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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (NSWCA) - motor accidents compensation - passenger injured by gunfire - driver's conduct not proximate cause - appeal dismissed (I)

Nominal Defendant v Ayache (NSWCA) - motor accidents compensation - fall from motorcycle - due inquiry and search - dismissal of proceedings refused (I)

Arkbay Investments Pty Ltd (in liquidation) (receivers and managers appointed) v Tripod Funds Management Pty Ltd (NSWSC) - real property - caveat lodged without reasonable cause preventing sale of property - compensation (B)

Webuildem Pty Ltd (Receivers & Managers Appointed) v Arab Bank Australia Ltd (NSWSC) - security for costs - stultification of proceedings - order declined (B C)

Flint Ink NZ Ltd v Huhtamaki Aust Pty Ltd L (VSCA) - arbitration - third party proceedings capable of settlement under arbitration agreement - appeal allowed (I B)

ADT v LRT (QSC) - wills - succession - leave to apply for order authorising alteration of will refused (B)

Hamilton v B & P Falcinella P/L (SASC) - pleadings - Court empowered to permit plaintiffs to plead new cause of action after expiry of limitation period (I)

Summaries with links (5 minute read)

Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd)

[2014] NSWCA 257

Court of Appeal of New South Wales

McColl & Gleeson JJA; Sackville AJA

Motor vehicle accident - motor accidents compensation - appellant was passenger in Mitsubishi - Commodore struck Mitsubishi causing its rear to move slightly to left - gunshots fired from Commodore into Mitsubishi - passenger shot and injured - Commodore stolen and uninsured - driver never identified - passenger sued Nominal Defendant pursuant to s33 *Motor Accidents Compensation Act 1999* (NSW) contending gunshot injuries caused by conduct of Commodore's driver - held: primary judge erred in applying *common sense* test of causation however his conclusion was open on application of *proximate cause* test - passenger's injuries not a result of or caused by fault of driver during either driving of Commodore or collision or action taken to avoid collision - shooting was independent of driving fault - driving may have been condition of injuries but it was not a relevant cause within meaning of s3A - gunfire was the proximate cause of injuries - appeal dismissed.

[Leach](#) (I)

Nominal Defendant v Ayache [2014] NSWCA 253

Court of Appeal of New South Wales

Emmett JA, Tobias AJA & Beech-Jones J

Motor accidents compensation - due inquiry and search - respondent injured when he fell from motorcycle - respondent sued Nominal Defendant under s34(1) *Motor Accidents Compensation Act 1999* (NSW) on basis that a motor vehicle, the identity of which could not be established, failed to give way to him and caused him to lose control and fall - Nominal Defendant sought dismissal of claim on basis that due enquiry and search to establish identity of vehicle had not been made - primary judge refused to dismiss claim finding that respondent was disabled by shock and pain from making obvious connection between circumstances and need to identify vehicle - primary judge found that because of severity of his injuries respondent was disabled from making obvious enquiries and that, in his case, enquiries were not *due* within meaning of Act - ss34 & 34A - held: extent of respondent's injuries justified primary judge's finding - no basis for interfering with primary judge's decision - case was not one of the *relatively rare cases* in which trial judge's finding as to due inquiry and search should be set aside.



[Nominal Defendant \(I\)](#)

Arkbay Investments Pty Ltd (in liquidation) (receivers and managers appointed) v Tripod Funds Management Pty Ltd [2014] NSWSC 1003

Supreme Court of New South Wales

Robb J

Real property - caveat - companies in liquidation sought orders against defendant for compensation under s74P *Real Property Act 1900* (NSW) - companies were registered proprietors of property - companies indebted to bank under loan agreements secured by mortgage over property - receivers and managers caused companies to enter contract with purchaser - defendant lodged caveat against title to property - companies sought order caveat be withdrawn - defendant withdrew caveat before return date of summons - companies claimed they suffered pecuniary loss because of lodgement of caveat and defendant's failure to withdraw caveat when requested to do so - onus - reasonable cause - held: evidence established on balance of probabilities that, if defendant had not lodged its caveat, settlement of contract would have taken place - companies entitled to compensation.

[Arkbay Investments Pty Ltd \(in liquidation\) \(receivers and managers appointed\)](#) (B)

Webuildem Pty Ltd (Receivers & Managers Appointed) v Arab Bank Australia Ltd [2014] NSWSC 1058

Supreme Court of New South Wales

Stevenson J

Security for costs - applicant bank provided facilities to respondent company to develop property - company did not pay bank amounts pursuant to facilities - bank appointed receivers over properties mortgaged to bank - receivers commenced proceedings against company - company sought to set aside settlement agreement reached in proceedings - bank sought security for costs - common ground company would not be able to meet adverse costs order - burden of proof - evidentiary onus - discretionary factors - stultification - held: Court declined to order security - factor which Court considered to weigh most heavily was that proceedings would be stultified if security ordered.

[Webuildem Pty Ltd \(Receivers & Managers Appointed\)](#) (B C)

Flint Ink NZ Ltd v Huhtamaki Aust Pty Ltd L [2014] VSCA 166

Court of Appeal of Victoria

Warren CJ; Nettle & Mandie JJA

Arbitration - Australian yoghurt manufacturing company sued Australian packaging company following recall of products necessitated by defective packaging - packaging was manufactured by New Zealand member of packaging company group using ink supplied by New Zealand company - Australian packaging company filed third party notice against New Zealand ink company - New Zealand ink company sought to rely on arbitration clause in its agreement with New Zealand member of packaging company group - trial judge found Australian packaging company's claim



not capable of settlement by arbitration - s7 *International Arbitration Act 1974* (Cth) - held: Australian packaging company's cause of action was a derivative one - claim was being made *through or under* New Zealand packaging company - third party proceeding capable of settlement by arbitration pursuant to arbitration agreement - appeal allowed.

[Flint Ink NZ Ltd](#) (I B)

ADT v LRT [2014] QSC 169

Supreme Court of Queensland

Flanagan J

Wills - succession - testamentary capacity - applicant husband of incapacitated testatrix sought leave pursuant to s22 *Succession Act 1981* (Qld) to apply for order pursuant to s21 authorising alteration of 1998 Will - testatrix's son married to respondent - primary reason for bringing application was that, since testatrix made Will, there had been change of circumstance in that son separated from respondent and they had decided to divorce - held: proposed codicil was or may be codicil that testatrix would make if she had testamentary capacity - however proposed codicil was intended to impact pending Family Court proceedings, and, in those circumstances, Court could not be satisfied it was appropriate for order to be made.

[ADT](#) (B)

Hamilton v B & P Falcinella P/L [2014] SASC 96

Supreme Court of South Australia

Bampton J

Pleadings - limitations - defendants appealed against Master's order granting plaintiffs permission to file statement of claim pleading new cause of action after expiry of six year limitation period and further ordering new cause of action was deemed to have been instituted on date of application to amend - Court's power to permit amendment - s48 *Limitation of Actions Act 1936* (SA) - held: *Supreme Court Civil Rules 2006* (SA) had not materially altered Court's power contained in *Supreme Court Rules 1987* (SA) to permit amendment to plead new cause of action after expiry of limitation period - Court could not utilise specific power conferred by rr54(6) & 54(7) *Supreme Court Civil Rules 2006* (SA) to permit amendment as new cause of action did not arise out of substantially same facts as original cause of action - Master correct to permit amendment utilising Court's general power under r57 - new cause of action deemed to have been instituted from date defendants notified that plaintiffs' proposed amendment to plead statute-barred cause of action would be coupled with a claim relief under s48.

[Hamilton](#) (I)



Long Island Sound

By Emma Lazarus

I see it as it looked one afternoon
In August,- by a fresh soft breeze o'erblown.
The swiftness of the tide, the light thereon,
A far-off sail, white as a crescent moon.
The shining waters with pale currents strewn,
The quiet fishing-smacks, the Eastern cove,
The semi-circle of its dark, green grove.
The luminous grasses, and the merry sun
In the grave sky; the sparkle far and wide,
Laughter of unseen children, cheerful chirp
Of crickets, and low lisp of rippling tide,
Light summer clouds fantastical as sleep
Changing unnoted while I gazed thereon.
All these fair sounds and sights I made my own.

[Emma Lazarus](#)

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