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## 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)

**Vanderloo v Milne (No 2)** (NSWSC) - costs - plaintiff successful in family provision proceedings up to certain date - plaintiff to pay executors' costs on ordinary basis from that date (B)

**Riverwood Legion & Community Club Ltd v Repaja & Co Pty Ltd** (NSWSC) - costs Club's costs incurred establishing fraud in which fifth defendant had no involvement - fifth defendant to pay 50% of successful Club's costs (I B)

**Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd** (VSCA) - legal professional privilege - waiver - application of wrong test - appeal allowed (I)

**Rosenwald v Hogg** (VSC) - real property - restrictive covenant should not be discharged or modified - declaration refused - proceeding dismissed (I B C)

**Condo v Nguyen** (QCA) - stay - agreement for transfer of interest in property - judgment for equitable compensation - balance of convenience - stay refused (B)

**Ferrari Estate Holdings Pty Ltd v Sovereign Resort Developments Pty Ltd** (QSC) - negligence - nuisance - trespass - claim dismissed for want of prosecution (I B C)

**Ninan v Westpac Banking Corporation** (WASCA) - loans and mortgages - bank granted security for its costs of appeal - appellants' application for discovery dismissed (I B)

## Summaries With Link (Five Minute Read)

### **Vanderloo v Milne (No 2) [2015] NSWSC 555**

Supreme Court of New South Wales

Robb J

Costs - Court dismissed plaintiff's claim under s59 *Succession Act 2006* in respect of deceased wife's estate - deceased was mother of the two defendants, who were executors - plaintiff submitted he should not be ordered to pay executors' costs in whole and that he should only have to bear part of their costs due to their conduct - executors submitted plaintiffs should be ordered to pay executors' costs on ordinary basis, and on indemnity basis from date of Calderbank offer - held: Calderbank letter ineffective - not appropriate to order plaintiff to pay any costs on indemnity basis - not appropriate to depart from principle that unsuccessful plaintiff should pay executors' costs - plaintiff had been successful in proceedings up to date of distribution of part of deceased's estate to plaintiff - plaintiff to pay defendants' costs on ordinary basis from that date onward.

[Vanderloo](#) (B)

### **Riverwood Legion & Community Club Ltd v Repaja & Co Pty Ltd [2015] NSWSC 550**

Supreme Court of New South Wales

Stevenson J

Costs - Court concluded Club entitled to judgment against each of two fraudsters and against fifth defendant - Court ordered fraudsters to pay Club's costs - dispute between Club and fifth defendant as to costs order to be made against her - fifth defendant submitted Club should only have costs from date of amendment of statement of claim to plead personal claim for unjust enrichment - held: fifth defendant did not object to making amendment - most if not all the costs Club incurred prior to date of amendment were as referable to case it ultimately propounded as to case it abandoned - costs had been incurred in establishing fraudulent activity in which fifth defendant had no involvement - fifth defendant to pay 50% of Club's costs.

[Riverwood](#) (I B)

### **Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd [2015] VSCA 101**

Court of Appeal of Victoria

Mandie & Beach JJA; Dixon AJA

Legal professional privilege - inducing breach of contract - trial judge determined preliminary point in respondent's favour concerning waiver of legal professional privilege - applicants sought leave to appeal from orders maintaining legal professional privilege in communications - *O47 Supreme Court (General Civil Procedure) Rules 2005* - held: there were real prospects of success on proposed appeal - Court accepted applicants' submission that judge applied wrong test - Court satisfied that respondent, by its pleading, acted inconsistently with objection to fourth applicant adducing evidence that would result in disclosure of confidential communication

for dominant purpose of provision of legal advice - respondent had waived privilege - leave to appeal granted - appeal allowed.

[VicHotel](#) (I)

## **Rosenwald v Hogg [2015] VSC 199**

Supreme Court of Victoria

Macaulay J

Real property - restrictive covenant - plaintiff wished to demolish detached single dwelling on her land and replace it with apartment building with car park - plaintiff sought declaration that covenant did not prevent construction on land of single building containing a number of residential apartments and outbuildings - whether covenant limited use of land to one dwelling - whether appropriate to either discharge or modify covenant to allow for multi-dwelling use - whether modifying covenant to permit built-form of development would 'substantially injure' a covenant beneficiary - construction of restrictive covenant - held: covenant limited use of land to one dwelling - Court not satisfied covenant should be discharged or modified in terms proposed by plaintiff - declaration refused - proceeding dismissed.

[Rosenwald](#) (I B C)

## **Condo v Nguyen [2015] QCA 064**

Court of Appeal of Queensland

Holmes JA

Stay - contract - equitable compensation - applicants sought stay of judgment given for equitable compensation arising out of agreement between them and respondents by which they were to transfer a half interest in property to respondents - judgment appealed on basis trial judge failed to have proper regard to evidence concerning proper measure of equitable compensation and erred in applying the principles of equitable compensation in calculating compensation - respondents had served creditors' petitions against applicants - held: appeal might have merit - powerful consideration that bankruptcy likely to diminish prospects of appeal proceeding - no proper basis for stay which extended to entirety of judgment - stay would not prevent bankruptcy proceedings continuing against applicants - not utility in stay - balance of convenience weighed against stay - stay refused.

[Condo](#) (B)

## **Ferrari Estate Holdings Pty Ltd v Sovereign Resort Developments Pty Ltd [2015] QSC 126**

Supreme Court of Queensland

Henry J

Negligence - nuisance - trespass - want of prosecution - parties were adjoining lot owners of properties - first defendant engaged second and third defendants to carry out development works - plaintiff alleged works carried out in 2004 were negligently done and transgressed property boundary onto its land - plaintiff did not file claim until 2010 - further delays followed - first defendant sought dismissal of claim for want of prosecution - plaintiff's director orally applied to take further step without notice at the hearing of application - held: plaintiff engaged in prolonged delays - plaintiff failed to comply with implied undertaking under r5 *Uniform Civil*

# Benchmark

*Procedure Rules 1999* to proceed in expeditious way - no good prospects of success - unsatisfactory explanation for delay - plaintiff exhibited no material regard to prejudice to first defendant - claim dismissed for want of prosecution.

[Ferrari](#) (I B C)

## **Ninan v Westpac Banking Corporation [2015] WASCA 94**

Court of Appeal of Western Australia

Newnes JA

Security for costs - discovery - appellants were registered proprietors of property - respondent bank agreed to loan amount to appellants - appellants mortgaged property to bank - appellants defaulted - bank obtained summary judgment against appellants - bank sought security for its costs of appeal - appellants sought discovery by respondent of documents - appellants also sought that respondent's application for security for costs not be heard until discovery provided - held: appellants not resident in Australia - appellants had no assets in jurisdiction to satisfy order for costs - in the circumstances Court satisfied appellants should be ordered to provide security - application for discovery dismissed.

[Ninan](#) (I B)

## CRIMINAL

### Executive Summary

**R v Capaldo** (SASCFC) - criminal law - possession of firearm - discretion to decline to suspend sentence miscarried - appeal allowed

### Summaries With Link

## **R v Capaldo [2015] SASCFC 56**

Full Court of the Supreme Court of South Australia

Gray, Sulan & Kelly JJ

Criminal law - police searched residential premises and seized pistol - appellant pleaded guilty to aggravated possession of class H firearm while not holding licence, possession of class H firearm with defaced, altered or removed characters, failing to keep class H firearm secured and failing to store ammunition in locked container separately from firearm - appellant sentenced to one year and six months imprisonment with a non-parole period of five months - head sentence not challenged - whether sentence should be suspended - ss11(1) & 24A(7)(b) *Firearms Act 1977* - held: judge's questioning of appellant's counsel was inappropriate - judge demonstrated pre-judgment and conduct giving rise to apprehension of bias - judge sentenced on misunderstanding of fact - head sentence was merciful and should not be interfered with -



# Benchmark

discretion to decline to suspend sentence miscarried - appellant's mental state and personal circumstances powerful mitigating factors - permission to appeal granted - appeal allowed - appellant resentenced - term of imprisonment suspended upon entry into supervised 3 year good behaviour bond.

[Capaldo](#)

## Serenity

By Edward Rowland Sill

Brook,  
Be still,—be still!  
Midnight's arch is broken  
In thy ceaseless ripples.  
Dark and cold below them  
Runs the troubled water,—  
Only on its bosom,  
Shimmering and trembling,  
Doth the glinted star-shine  
Sparkle and cease.

Life,  
Be still,—be still!  
Boundless truth is shattered  
On thy hurrying current.  
Rest, with face uplifted,  
Calm, serenely quiet;  
Drink the deathless beauty—  
Thrills of love and wonder  
Sinking, shining, star-like;  
Till the mirrored heaven  
Hollow down within thee  
Holy deeps unfathomed,  
Where far thoughts go floating,  
And low voices wander  
Whispering peace.

[Edward Roland Sill](#)

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