

Friday 8 March 2013

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Rawson Finances Pty Ltd v Commissioner of Taxation - administrative law - objections to income tax assessments - Administrative Appeals Tribunal's decision reasonably open on material before it - appeal allowed (I, B, G)

Premier Pet Pty Ltd trading as Bay Fish v Brown (No 2) - administrative law - industrial law - appeal from decision of Federal Magistrate that appellant unlawfully dismissed respondent - protection for exercise of workplace rights - appeal dismissed (I, G)

Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd - evidence - new trial - absence of reasons for conclusions on evidence - process of fact-finding miscarried new trial ordered (I)

Commonwealth Bank of Australia v Thompson - guarantee and indemnity - effect of bank's conduct since taking possession of property on enforceability of guarantee - no unconscionable conduct - bank entitled to enforce guarantee (I, B, C)



In the matter of Bevillesta Creditors' Trust - summary dismissal - proof of debt - trustees of creditors' fund sought dismissal of proceedings or strike out of summonses for abuse of process - notices of motion dismissed (I, B)

In the matter of Cancer Care Institute of Australia Pty Ltd (administrator appointed) - real property - fixtures to property - equipment installed at medical centre not a fixture in which owner of medical centre had any interest, title or rights (B, C)

Triple M Mechanical Services Pty Ltd v Ellis - judicial review - construction contract - determination of adjudicator - arguable procedural unfairness and failure to address or answer required question amounting to jurisdictional error - *certiorari* granted (I, C, G)

Summaries with links (5 minute read)

Rawson Finances Pty Ltd v Commissioner of Taxation [2013] FCAFC 26

Full Court of the Federal Court of Australia

Jessup, Jagot & Nicholas JJ

Administrative law - appeal from judgment allowing appeal under s44 *Administrative Appeals Tribunal Act 1975* (Cth) from decision of Administrative Appeals Tribunal to set aside Commissioner's decisions on objections to assessments of income tax - primary judge concluded it was not open on evidence for Tribunal to find funds transferred by bank were loans - Commissioner filed notice of contention alleging procedural unfairness in Tribunal - held: applicant had established Tribunal's decision was reasonably open on material before it - no denial of procedural fairness by Tribunal to Commissioner - appeal allowed - Tribunal's decision reinstated.

[Rawson Finances](#) (I, B, G)

Premier Pet Pty Ltd trading as Bay Fish v Brown (No 2) [2013] FCA 167

Federal Court of Australia

Collier J

Administrative law - industrial law - protection for exercise of workplace rights - appeal from decision of Federal Magistrate that appellant had contravened s340(1) *Fair Work Act 2009* (Cth) by dismissing respondent from employment, and ordering appellant to reinstate respondent - natural



justice - employer's onus of proof of valid reasons to terminate employment - test of reasonableness in respect of overtime work - practicability of reinstatement - respondent's notice of contention seeking to add additional basis on which decision should be affirmed - held: Federal Magistrate's decision not affected by errors of law material to decision below or affected by type of errors adverted in *House v R* [1936] HCA 40 - appeal dismissed.

[Premier Pet](#) (I, G)

Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd [2013] NSWCA 46

Court of Appeal of New South Wales

McColl JA; Bergin CJ in Eq & Blanch J

Evidence - new trial - contribution between tortfeasors - appeal from decision rejecting appellant's claim that worker suffered injury at its premises, and that the injury was caused by negligence of respondent - appellant complained that trial judge erred in process of fact finding, primarily due to absence of any reasoning process leading to conclusions - principal issues in proceedings were mechanism of injury suffered by worker and worker's credit - held: trial judge failed to subject all evidence to rational analysis in manner which exposed reasoning process - process of fact-finding miscarried - new trial ordered.

[Ceva Logistics](#) (I)

Commonwealth Bank of Australia v Thompson [2013] NSWSC 149

Supreme Court of New South Wales

Harrison AsJ

Guarantee and indemnity - director provided guarantee for money owed to bank by his property development company - bank sought repayment of sum, interest from judgment and costs on an indemnity basis - guarantor alleged bank's conduct after taking possession of properties disentitled it from enforcing guarantee - held: bank had been dilatory since taking possession of property but had now taken steps to sell it - any prejudice to guarantor from bank's inaction had been ameliorated - bank's conduct not unconscionable - bank entitled to enforce guarantee.

[Commonwealth Bank of Australia](#) (I, B, C)

In the matter of Bevillesta Creditors' Trust [2013] NSWSC 162

Supreme Court of New South Wales

Gzell J

Summary dismissal - abuse of process - trusts and trustees - plaintiffs sought declarations that decisions of trustees of creditor's fund rejecting proofs of debt were made in error and orders that



proofs of debt be admitted - trustees sought orders dismissing proceedings or striking out summonses as abuse of process pursuant to rr13.4 and 14.28 *Uniform Civil Procedure Rules 2005* (NSW) - trustees claimed plaintiffs' proceedings were commenced out of time period specified in creditors' trust deed and there was no power to extend time - plaintiffs sought to file amended summons seeking order giving trustee power to extend time pursuant to s81 *Trustee Act 1925* (NSW) - held: plaintiffs had demonstrated that summonses would be saved by legitimate amendments - leave to file amended summonses granted - trustees' notices of motion dismissed.

[Bevillesta Creditors' Trust](#) (B)

In the matter of Cancer Care Institute of Australia Pty Ltd (administrator appointed)

[2013] NSWSC 37

Supreme Court of New South Wales

Black J

Real property - fixtures - Cancer Care Institute and its administrator sought declarations as to title of medical equipment - Cancer Care Institute occupies parts of medical centre owned by Cortez Enterprises Pty Ltd - Cortez, and its lenders who had mortgages over the medical centre, claimed the medical equipment installed at premises were fixtures, so that title passed to Cortez and was subject to the mortgages - evidence - proper characterisation of medical equipment as fixtures, non-fixtures, or tenant's fixtures - principles applicable to whether item a chattel or a fixture: *Loiero (aka Lero) v Adel Sportswear Pty Ltd* [2010] NSWSC 1133 - held: Cortez had no interest, title or rights in the equipment - Cancer Care Institute had title in the equipment - equipment to be delivered up to Cancer Care Institute and its administrator.

[Cancer Care Institute of Australia](#) (B, C)

Triple M Mechanical Services Pty Ltd v Ellis [2013] WASC 67

Supreme Court of Western Australia

EM Heenan J

Judicial review - construction contract - dispute concerning amount payable by applicant to subcontractor for variations alleged to have been authorised by contract between them - applicant sought order in nature of certiorari to quash or set aside decision of adjudicator made under s32 *Construction Contracts Act 2004* (WA) - held: arguable procedural unfairness and failure to directly address or answer question required of adjudicator amounted to jurisdictional error - this jurisdictional error justified judicial review in form of *certiorari* - *certiorari* granted.

[Triple M Mechanical Services](#) (I, C, G)

Book 2, Epigram 8

By Thomas Bastard

Walking the fields a wantcatcher I spied,
To him I went, desirous of his game:
Sir, have you taken wants? Yes, he replied,
Here are a dozen, which were lately ta'en.
Then you have left no more. No more? quoth he.
Sir I can show you more: the more the worse;
And to his work he went, but 'twould not be,
For all the wants were crept into my purse.
Farewell friend wantcatcher, since 'twill not be,
Thou cannot catch the wants, but they catch me.

<http://www.poetryfoundation.org/bio/thomas-bastard>

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