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Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Fischer v Nemeske Pty Ltd (HCA) - trusts and trustees - family trust - valid exercise of power to “advance” or “apply” sum - appeal dismissed (I B)

Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd (NSWCA) - insurance - commercial motor vehicle policy - basis for application of exemption or condition not established - appeal allowed (I B C)

Surgibit IP Holdings Pty Limited v Ellis (NSWSC) - pleadings - enforcement of foreign judgment - permission to amend defence to reflect claims concerning parts of judgment which were allegedly penal in nature (I B)

Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) (NSWSC) - negligence - plaintiff injured when she tripped while leaving lift - lift had not levelled with floor - defendants not liable - judgment for defendants - cross-claims dismissed (I B C)

Commonwealth Bank of Australia v Rafidi (NSWSC) - pleadings - multiple attempts to amend cross-claim - pleadings were embarrassing - pleadings left out critical matters - leave to amend refused (I B)

Champion v Rohrt (VSCA) - costs - contention concerning jurisdiction of Victorian Civil and

Administrative Tribunal arguable - no prejudice established - extension of time to seek leave to appeal granted (I B)

Department of State Development v Latro Lawyers (WASC) - freedom of information - erroneous determination that documents not exempt under *Freedom of Information Act 1992* (WA) (I G)

Summaries With Link (Five Minute Read)

Fischer v Nemeske Pty Ltd [2016] HCA 11

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Gordon JJ

Trusts and trustees - family trust established by deed of settlement - sole asset was shares in another company (Aladdin) - in September 1994 trustee resolved asset revaluation reserve (sum) be distributed to husband and wife as joint tenants - trustee's books acknowledged debt to husband and wife - in 1995, by deed of charge, trustee covenanted to pay sum to husband and wife "on demand" - in May 1994 husband had orally varied vesting date to June 1992 - husband died in 2011 - wife died in 2010 - Court of Appeal found cause of action in debt accrued to husband and wife when trustee admitted and acknowledged itself to be indebted to them in its accounts and by means of deed of charge - Court of Appeal found oral resolution was not a valid exercise of power conferred by trust deed to vary vesting date, wife had predeceased husband and husband's estate entitled to judgment for sum against trustee - held: resolution was valid exercise of power to "advance" and "apply" sum by creation of debt - appeal dismissed.

[Fischer](#) (I B)

Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd [2016] NSWCA 67

Court of Appeal of New South Wales

Meagher & Ward JJA; Sackville AJA

Insurance - commercial motor vehicle policy - damage to public road - s102 *Roads Act 1993* (NSW) - arm of excavator loaded on a vehicle struck a bridge causing damage - Barrie Toepfer owned vehicle and excavator and employed driver - RTA claimed costs of repair from Barrie Toepfer - Barrie Toepfer cross-claimed against its insurer under a Commercial Motor Vehicle Policy - Barrie Toepfer also cross-claimed against RTA and NSW - primary judge found s102 established strict liability unrelated to fault or liability in tort - Barrie Toepfer caused damage to bridge - RTA entitled to recover cost it incurred in making good the damage - primary judge gave judgment for RTA against Barrie Toepfer and that insurance policy exclusion for recklessness extended to recklessness of the insured's employed driver - cross-claim against insurer failed - construction and application of policy provisions - whether findings correct that as truck approached bridge driver appreciated load might strike bridge and consciously decided to

run risk by continuing - held: driver not reckless in driving onto bridge - driver did not fail to do what was reasonable - insurers did not establish basis for application of exclusion or condition - appeal allowed.

[Barrie Toepfer](#) (I B C)

Surgibit IP Holdings Pty Ltd v Ellis [2016] NSWSC 359

Supreme Court of New South Wales

Button J

Pleadings - proceedings in which plaintiff was seeking registration of foreign judgment - first defendant sought to file amended defence in these proceedings - plaintiff contended proposed amended defence insufficiently pleaded and had no prospects of success - 35 United States Code § 285 - r13.3 *Uniform Civil Procedure Rules 2005* (NSW) - held: propose default judgment entered for severable sums which defendant conceded were indisputable - defendant permitted to amend defence to reflect claims concerning parts of judgment allegedly penal in nature.

[Surgibit](#) (I B)

Schneider v AMP Capital Investors Ltd; Schneider v Kent Street Pty Ltd; AMP Office & Industrial Pty Ltd v AMP Capital Investors Ltd; (“Schneider v AMP Capital Investors Ltd”) [2016] NSWSC 333

Supreme Court of New South Wales

Fagan J

Negligence - plaintiff sued defendants for injuries sustained when she tripped while leaving lift in building - lift had not levelled at floor - defendants were occupier of building (Capital Investors), company which serviced repairs and maintained lifts (Thyssenkrupp), and company which managed and oversaw performance of building maintenance contracts (ISS) - *Civil Liability Act 2002* (NSW) - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) held: none of the defendants was liable to plaintiff - judgment for defendants - cross-claims dismissed.

[Schneider](#) (I B C)

Commonwealth Bank of Australia v Rafidi [2016] NSWSC 381

Supreme Court of New South Wales

Stevenson J

Pleadings - BankWest provided financial facilities to cross-claimant - company which owned BankWest (HBOS) agreed to sell shares in BankWest to plaintiff - cross-claimant had made five applications to amend its cross-claim - cross-claims sought to make claims arising from allegation that BankWest's appointment of receivers to it were motivated by plaintiff's desire make a "warranty claim" against HBOS under share sale agreement - held: pleadings struck out on grounds they were embarrassing or failed to state critical matters - proposed pleadings' shortcomings were fundamental - leave to amend cross-claim refused.

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

Champion v Rohrt [2016] VSCA 64

Court of Appeal of Victoria
Santamaria JA

Costs - applicant sought extension of time to seek leave to appeal from Victorian Civil and Administrative Tribunal to order applicant to pay respondent's costs of proceeding on indemnity basis - rr64.15(1) & 64.15.5(b) *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - held: applicant's contention in relation VCAT's jurisdiction arguable and of general importance - contention should be resolved by Court of Appeal - no prejudice shown by reason of delay - extension of time granted.

[Champion](#) (I B)

Department of State Development v Latro Lawyers [2016] WASC 108

Supreme Court of Western Australia
Beech J

Freedom of information - Department appealed against Information Commissioner's determination that certain documents were not exempt under *Freedom of Information Act 1992* (WA) - procedural fairness - sch1 cl4(3) - held: ground of appeal succeeded that Commissioner misconstrued phrase 'could reasonably be expected' in relation to what might follow from disclosure - denial of procedural fairness established - appeal upheld.

[Department of State Development](#) (I G)

CRIMINAL

Executive Summary

Allen (a Pseudonym) v The Queen (VSCA) - criminal law - incest and indecent act with child - admission of irrelevant, highly prejudicial evidence - appeal allowed - retrial

The Queen v DK (ACTCA) - criminal law - acts of indecency of person under 16 years - no sentencing error or manifest inadequacy - appeal dismissed

Summaries With Link

Allen (a Pseudonym) v The Queen [2016] VSCA 59

Court of Appeal of Victoria
Maxwell P, Redlich & Priest JJA

Criminal law - incest - indecent act with a child - applicant convicted of one charge of incest and eight charges of indecent act with child under 16 - applicant pleaded guilty to one charge of making a threat to kill - judge sentenced applicant to seven years and three months' with fixed non-parole period of five years and three months - applicant sought extension of time to appeal



against conviction - held: counsel's assertion of complainant's collusion with plaintiff's mother not based on instruction or evidence - assertion should not have been made - no forensic benefit from pursuing assertion of collusion - counsel failed to resist admission of irrelevant and highly prejudicial evidence - trial judge permitted admission of such evidence - there was substantial miscarriage of justice - appeal allowed - retrial.

[Allen](#)

The Queen v DK [2016] ACTCA 7

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Perry JJ

Criminal law - Crown appealed against sentences imposed on respondent for five acts of indecency on person under 16 years - sentencing judge sentenced DK to total sentence of 18 months imprisonment immediately suspended subject to 18-month good behaviour - held: judge's apparently incorrect description of operation of s10(2) *Crimes (Sentencing) Act* did not amount to sentencing error - manifest inadequacy of sentences not established - appeal dismissed.

[The Queen](#)



Benchmark

The Florist Wears Knee-Breeches

Wallace Stevens

My flowers are reflected
In your mind
As you are reflected in your glass.
When you look at them,
There is nothing in your mind
Except the reflections
Of my flowers.
But when I look at them
I see only the reflections
In your mind,
And not my flowers.
It is my desire
To bring roses,
And place them before you
In a white dish.

[Wallace Stevens](#)

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