

Friday, 13 February 2015

## Insurance, Banking, Construction & Government

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

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### *Civil Selection*

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## Executive Summary (1 minute read)

**Fischer v Nemeske Pty Ltd** (NSWCA) - equity - deceased's estate entitled to sum against trustee of family trust - appeal dismissed (B)

**CGU Insurance Ltd v Davies** (NSWCA) - workers compensation - employer liable for worker's occupational disease - insurer required to indemnify employer (I C)

**Low v Low** (NSWSC) - Wills - succession - entitlement to estate assets - separate determination - meaning of *personal effects* (B)

**Brand v Brand** (NSWSC) - succession - family provision order made in favour of sons of deceased (B)

**Merhi v Ford Motor Company of Australia** (VSCA) - costs - appeal succeeded by application to admit fresh evidence - costs of appeal and application apportioned (I)

**Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd** (VSCA) - equity - money transferred from company to super fund by director in breach of duties - trustee of super fund liable to repay money to company (I B)

**Barringtons Accounting Pty Ltd v Barringtons Your Business Advisors Pty Ltd (in liq)**  
(WASC) - trusts and trustees - mistaken payments - leave to bring proceedings against company subject to winding up order refused (I B)

## Summaries with links (5 minute read)

### **Fischer v Nemeske Pty Ltd [2015] NSWCA 6**

Court of Appeal of New South Wales

Beazley P; Barrett & Ward JJA

Equity - trusts and trustees - family trust established by deed of settlement - sole asset was shares in another company (Aladdin) - in September 1994 trustee resolved asset revaluation reserve (sum) be distributed to husband and wife as joint tenants - trustee's books acknowledged debt to husband and wife - in 1995, by deed of charge, trustee covenanted to pay sum to husband and wife "on demand" - in May 1994 husband had orally varied vesting date to June 1992 - husband died in 2011 - wife died in 2010 - trial judge held family trust indebted to estate of husband in amount of a certain sum - held: trustee's resolution advanced and applied income or capital held to extent of sum for benefit of deceased and wife - cause of action in debt accrued to husband and wife when trustee admitted and acknowledged itself to be indebted to them in its accounts and by means of deed of charge - oral resolution not a valid exercise of power conferred by trust deed to vary vesting date - wife had predeceased husband - primary judge correctly concluded husband's estate entitled to judgment for sum against trustee - appeal dismissed.

[Fischer](#) (B)

### **CGU Insurance Ltd v Davies [2015] NSWCA 5**

Court of Appeal of New South Wales

Beazley P; McColl, Basten, Macfarlan & Meagher JJA

Workers compensation - worker employed by company (Fowler) from 1940 to 1979 - worker employed from 1979 by another company (Seapip) - worker exposed to silica dust in in each employment - worker developed silicosis as result of inhaling dust - worker sued Fowler and Seapip - claim settled - appellant assumed liabilities of Fowler's workers compensation insurer (South British) up to 30/6/79 - no known workers compensation insurer of Fowler after 30/6/79 and before it sold business to Seapip - appellant contended it was not liable to indemnify Fowler because policy which applied for period ending 30/6/79 only indemnified against liability accruing during period of insurance - held: relevant liability was for occupational disease caused only by exposure to silica dust during particular period - claim was in respect of period of employment to the nature of which the *disease* was due, which ended on 30/6/79 - that was time at which Fowler's liability for disease was taken to have arisen by s151AB(1) *Workers Compensation Act*

1987 (NSW) - South British was on risk at that time and its policy indemnified Fowler against that liability - appeal dismissed.

[CGU Insurance Ltd](#) (I C)

### **Lowe v Lowe [2015] NSWSC 48**

Supreme Court of New South Wales

Brereton J

Wills - succession - testamentary dispositions - plaintiff widow sought family provision order out of deceased's estate - plaintiff sought declaration concerning entitlement to estate assets - separate determination of meaning of *personal effects* - s101 *Succession Act 2006* (NSW) - construction of Will - held: gift to plaintiff of deceased's *personal effects* included deceased's motor vehicle, but not his moneys on hand, in bank accounts or on term deposit, nor his shares or notes in public companies.

[Lowe](#) (B)

### **Brand v Brand [2015] NSWSC 52**

Supreme Court of New South Wales

Pembroke J

Succession - family provision - plaintiffs were adult sons of deceased - plaintiffs were half-brothers whose mothers were first and second wives of deceased - plaintiffs sought family provision orders from estate pursuant to s59 *Succession Act 2006* (NSW) - freedom of testamentary disposition - adequate and proper provision - s60(2) - held: testator's attitude to sons in distribution of estate unfair and inconsistent with standards of wise and just father cognisant of circumstances of sons - no evidence of sound, justifiable or rational ground for ignoring sons' moral claims on his benevolence - Court satisfied adequate provision not made in the testator's will for sons - orders made.

[Brand](#) (B)

### **Merhi v Ford Motor Company of Australia [2015] VSCA 13**

Court of Appeal of Victoria

Neave, Tate & Santamaria JJ

Costs - Court allowed appeal against judgment that appellant had not suffered serious injury within s134AB(37)(a) or (c) *Accident Compensation Act 1985* (Vic) - Court held grounds of appeal alleging error were not made out, but that appellant should be given leave to adduce fresh evidence - Court remitted matter to County Court to determine whether appellant was suffering from serious injury - held: appellant had failed to make out grounds of appeal but succeeded in having matter remitted as consequence of successful application to admit fresh evidence - apportionment of costs of appeal and application justified - respondent to pay 60% of costs of appeal and application.

[Merhi](#) (I)

## **Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd [2015] VSCA 9**

Court of Appeal of Victoria

Warren CJ, Neave JA & Garde AJA

Equity - directors' duties - appellant brought action for knowing receipt and restitution against respondent - funds diverted from appellant to superannuation fund of which respondent was trustee - appellant sought to recover payments, alleging they were diverted in breach of fiduciary duties owed by appellant's sole director - held: respondent as trustee of super fund was liable to appellant for the knowing receipt of funds diverted to respondent by director in breach of his fiduciary duties as appellant's director - director's knowledge imputed to respondent - liability for respondent arose under first limb of *Barnes v Addy* - claim made by appellant against respondent as a volunteer failed - amount paid by director out of appellant's account for personal benefit and benefit of his family to be repaid by respondent to appellant together with interest - appeal allowed.

[Australasian Annuities Pty Ltd \(in liq\)](#) (I B)

## **Barringtons Accounting Pty Ltd v Barringtons Your Business Advisors Pty Ltd (in liq) [2015] WASC 56**

Supreme Court of Western Australia

Mitchell J

Trusts and trustees - plaintiff claimed its clients mistakenly made payments for services performed or to be performed by plaintiff into bank accounts in name of company, intending payments be made to plaintiff - plaintiff contended company and liquidator held funds paid into those bank accounts on constructive trust for plaintiff - company was subject to winding up order - plaintiff sought leave to continue and commence proceedings against company and liquidator - s471B *Corporations Act 2001* (Cth) - held: Court not convinced leave should be granted to commence or continue proceedings as currently formulated in all the circumstances of the case - applications dismissed.

[Barringtons Accounting Pty Ltd](#) (I B)

## *Criminal Selection*

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### Executive Summary

**Hermanus (a pseudonym) v The Queen** (VSCA) - criminal law - allegations of indecent assault on complainant in 1975 - stay of proceedings refused - leave to appeal refused

**R v Violi** (SASCFC) - criminal law - commercial drug offending - cumulative sentences not manifestly excessive - appeal dismissed

### Summaries with links

**Hermanus (a pseudonym) v The Queen [2015] VSCA 2**

Court of Appeal of Victoria

Maxwell P & Priest JA

Criminal law - applicant sought leave to appeal against interlocutory decision to refuse to permanently stay proceedings in County Court - two charges in indictment - alleged applicant indecently assaulted complainant in 1975 when complainant was 5 years old - applicant contended trial judge erred by refusing to rule that forensic disadvantage to applicant was such that the only remedy available was a stay - held: trial judge satisfied that some forensic disadvantage to applicant would probably flow from the long delay - in order to ameliorate disadvantage, judge excluded evidence of uncharged acts and delay, and resolved to give forensic disadvantage direction - no error in trial judge's approach - open to judge to conclude loss of police brief would not render trial unacceptably unfair - applicant failed to demonstrate trial judge's decision to refuse a permanent stay was not open - leave to appeal refused.

[Hermanus \(a pseudonym\)](#)

## **R v Violi [2015] SASCFC 2**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Bampton & Parker JJ

Criminal law - sentencing - deterrence - appellant convicted in respect of manufacture of drugs for sale and trafficking - appellant pleaded guilty to 22 counts of possession of firearm without licence - drugs and firearms found in workshop and sheds leased by appellant - appellant sentenced for all offences of which he was convicted - sentence of four years imprisonment for drug related offences - three years imprisonment for firearms offences - judge ordered sentences be served cumulatively - fixed non-parole period of four years - appellant claimed sentence was manifestly excessive, that judge erroneously sentenced appellant on basis he was a principal, and that judge erred in failing to direct sentences operate at least partly concurrently - importance of general deterrence regarding commercial drug offending - held: acquittal of one count of trafficking did not detract from the jury's finding that the appellant was a principal in the manufacture and trafficking of drugs - sentence was not manifestly excessive - no reason to order partial concurrence, as conduct comprising each offence was distinctly different and also aggravated the overall offending - appeal dismissed.

[R](#)



**Song of the Witches: “Double, double toil and trouble”**

By William Shakespeare

*(from Macbeth)*

Double, double toil and trouble;  
Fire burn and caldron bubble.  
Fillet of a fenny snake,  
In the caldron boil and bake;  
Eye of newt and toe of frog,  
Wool of bat and tongue of dog,  
Adder's fork and blind-worm's sting,  
Lizard's leg and howlet's wing,  
For a charm of powerful trouble,  
Like a hell-broth boil and bubble.

Double, double toil and trouble;  
Fire burn and caldron bubble.  
Cool it with a baboon's blood,  
Then the charm is firm and good.

[William Shakespeare](#)

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