

Friday 16 May 2014

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

MacarthurCook Fund Management Ltd v TFML Ltd (HCA) - corporations - redemption of interests in managed investment scheme did not constitute withdrawal from that scheme - appeal allowed (B)

Johnston v Stock (NSWCA) - negligence - intoxicated pedestrian injured in collision with motor vehicle - driver not negligent - appeal allowed (I)

Maxwell-Smith v S & E Hall Pty Ltd (NSWCA) – solicitors' duties to former client - collateral abuse of process - claims against solicitor and building company dismissed (I B C)

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher (NSWCA) - corporations - insolvency - voidable transactions - s588FF(3) *Corporations Act 2001* (Cth) allowed making of *shelf orders* - appeal dismissed (B)

Johnston v Brightstars Holding Company Pty Ltd (NSWCA) - contract - variation to deed of settlement deferred obligation to pay amount but did not release obligation - appeal dismissed (I B C)



Deferos v Scott (VSC) - legal practitioners - unqualified costs consultant did not impermissibly engage in *legal practice* when performing services for solicitor - appeal dismissed (I)

Merrick Tyler Pty Ltd v Commissioner of Main Roads (WASC) - compulsory acquisition of part of land - no entitlement to compensation for remaining portion of land which was not contiguous with land taken (C G)

Summaries with links (5 minute read)

MacarthurCook Fund Management Ltd v TFML Ltd [2014] HCA 17

High Court of Australia

French CJ; Crennan, Kiefel, Bell & Gageler JJ

Corporations - regulation of managed investment schemes - members' rights to withdraw from scheme - company was responsible entity of unlisted unit trust which was registered scheme - withdrawal procedures in constitution complemented s601KA(3)(b) *Corporations Act 2001* (Cth) by providing unit holder had no right to withdraw when trust was not liquid unless there was withdrawal offer currently open - trustee had power to suspend withdrawals not in best interests of unit holders - responsible entity sought to raise funds by public offer of ordinary units in trust - first appellant underwrote public offer by subscribing for units in trust - terms of issue provided for redemption within stipulated time period - responsible entity suspended all *withdrawals* from trust - whether responsible entity breached obligation to redeem - whether redemption of units was withdrawal from scheme within meaning of Pt 5C.6 - held: a member did not withdraw from scheme by responsible entity performing obligation (or exercising a power compulsorily) to redeem interest - withdrawal by a member regulated by Pt 5C.6 involved act of volition on the part of the member - responsible entity breached its obligation to redeem - appeal allowed.

[MacarthurCook Fund Management Ltd](#) (B)

Johnston v Stock [2014] NSWCA 147

Court of Appeal of New South Wales

Meagher, Barrett & Ward JJA

Negligence - motor vehicle collision - grossly intoxicated pedestrian injured in collision with motor vehicle - primary judge found driver liable and reduced damages by 75% for pedestrian's contributory negligence - driver contended primary judge erred in finding negligence without considering relevant duty of care and in failing to make correct assessment of reasonableness of her conduct - driver contended that expectations to which primary judge found her to be subject went beyond things that reasonably careful motorist ought reasonably to have anticipated - motorist's duty of care - s5B *Civil Liability Act 2002* (NSW) - held: exercise of reasonable care by motorist involved degree of anticipation of what others might do - required standard of care when driver saw a pedestrian progress downhill in a stumbling fashion, stop on pedestrian ramp at side of the road, look right and apparently fix her eyes on approaching vehicle as if waiting for it to pass



- several precautions which primary judge found could or should have been taken by driver were not called for in interests of due care towards pedestrian - primary judge's conclusion of breach of duty by appellant erroneous - appeal allowed.

[Johnston \(I\)](#)

Maxwell-Smith v S & E Hall Pty Ltd [2014] NSWCA 146

Court of Appeal of New South Wales

Beazley P; McColl & Barrett JJA

Professional negligence - tort of collateral abuse of process - solicitors' duties - limitation of actions - appellants retained solicitor to act for them on purchase of land and building company to build house - dispute arose in relation to building work - solicitor acted for builder in that litigation - appellants lost case- appellants alleged solicitor breached retainer, duty of care and equitable duty of loyalty by acting for builder and that builder and solicitor committed collateral abuse of process by serving bankruptcy notices - s14 *Limitation Act 1969* (NSW) - held: no retainer between appellants and solicitor when he began to act for building company - no continuing equitable or contractual duty of loyalty to former client - doubtful bankruptcy notice was a *process* to which tort of collateral abuse of process applied - appellants did not prove builder engaged in any overt act or threat in furtherance of allegedly improper purpose - action for collateral abuse of process did not lie against solicitor because it only be committed by party to proceedings said to constitute the abuse - all claims except collateral abuse of process claim in respect of one bankruptcy notice were statute-barred - no procedural unfairness - appeal dismissed.

[Maxwell-Smith \(I B C\)](#)

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher [2014] NSWCA 148

Court of Appeal of New South Wales

Bathurst CJ, Beazley P; Macfarlan, Barrett & Gleeson JJA

Corporations - insolvency - voidable transactions - liquidators obtained order under s588FF(3)(b) *Corporations Act 2001* (Cth) generally extending time to make applications under s588FF(1) (shelf order) - liquidators sought order under s588FF(1) against applicants with respect to certain transactions) - applicants sought to have shelf order to be set aside on the basis that it was invalid - validity of shelf orders - 36.16(2)(b) *Uniform Civil Procedure Rules 2005* (NSW) - held: primary judge did not err in following decision in *BP v Brown* (2003) 58 NSWLR 322) by holding s588FF(3)(b) allowed making of shelf orders - applications under ss588FF(1) and (3) are distinct applications - Court did not err in exercising discretion not to set aside shelf order - appeal dismissed.

[Fortress Credit Corporation \(Australia\) II Pty Ltd \(B\)](#)

Johnston v Brightstars Holding Company Pty Ltd [2014] NSWCA 150

Court of Appeal of New South Wales

Beazley P; Basten & Gleeson JJA



Contract - deed of settlement - appellants agreed by deed to pay settlement to respondents' solicitors - deed varied by agreement - dispute concerning terms of variation - primary judge found agreement was to defer liability with implied term that payment was required on giving reasonable notice - appellants had contended variation expunged their liability to make payment - appellants claimed respondents should be estopped from resiling from terms of variation for which appellants contended - *Browne v Dunn* - held: deed of settlement was varied by communications between parties' solicitors - variation was to defer obligation to pay amount not to release that obligation - evidence of negotiations between parties prior to offer or acceptance of variation not admissible to prove variation - post-contractual statements which provided evidence of facts against party's interest might be admissible as an admission by that party - to extent evidence revealed an opinion as to a question of law rather than fact admission may be irrelevant or valueless - no aspect of fairness required respondents to call witness for cross-examination - appellants did not establish reliance on a representation made by respondents - estoppel claim failed - appeal dismissed.

[Johnston](#) (I B C)

Deferos v Scott [2014] VSC 205

Supreme Court of Victoria

Kaye J

Legal practitioners - retainer for provision of costing services - appellant solicitor engaged struck off solicitor as legal cost consultant - fee dispute arose - solicitor appealed from judgment of Magistrate ordering solicitor to pay cost consultant - solicitor claimed Magistrate erred in law in failing to hold that by performing work in respect of which outstanding fees were claimed consultant had engaged in legal practice contrary to s2.2.2 *Legal Practice Act 2004* (Vic) - held: Court not satisfied Magistrate erred in finding solicitor failed to prove consultant had engaged in legal practice in respect of work which was subject of fees claimed - lack of evidence was such that it was open to Magistrate to conclude that appellant solicitor had not satisfied her that work performed by consultant answered description of *legal practice* - appeal dismissed.

[Deferos](#) (I)

Merrick Tyler Pty Ltd v Commissioner of Main Roads [2014] WASC 166

Supreme Court of Western Australia

Le Miere J

Compulsory acquisition of land - compensation - Commissioner compulsorily acquired land owned by plaintiff for construction of highway - plaintiff also owned land to west of road (western land) - whether plaintiff was entitled to claim compensation under s241(7)(b) *Land Administration Act 1997* (WA) in respect of western land on the basis that it was *adjoining land* - construction of s241(7) - held: words *adjoining land* in s 241(7)(b) is land which was contiguous with land taken - meaning was indicated by the difference in terminology between *adjoining land* and *other land* and by extended definition of *adjoining land* in relation to Crown Land in s3(1) - western land did not



adjoin taken land within meaning of s241(7)(b) because two portions were separated by Crown owned land - plaintiff not entitled to compensation.

[Merrick Tyler Pty Ltd](#) (C G)

I Have a Rendezvous With Life

by Countee Cullen

I have a rendezvous with Life,
In days I hope will come,
Ere youth has sped, and strength of mind,
Ere voices sweet grow dumb.
I have a rendezvous with Life,
When Spring's first heralds hum.
Sure some would cry it's better far
To crown their days with sleep
Than face the road, the wind and rain,
To heed the calling deep.
Though wet nor blow nor space I fear,
Yet fear I deeply, too,
Lest Death should meet and claim me ere
I keep Life's rendezvous.

[Countee Cullen](#)

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