

Friday, 9 September 2016

## Daily Composite 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)

**Sims v Suda Ltd** (FCA) - contract - former employee unsuccessful in proceedings against former employer - indemnity clause of contract did not indemnify employee in respect of indemnity costs order in former employer's favour (I B C G)

**Hoy v Coffs Harbour City Council** (NSWCA) - environment and planning - compulsory acquisition of land - statutory interpretation - appeal against commissioners' determination dismissed (I B C G)

**Lum v M V Developments (Lane Cove) Pty Ltd (in liq)** (NSWSC) - costs - unreasonable rejection of Calderbank offer - indemnity costs awarded from date of Calderbank offer - liquidators' conduct did not warrant payment of indemnity costs prior to Calderbank offer (I B C G)

**Paccar Financial Pty Ltd v Ian Menzies & Colleen Menzies (No 2)** (NSWSC) - contempt - 'deliberate and wilful' refusal to forfeit and return property - custodial sentences warranted (I B C G)

**Denby v Power** (VSC) - wills and estates - defendants removed as executors and trustees of deceased's estate due to conflict between interest and duty - plaintiff appointed administrator of deceased's estate with will annexed (B)

**Re Traditional Values Management Ltd (In Liq) (No 4) (VSC)** - corporations - determination of special purpose liquidator's remuneration and prospective remuneration (I B C G)

**Forum Theatre Holdings Pty Ltd v MCC (VSC)** - environment and planning - Council was responsible authority for determining two projects - Minister's Notice of Decision to Grant Permit void - appeal dismissed (I B C G)

## Summaries With Link (Five Minute Read)

### **Sims v Suda Ltd [2016] FCA 1086**

Federal Court of Australia

Siopis J

Contract - applicant was former director of respondent former employer - applicant unsuccessful in proceedings against respondent - applicant ordered to pay respondent's costs on indemnity basis - Official Receiver issued bankruptcy notice for sum in respect of indemnity costs order - applicant unsuccessfully sought to set aside bankruptcy notice - Federal Circuit Court refused review of Registrar's decision not to set aside bankruptcy notice, rejecting applicant's argument that indemnity clause in contract of employment required respondent to indemnify him in respect of indemnity costs order - held: language of clause of contract did not support applicant's construction - even if there was substance to applicant's contentions as to 'effect of the concluding words' of clause, the clause did not operate in circumstances of case.

[Sims](#) (I B C G)

### **Hoy v Coffs Harbour City Council [2016] NSWCA 257**

Court of Appeal of New South Wales

Bathurst CJ; Simpson & Payne JJA

Environment and planning - compulsory acquisition of land - commissioners determined applicant was entitled to compensation in respect of respondent's compulsory acquisition of land it owned - judge of Land and Environment Court dismissed appeal - value of residue lot - costs of developing steep land - whether legal costs of establishing hardship were not disturbance costs 'in connection with the compulsory acquisition of the land' - construction of s59(a) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) - ss21, 23, 24, 25, 26, 47, 54, 55, 56, 59, 66 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) - ss56A, 57 *Land and Environment Court Act 1979* (NSW) - held: leave to appeal granted only on issue of statutory construction - appeal dismissed.

[Hoy](#) (I B C G)

### **Lum v M V Developments (Lane Cove) Pty Ltd (in liq) [2016] NSWSC 1248**

Supreme Court of New South Wales

Darke J

Costs - plaintiffs sought specific performance of contracts with first defendant for purchase of

residential property - no dispute orders should be made in plaintiffs' favour - plaintiffs sought that first defendant or its liquidator should pay its costs in fixed sum and on indemnity basis - plaintiffs also sought set-off of costs against balance of property's purchase price - Calderbank offer - conduct of liquidators - held: rejection of plaintiff's Calderbank offer was unreasonable - indemnity costs awarded from date of Calderbank offer - Court not satisfied liquidators' conduct was so 'so egregious or unreasonable' to warrant payment of indemnity costs before plaintiffs' Calderbank offer - orders made.

[Lum](#) (I B C G)

## **Paccar Financial Pty Ltd v Ian Menzies & Colleen Menzies (No 2) [2015] NSWSC 1622**

Supreme Court of New South Wales

Rothman J

Contempt - sentence - Court found first and second defendants guilty of contempt for 'failing to forfeit and return to the plaintiff' property specified in Statement of Charge - punishment for contempt - r13, Pt 55 *Supreme Court Rules 1970* (NSW) - *Crimes (Sentencing Procedure) Act 1999* (NSW) - held: custodial sentence was warranted because of defendants' 'deliberate and wilful refusal to surrender the property and purge their contempt' - first defendant sentenced to six months' imprisonment - second defendant sentenced to two months' imprisonment.

[Paccar](#) (I B C G)

## **Denby v Power [2016] VSC 535**

Supreme Court of Victoria

McMillan J

Wills and estates - plaintiff sought defendants' removal as executors and trustees of deceased's estate under s34(1)(c) *Administration and Probate Act 1958* (Vic) and s48(1) *Trustee Act 1958* (Vic) - plaintiff sought own appointment as administrator with will annexed or that independent person be appointed - held: Court satisfied that in case's facts and circumstances defendants were in position of conflict between interest and duty due to conduct and attitude towards plaintiff - Court satisfied defendants should be removed - 'just and efficient' to appoint plaintiff as administrator with will annexed.

[Denby](#) (B)

## **Re Traditional Values Management Ltd (In Liq) (No 4) [2016] VSC 520**

Supreme Court of Victoria

Gardiner AsJ

Corporations - special purpose liquidator of company sought further remuneration for work completed and prospective remuneration for remaining period of appointment - terms of s473(10) *Corporations Act 2001* (Cth) introduced by *Corporations Amendment (Insolvency) Act 2007* (Cth) - held: Court satisfied it was appropriate that remuneration be determined in amount sought and prospective remuneration granted.

[Re Traditional Values Management](#) (I B C G)

## **Forum Theatre Holdings Pty Ltd v MCC [2016] VSC 534**

Supreme Court of Victoria

Emerton J

Environment and planning - applicant sought to appeal against decision in which it found Council was responsible authority for determining two projects and that Minister's Notice of Decision to Grant a Permit was void - whether Tribunal erred in relation to disaggregation question - whether Tribunal took irrelevant consideration into account when it referred to the Notice of Decision - whether Tribunal failed 'properly' to consider matters which establishing connection between permit application's two components - held: leave to appeal on certain grounds refused - grounds of appeal failed - appeal dismissed.

[Forum](#) (I B C G)

## CRIMINAL

### Executive Summary

**R v P, S** (SASCFC) - criminal law - sexual offences - adduction of initial complaint evidence led to substantial miscarriage of justice - appeal allowed - new trial

**LJH v The State of Western Australia** (WASCA) - criminal law - sexual offences against de facto child - failure to properly assess discount for guilty plea - total effective sentence manifestly excessive - appeal allowed

### Summaries With Link

#### **R v P, S [2016] SASCFC 97**

Full Court of the Supreme Court of South Australia

Nicholson, Parker & Lovell JJ

Criminal law - sexual offences - applicant convicted of five counts of rape against complainant while applicant and complainant were husband and wife - applicant sought to appeal against verdict - prosecution relied on complainant's sworn testimony - prosecution also adduced purported 'initial complaint evidence' which was withdrawn from jury in summing up - primary judge directed jury to ignore the 'initial complaint' evidence - whether primary judge erroneously permitted prosecution to open and lead purported 'initial complaint' evidence - whether primary judge erred in directions to jury on complaint evidence, motive to lie and good character evidence - s48 *Criminal Law Consolidation Act 1935 (SA)* - s34M *Evidence Act 1929 (SA)* - held: adduction of the 'complaint' evidence which was withdrawn gave rise to miscarriage of justice because there was reasonable possibility that its adduction may have affected verdict - appeal allowed - new trial.



[R v P, S](#)

**LJH v The State of Western Australia [2016] WASCA 155**

Court of Appeal of Western Australia

Martin CJ, Mazza JA & Beach J

Criminal law - appellant pleaded guilty to '26 counts of sexual penetration of a de facto child under the age of 16, two counts of procuring a de facto child under the age of 16 to engage in sexual behaviour, 13 counts of indecently recording a de facto child under the age of 16, and two offences of possession of child exploitation material' - appellant's total effective sentence was 13 years in prison - appellant contended there was no proper application of s9AA *Sentencing Act 1995* (WA) (*Sentencing Act*) in determining discounts for guilty plea and that total effective sentence was manifestly excessive - appellant also contended there was error in sentencing appellant on basis of offending behaviour commenced earlier than dates charged on indictment - held: primary judge erred in assessing discount under s9AA *Sentencing Act* by taking irrelevant consideration of seriousness of offending into account - contention that total effective sentence was manifestly excessive upheld - appellant resentenced to total effective sentence of 10 years in prison - appeal allowed.

[LJH](#)



# Benchmark

## Voices of the Air

By [Katherine Mansfield](#)

But then there comes that moment rare  
When, for no cause that I can find,  
The little voices of the air  
Sound above all the sea and wind.

The sea and wind do then obey  
And sighing, sighing double notes  
Of double basses, content to play  
A droning chord for the little throats

The little throats that sing and rise  
Up into the light with lovely ease  
And a kind of magical, sweet surprise  
To hear and know themselves for these

For these little voices: the bee, the fly,  
The leaf that taps, the pod that breaks,  
The breeze on the grass-tops bending by,  
The shrill quick sound that the insect makes.

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