

Friday 11 April 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Van der Kooij v Mystate Financial Ltd** (FCA) - contract - loan agreement - promissory note did not constitute payment of loan obligations - summary judgment (B)

**Grant v Roads and Traffic Authority of NSW** (NSWSC) - negligence - motorcyclist injured in collision with median strip - Authority liable (I)

**Larner v George Weston Foods Ltd** (VSCA) - negligence - employer's duty of care - employee's psychiatric injury not reasonably foreseeable - appeal dismissed (I)

**MK Builders Pty Ltd v 36 Warrigal Road Pty Ltd** (VSC) - corporations - building contract - automatic set-off - builder's claim not extinguished by deed of company arrangement - appeal allowed (B C)

**First Strategic Development Corporation Ltd (in liq) v Chan** (QSC) - corporations - winding up - company incurred debts while insolvent - directors required to compensate liquidator (B)



**The Palace Gallery Pty Ltd v The Liquor and Gambling Commissioner** (SASCFC) constitutional law – State Parliament can amend law so as to affect existing proceedings – no interference with integrity of Supreme Court - *Liquor Licensing (Late Night Trading) Code of Practice 2013* (SA) valid (G)

**In the estate of Leber (deceased)** (SASC) - wills and estates - informal will admitted to probate (B)

**Armstrong v Commissioner for Consumer Protection** (WASCA) - administrative law - defalcation by settlement agent - claim from Fidelity Fund for interest on borrowings used to fund settlement refused - leave to appeal refused (I B G)

## Summaries with links (5 minute read)

### **Van der Kooij v Mystate Financial Ltd [2014] FCA 350**

Federal Court of Australia

Tracey J

Summary judgment - contract - loan agreement - first and second applicant borrowers sought damages for detention and conversion of real and personal property - third applicant sought damages arising from lender's refusal to accept a promissory note tendered by agent - applicants accepted borrowers were in arrears and defaulted on obligations under loan agreements but alleged sale of residential property was unlawful because lender failed to accept promissory note in settlement of outstanding obligations and because property and chattels sold for less than *best price reasonably obtainable* - lender sought summary judgment on originating application and its cross-claim for debt or damage - duty of mortgagee - s31A *Federal Court of Australia Act 1976* (Cth) - r26.01 *Federal Court Rules 2011* (Cth) - held: even if promissory note had been acceptable to lender it did not satisfy requirement of immediate payment - no authority for pleaded liability for shortfall between price obtained for property and chattels and *the best price reasonably obtainable* - judgment for respondents on originating application and cross-claim.

[Van der Kooij](#) (B)

### **Grant v Roads and Traffic Authority of NSW [2014] NSWSC 379**

Supreme Court of New South Wales

Rothman J

Negligence - motorcyclist injured when motorcycle collided with median strip and/or pedestrian barrier - barrier and median strip at its base were designed for and built by or for Authority - Authority governed stretch of road at which collision occurred and was therefore responsible for its maintenance and akin to its occupier - motorcyclist sued Authority for damages in negligence, alleging that placement of median strip of itself or without warning sign was negligent and in



breach of Authority's duty of care - ss5B, 5C, 5D & 43A *Civil Liability Act 2002* (NSW) - Road Authority's duty of care to road users - held: Authority was negligent not to have placed a sign warning of median strip's location on or at nose of median strip that could be seen by road users travelling up hill towards intersection - factual causation established - Authority not exercising a *special statutory power* under s43A in constructing median strip and/or failing to place appropriate sign - contributory negligence assessed at 30% - damages assessed - judgment for motorcyclist.

[Grant](#) (I)

## **Larner v George Weston Foods Ltd [2014] VSCA 62**

Court of Appeal of Victoria

Redlich, Tate & Santamaria JJA

Negligence - employer's duty of care - employee alleged psychiatric injury in course of employment as result of employer's negligence - alternatively, employer breached express and implied terms in contract of employment - employee alleged he was required to perform unduly onerous work and was not provided with guidance or assistance - employee appealed against judgment in employer's favour - held: content of employer's duty of care was informed by nature of contractual obligations which employee had undertaken to perform - employee failed to establish that reasonable person in employer's position would have foreseen risk of psychiatric injury through performance of obligations - no facts identified which were incontrovertible, glaringly improbable or contrary to compelling inferences - trial judge did not fail to use or palpably misuse his advantage - judge carefully evaluated all important evidence - appeal dismissed.

[Larner](#) (I)

## **MK Builders Pty Ltd v 36 Warrigal Road Pty Ltd [2014] VSC 149**

Supreme Court of Victoria

Almond J

Corporations - deed of company arrangement - builder alleged owner of property breached building contract for construction of townhouses and joint venture agreement to share profits on sale of townhouses - builder brought proceedings against respondents in Victorian Civil & Administrative Tribunal - respondents contended deed of company arrangement and s553C *Corporations Act 2001* (Cth) caused an automatic set-off of respective claims so that original choses in action ceased to exist and were replaced by owner's claim to a net balance - builder appealed from decision of VCAT in respondents' favour - held: no evidentiary basis for VCAT's finding that accounting required by s553 had taken place or that there was no balance owing to builder - VCAT erred in law by finding builder's claim extinguished by deed of company arrangement - premature to make finding that claim was extinguished until it was demonstrated that there had been a taking of account in accordance with insolvency law - appeal allowed.

[MK Builders](#) (B C)



**First Strategic Development Corporation Ltd (in liq) v Chan [2014] QSC 60**

Supreme Court of Queensland

P McMurdo J

Corporations - winding up - insolvency - company in liquidation and liquidator claimed compensation from directors for losses from alleged insolvent trading - directors denied company was insolvent when debts were incurred and claimed that likelihood that first defendant director would pay whatever amount was required was sufficiently reliable for company's purpose - nature and extent of director's willingness to provide funds to finance condition of option to purchase mining tenements - ss95A, 286(1), 588E(4), 588H(2), 588H(4) & 588M(2) *Corporations Act 2001* (Cth) - held: director's degree of preparedness to pay debts did not provide a sufficiently reliable source of funds by which the company became able to pay its debts as they fell due - company was insolvent at all material times and debts were incurred when company was insolvent - directors liable - unnecessary to consider alternative claims for breach of duty.

[First Strategic Development Corporation](#) (B)**The Palace Gallery Pty Ltd v The Liquor and Gambling Commissioner [2014] SASCFC 26**

Full Court of the Supreme Court of South Australia

Kourakis CJ, Blue &amp; Stanley JJ

Constitutional law - Commissioner published the *Liquor Licensing (Late Night Trading) Code of Practice 2013* (SA) under former s11A, *Liquor Licensing Act 2013* (SA) - Palace Gallery sought declarations certain clauses of Code were beyond power and invalid - Parliament then amended s11A to widen code-making power - Sch1 cl3 of amending Act stated a code in force at the time of amendment was taken to be valid, and to always have been valid, as if published under the amended s11A - Palace Gallery argued Sch1 cl3 was invalid - alternatively that the impugned clauses of the Code were invalid even under the amended s11A - held: State Parliament can amend the law so as to affect existing proceedings - State Parliament cannot direct a court how to exercise its jurisdiction - Sch1 cl3 does not do so - Sch1 cl3 does not interfere with the operational integrity of the Court - Sch1 cl3 is consistent with the Court's independence - Code appropriate and adapted to further the objects of the *Liquor Licensing Act* - all clauses of Code valid.

[The Palace Gallery](#) (G)**In the estate of Leber (deceased) [2014] SASC 47**

Supreme Court of South Australia

Gray J

Wills and estates - probate - succession - applicant was nephew of deceased - applicant sought order admitting 2006 informal will to probate under s12(2) *Wills Act 1936* (SA) for use and benefit of deceased's brother, who was unable to act as executor due to physical incapacity - deceased left two handwritten torn documents that appeared to be testamentary in nature - first document dated 1998 - second document dated 2006 - ss8 & 22 - rr23, 44, 64 & 64A *Probate Rules 2004* (SA) - held: appropriate to admit both documents to probate under section 12(2) - deceased did not intend to revoke documents by destruction - wording of 2006 document sufficiently broad to



suggest deceased was attempting to deal with entire estate - deceased impliedly expressed intention that 2006 document would revoke 1998 document - deceased's brother the only beneficiary under 2006 document - brother entitled to grant of probate as universal devisee and legatee - application granted.

[Leber](#) (B)

### **Armstrong v Commissioner for Consumer Protection [2014] WASCA 71**

Court of Appeal of Western Australia

Martin CJ; Newnes & Murphy JJA

Administrative law - fidelity fund - defalcation - Commissioner disallowed property investors' claims for compensation from Fidelity Guarantee Account established by *Settlement Agents Act 1981* (WA) as result of defalcation by settlement agent - State Administrative Tribunal set aside Commissioner's decision and allowed claims to the extent of the defalcation - property investors challenged disallowance of claims for interest on borrowings made to fund settlement - statutory interpretation - ss3, 49, 93, & 95 *Settlement Agents Act 1981* (WA) - statutory limitation of reimbursement - *actual loss - by reason of - defalcation* - held: interest had no connection with defalcation - property investors' claims were limited to actual loss to the extent of defalcation - SAT's decision not attended with sufficient doubt to justify extension of time to appeal or leave to appeal - application dismissed.

[Armstrong](#) (I B G)

### **Travel**

By Edna St. Vincent Millay

The railroad track is miles away,  
And the day is loud with voices speaking,  
Yet there isn't a train goes by all day  
But I hear its whistle shrieking.

All night there isn't a train goes by,  
Though the night is still for sleep and dreaming,  
But I see its cinders red on the sky,  
And hear its engine steaming.

My heart is warm with friends I make,  
And better friends I'll not be knowing;  
Yet there isn't a train I wouldn't take,  
No matter where it's going.

[Edna St. Vincent Millay](#)



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