

Friday, 13 November 2015

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

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Ramsay Health Care Australia Pty Ltd v Compton** (FCA) - bankruptcy - creditor's petition - application to "go behind" judgment of Supreme Court of New South Wales dismissed (B)

**JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd** (NSWCA) - contract - franchise agreement - "monthly cash flow projection" spreadsheet not relied on in decision to enter agreement - appeal dismissed (I B C)

**Gabo Island Investments Pty Ltd v Barea** (NSWSC) - conveyancing - breach of covenant implied in lease - relief against forfeiture refused - plaintiff granted judgment for possession and damages (I B)

**Mealey v Power** (NSWSC) - contract - offer and acceptance - conversation between two solicitors in context of personal injury action - no offer made capable of acceptance - solicitor fishing for a higher offer - summons dismissed (I B)

**Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd** (QSC) - costs - rejection of offer to settle not unreasonable - indemnity costs refused - unsuccessful plaintiffs to pay defendant's costs on standard basis (I B C)

**Steen v Senton by his litigation guardian The Public Advocate of the Australian Capital Territory** (ACTCA) - negligence - respondent injured when struck by motor vehicle driven by

appellant - contributory negligence 50% - recalculation of certain damages - appeal upheld in part (I)

**Meyer v Cool Chilli Pty Ltd (ACTSC)** - work injury - negligence - worker injured in slip and fall from ladder - employer negligent - breaches of statutory duty by employer and third party - third party liable to employer for 25% contribution (I B C)

## Summaries With Link (Five Minute Read)

### **Ramsay Health Care Australia Pty Ltd v Compton [2015] FCA 1207**

Federal Court of Australia

Flick J

Bankruptcy - applicant petitioning creditor filed petition maintaining respondent owed it amount of judgment - respondent opposed petition on basis no debt "is or was really owed" to applicant and Court ought to exercise discretion to go behind judgment - whether just to permit judgment debtor to "go behind" judgment - held: Court concluded it should not go behind judgment either because the circumstances in which the discretion should be exercised were not enlivened; and/or as Court should not go behind judgment as a matter of discretion - application dismissed.

[Ramsay](#) (B)

### **JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd [2015] NSWCA 347**

Court of Appeal of New South Wales

Macfarlan & Leeming JJA; Emmett AJA

Contract - franchise agreement - first appellant franchisee entered franchise agreement with respondent franchisor which gave franchisee right to operate a "Snap-on" franchise - franchisee fell into arrears - agreement terminated - franchisor sued franchisee and second appellant director and shareholder of franchisee for recovery of debt - director sued on a guarantee - franchisor obtained judgment against appellants - appellants had cross-claimed based on contraventions of ss52 & 51AD *Trade Practices Act 1974* (Cth) in relation to "monthly cash flow projection" spreadsheet (document) given to director before entry into agreement - primary judge found aspects of document misleading but found director did not rely on it when entering into agreement - appellants challenged dismissal of cross-claim - held: no appellable error demonstrated in primary judge's findings that document not relied on in decision to enter agreement - appeal dismissed.

[JM & PM Holdings](#) (I B C)

### **Gabo Island Investments Pty Ltd v Barea [2015] NSWSC 1675**

Supreme Court of New South Wales

Adamson J

Conveyancing - relief against forfeiture - plaintiff sought possession of property leased to defendant and damages for breach of contract - premises located on larger property - defendant

conceded he breached implied term of lease - construction of lease - how rent ought be calculated - whether defendant's breach of covenant implied in lease entitled plaintiff to terminate - whether relief against forfeiture ought to be granted - amount of damages to which plaintiff entitled - ss116, 117, 125 & 129 *Conveyancing Act 1919* (NSW) - held: defendant's breach substantial and non-compliance deliberate - no basis established to conclude it would be unjust or unconscionable for plaintiff to insist on forfeiture - relief against forfeiture inappropriate in circumstances - judgment for possession granted - damages assessed.

[Gabo](#) (I B)

## **Mealey v Power [2015] NSWSC 1678**

Supreme Court of New South Wales

Pembroke J

Contract - offer and acceptance - personal injury action - communications between solicitors - whether one solicitor's statement should be properly characterised as an offer or whether communication more in nature of invitation seeking to elicit higher offer from other party - objective intention of parties - held: solicitor's language did not amount to an offer - solicitor was fishing for a higher offer - no promise client would accept amount - solicitor never made offer capable of acceptance - other solicitor's misconstruction founded in enthusiasm to resolve case for client - summons dismissed.

[Mealey](#) (I B)

## **Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd [2015] QSC 322**

Supreme Court of Queensland

P Lyons J

Indemnity costs - defendant established limitation clause formed part of contract between it and plaintiffs - defendant sought indemnity costs on basis of non-acceptance by plaintiffs of its offer to settle by discontinuance of action with no order as to costs - whether r361 *Uniform Civil Procedure Rules 1999* (Qld) applied - held not a straightforward matter to determine whether limitation clause was included in contract - it was reasonable for plaintiffs not to accept defendant's offer - order for indemnity costs refused - plaintiffs to pay defendant's costs on standard basis.

[Surfstone](#) (I B C)

## **Steen v Senton by his litigation guardian The Public Advocate of the Australian Capital Territory [2015] ACTCA 57**

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Rangiah JJ

Negligence - contributory negligence - damages - respondent injured when struck by motor vehicle driven by appellant - respondent sued appellant - appellant admitted negligence but alleged contributory negligence - Master found appellant negligent but reduced damages by 30% for contributory negligence - appellant contended Master erred in assessment of contributory negligence, in assessing damages for future care and awarding damages for future care after time which on Master's findings respondent would have moved into residential aged



care facility - *Civil Law (Wrongs) Act 2002 (ACT)* - ss5B(2) & 5R *Civil Liability Act 2002 (NSW)* - s74 *Motor Accidents Act 1988 (NSW)* - ss138(1) & 138(3) *Motor Accidents Compensation Act 1999 (NSW)* - held: appellant succeeded on contributory negligence case - appellant succeeded on one of two aspects of argument concerning quantum - appeal upheld in part - judgment varied by assessing contributory negligence at 50% and reducing damages by 50% - portion of damages payable for care while respondent in an aged care facility recalculated.

[Steen \(I\)](#)

## **Meyer v Cool Chilli Pty Ltd [2015] ACTSC 336**

Supreme Court of the Australian Capital Territory

Mossop AsJ

Work injury - negligence - breach of statutory duty - apportionment - plaintiff worked in IT support role for defendant employer - plaintiff working at premises of third party - while plaintiff climbing ladder to get into ceiling space it slipped from beneath her and she injured herself - plaintiff sued employer in negligence - employer issued third-party notice against third party seeking contribution or indemnity - ss21 & 168 *Civil Law (Wrongs) Act 2002 (ACT)* - s24 *Scaffolding and Lifts Act 1912 (ACT)* - *Workers Compensation Act 1951 (ACT)* - ss6, 7, 73 & 80 *Scaffolding and Lifts Regulation 1950 (ACT)* - held: employer breached duty of care to plaintiff and was liable for damage caused by accident - no contributory negligence - third party claim failed insofar as relied on allegation of negligence - work being carried out was building work under Scaffolding and Lifts Act - both third party and employer breached s73 Scaffolding and Lifts Act when they carried out work in ceiling space - employer breached s80(7) Scaffolding and Lifts Act - appropriate contribution from third party was 25% - judgment for plaintiff against employer - judgment for employer against third party.

[Meyer \(I B C\)](#)

## CRIMINAL

### Executive Summary

**Payne v The Queen (VSCA)** - criminal law - maintaining sexual relationship with child under 16 - failure to give directions to jury on admissions - conviction and sentence quashed - new trial

**Director of Public Prosecutions (Acting) v Crosswell (TASCCA)** - criminal law - aggravated burglary - aggravated armed robbery - sentences manifestly inadequate - appeal allowed - respondents resentenced

### Summaries With Link

**Payne v The Queen [2015] VSCA 291**

Court of Appeal of Victoria

Redlich & Whelan JJA

Criminal law - applicant convicted on one charge of maintaining sexual relationship with child under 16 - applicant contended trial miscarried because jury given no directions as to evidence of admissions allegedly made by applicant - applicant contended admissions a very important part of Crown case and that admissions highly prejudicial if jury accepted they were made - applicant contended failure to give relevant directions gave rise to substantial miscarriage of justice - Crown supported applicant's submission that substantial miscarriage of justice occurred - held: joint position of Crown and applicant correct - appeal allowed - conviction and sentence quashed - new trial ordered.

[Payne](#)

**Director of Public Prosecutions (Acting) v Crosswell [2015] TASCRA 22**

Court of Criminal Appeal of Tasmania

Criminal law - respondents found guilty of one count of aggravated burglary and one count of aggravated armed robbery - respondents also pleaded guilty to other charges - respondents sentenced to 4½ years', 3 years', and 4 years' imprisonment. - appellant contended each respondent's sentence manifestly inadequate in all circumstances - held: sentence in each case manifestly inadequate - length of sentences sufficiently out of step with Court's approach in sentencing for aggravated armed robbery to warrant intervention - respondents resentenced to 6 years and 3 months', 4 years and 5 years and 3 months' imprisonment.

[Crosswell](#)



# Benchmark

## **The Lake Isle of Innisfree**

BY WILLIAM BUTLER YEATS

I will arise and go now, and go to Innisfree,  
And a small cabin build there, of clay and wattles made;  
Nine bean-rows will I have there, a hive for the honey-bee,  
And live alone in the bee-loud glade.

And I shall have some peace there, for peace comes  
dropping slow,  
Dropping from the veils of the morning to where the cricket  
sings;  
There midnight's all a glimmer, and noon a purple glow,  
And evening full of the linnet's wings.

I will arise and go now, for always night and day  
I hear lake water lapping with low sounds by the shore;  
While I stand on the roadway, or on the pavements grey,  
I hear it in the deep heart's core.

[WILLIAM BUTLER YEATS](#)

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