



Friday 10 October 2014

## Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark\_Legal

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)** (FCAFC) - income tax - liquidators' obligation to retain amount from sale of property only arose after assessment issued - appeal dismissed (B G)

**Davis v Halliday Financial Management Pty Ltd** (NSWSC) - pleadings - accessorial liability - actual knowledge - statement of claim struck out in part - leave to replead (I B)

**In the matter of Gerard Cassegrain & Co Pty Ltd (in liq)** (NSWSC) - entry into litigation funding agreement approved (B)

**Turner v Gorkowski** (VSCA) - bankruptcy - cross-vesting - claim against trustee in bankruptcy was *special federal matter* - proceedings transferred to Federal Court (B)

**Essential Beauty Franchising (WA) Pty Ltd v Pilton Holdings (No 3)** (SASC) - stay pending appeal granted - security for costs of appeal granted (I B)

**Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd** (WASCA) - insurance - property damage and business interruption insurance policy - construction of excess clause - appeal dismissed (I B C)

**Mander Forklift Pty Ltd v Singles (ACTCA)** - work injury damages - appeal from reinstatement of proceedings allowed (I)

## Summaries with links (5 minute read)

### **Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq) [2014] FCAFC 133**

Full Court of the Federal Court of Australia

Edmonds, Collier & Davies JJ

Income tax - liquidators of Australian Building Systems (ABS) caused it to sell property during year ended 30 June 2012 - ABS made capital gain on sale which entered into calculation of ABS' assessable income of that year - common ground that assessment of taxable income calculated by reference to such capital gain would, in fullness of time, be issued to ABS, not to liquidators - Commissioner found that s254(1)(d) *Income Tax Assessment Act 1936* (Cth) obliged liquidators to retain from proceeds of sale an amount sufficient to pay tax to be assessed in respect of sale of the property in the period prior to the issue of an assessment - primary judge held obligation to retain only arose after the issue of an assessment - held: primary judge correct to find s254(1)(d) only imposed an obligation of retention once a relevant assessment had issued - appeal dismissed.

[Commissioner of Taxation](#) (B G)

### **Davis v Halliday Financial Management Pty Ltd [2014] NSWSC 1371**

Supreme Court of New South Wales

Kunc J

Pleadings - accessorial liability - plaintiffs sued defendants in relation to investment advice given by first defendant in relation to investment which was unsuccessful - sufficiency of allegation in pleadings that defendants had actual knowledge - held: if plaintiffs were to make out allegation of accessorial liability, further pleading would need to do more than just allege that relevant defendants had actual knowledge of matters alleged - material facts required to be pleaded must extend to pleading those facts by reason of which it would be alleged defendants had relevant actual knowledge - statement of claim struck out in part with leave to replead.

[Davis](#) (I B)

### **In the matter of Gerard Cassegrain & Co Pty Ltd (in liq) [2014] NSWSC 1292**

Supreme Court of New South Wales

Black J

Corporations - liquidator and company sought approval under s477(2B) *Corporations Act 2001* (Cth) for entry into litigation funding agreement - liquidator also sought direction under s479(3) he would be justified in entering into an agreement in or substantially in form of funding agreement as

amended - held: Court satisfied it was in interests of creditors to grant relevant approval so far as it would allow company to seek to obtain financial benefit of existing judgment in its favour - no lack of good faith or error of law - no lack of prudence in entry into proposed agreement - corresponding direction justified - orders made.

[In the matter of Gerard Cassegrain](#) (B)

## **Turner v Gorkowski [2014] VSCA 248**

Court of Appeal of Victoria

Neave & Santamaria JJA

Bankruptcy - jurisdiction - cross-vesting - applicant trustee of bankrupt estate sought leave to appeal against decision of trial judge that Supreme Court had jurisdiction to hear and determine respondent's claim to an interest in property and that matter was not a *special federal matter* which Supreme Court was required to transfer to Federal Court under s6(1) *Jurisdiction of Courts (Cross Vesting Act) 1987* (Cth) - trustee contended primary judge erred in failing to hold proceeding raised a *special federal matter* arising under *Bankruptcy Act 1966* (Cth) - held: primary judge should have held proceeding was a *special federal matter* because it was necessary for the trustee in bankruptcy to rely on a sequestration order made under the Bankruptcy Act, and the title conferred on him as a consequence of that order, to resist respondent's claim - proceeding transferred.

[Turner](#) (B)

## **Essential Beauty Franchising (WA) Pty Ltd v Pilton Holdings (No 3) [2014] SASC 148**

Supreme Court of South Australia

Nicholson J

Stay - security for costs - appellants appealed against judgment ordering them to pay amount to first respondent - appellants sought stay pending outcome of appeal - respondents sought that appellants provide security for costs of appeal - respondents also sought that appeal be dismissed, or that appellants provide further and better particulars of grounds of the appeal - held: appeal not without merit - real risk that, if stay not granted, first appellant would be wound up and second appellant would enter into bankruptcy, which would render it much more difficult for appeal to proceed, if it were to proceed at all - application for stay of execution allowed - appellants impecunious - prospects of success on appeal limited - first respondent had already been put to great expense of lengthy trial and had obtained very substantial costs order in its favour - first respondent at real risk of not having its costs order at trial met by the appellants - application for security for costs allowed.

[Essential Beauty Franchising \(WA\) Pty Ltd](#) (I B)

## **Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd [2014] WASCA 180**

Court of Appeal of Western Australia

McLure P; Buss & Newnes JJA

Insurance - appellant insured operated mines - appellant entered insurance contract with respondent insurer, on behalf of itself and other underwriters for period 31/3/08 to 31/3/09 - respondent was lead insurer - contract provided property damage cover and business interruption cover for mines' operation - during period of insurance, appellant suffered business interruption loss from interruption in supply of gas mine caused by explosion at company's gas facilities - meaning of *annual value* in excess clause - primary judge rejected both parties' construction of clause and made no final determination on meaning of clause - even if primary judge had favoured either party's interpretation, he would not have allowed insurer's claim that insured was estopped from disputing its interpretation - held: primary judge correctly identified compelling reasons for rejecting insured's constructions of excess clause - insurer's declared value construction of excess clause upheld - primary judge ought to have concluded *annual value of the site affected* meant estimated gross profit and payroll of that mine specified as declared value in Placing Slip - appeal dismissed.

[Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd](#) (I B C)

### **Mander Forklift Pty Ltd v Singles [2014] ACTCA 44**

Court of Appeal of the Australian Capital Territory

Gilmour J; Walmsley & Robinson AJJ

Work injury damages - worker injured in 1997 when thrown from pallet truck while employed by Australia Post - appellant filed statement of claim in 2000, claiming damages from supplier of truck for failure to adequately maintain truck - proceedings stood over several times before being stood over generally by consent in 2004 with liberty to restore proceedings to active cases list - no steps taken by either party - claim dismissed - primary judge granted leave to reinstate proceedings pursuant to r76 *Court Procedures Rules 2006* (ACT) - held: primary judge set aside Master's refusal to reinstate proceedings on account of three instances concerning weight to be given to factors and one instance of overlooking a fact - however, Master was entitled in his discretion to give relevant factors such weight as he thought they deserved - judge on appeal from such a judgment had no authority to substitute his or her view as to weight to be given to the same factors - no appealable error going to exercise of Master's discretion - primary judge was in error in concluding to the contrary - appeal allowed.

[Mander Forklift Pty Ltd](#) (I)



## From "The Princess"

By Lord Alfred Tennyson

Come down, O maid, from yonder mountain height:  
What pleasure lives in height (the shepherd sang),  
In height and cold, the splendour of the hills?  
But cease to move so near the Heavens, and cease  
To glide a sunbeam by the blasted Pine,  
To sit a star upon the sparkling spire;  
And come, for Love is of the valley, come,  
For Love is of the valley, come thou down  
And find him; by the happy threshold, he,  
Or hand in hand with Plenty in the maize,  
Or red with spirted purple of the vats,  
Or foxlike in the vine; nor cares to walk  
With Death and Morning on the silver horns,  
Nor wilt thou snare him in the white ravine,  
Nor find him dropt upon the firths of ice,  
That huddling slant in furrow-cloven falls  
To roll the torrent out of dusky doors:  
But follow; let the torrent dance thee down  
To find him in the valley; let the wild  
Lean-headed Eagles yelp alone, and leave  
The monstrous ledges there to slope, and spill  
Their thousand wreaths of dangling water-smoke  
That like a broken purpose waste in air:  
So waste not thou; but come; for all the vales  
Await thee; azure pillars of the hearth  
Arise to thee; the children call, and I  
Thy shepherd pipe, and sweet is every sound,  
Sweeter thy voice, but every sound is sweet;  
Myriads of rivulets hurrying thro' the lawn,  
The moan of doves is immemorial elms,  
And murmuring of innumerable bees.

[Lord Alfred Tennyson](#)

[Click Here to access our Benchmark Search Engine](#)