



Friday, 14 October 2016

## 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)

**HC Foods Pty Ltd v Carmichael** (FCA) - pre-action discovery - reasonable for prospective applicant to believe it may have right to obtain relief - pre-action discovery granted (I B)

**Coote v Kelly; Northam v Kelly** (NSWSC) - medical negligence - compensation to relatives - nervous shock - deceased died of melanoma after doctors diagnosed plantar wart - no breach of duty by defendant doctor - judgment for defendant (I)

**Caird Seven Pty Ltd v Mina Attia and Shopsmart Pharmacy Franchising Pty Ltd (No 3)** (NSWSC) - judgment and orders - enforcement - specific performance - deferral of appointment of receiver on basis of regime which combined two alternatives to immediate appointment (B)

**Hughes v Fong** (NSWSC) - pleadings - professional negligence - joinder of 17 plaintiffs - application to strike out statement of claim dismissed (I)

**Belle Corp Equity Pty Ltd v Defined Properties Pty Ltd** (NSWSC) - real property - possession - defence disclosed no defence to claim - defence struck out (B)

**Trenberth v Trenberth** (SASC) - wills and estates - succession - application for advice or directions on construction of Will and Deed of Family Arrangement (B)

**Wang v HACCP Cleaning Australia Pty Ltd (SASC) - corporations - appeal against liquidator's partial rejection of proof of debt dismissed (I B)**

## Summaries With Link (Five Minute Read)

### **HC Foods Pty Ltd v Carmichael [2016] FCA 1214**

Federal Court of Australia

Gilmour J

Pre-action discovery - prospective applicant in proceedings sought pre-action discovery - respondent was formerly employed by prospective applicant and had registered own company in competition with prospective applicant after being made redundant - s183(1) *Corporations Act 2001* (Cth) - O15A r6 *Federal Court Rules 1979* (Cth) - rr6, 7.23, 7.23(1), 7.23(1)(a), 7.23(1)(b), 7.25 & 20.17 *Federal Court Rules 2011* (Cth) - held: there was 'cogent foundation' in evidence that respondent used information confidential to prospective applicant - it was reasonable for prospective applicant to believe it may have right to obtain relief against respondent - granting relief would not be nugatory - Court exercised discretion to make orders sought by prospective applicant.

[HC Foods](#) (I B)

### **Coote v Kelly; Northam v Kelly [2016] NSWSC 1447**

Supreme Court of New South Wales

Davies J

Medical negligence - deceased died of melanoma which several doctors diagnosed as a plantar wart - plaintiff was deceased's wife and executor of deceased's estate - plaintiff appealed against dismissal of deceased's claim against defendant doctor - Court of Appeal ordered new trial - plaintiff brought two additional claims: one under *Compensation to Relatives Act 1897* (NSW); and the other for nervous shock arising from husband's diagnosis and death - held: no breach of duty by defendant doctor established - defendant acted in manner widely accepted by peer professional opinion as competent professional practice - plaintiff did not establish causation - judgment for defendant in the three proceedings.

[Coote](#) (I)

### **Caird Seven Pty Ltd v Mina Attia and Shopsmart Pharmacy Franchising Pty Ltd (No 3) [2016] NSWSC 1452**

Supreme Court of New South Wales

Emmett AJA

Judgments and orders - enforcement - specific performance - applicant sought appointment of receiver over defendants' property for purpose of satisfying Court orders for performance of contract - defendants contended Court did not have power to appoint receiver and even if it did, the circumstances would not justify appointment of a receiver - s106 *Civil Procedure Act 2005* (NSW) - s66G *Conveyancing Act 1919* (NSW) - s420 *Corporations Act 2001* (Cth) - s57 *Equity*

*Act 1880 (NSW) - s57(2) Real Property Act 1900 (NSW) - s67 Supreme Court Act 1970 (NSW) - 25(8) Supreme Court of Judicature Act 1873 (Imp) - held: Court satisfied it had jurisdiction and power to appoint a receiver to aid orders' enforcement - Court concluded it was appropriate to defer appointment of receiver on basis of a regime combining two alternatives to immediate appointment.*

[Caird](#) (B)

## **Hughes v Fong [2016] NSWSC 1451**

Supreme Court of New South Wales

Campbell J

Pleadings - professional negligence - second defendant sought to strike out amended statement of claim - second defendant contended joinder of 17 plaintiffs did not comply with r6.19 *Uniform Civil Procedure Rules 2005* (NSW) and that claims did not satisfy 'conjunctive criteria' under sub-rule 6.19(1)(a) - first defendant did not object to constitution of proceedings - ss56 & 157 *Civil Procedure Act 2005* (NSW) - s90 *Commonwealth of Australia Constitution Act* - O16, r1 *High Court Rules 2004* (Cth) - *Practice Note SC Gen 17* - held: proceedings fell within conjunctive test - proceedings did not unduly disadvantage defendants - application to strike out proceedings dismissed.

[Hughes](#) (I)

## **Belle Corp Equity Pty Ltd v Defined Properties Pty Ltd [2016] NSWSC 1454**

Supreme Court of New South Wales

Davies J

Real property - possession - plaintiff claimed possession of property on basis of default under loan agreement and mortgage - plaintiff claimed there were breaches of obligation to pay interest and repay principal sum - held: defence did not disclose defence to claim - defence struck out - amended defence to be filed and served - any evidence which defendant intended to rely on in response to plaintiff's motion for summary judgment to be served by 26 October 2016.

[Bell Corp](#) (B)

## **Trenberth v Trenberth [2016] SASC 150**

Supreme Court of South Australia

Bampton J

Wills and estates - succession - plaintiffs sought advice or direction pursuant to s69 *Administration and Probate Act 1919* (SA) and r131 *Supreme Court Civil Rules 2006* (SA) as to construction of words of father's Will: "my real property at John Street Tumby Bay" and construction of words in Deed of Family Arrangement: "John Street properties" - terms of Will - terms of Deed - held: references to property or properties in Will and Deed referred to all three disputed properties which were the subject of the application - parties to be heard as to consequential orders.

[Trenberth](#) (B)

## **Wang v HACCP Cleaning Australia Pty Ltd [2016] SASC 161**

Supreme Court of South Australia

Doyle J

Corporations - plaintiff entered franchise agreement with first defendant for provision by plaintiff of cleaning services to company and hotel - first defendant went into liquidation - third defendant was appointed liquidator and then became administrator and subsequently Deed Administrator of the Deed of Company Arrangement - plaintiff lodged a proof of debt - liquidator partially allowed proof of debt - plaintiff appealed against rejection of proof pursuant to s1321 *Corporations Act 2001* (Cth) - held: plaintiff did not establish cause of action against first defendant - no entitlement to recover franchise fees or entitlement to damages or monetary award - appeal dismissed.

[Wang](#) (I B)

## CRIMINAL

### Executive Summary

**Kim v The Queen** (VSCA) - criminal law - Commonwealth offence - entitlement to utilitarian benefit following guilty pleas - aiding and abetting dealing with proceeds of crime - appeal against sentences dismissed

**DPP (Cth) v Thomas** (VSCA) - criminal law - Commonwealth offence - drug offences - entitlement to utilitarian benefit following guilty pleas - Director's appeal against sentences allowed on grounds of manifest inadequacy

### Summaries With Link

## **DPP (Cth) v Thomas [2016] VSCA 237**

Court of Appeal of Victoria

Redlich, Santamaria & McLeish JJA

Criminal law - Commonwealth offence - one respondent pleaded guilty to attempted possession of commercial quantity of border controlled drug - other respondent pleaded guilty to importation of commercial quantity of border controlled drug - appeal concerned whether discount for utilitarian benefit of plea of guilty attracted for Commonwealth offence - Director of Public Prosecutions submitted it was not - respondents submitted discount available under s16A(2)(g) *Crimes Act 1914* (NSW) in same way as it was for State offences - whether discount to be allowed for objective utilitarian benefit of guilty plea - whether material difference between 'discount for a willingness to facilitate the course of justice' and discount for utilitarian benefit of



guilty plea - effect of decision in *Cameron v The Queen* (2002) 209 CLR 339 - whether discount for guilty plea to Commonwealth offences confined to the three subjective factors stated in *Cameron* - held: Court accepted respondents' submissions that discount was available under s16A(2)(g) in same way as it was available for State offences - Director's appeals against sentences allowed on grounds of manifest inadequacy.

[DPP](#)

## **Kim v The Queen [2016] VSCA 238**

Court of Appeal of Victoria

Redlich, Santamaria & McLeish JJA

Criminal law - Commonwealth offence - applicants pleaded guilty to 'aiding and abetting dealing with proceeds of crime worth \$50,000 or more, contrary to s400.5(1) of the Criminal Code (Cth)' - applicants sought to appeal against sentences - respondents entitled to reduced sentences due to utilitarian benefit following guilty pleas for reasons given in *DPP (Cth) v Thomas* [2016] VSCA 237 but submitted sentencing judge failed to afford them that benefit - whether sentencing judge failed to did not afford them of benefit of reduced sentences by virtue of utilitarian benefit following guilty pleas - whether failure to take into account lack of prior convictions - whether sentences offended parity principle and/or were manifestly excessive - held: no error in decision of sentencing judge - appeal dismissed.

[Kim](#)



# Benchmark

## Scorn not the Sonnet ?

By [William Wordsworth](#)

Scorn not the Sonnet; Critic, you have frowned,  
Mindless of its just honours; with this key  
Shakespeare unlocked his heart; the melody  
Of this small lute gave ease to Petrarch's wound;  
A thousand times this pipe did Tasso sound;  
With it Camöens soothed an exile's grief;  
The Sonnet glittered a gay myrtle leaf  
Amid the cypress with which Dante crowned  
His visionary brow: a glow-worm lamp,  
It cheered mild Spenser, called from Faery-land  
To struggle through dark ways; and, when a damp  
Fell round the path of Milton, in his hand  
The Thing became a trumpet; whence he blew  
Soul-animating strains—alas, too few!

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