



Thursday 13 March 2014

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Francis v Eggleston Mitchell Lawyers Pty Ltd** (FCAFC) - bankruptcy – enforcement of judgment - annulment of sequestration order refused - appeal dismissed (I B)

**Verzar v Verzar** (NSWCA) - succession - family provision - decision not unreasonable or plainly unjust - appeal dismissed (B)

**Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd** (VSCA) - contract - abandonment - accrued rights - estoppel - waiver - appeal allowed in part (B C)

**Owens v Galvin** (VSCA) - professional negligence - barrister not negligent in advising solicitor in relation to her bankruptcy - appeal dismissed (I B)

**Matthews v SPI Electricity Pty Ltd (Ruling No 35)** (VSC) - evidence - admissibility - business records exception - probative value outweighed by prejudice - documents excluded (I B C G)

**Browning v Australia and New Zealand Banking Group Ltd** (QCA) - contract - loan agreements - default judgment irregularly entered - appeal allowed (B C)



**Zanker v Kupsch** (SASCFC) - workers compensation - payments obtained by dishonest means - no bias or error in decision of Magistrate - convictions restored (I)

## Summaries with links (5 minute read)

### **Francis v Eggleston Mitchell Lawyers Pty Ltd [2014] FCAFC 18**

Full Court of the Federal Court of Australia

Rares, Flick & Bromberg JJ

Bankruptcy - appellant sought annulment of sequestration order pursuant to s153B(1) *Bankruptcy Act 1966* (Cth) - creditor's petition alleged appellant failed to comply with bankruptcy notice founded on order that she pay her former solicitors' costs - name of petitioning creditor stated as *Eggleston Mitchell Lawyers (ACN 131 952 942)* - appellant contended petitioning creditor was company and that it was not her creditor because she had retained the firm, which was a partnership and not company - ss40(1)(g), 40(3) & 41(3) - *creditor - final order* - held: primary judge correct to find company beneficially entitled to firm's book debts, including chose in action represented by right of firm to enforce or bring proceedings in respect of money due to it under Master's order - Master's order was final order for payment of money - no error in finding that appellant had not satisfied Court that she was solvent at the date of sequestration order - appeal dismissed.

[Francis](#) (I B)

### **Verzar v Verzar [2014] NSWCA 45**

Court of Appeal of New South Wales

Macfarlan, Meagher & Barrett JJA

Succession - family provision - second wife and executrix of deceased's will sought family provision order pursuant to *Succession Act 2006* (NSW) - appellant adult son of testator by his first marriage opposed application - primary judge extended time for making of application, made family provision order, ordered appellant to pay costs, charged against property left to him in testator's will - ss58(2), 59(1)(c) & 99 *Succession Act - Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) - *House v R* - relevance of wife's need to provide for child of testator - held: primary judge did not err in decision to extend time - primary judge not shown to have mistaken facts, or failed to consider matters that should have been considered or to have considered irrelevant or extraneous matters in assessing whether adequate provision made for wife - assessment not so unreasonable or plainly unjust that it bespoke error - no error of principle in relation to exercise of discretion as to costs under s99 *Succession Act* - primary judge's decision not unreasonable or plainly unjust - appeal dismissed.

[Verzar](#) (B)



## **Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd [2014] VSCA 32**

Court of Appeal of Victoria

Nettle & Beach JJA; McMillan AJA

Contract - abandonment - accrued rights - Cedar Meats appealed from primary judge's rejection of its claim for amounts alleged to be due from Five Star Lamb under agreement for processing and packaging lamb products - primary judge concluded parties had abandoned agreement with result Cedar Meats' claim was extinguished and, in any event, amounts in question were in nature of penalty and therefore unenforceable - construction of agreement - gratuitous forbearance - objective assessment of parties' words and actions - waiver - held: primary judge erred in finding abandonment of agreement had discharged Cedar Meats' rights to payments accrued due up to point of abandonment and that Cedar Meats' conduct in relation to abandonment and estoppel issues was sufficient to constitute intention not to pursue, and therefore to waive, any claim for arrears under agreement - no misleading or deceptive conduct by Cedar Meats - judge did not err in holding payments were penal in nature and therefore unenforceable - appeal allowed in part - matter remitted for further determination.

[Cedar Meats \(Aust\)](#) (B C)

## **Owens v Galvin [2014] VSCA 33**

Court of Appeal of Victoria

Beach JA & McMillan AJA

Professional negligence - barristers' duties - bankruptcy - bias - appellant was practising solicitor when sequestration order made against her - appellant remained a bankrupt until her bankruptcy was annulled five years later pursuant to s153A *Bankruptcy Act 1966* (Cth) - respondent was barrister engaged to prepare an application to set aside sequestration order - barrister subsequently engaged to provide advice, draft documents and to appear - appellant alleged she suffered loss as result of barrister's negligence in failing to give adequate advice about options open to her to end her bankruptcy - held: primary judge did not err in holding that barrister did not breach any duty owed to appellant in failing to advise her of the possibility of making a second composition proposal and/or of possibility of engaging a financier to access equity in property owned or controlled by her - no error in findings on causation - no apprehended or actual bias - appeal dismissed.

[Owens](#) (I B)

## **Matthews v SPI Electricity Pty Ltd (Ruling No 35) [2014] VSC 59**

Supreme Court of Victoria

J Forrest J

Evidence - admissibility - SPI issued subpoenas to three electricity distribution companies - documents produced - SPI relied on business records provisions in s69 *Evidence Act 2008* (Vic) in its application to tender documents which it claimed were probative of electricity distribution industry practice - authenticity of documents - hearsay - s135 - held: certain documents inadmissible due to lack of relevance - other documents authentic and were genuine records



which satisfied business records exception to hearsay rule - probative value outweighed by prejudice occasioned by plaintiff's inability to test whether representations were truly reflective of companies' practices in years preceding Black Saturday - documents excluded under s135(a) of the Act.

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

### **Browning v Australia and New Zealand Banking Group Ltd [2014] QCA 43**

Court of Appeal of Queensland

M McMurdo P, Muir JA & Daubney J

Contract - loan agreements – appeal - borrowers sought to set aside default judgment which ordered them to pay amount to lender and that lender have possession of land and specified livestock - rr283 - 286, 287 & 290 *Uniform Civil Procedure Rules 1999* (Qld) - judgment by default - mixed claims - non-compliance with the Rules - *goods - possessions, especially moveable effects or personal chattels* - held: default judgment was irregularly entered - lender had sought to rely on r287 of the Rules in relation to mixed claims, arguing that its claims for relief included two or more claims for relief mentioned in rr283 to 286 of the Rules - however lender's claim for relief in fact included an additional claim for recovery of possession of livestock, which was not a claim *for detention of goods only* as specified in r285 - exercise of discretion by primary judge miscarried as he failed to have regard to non-compliance with the Rules - appeal allowed.

[Browning](#) (B C)

### **Zanker v Kupsch [2014] SASCFC 13**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Sulan & Anderson JJ

Workers compensation - bias – worker, a police officer, suffered whiplash injury while driving police vehicle - worker succeeded in compensation claim and returned to work on light duties while remaining in receipt of income maintenance compensation - worker convicted for having obtained payment under *Workers Rehabilitation and Compensation Act 1986* (SA) by dishonest means contrary to s120(1)(a) Act - appellant appealed against orders made by primary judge to set aside convictions and remit matter for retrial - held: Magistrate's questioning was more extensive than it ought to have been but there was no miscarriage of justice - questioning did not indicate actual or apprehended bias or compromise proper presentation of evidence - questioning not such an egregious intervention in course of proceedings as to compromise Magistrate's capacity to independently evaluate evidence - Magistrate did not misunderstand doctor's evidence - Magistrate did not proceed on mistaken view of covert surveillance evidence - appeal allowed - convictions recorded in Magistrate's Court restored.

[Zanker](#) (I)

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