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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)

Australian Competition and Consumer Commission v Artorios Ink Co Pty Ltd (FCA) - consumer law - leave to proceed against company in liquidation - orders for further discovery (I, B, G)

Day v The Ocean Beach Hotel Shellharbour Pty Ltd (NSWCA) - vicarious liability - occupier and licensee of hotel not vicariously liable for security guard's assault and battery of patron (I)

Singer v United Israel Appeal Refugee Relief Fund (NSWSC) - succession - direction in will to executors to pay estate's liabilities did not displace statutory provisions - *pecuniary legacy* (B)



Meriton Apartments Pty Ltd v Owners of the Strata Plan No 72381 (NSWSC) - order for discovery set aside (C)

Avery v Saree Holdings Ltd; Lava Ltd v Avery (No. 3) (NSWSC) - mortgagee did not pay sum to mortgagor by mistake - no overpayment recoverable (B)

Osachy v O'Sachy (QCA) – limitation of actions - leave refused to appeal dismissal of counter claim (I)

Re Quinlivan; ex parte Quinlivan (WASC) - no evidence deceased intended unsigned draft will to constitute last will - executor refused probate (B)

Summaries with links (5 minute read)

Australian Competition and Consumer Commission v Artorios Ink Co Pty Ltd [2013] FCA 753

Federal Court of Australia

Mortimer J

Consumer law - applicant sought leave to proceed under s500(2) *Corporations Act 2001* (Cth) against company in liquidation for purpose of seeking declaratory relief for breaches of *Australian Consumer Law* - applicant also sought orders for further discovery - relevant considerations when grant of leave sought by regulator rather than private party - held: there was firm basis for grant of leave - appropriate to order further discovery to facilitate conduct of penalty hearing, but court not prepared to waive compliance with r20.16 *Federal Court Rules 2011* (Cth).

[Australian Competition and Consumer Commission](#) (I, B, G)

Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250

Court of Appeal of New South Wales

Meagher, Emmett & Leeming JJA

Vicarious liability - appellant injured when security guard removed her from premises at request of manager - primary judge found security guard committed assault and battery on appellant for which his employer was vicariously liable - employer was deregistered - appellant appealed verdict in favour of occupier of hotel and licensee of premises, contending they were vicariously liable for security guard's conduct - appellant also contended award of damages inadequate - provisions of *Liquor Act 2007* (NSW) (*Liquor Act*) and *Security Industry Act 1997* (NSW) - true agent



- dual vicarious liability - held: security guard was not expressly authorised by occupier or licensee to commit assault and battery, nor was he acting as agent of either of them in requisite sense to create vicarious liability - licensee not directly liable via s91 of the Liquor Act - no error in assessment of damages - appeal dismissed.

[Day \(I\)](#)

Singer v United Israel Appeal Refugee Relief Fund [2013] NSWSC 1035

Supreme Court of New South Wales

White J

Succession - how estate's liabilities for debts and testamentary expenses were to be borne between beneficiaries - construction of will - held: direction in will for executors to pay debts and testamentary expenses did not displace provisions of s46(2) *Probate Administration Act 1898* (NSW) and Pt 2 Sch 3 of the Act in relation to administration of assets and order of application of assets - gift to third and fourth defendants was an *asset specifically disposed of* under Act - gift to tenth defendant was *pecuniary legacy* under Act - condition on gift to fifth defendant was void as being against public policy - declarations made - submissions invited on further matters relevant to how debts, testamentary expenses and liabilities were to be borne.

[Singer \(B\)](#)

Meriton Apartments Pty Ltd v Owners of the Strata Plan No 72381 [2013] NSWSC 1037

Supreme Court of New South Wales

Rein J

Discovery - proceedings concerning high rise building constructed by first plaintiff - plaintiffs applied pursuant to r49.19 *Uniform Civil Procedure Rules 2005* (NSW) to set aside decision ordering them to give discovery of documents - applicant's onus to persuade court it was in interests of justice for court to intervene - desirability of evidence being marshalled and served by first plaintiff before any discovery proceeded with - held: Registrar's order set aside on basis that alternative order for discovery was likely to be more conducive to the efficient conduct of the litigation.

[Meriton Apartments Pty Ltd \(C\)](#)

**Avery v Saree Holdings Ltd; Lava Ltd v Avery (No. 3) [2013] NSWSC 1032**

Supreme Court of New South Wales

Slattery J

Loans and mortgages - related proceedings in which plaintiff mortgagor sought relief against two mortgagees - judgment concerned remaining account-related matters in Saree proceedings - held: mortgagee had not overpaid sum to mortgagor by mistake and no overpayment could be recovered as *Monies Owing* under Saree Mortgage - unnecessary to determine for whose benefit any overpaid funds were held by mortgagee - parties given opportunity to make submissions concerning remaining issues.

[Avery](#) (B)**Osachy v O'Sachy [2013] QCA 212**

Court of Appeal of Queensland

P de Jersey CJ; Gotterson JA & Mullins J

Limitation of actions - respondent succeeded at trial in claim for half of proceeds of insurance policy payment made following destruction of house by fire which he and his brother owned as tenants in common - applicant sought to appeal trial judge's dismissal of his counterclaim for payment of amounts on basis it had no merit - application was brought outside limitation period - explanation for delay - merits of proposed appeal - held: appeal failed to raise viable ground of appeal - no measurable prospects of success - leave to appeal refused.

[Osachy](#) (I)**Re Quinlivan; ex parte Quinlivan [2013] WASC 286**

Supreme Court of Western Australia

Registrar C Boyle

Wills and estates - probate - no will found following death of deceased - 15 years prior to death, deceased had contacted solicitor who prepared and sent draft will to deceased - deceased's son, named as institute executor in draft will, sought probate of copy of will pursuant to Pt X *Wills Act 1970* (WA) - evidence required to prove informal will - ss8 & 34 of the Act - evidence - held: requirements that document existed and was not signed satisfied - draft reflected testamentary intentions of deceased but there was no evidence of critical requirement that deceased had demonstrated he intended document to constitute his last will - application refused.

[Re Quinlivan](#) (B)

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