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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement



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Executive Summary (1 minute read)

Born Brands Pty Ltd v Nine Network Australia Pty Ltd (No. 6) (NSWSC) - defamation - television broadcast - imputations did not carry - claim for injurious falsehood failed (I)

Owners Strata Plan 70335 v Walsh Bay Finance (NSWSC) - strata titles - order for disclosure before evidence granted to owners corporation (I B C)

Agripower Barraba Pty Ltd v Blomfield (NSWSC) - real property - ownership and entitlement to possession of items on land - items were fixtures - proceedings dismissed (I B C)



Beraru v Perpetual Ltd (QCA) - loans and mortgages - stay of execution of judgment for possession and recovery of loan amount refused (B)

Sargent v Brangwin (QSC) - wills and estates - testator had testamentary capacity to make will revoking all prior wills - probate granted to executors (B)

McElligott v Public Trustee of Queensland (QSC) - succession - bankruptcy - construction of will concerning entitlements to proceeds of sale of estate's major asset (B)

Lang v Australian Executor Trustees Ltd (SASC) - succession - inadequate explanation for delay in bringing family provision claim - application refused (B)

Summaries with links (5 minute read)

Born Brands Pty Ltd v Nine Network Australia Pty Ltd (No. 6) [2013] NSWSC 1651

Supreme Court of New South Wales

Adamson J

Defamation - product designers established company to sell baby product - designers and company sought damages for defamation arising from television broadcast concerning risks of baby devices - company also sought damages for injurious falsehood - ss8, 9, 9(2), 9(2)(b), 9(3), 25, 26, 35 & 36 *Defamation Act 2005* (NSW) - s79 *Evidence Act 1995* (NSW) - malice - qualified privilege - contextual imputations - special damages - *falsely* - *incorrectly* - credit - held: company did not discharge onus of establishing it was an excluded corporation within meaning of s9 *Defamation Act* - company had no cause of action in defamation - court not satisfied any imputations were carried and even if they had, no imputations were defamatory of designers - no statutory impediment to company bringing a claim in damages for injurious falsehood but plaintiffs failed to prove the imputations or statements were false- judgment for defendants.

[Born Brands](#) (I)

Owners Strata Plan 70335 v Walsh Bay Finance [2013] NSWSC 1623

Supreme Court of New South Wales

McDougall J

Strata titles - owners corporation of marina came into existence on registration of strata plan - owners corporation claimed there were defects in piles or pylons supporting structure and that defects had not been rectified - owners corporation sought order for disclosure before evidence -



PN SC Eq 11 - held: owners corporation was not party to contract or in existence at relevant time so it did not know roles of defendants - owners corporation's understanding needed to be facilitated by access to documents - defendants' strike-out threats could be met once owners corporation had access to documents - exceptional circumstances justified order for disclosure before evidence.

[Owners Strata Plan 70335](#) (I B C)

Agripower Barraba Pty Ltd v Blomfield [2013] NSWSC 1598

Supreme Court of New South Wales

Black J

Real property - fixtures - energy company sought declaration it was true owner of plant and equipment on land and orders to permit removal of items - occupiers of property agreed that if disputed items were not fixtures they would permit their removal from property - uncertainty as to ownership before transfer of title to property - principles applicable to determining whether disputed items were fixtures - intention of parties - annexation of items to land - ss48(4)(a), 48(4)(b) & 48(4)(d) *Evidence Act 1995* (NSW) - s27 *Sale of Goods Act 1923* (NSW) - r14.26(1) *Uniform Civil Procedure Rules 2005* (NSW) - held: disputed items were fixtures - proceedings dismissed.

[Agripower Barraba](#) (I B C)

Beraru v Perpetual Ltd [2013] QCA 330

Court of Appeal of Queensland

Fraser JA

Mortgage - stay - bank obtained summary judgment for possession of land pursuant to mortgage and recovery of outstanding amount of loan - mortgagors sought stay of execution of judgment pending appeal - onus - natural justice - hardship - validity of loan agreement - held: evidence on which mortgagors relied revealed no merit in appeal - appeal had no prospects of success - application for stay refused - short stay of execution of warrant granted.

[Beraru](#) (B)

Sargent v Brangwin [2013] QSC 306

Supreme Court of Queensland

Dalton J

Wills - testamentary capacity - executors sought probate of 2011 will of deceased which revoked all former wills - deceased's daughter objected to grant of probate and propounded will made by deceased in 2010 - both wills made while testator was in hospital - testator's capacity to make will



- medical evidence - credit - held: testator was ill when he made 2011 will - testator's physical ailments had capacity to affect functioning of testator's mind and had done so at times since initial illness in 2010 - evidence was sufficient to establish as a presumption the validity of the 2011 will - more probable than not that testator had testamentary capacity when he gave instructions for and executed 2011 will - judgment for executors.

[Sargent](#) (B)

McElligott v Public Trustee of Queensland [2013] QSC 314

Supreme Court of Queensland

P McMurdo J

Succession - debts of deceased could not be paid without sale of property which was major asset of estate - application raised questions about construction of will to determine what sole executor and trustee should do with proceeds of sale - one child of deceased was bankrupt - whether bankrupt's children were given equitable interest in property (entitling them to a share of the sale proceeds) or personal right to occupy property for 5 years- effect of clause providing that if person *under a legal disability* was entitled to any gift then executor should hold share to which that person was entitled on trust - whether bankrupt was under legal disability - held: grandchildren had no entitlement to proceeds of sale - share of residuary estate to which bankrupt would be entitled vested in Official Trustee in Bankruptcy.

[McElligott](#) (B)

Lang v Australian Executor Trustees Ltd [2013] SASC 171

Supreme Court of South Australia

Anderson J

Succession - family provision - four grandchildren sought to claim a benefit from grandfather's estate pursuant to *Inheritance (Family Provision) Act 1972* (SA) in addition to that left to them in his will - summons not issued within time specified by s8(1) of the Act - delay - held: inadequate explanation of length of delay in making claim - grandchildren failed to overcome difficulty and onus they bore to provide sufficient reason to justify application out of time - on limited evidence it seemed grandchildren may have difficulty establishing claim - application to make claim refused.

[Lang](#) (B)



Inscription for a Fountain on a Heath

By Samuel Taylor Coleridge

This Sycamore, oft musical with bees, —
Such tents the Patriarchs loved! O long unharmed
May all its agèd boughs o'er-canopy
The small round basin, which this jutting stone
Keeps pure from falling leaves! Long may the Spring,
Quietly as a sleeping infant's breath,
Send up cold waters to the traveller
With soft and even pulse! Nor ever cease
Yon tiny cone of sand its soundless dance,
Which at the bottom, like a Fairy's Page,
As merry and no taller, dances still,
Nor wrinkles the smooth surface of the Fount.
Here Twilight is and Coolness: here is moss,
A soft seat, and a deep and ample shade.
Thou may'st toil far and find no second tree.
Drink, Pilgrim, here; Here rest! and if thy heart
Be innocent, here too shalt thou refresh
Thy spirit, listening to some gentle sound,
Or passing gale or hum of murmuring bees!

[Samuel Taylor Coleridge](#)

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