

Tuesday, 17 March 2015

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

 Follow @Benchmark\_Legal

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**Khouzame v All Seasons Air Pty Ltd** (FCAFC) – bankruptcy – adjudication certificate not accompanied by affidavit – judgment debt unenforceable – bankruptcy notice set aside (I B C)

**Zdziarski v Telstra Corporation Ltd** (FCA) – workers compensation – Tribunal applied incorrect standard of causation – appeal allowed (I B C G)

**Singh v McKey Distribution Pty Ltd** (NSWCA) – motor accidents compensation – worker injured in collision with forklift – employer not liable – appeal dismissed (I)

**O'Farrell v Allianz Australia Insurance Ltd** (NSWCA) – judicial review – motor vehicle insurance – insurer failed to comply with obligations concerning duty of disclosure – decision of District Court set aside (I)

**AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Ltd** (NSWSC) – trusts and trustees – trustee entitled to refuse access to register – summons dismissed (B)

**Victorian WorkCover Authority v The Australian Steel Company (Operations) Pty Ltd (No 2) (Costs)** (VSC) – costs – offer of compromise – defendant not unable to properly assess offer – plaintiff entitled to indemnity costs (I C G)

**Palermo v Palermo** (WASCA) – contract – alleged inferred agreement concerning share in over-all profit – failure to consider merits of claim – appeal allowed – new trial (I B C)

# Benchmark

## Summaries with links (5 Minute Read)

### **Khouzame v All Seasons Air Pty Ltd [2015] FCAFC 28**

Full Court of the Federal Court of Australia

Robertson, Wigney & Gleeson JJ

Bankruptcy – respondent was subcontractor retained by appellant – payment dispute arose – adjudication carried out pursuant to *Building and Construction Industry Security of Payment Act 1999* (NSW) – adjudication concluded respondent entitled to payment – adjudication certificate issued – Local Court entered judgment for respondent – bankruptcy notice issued on application of respondent – primary judge dismissed application to set aside bankruptcy notice – primary judge found respondent’s failure to file affidavit at time of seeking entry of judgment as required by s25 did not rise as high as abuse of process for bankruptcy law purposes – statutory construction - held: adjudication certificate only became enforceable as judgment for debt when it *may be filed* and it *cannot be filed* unless accompanied by affidavit specified in s 25(2) – appeal allowed – bankruptcy notice set aside.

[Khouzame](#) (I B C)

### **Zdziarski v Telstra Corporation Ltd [2015] FCA 207**

Federal Court of Australia

Perram J

Workers compensation - former employee of Telstra injured at work in 2001 – claim for compensation accepted by Comcare – employee made further claim for compensation on Telstra for depression, emotional stress and physical stress which Telstra rejected - AAT affirmed refusal of claim – whether worker suffering from emotional disorder and whether caused by employment with Telstra – test for causation - held: question of which test of causation applied could only be answered by asking questions in ss7(4)(a) or 7(4)(b) concerning when employee first sought treatment or when disease first impaired him - Tribunal did not address either question - Tribunal applied incorrect standard of causation in assessing whether employee’s substance abuse problem was caused by employment– appeal allowed.

[Zdziarski](#) (I B C G)

### **Singh v McKey Distribution Pty Ltd [2015] NSWCA 43**

Court of Appeal of New South Wales

Meagher & Ward JJA; Beech-Jones J

Motor accidents compensation - appellant employed by respondent as storeman and forklift driver - appellant injured as result of collision with motorised forklift driven by co-worker - appellant alleged injury resulted from use or operation of motor vehicle caused by negligence of employer giving rise to *work injury claim* - primary judge concluded appellant failed to exercise due care for his safety and that there was no fault on part of driver – primary judge dismissed claim - credit - held: primary judge in best position to assess whether appellant seeking to answer cross examiner’s questions directly and truthfully - no error in concluding respondent’s version of events should be accepted - appeal dismissed.

[Singh](#) (I)

**O'Farrell v Allianz Australia Insurance Ltd [2015] NSWCA 48**

Court of Appeal of New South Wales

Basten, Macfarlan & Gleeson JJA

Judicial review – insurance - applicant obtained comprehensive motor vehicle insurance policy from insurer - motor vehicle stolen – insurer gave notice it would disavow policy and sought cancellation on basis of applicant's failure to comply with duty of disclosure – Consumer, Trader and Tenancy Tribunal upheld applicant's claim for payment by insurer of value of vehicle – District Court allowed insurer's appeal – ss21, 21A, 22, 28 & 29A *Insurance Contracts Act 1984* (Cth) – *matter relevant to the insurer - clearly inform* – operation of s22 - held: Tribunal's conclusion that insurer had not satisfied s22(1) was not attended by legal error – District Court's contrary finding revealed misapprehension of nature and scope of jurisdiction under s67 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) – decision set aside.

[O'Farrell](#) (I)

**AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Ltd [2015] NSWSC 216**

Supreme Court of New South Wales

Bergin CJ in Eq

Trusts and trustees – plaintiff sought order that trustee of trust produce to it for inspection the register of Unit Holders of trust maintained by trustee pursuant to trust deed – held: on proper construction of deed plaintiff not entitled to have access to register – Court not satisfied Unit Holders had “proprietary interest” in register such to enable them to have access to it “as of right” – trustee had discretion to refuse plaintiff access to register - trustee justified in doing so - summons dismissed.

[AIT](#) (B)

**Victorian WorkCover Authority v The Australian Steel Company (Operations) Pty Ltd (No 2) (Costs) [2015] VSC 81**

Supreme Court of Victoria

Kaye JA

Costs – offer of compromise - plaintiff obtained judgment against defendant in claim under s138 *Accident Compensation Act 1985* (Vic) for indemnity for compensation payments made to employee for injury sustained while working for employer – effect of plaintiff's offer of compromise which defendant did not accept – effect of plaintiff's lack of success on one basis upon which it sought to make defendant liable – held: defendant not genuinely unable to properly assess offer of compromise at time served because it lacked relevant information – Court not persuaded to *otherwise order* under r26.08 *Supreme Court (General Civil Procedure) Rules 2005* (NSW) - offer made allowance for prospect plaintiff might not succeed on part of its claim - not appropriate to apportion costs payable to the plaintiff according to issues on which parties respectively succeeded – plaintiff entitled to costs of indemnity basis from date of offer.

[VictorianWorkCover](#) (I C G)



**Palermo v Palermo [2015] WASCA 49**

Court of Appeal of Western Australia

Buss, Newnes & Mazza JJA

Contract - parties were brothers involved in business activities - dispute arose as to basis on which businesses undertaken - appellant contended it was to be inferred from conduct there was agreement that businesses to be conducted on basis they would share equally in overall after-tax profit – appellant claimed primary judge erred in finding alleged agreement inconsistent with corporate and trust structure and failed to have regard to evidence supporting existence of agreement – held: primary judge failed to consider substantive merits of appellant’s claim and to make necessary findings of fact and law – primary judge’s conclusion that appellant had not made out case not the only conclusion open on evidence – appeal allowed – new trial.

[Palermo](#) (I B C)

[Click Here to access our Benchmark Search Engine](#)