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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)

City of Swan v McGraw-Hill Companies Inc. (FCA) - proportionate liability – estoppel - representative proceedings by councils against companies which assigned credit ratings to financial products - dismissal of proceedings refused (I B)

Zomojo Pty Ltd v Hurd (No 4) (FCA) - damages - breach of service agreement - time devoted to other business interests - recruitment agency costs - damages assessed (I B C)

Boral Bricks Pty Ltd v Cosmidis (No 2) (NSWCA) - negligence - motor vehicle accident - worker struck by forklift - contributory negligence 30% - appeal allowed (I)

Druin Pty Ltd atf the Druin No 3 Trust trading as Harvey Norman Commercial Division v Corbin (NSWSC) - guarantee - witness signature on guarantee by mistake - no objective intention to be bound by guarantee - proceedings dismissed (I B C)

ABI-K Pty Ltd v Shi (NSWSC) - easements - drainage easement reasonably necessary for development of land imposed (B C)



Rosen v Georges (VSC) - corporations - interlocutory applications - failure to obtain order registering transfer of shares of company in liquidation - standing (B)

Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3] (WASC) - pleadings – nature of claim for unjust enrichment leave to replead (I B C)

Summaries with links (5 minute read)

City of Swan v McGraw-Hill Companies Inc. [2014] FCA 442

Federal Court of Australia

Rares J

National proportionate liability legislation - councils brought representative proceedings under Pt IVA *Federal Court of Australia Act 1976* (Cth) against related companies (S & P) incorporated in USA - councils alleged S & P made misleading or deceptive or negligent representations about credit ratings for financial products purchased by councils and independence of role in assigning each rating - S & P sought orders that originating applications be set aside and proceedings dismissed - S & P claimed proceedings were abuse of process because judgment against it in favour of applicants would conflict with earlier judgment - earlier judgment in favour of one applicant and two other councils against their financial adviser held that S & P was not a concurrent wrongdoer with financial adviser - statutory interpretation - estoppel - *res judicata* - held: there was nothing in Subdiv GA Div 2, Pt 2 *Australian Securities and Investments Commission Act 2001* (Cth) that prevented applicants seeking recovery pursuant to s12GU from S & P for any loss that they did not recover from financial adviser in other proceedings and that they actually sustained from investing in products - no relevant non-disclosure - companies had submitted to jurisdiction - application dismissed.

[City of Swan](#) (I B)

Zomojo Pty Ltd v Hurd (No 4) [2014] FCA 441

Federal Court of Australia

Jessup J

Damages - contract - breach of service agreement by managing director - determination of damages after decision in favour of applicant on liability - applicant claimed monetary value of time which respondent had devoted to other business interests while he was employed by applicant - applicant also claimed cost of engaging recruitment agency to replace staff to whom respondent offered other employment in breach of service agreement - construction of agreement - held: applicant's loss consequent on respondent's failure to devote his full working time to business of which he was managing director is measured by applying a fraction representing the amount of time that he spent working on his other business to his monthly salary – no need to prove loss of production or output - Court identified findings of breach of agreement and assigned its estimate of



time that respondent was probably engaged in conduct referred to - monetary value assigned to time period - damages assessed - damages awarded for recruitment agency costs - orders made.

[Zomojo Pty Ltd](#) (I B C)

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139

Court of Appeal of New South Wales

McColl, Basten & Emmett JJA

Negligence - motor vehicle accident - respondent delivered tanker of fuel to appellant's premises - respondent hit by forklift walking to truck - respondent aware forklifts operated in area - primary judge found appellant liable and respondent not to be contributorily negligent for failing to keep proper lookout - appellant accepted liability but challenged finding of no contributory negligence and damages - Court of Appeal set aside finding of contributory negligence - Divs 4, 8, Pt 1, ss3B, 5B, 5C, 5D, 5F, 5R, & 5S *Civil Liability Act 2002* (NSW) - held (by majority): s5R reflected policy that people were to take responsibility for own lives and safety - if driver and pedestrian equally careless, liability should be shared equally - approach in authorities that culpability of person controlling potentially dangerous heavy vehicle was necessarily greater no longer applied - applicable test for apportionment was *just and equitable* test in s138(3) *Motor Accidents Compensation Act 1999* (NSW) - apportionment required comparison of parties' culpability and importance of their acts in causing damage - necessary to consider occupier's duty to ensure safety of entrant to its premises and relative danger posed by conduct of driver compared to pedestrian - contributory negligence assessed at 30% - appeal allowed.

[Boral Bricks Pty Ltd](#) (I)

Druin Pty Ltd atf the Druin No 3 Trust trading as Harvey Norman Commercial Division v Corbin [2014] NSWSC 510

Supreme Court of New South Wales

Robb J

Guarantee - plaintiff was trustee of trust engaged in business of supply of plumbing products to plumbers - defendant was plumber and former director of plumbing company - trust provided products to company under credit agreement - trust sued plumber on a guarantee it alleged he entered into when trust accepted company's application for credit agreement - plumber claimed he was not bound by guarantee because he did not sign application as a proposed guarantor - plumber claimed he signed document in space provided for witness to sign as a simple mistake, as he intended to sign his name as director of the company - construction of guarantee - objective intention - parole evidence rule - held: plumber did not sign in space provided for signature of intended guarantor - plumber signed as witness - signing of guarantee plumber as a witness did not objectively establish he intended to be bound by guarantee in favour of trust - proceedings dismissed.

[Druin Pty Ltd](#) (I B C)

**ABI-K Pty Ltd v Shi [2014] NSWSC 551**

Supreme Court of New South Wales

Kunc J

Easements - costs - plaintiff sought order pursuant to s88K *Conveyancing Act 1919* (NSW) creating a drainage easement along western boundary of property owned by defendant - elements of s88K - *reasonably necessary* - compensation - public interest - reasonable attempts to obtain easement - held: proposed easement was reasonably necessary for effective use or development of plaintiff's land - no significant deleterious consequence for defendant's land if proposed easement is granted - proposed drainage easement would not permit other uses - easement would not adversely affect defendant's development application - Court satisfied it should exercise its discretion to impose proposed easement - drainage easement imposed – ordinary rule is applicant pays costs - defendant had not accepted reasonable offer of compensation before proceedings commenced - plaintiff awarded costs on ordinary basis.

[ABI-K Pty Ltd](#) (B C)**Rosen v Georges [2014] VSC 193**

Supreme Court of Victoria

Randall AsJ

Corporations - registration of transfer of shares of company in liquidation - defendant liquidator of companies sought reinstatement and then winding up of another deregistered company - plaintiff sought termination of winding up, to review decisions of liquidator, and an inquiry into liquidator's conduct - liquidator sought summary judgment on basis plaintiff did not have standing - plaintiff sought order transferring shares in company in liquidation to him - transfer received after liquidation and death of transferor – whether deregistered company should be reinstated - whether plaintiff entitled to be registered as shareholder - whether plaintiff had standing - whether deregistered company should be wound up on reinstatement - whether share transfer signed by transferor and, if so, whether a perfected gift - s468A *Corporations Act 2001* (Cth) - interests of creditors - held: shares sought to be transferred were not beneficially held by transferor - Court declined to order transfer of shares - plaintiff did not have standing - Court to hear argument about disposition of originating process - ASIC to provide submissions with respect to conditions it may seek to impose on reinstatement of deregistered company

[Rosen](#) (B)**Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3] [2014] WASC 162**

Supreme Court of Western Australia

Edelman J

Pleadings - unjust enrichment - strike-out application - plaintiff claimed restitution for unjust enrichment for work done for defendants' benefit at mine site in anticipation of contract that did not materialise - Court struck out paragraphs of statement of claim - defendants sought plaintiffs be denied leave to replead - principles of pleading claim in restitution for unjust enrichment - nature and basis of claim - relationship with common counts of forms of action - whether open for



plaintiff in action in unjust enrichment to rely on an unjust factor of free acceptance - necessary elements for a pleading of failure of consideration where an anticipated contract failed to materialise - held: Court rejected defendant's submission against plaintiff being given leave to replead - paragraphs of statement of claim struck out with leave to replead.

[Lampson](#) (I B C)

Meeting at Night

By Robert Browning

The gray sea and the long black land;
And the yellow half-moon large and low:
And the startled little waves that leap
In fiery ringlets from their sleep,
As I gain the cove with pushing prow,
And quench its speed i' the slushy sand.

Then a mile of warm sea-scented beach;
Three fields to cross till a farm appears;
A tap at the pane, the quick sharp scratch
And blue spurt of a lighted match,
And a voice less loud, through joys and fears,
Than the two hearts beating each to each!

[Robert Browning](#)

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