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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement



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Executive Summary (1 minute read)

Nemeth v Westfield Shopping Centre Co Management Pty Ltd (NSWCA) – negligence – assessment of damages – appeal dismissed (I)

Graham v Powell (NSWSC) - defamation - posting items on website - defence struck out with leave to replead (I)

Gnych v Polish Club Ltd (NSWSC) - retail lease - restaurant operators entitled to leasehold interest in space they occupied - injunction granted (B)



Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (VSCA) – trade practices – misleading and deceptive conduct – no error in dismissal of claims for damages – appeal dismissed (B)

Matthews v SPI Electricity (Ruling No 27) (VSC) - evidence - legitimate forensic purpose - notice to produce not set aside (I B C G)

Giamarelos v Motor Accident Commission (SASC) – motor vehicle collision – insufficient award of damages – assessment of magistrate set aside (I)

Alcoa of Australia Ltd v Apache Energy Ltd [No 3] (WASC) – pleadings – certain paragraphs of defence struck out – application otherwise dismissed (I C)

Summaries with links (5 minute read)

Nemeth v Westfield Shopping Centre Co Management Pty Ltd [2013] NSWCA 298

Court of Appeal of New South Wales

Meagher & Barrett JJA

Damages – negligence - appellant sued in respect of injury suffered in fall in shopping centre carpark – trial judge found appellant was entitled to damages – appellant contended trial miscarried concerning assessment of damages and that proceedings there should be a new trial – held: judge did not make implied findings concerning likely duration of injury and psychological recovery in relation to assessment of non-economic loss - medical opinions were not inconsistent – judge did not err in not being satisfied appellant suffered future economic loss or in rejecting claim for future domestic assistance on a commercial basis – leave to appeal granted – appeal dismissed.

[Nemeth](#) (I)

Graham v Powell [2013] NSWSC 1266

Supreme Court of New South Wales

McCallum J

Defamation – local councillor sued in respect of posting of items on websites allegedly owned or maintained by defendant - defendant sought order striking out plaintiff's claim as abuse of process and stay of action on basis that material published in matters complained of was very similar to material contained in reports referred to ICAC - defendant also sought dismissal of



claim on basis it was manifestly hopeless due to strength of proposed defences - plaintiff sought to strike out defence - held: there was no authority to say plaintiff could not maintain action for defamation arising out of allegations simultaneously the subject of an inquiry by ICAC - court not persuaded stay should be granted or proceedings liable to be struck out for abuse of process - summary dismissal could not be determined at present stage - defence not properly pleaded - defence struck out with leave to replead.

[Graham](#) (I)

Gnych v Polish Club Ltd [2013] NSWSC 1249

Supreme Court of New South Wales

Ball J

Leases and tenancies - plaintiffs operated restaurant on premises owned by defendant licensed club - rest of the building used by club for benefit of members - club gave plaintiffs notice to vacate premises and subsequently plaintiffs were excluded from premises - plaintiffs sought declaration they had a leasehold interest in the space they occupied for a five year period commencing on 31 March 2012 and ancillary relief to give effect to interest claimed - plaintiffs did not suggest agreement to lease was reached - provisions of *Retail Leases Act 1994* (NSW) - s127(1) *Conveyancing Act 1919* (NSW) - s92 *Liquor Act 2007* (NSW) - s41J *Registered Clubs Act 1976* (NSW) - *retail shop* - held: plaintiffs entitled to declaration in respect of restaurant and injunction to restrain club from interfering with their rights of possession.

[Gnych](#) (B)

Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd [2013] VSCA 237

Court of Appeal of Victoria

Warren CJ, Osborn JA & Macaulay AJA

Trade practices - appellant agreed with government owned land owner to purchase land in Dubai - on same day appellant paid consultancy fee to company whose parent company was first respondent - appellant contended it was induced by respondents' misleading and deceptive conduct to believe it was necessary to pay fee in order to acquire land - appellant claimed damages pursuant to s82 *Trade Practices Act 1974* (Cth) - trial judge found in favour of respondents - appellant contended trial judge did not properly consider the case theory it advanced in its pleadings and at trial, failed to properly evaluate evidence, made erroneous findings and wrongly held that appellant failed to prove that it suffered loss and damage - held: appellant failed to persuade court trial judge erred by dismissing claims for damages, whether for breach of statutory provisions or in deceit - substantive appeal dismissed - appeal from anti-suit injunction issued in



relation to foreign proceedings dismissed – application to adduce fresh evidence refused – leave to appeal from costs order refused.

[Sunland Waterfront \(BVI\) Ltd \(B\)](#)

Matthews v SPI Electricity (Ruling No 27) [2013] VSC 483

Supreme Court of Victoria

J Forrest J

Evidence - defendants sought to set aside notice to produce - plaintiff sought production of documents relating to inspection of timber poles conducted by SPI's employees or agents in April and May 2013 - held: notice was founded on legitimate forensic purpose in relation to plaintiff's case on adequacy of asset inspections - it was on the cards that production of documents would assist plaintiff's case against defendants - notwithstanding time that had elapsed since inspection carried out by previous inspector in February 2008, documents should be produced.

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

Giamarelos v Motor Accident Commission [2013] SASC 138

Supreme Court of South Australia

Anderson J

Damages - motor vehicle collision - bias – appeal from decision of magistrate - appellant contended award of damages was manifestly inadequate and that magistrate made errors reaching his conclusion - appellant also contended magistrate exhibited apprehension of bias - held: magistrate did not award sufficient damages to compensate appellant - award of damages set aside - assessment of damages to be remitted for assessment before different magistrate - appeal on ground of bias dismissed.

[Giamarelos](#) (I)

Alcoa of Australia Ltd v Apache Energy Ltd [No 3] [2013] WASC 334

Supreme Court of Western Australia

Le Miere J

Pleadings – plaintiff claimed damages for economic loss for breach of duties of care owed by defendants and damages for breach of gas supply agreements with the second, third and fourth defendants - claims arose out of cessation of supply of natural gas to plaintiff as a result of explosion and fire at defendants' processing facilities - plaintiff applied pursuant to O20, r19(1)(c) *Rules of the Supreme Court 1971* (WA) to strike out certain paragraphs of defence filed by defendants – bare denials of matters within defendants' knowledge – denials inconsistent with



defendant's pleading that a reasonable and prudent operator could not prevent explosion – *force majeure* pleaded without material facts – held: time extended for plaintiff to make application – pleadings which were denials without affirmative allegation not struck out - certain paragraphs struck out – application otherwise dismissed.

[Alcoa of Australia Ltd](#) (I C)

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