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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)

Coles Supermarkets Australia Pty Ltd v Fardous (NSWCA) - negligence - slip and fall at supermarket - erroneous assessment of damages for economic loss - appeal allowed (I)

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher & Barnet (NSWCA) - corporations - standing - appeal against approval of entry into funding agreement allowed (I B)

Workplace Safety Australia v Simple OHS Solutions Pty Ltd (NSWCA) - trade practices - contract - equity - franchise agreement entered in contravention of *Competition and Consumer Act 2010* - damages (I B)

Hou v Westpac Banking Corporation Ltd (VSCA) - mortgage recovery - summary judgment in favour of bank - leave to appeal refused (I B)

Douglas v Simons Builders Pty Ltd (VSC) - contract for sale of land - vendor entitled to summary judgment and possession of land (B C)

Daniel v Van Zwol (SASC) - succession - family provision award - discretion miscarried – award adjusted (B)

Hamcor Pty Ltd v State of Qld (No 2) (QSC) - costs - unreasonable rejection of Calderbank offer - indemnity costs awarded (I B C)

Summaries with links (5 Minute Read)

Coles Supermarkets Australia Pty Ltd v Fardous [2015] NSWCA 82

Court of Appeal of New South Wales

Macfarlan & Emmett JJA; Simpson J

Negligence - occupier's liability - respondent injured in slip and fall at appellant's supermarket - primary judge found in respondent's favour against appellant on liability and awarded damages - appellant challenged awards for past economic loss, future economic loss and future out-of-pocket expenses - whether respondent had any earning capacity at time of accident taking into account earlier work accident - s13 *Civil Liability Act 2002* (NSW) - held: primary judge erred in assessment of damages for economic loss - respondent had significant prospect assessed at 65% of obtaining employment of 20 hours per week at rate of \$20 per hour - primary judge's award of damages for past and future economic loss reduced to reflect percentage - no error in assessment of damages for future out-of-pocket expenses - appeal allowed.

[Coles \(I\)](#)

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher & Barnett [2015] NSWCA 85

Court of Appeal of New South Wales

Bathurst CJ; Beazley, Macfarlan, Meagher & Barrett JJA

Corporations - standing - second respondent company (OA) and its ultimate holding company (OL) commenced separate proceedings against Fortress - OA and OL alleged certain transactions entered into by Fortress were voidable - liquidators of OA and OL sought to enter into funding agreement that provided for OA to fund OL's proceedings - primary judge concluded Fortress had no relevant right to be heard on application and approved entry into funding agreement - held: Fortress was person aggrieved or sufficiently interested in proceedings because it had interest in any debt due by OA to OL, and funding agreement had potential to diminish value of OL's debt to Fortress - primary judge failed to analyse extent to which OA and OL could succeed in claims and potential practical benefit to OA in entering into agreement - primary judge's discretion miscarried in approving entry into funding agreement - appeal allowed - matter remitted.

[Fortress \(I B\)](#)

Workplace Safety Australia v Simple OHS Solutions Pty Ltd [2015] NSWCA 84

Court of Appeal of New South Wales

Bathurst CJ; Basten & Emmett JJA

Trade practices - contract - equity - estoppel - distribution agreement between Workplace Safety Australia Pty Ltd (WSA), Simply OHS Solutions Pty Ltd (Simple) and guarantor - under agreement Simple agreed to distribute WSA's online subscription packages - WSA purported to terminate agreement for alleged breaches by Simple - WSA sued Simple and guarantor for money owing under agreement and damages for loss of further profits - Simple cross-claimed

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for damages for wrongful repudiation and on basis WSA contravened s51AD *Competition and Consumer Act 2010* (Cth) in entering agreement - common ground that *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth) contravened if agreement was franchising agreement - held: primary judge did not err in concluding agreement was a franchise agreement within meaning of Code - WSA not entitled to terminate agreement on basis of Simple's failure to pay instalment or meet sales target - no error in assessment of damages under s82 - appeal dismissed.

[Workplace](#) (I B)

Hou v Westpac Banking Corporation Ltd [2015] VSCA 57

Court of Appeal of Victoria

Whelan & Beach JJA

Summary judgment - mortgage - bank issued proceeding against applicant and proceeding against applicant and partner - Associate Justice gave judgment in favour of bank on summary judgment applications - Chief Justice dismissed appeals - applicants sought extensions of time to seek leave to appeal, stay of orders made against them and leave to appeal from orders made by Chief Justice - r77.06.9 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - held: no basis for conclusion that applicants real prospect of success - leave to appeal on each application refused - even if Court had granted leave to appeal, Court would have dismissed each appeal.

[Hou](#) (I B)

Douglas v Simons Builders Pty Ltd [2015] VSC 118

Supreme Court of Victoria

Derham AsJ

Summary judgment - contract for sale of land - first defendant was vendor and plaintiff was purchaser under contract for sale of land occupied by plaintiff under licence agreement - defendants sought to dismiss plaintiff's proceeding and summary judgment on counterclaim - whether delivery of promissory note by purchaser for balance of deposit was payment in accordance with contract - held: delivery of promissory note not effective as payment of the balance of deposit under contract - notice of default and rescission given by vendor had operated to terminate contract.- in any event vendor entitled to possession because licence agreement had been validly revoked – vendor entitled to relief sought.

[Douglas](#) (B C)

Daniel v Van Zwol [2015] SASCF 38

Full Court of the Supreme Court of South Australia

Kourakis, Stanley & Parker JJ

Succession - family provision - testatrix made Will in 2009 appointing appellant daughter as executrix - Will left residue of estate to appellant, her brother and their nephew - Will made no provision for appellant's remaining brother - appellant's brother claimed testatrix failed to make adequate provision for his proper maintenance - Master allowed claim - appellant appealed - held: factual error by Master not material - no error in finding that evidence established

testatrix's reason for excluding brother from provision was incorrect - Master's discretion miscarried to extent that award resulted in brother receiving greater share than others whose claim on bounty was the same – award adjusted.

[Daniel](#) (B)

Hamcor Pty Ltd v State of Qld (No 2) [2015] QSC 69

Supreme Court of Queensland

Dalton J

Indemnity costs - Calderbank offer - second and third defendants were plaintiffs' insurance brokers - insurance brokers wholly successful against plaintiffs at trial - insurance brokers sought costs of proceedings - uncontroversial that insurance brokers should have costs - whether part of costs should be paid on an indemnity basis - held: plaintiffs had no worthwhile prospects of success - plaintiffs' refusal to accept Calderbank offer was unreasonable - insurance brokers to have costs on indemnity basis from date of expiry of Calderbank letter.

[Hamcor](#) (I B C)

CRIMINAL

Executive Summary

Karam v The Queen (VSCA) - conspiracy to possess unlawfully imported border controlled drug in commercial quantity - leave to appeal against conviction and sentence refused

Bauer (a Pseudonym) v The Queen (VSCA) - criminal law - sexual offences -overloaded indictment - cross-admissibility of evidence as tendency evidence -convictions on trial indictment set aside - appeal against sentences allowed

Summaries with links

Karam v The Queen [2015] VSCA 50

Court of Appeal of Victoria

Weinberg, Priest & Beach JJA

Criminal law – applicant convicted of conspiring with co-accused to possess unlawfully imported border controlled drug in commercial quantity - applicant sentenced to 19 years imprisonment with non-parole period of 15 years - applicant sought leave to appeal against both his conviction and sentence - hearsay - whether certain evidence should have been excluded under s137 *Evidence Act 2008* (Vic) - elements of conspiracy – whether sentence manifestly excessive - held: grounds of appeal with respect to conviction failed - Court not persuaded any error made by trial judge in sentencing applicant - even if error shown, Court did not think any different



sentence should be passed - applications refused.

[Karam](#)

Bauer (a Pseudonym) v The Queen [2015] VSCA 55

Court of Appeal of Victoria

Maxwell P, Weinberg & Priest JJA

Criminal law - applicant found guilty of sexual offences - applicant sought to appeal against conviction on first indictment (trial indictment) - applicant pleaded guilty to two charges of indecent assault contained in second indictment (plea indictment) - applicant sought leave to appeal against conviction in trial indictment - applicant sought leave to appeal against sentences - whether trial judge erred in refusing permanent stay of charges - whether certain evidence properly left as tendency evidence - cross-admissibility of evidence as tendency evidence - held: indictment overloaded by inclusion of many charges relating to five separate complainants resulting in unfairness - supposed tendency evidence amounted to no more than evidence of mere propensity, was without significant probative value, and should have been excluded - questions of cross-admissibility and severance to be decided by trial judge on retrial - convictions set aside on certain charges - leave to appeal against sentences imposed on plea indictment allowed - total effective sentence 8 months' imprisonment.

[Bauer](#)

A Gift

by Leonora Speyer

I Woke: —

Night, lingering, poured upon the world

Of drowsy hill and wood and lake

Her moon-song,

And the breeze accompanied with hushed fingers

On the birches.

Gently the dawn held out to me

A golden handful of bird's-notes.

[Leonora Speyer](#)

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