

Thursday 8 August 2013

## 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)

**City of Canterbury v Saad** (NSWCA) - real property - no error in decision to grant easement over council's property - appeal dismissed (B, C)

**Sun v Hojunara International Group (No 2)** (NSWSC) - limitation of actions - defamation - extension of time and leave to commence fresh proceedings against moderators of website (I)

**Arida v Arida** (NSWSC) - contract - property valuer mistaken in how he carried out valuations under contract - valuations not binding (I, B)



**Wentworth Shire Council v Bemax Resources Ltd** (NSWSC) - contract - council entitled to payment of rates by holders of mining leases (I, B, C, G)

**Thompson v National Australia Bank Ltd** (VSC) - loans and mortgages - extension of interlocutory injunction preventing mortgagee from selling or disposing of property refused (B)

**Brighty (deceased)** (SASC) - succession - probate of will as contained in copy granted to sole executor until original will or more authentic copy brought to Probate Registry (B)

**Skilled Group Limited v Briers** (TASSC) - workers compensation - Commissioner's finding as to worker's normal weekly earnings not open - determination quashed (I, G)

## Summaries with links (5 minute read)

### **City of Canterbury v Saad [2013] NSWCA 251**

Court of Appeal of New South Wales

Beazley P; Meagher & Leeming JJA

Real property - easements - council appealed against order made under s88K *Conveyancing Act 1919* (NSW) granting easement over council's land for benefit of respondent's land - purpose of easement was to provide access to respondent's landlocked property - held: primary judge's conclusion that grant of easement was reasonably necessary for effective use of respondent's land was the only conclusion available on the evidence - no error in finding that provision of easement was entirely consistent with public interest in use or development of land for its designated purpose - no error in court's exercise of discretion to grant easement - leave to appeal granted - appeal dismissed.

[City of Canterbury](#) (B, C)

### **Sun v Hojunara International Group (No 2) [2013] NSWSC 1050**

Supreme Court of New South Wales

Campbell J

Limitation of actions - defamation - plaintiffs operated restaurant which asserted it was defamed by material published on website by first defendant corporation now in liquidation - plaintiffs sought order under s56A *Limitation Act 1969* (NSW) extending limitation period for commencing proceedings against second and third defendant "moderators" of website - held: plaintiffs



satisfied test imposed by s56A - limitation period extended - proceedings against first defendant stayed pursuant to *Corporations Act 2001* (Cth) - leave granted to commence fresh proceedings against second and third defendants.

[Sun](#) (I)

## **Arida v Arida [2013] NSWSC 1051**

Supreme Court of New South Wales

White J

Contracts - plaintiff and first to third defendants were brothers – plaintiff commenced proceedings for dissolution of partnership - brothers and trustees for sale entered heads of agreement for appointment of valuer - appointed valuer did not agree valuations could be relied upon by incoming lender – brothers entered subsequent agreement with fourth defendant valuer - valuer was required to value properties as at requested date but valuations reported properties valued at later date - valuer provided new valuations stating valuations occurred as at requested date - plaintiff sought declarations that valuations were not in accordance with heads of agreement or valuer's retainer - undisputed that first set of valuations not binding - held: no implied term that expert, having tendered ineffective performance, could retrieve mistake by providing fresh valuations - parties not bound by second valuations - valuer had completed task - plaintiff entitled to specific performance of heads of agreement subject to consideration concerning mortgagee - parties to bring in short minutes of order in accordance with reasons.

[Arida](#) (I, B)

## **Wentworth Shire Council v Bemax Resources Ltd [2013] NSWSC 1047**

Supreme Court of New South Wales

Rein J

Contracts - administrative law - misleading and deceptive conduct - holders of two mining leases claimed council not entitled to issue rate notices in amount issued because of agreement between council and agent acting on behalf of holders of one of the mining leases - construction of agreement - *adjusted annually in accordance with the Local Government Act* - rectification and estoppel - fetter/ultra vires - held: agreement did not permit council to make adjustments to \$100K rate per annum other than adjustments resulting from Ministerial direction under s506 *Local Government Act 1993* (NSW) – clause invalid because it was beyond council's power to make - leaseholders' claims against council under s42 *Fair Trading Act 1987* (NSW) and s52 *Trade Practices Act 1952* (NSW) failed - judgment for council for rates due and interest.

[Wentworth Shire Council](#) (I, B, C, G)



## **Thompson v National Australia Bank Ltd [2013] VSC 400**

Supreme Court of Victoria

Elliott J

Loans and mortgages - plaintiff granted interlocutory injunction preventing bank from selling or disposing of property of which it was mortgagee - whether injunction ought to be extended - held: serious question to be tried concerning plaintiff's alleged agreements with bank and prospective purchaser - prospects of success not of such strength to reduce weight to be given to considerations applicable under balance of convenience - prejudice to bank if extension granted was greater than prejudice to plaintiff if extension refused - damages adequate remedy if plaintiff succeeded against bank - extension of injunction refused.

[Thompson](#) (B)

## **Brighty (deceased) [2013] SASC 125**

Supreme Court of South Australia

Gray J

Succession - application by summons under r68 *Probate Rules 2004* (SA) for grant of probate of will as contained in copy of will - deceased executed will at solicitor's office and retained original will - after deceased's death original will not found but copy located - considerations relevant to admission to probate of copy of missing will - held: court satisfied copy of will was accurate and complete copy of original will, which was duly executed - there was evidence of terms of original will - persons who would be prejudiced were application granted had consented to application and were *sui juris* - despite thorough searches, original will could not be located - sufficient evidence to rebut presumption of revocation - probate of will as contained in copy granted to sole executor until original will or more authentic copy brought into and left in Probate Registry.

[Brighty](#) (B)

## **Skilled Group Limited v Briers [2013] TASSC 40**

Supreme Court of Tasmania

Tennent J

Workers compensation - assessment of compensation - respondent worker injured while working at tip when truck knocked him down and backed over his legs - Workers Rehabilitation and Compensation Tribunal found worker entitled to weekly payments in amount higher than asserted by appellant employer - construction of s69 *Workers Rehabilitation and Compensation Act 1988* (Tas) - *relevant period* - principle that where two constructions of a Workers Compensation Act possible, that which is favourable to the worker should be preferred - held: appeal allowed -



Commissioner erred in approach to s69(14) of the Act - finding as to worker's normal weekly earnings not open - determination quashed.

[Skilled Group Limited](#) (I, G)

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