Cth) - held: court not satisfied appellant's pathological gambling was a special disadvantage which made him susceptible to exploitation by respondent - appellant was able to make rational decisions to refrain from gambling and to refrain from gambling with respondent - appellant's attempt to rely on constructive notice to establish awareness of respondent's employees of any personal disability rejected - casino operator did not knowingly victimise appellant by allowing him to gamble - appeal dismissed.

[Kakavas](#) (I, B, G)

**Taylor v Owners - Strata Plan No 11564 (No 2) [2013] NSWCA 153**

Court of Appeal of New South Wales

McColl, Basten & Hoeben JJA

Costs - applicant sought variation of costs order pursuant to r36.16(3A) *Uniform Civil Procedure Rules 2005* (NSW) - applicant sought one order for costs on basis that multiple respondents did not need to be separately represented - requirement for notice of objection to more than one set of costs - held: order granted for appellant to pay one set of costs to first to fourth and sixth respondents - not appropriate for court to enter debate as to how costs should be divided between respondents - express disallowance of respondents' costs of preparing written submissions.

[Taylor](#) (I, B, C)

Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd [2013] NSWSC 707

Supreme Court of New South Wales

Hammerschlag J

Security of payments - plaintiff contractor and defendant principal entered written construction contract - principal failed to provide payment schedule within time allowed by s14(4)(b) *Building and Construction Industry Security of Payment Act 1999* (NSW) - contractor sought to recover unpaid portion of its claim under s15(2)(a) of the Act - held: payment claim did not disclose precise contractual provisions on which it relied but assertion of entitlement was sufficient to enliven operation of the Act - principal previously had the option to serve payment schedule and adjudication response on contractual issue but it was now precluded from doing so by s15(4)(b)(ii) of the Act - judgment for contractor.

[Ampcontrol SWG](#) (I, C)

Permanent Custodians Ltd v Geagea [2013] NSWSC 693

Supreme Court of New South Wales

Rothman J

Bias - application for disqualification on basis of apprehended bias - proceedings in which plaintiff made allegations of misleading or deceptive conduct and alleged defendants breached their duty of care to avoid foreseeable loss - fourth defendant had had prior relationship with judge as contemporaneous presidents of boards of two schools - second and third defendants objected to judge hearing proceedings - held: fourth defendant's professional association with judge prior to his appointment did not, without more, form basis for disqualification - relationship not one that would reasonably be seen to impede impartial determination by judge - judge refused to excuse himself from proceedings.

[Permanent Custodians](#) (I, B)

**Pollard v Registrar of Titles [2013] VSC 286**

Supreme Court of Victoria

Mukhtar AsJ

Real property - restrictive covenant - first and second plaintiffs were registered proprietors of land - third plaintiff was developer who purchased land from registered proprietors - restrictive covenant restricted building to single dwelling and restricted type of building materials - plaintiffs applied under s84(2) *Property Law Act 1958* (Vic) for a declaration that covenant was unenforceable - held: no identification of benefitted land in the covenant - covenant not part of building scheme - covenant unenforceable.

[Pollard](#) (B, C)

Barker v GE Mortgage Solutions Ltd [2013] QCA 137

Court of Appeal of Queensland

White JA; Philippides & Lyons JJ

Loan – appeal from summary judgment in lender’s favour - held: no error by primary judge in failing to find lender responsible for mortgage broker’s conduct on basis he was their agent or in not finding serious issue to be tried on question of agency - no substance to claim that lender failed to consider loan contract under relevant consumer credit legislation - no real prospect of successfully defending lender’s claim on basis of unjust transaction - appeal dismissed.

[Barker](#) (B)

From New Zealand...

Zurich Australian Insurance Ltd t/a Zurich New Zealand [2013] NZCA 180

Court of Appeal of New Zealand

Stevens, French & R Young JJ

Commercial arbitration - insurance - insured made a claim under a contract frustration policy which contained an arbitration clause - insurer declined to indemnify and insured commenced proceedings seeking summary judgment - Article 8(1) of the First Schedule to the *Arbitration Act 1996* (NZ) requires a court considering proceedings the subject of an arbitration agreement to stay proceedings on the application of a party unless it finds there is not in fact any dispute - line of NZ and UK authority provided that the court must assess whether there is an arguable defence - whether requirement of arguable defence is a judicial gloss on art 8 (1) - held: there will be no dispute if a defendant has no arguable defence and the court is empowered to refuse a stay to



permit arbitration if the claim is a proper one for summary judgment.

[Zurich](#) (I)

Blue Hyacinths

By Adelaide Crapsey

In your
Curled petals what ghosts
Of blue headlands and seas,
What perfumed immortal breath sighing
Of Greece.

[Blue Hyacinths](#)

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