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A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Director of Consumer Affairs Victoria v Gibson (FCA) - consumer law - false claims of having brain cancer and being cured by natural means - financial benefit - liability for misleading and deceptive conduct - no liability in respect of testimonials or unconscionable conduct (I B)

People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd (NSWCA) - planning law - development consent not required under Pt 4 Div 2 of the *Environmental Planning and Assessment Act* - appeal dismissed (I B C G)

In the matter of Edgecliff Car Rentals Pty Ltd (deregistered) (NSWSC) - legal practitioners - dispute between widow and daughter regarding deceased's business - solicitor had acted for business entities - solicitor restrained from acting for widow (I B)

Winn v Harding (NSWSC) - succession law - Will contained intention contrary to default position under s145, *Conveyancing Act 1919* (NSW) - mortgage to be satisfied first from residuary estate and then from two properties in proportion to their value (B)

White v Quest Rosehill Pty Ltd (NSWSC) - landlord and tenant - tenant should have allowed owners access to property - improper conduct by tenant but not unconscionable (I B C)

Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd & Ors (VSC) - unjust enrichment - third party in receipt of proceeds of fraud failed to make inquiries an honest and reasonable person

would have made in the circumstances - money had and received - officers of third party liable for knowing assistance of breach of trust - tracing into real property not defeated by Torrens system indefeasibility (I B)

Bigby v Kondra & Anor (QSC) - negligence and insurance - building contractor liable in negligence in respect of supervision of subcontractor - insurer denied indemnity - meaning of 'occurrence' in policy - exclusion clause inapplicable - defendant's 'product' was not the house itself - insurer liable to indemnify the defendant (I B C)

Summaries With Link (Five Minute Read)

Director of Consumer Affairs Victoria v Gibson [2017] FCA 240
Federal Court of Australia
Mortimer J
Consumer law - Director of Consumer Affairs Victoria alleged Ms Gibson had falsely claimed to have been diagnosed with brain cancer, to have rejected conventional treatments in favour of a natural cure, and that she had developed and promoted a smart phone application and a book - further, that she said that part of the proceeds of sales of the smart phone application and book would be donated to charities without then making many or most of such donations - Director brought proceedings under *Australian Consumer Law and Fair Trading Act 2012* (Vic) (which adopts the Australian Consumer Law ('ACL') into Victorian law) and directly under the ACL - held: Ms Gibson's representations about cancer and donations constituted misleading or deceptive conduct in trade and commerce - Director's claims under s18 of the ACL succeeded - Ms Gibson's statements about herself were not testimonials, and her claims were not claims concerning testimonials relating to goods - Director's claim under s29 of the ACL therefore failed - Director had not discharged burden of proof in showing that Ms Gibson had known she had not had cancer - unconscionable conduct claim regarding cancer representations under s21 of the ACL therefore failed - unconscionable conduct claim under s21 of the ACL regarding representations of making donations succeeded - Director to file proposed minute of orders. (I B)
Director of Consumer Affairs Victoria (I B)

People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd [2017] NSWCA 46
Court of Appeal of New South Wales
Meagher, Ward, & Payne JJA
Planning law - People for the Plains challenged validity of approvals to Santos under the *Petroleum (Onshore) Act 1991* (NSW) - claimed that relevant approvals covered the treatment of water and brine produced not only on one petroleum title, but also on land outside that title - claimed development consent was required - People for the Plains brought judicial review proceedings and enforcement proceedings under the *Environmental Planning and Assessment Act 1979* (NSW) - primary judge dismissed both proceedings - appeal to Court of

Appeal - held: the condition on the relevant title that activities be conducted under an approved Petroleum Operations Plan and the requirement that this plan deal with the treatment and beneficial reuse of produced water meant that the project was for the purpose of satisfying the condition and therefore for the purpose of enabling the petroleum exploration and appraisal activities to be carried out - the project should be characterised as being for the treatment of produced water for the purposes of petroleum exploration and not waste or resource disposal or management - development consent was not required under Pt 4 Div 2 of the *Environmental Planning and Assessment Act* - appeal dismissed.
(I B C G)
People for the Plains (I B C G)

In the matter of Edgecliff Car Rentals Pty Ltd (deregistered) [2017] NSWSC 244
Supreme Court of New South Wales
Stevenson J
Legal practitioners - deceased had operated a prestige motor vehicle leasing business through various trading companies - effective control of business passed to widow after deceased's death - deceased's daughter by an earlier relationship and daughter's husband were also involved in the business - after deceased's death, daughter's husband acquired effective control of business by propounding documents whose validity the widow disputed - widow commenced proceedings against daughter and daughter's husband - daughter and husband sought to have widow's solicitor restrained from acting - solicitor had acted for trading companies between 2011 and 2015 in a large number of debt recovery matters - had observed daughter and husband's behaviour in litigious circumstances - daughter and husband claimed solicitor had confidential information concerning their 'litigious character and tendencies' - held: daughter and her husband could not point to any particular information that the solicitor might have - however, this was not an answer to the problem - the solicitor had seen the daughter and her husband in a litigious context, and they could not know what advantage the solicitor might have from having done so - regard should be had to the public interest in a litigant not being deprived of the lawyer of his or her choice - also relevant that solicitor could speak to widow in her native Russian and had spent some 300 hours on the matter to date - however, taking all matters into account, solicitor should be restrained from acting.
(I B)
In the Matter of Edgecliff (I B)

Winn v Harding [2017] NSWSC 239
Supreme Court of New South Wales
Darke J
Succession law - deceased owned two properties - Bathurst property and residuary estate left to mother - Fairfield West property left to mother and deceased's friend as tenants in common in equal shares - both properties secured by single registered mortgage - dispute regarding extent to which properties were liable under the mortgage - s145 *Conveyancing Act 1919* (NSW) - held: both properties were charged by the mortgage, and so both came within s145(1)(a) -

therefore, unless the deceased had by will, deed, or other document, signified a contrary or other intention, both properties would be primarily liable for the payment of the mortgage in proportion to their values - s145(2) provides that such other or contrary intention is not signified merely by a general direction for the payment of debts, except by express words or necessary implication - proper approach was, first, to construe the Will; to find what provision, if any, concerns payment of debts; and then to apply s145(2) only if the provision for payment of debts in the Will falls strictly within the express words of s145(2) - in this case, the Will had provision for payment of debts - this provision contained a general direction for payment of all the testator's debts out of the testator's real and personal estate and so fell within s145(2) - both properties were expressly referred to in the payment of debts clause - such references signified a contrary or other intention that the residuary estate should be primarily liable for the discharge of the mortgage - residuary estate insufficient to discharge the mortgage - following the exhaustion of the residuary estate, the two properties both remained liable for payment of the mortgage, in shares proportionate to their values.
(B)
Winn (B)

White v Quest Rosehill Pty Ltd [2017] NSWSC 238
Supreme Court of New South Wales
Darke J
Landlord and tenant - several owners of units in apartment complex granted a lease to Quest - litigation between owners and Quest had been ongoing for many years - in this case, one owner, as representative of all owners, sued Quest, claiming that Quest had failed to provide owners with access to units in accordance with express or implied terms of the leases - further, that such failure was unconscionable conduct against s21 of the *Australian Consumer Law* - held: the access clause in the lease had the construction contended for by the owners - where an owner has to perform works under the lease, Quest is obliged to co-operate with the owner to enable reasonable access to the unit (together with building consultants if required) to properly assess the condition of the unit and the scope of the required works and enable quotations to be obtained - Quest's conduct was unreasonable and contrary to the terms of the lease - however, it did not involve moral obloquy of sufficient magnitude to justify the conduct being held to be, in all the circumstances, unconscionable - parties to bring in short minutes to give effect to the Court's reasons.
(I B C)
White (I B C)

Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd & Ors [2017] VSC 101
Supreme Court of Victoria
Hargrave J
Unjust enrichment - Sino Iron and a related company defrauded - fraudster caused Sino Iron and related company to pay over $2 million into bank account of Worldwide Wagering - Worldwide's sole director and general manager suspected the funds may have been

fraudulently paid, due to a similar fraud two weeks earlier - however, after they spoke with a customer, they allowed him to bet with that money - the funds were then gambled on international sporting events, and mostly lost - held: Worldwide and its officers acted wilfully and recklessly in failing to make the inquiries an honest and reasonable person would have made in the circumstances - money paid under mistake of fact can be recovered in a common law action for money had and received, subject to a defence that it would not be inequitable for the recipient to retain the benefit of the money - retention might not be inequitable if the recipient has changed its position on the faith of the receipt and thereby suffered a detriment - given Worldwide's constructive knowledge, it could not rely on a defence of change of position - Sino Iron was entitled to restitution for money had and received - Sino Iron also entitled to restitution and tracing under principles in *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102 - further, Worldwide had held the funds as trustee for Sino Iron under either a constructive or resulting trust - Worldwide's officers had knowingly assisted Worldwide's breach of trust - they were therefore also each liable to Sino Iron for the amount lost - the stolen funds were traceable into real property bought jointly by Worldwide's officers using proceeds of the stolen funds - this was not defeated by s42 of the *Real Property Act 1900* (NSW) due to the fraud exception to indefeasibility - parties to make further submissions as to the form of the Court's judgment and concerning tracing issues.
(I B)
Sino Iron (I B)

Bigby v Kondra & Anor [2017] QSC 37
Supreme Court of Queensland
Daubney J
Negligence - the plaintiffs contracted for the defendant to build a house - house suffered damage in a storm through improperly installed windows producing internal pressure - windows installed by a third party - the defendant had been contractually obliged to supervise construction of the house - held: the defendant had failed in his duty of care in respect of supervision - due supervision of the installation of windows would have revealed the patent inadequacy of their installation - defendant liable to plaintiffs - defendant's insurer denied indemnity - insurer said the 'occurrence' leading to property damage was the storm, and this occurrence was not in connection with the defendant's business - further, an exclusion clause applied because the plaintiff's house was a 'product', and the damage was attributed to a defect in that product, that is, the defectively installed windows - held: this case was distinct from *GIO General Limited v Newcastle City Council* (1996) 38 NSWLR 558 - in that case, an earthquake itself did the relevant damage - in this case, it was not the storm that damaged the house, it was the over-pressurisation event - this event occurred because of the defectively installed windows, which was part of the defendant's business - the house itself was not the defendant's 'product' - therefore, the exclusion clause did not apply - the insurer was liable to indemnify the defendant.
(I B C)
Bigby (I B C)

CRIMINAL

Executive Summary

McIntosh v The State of Western Australia (WASCA) - criminal law - evidence of accomplice who pled guilty - trial judge correct to remind the jury of effect of s37A *Sentencing Act 1995* (WA) - no real risk that, absent a direction from the trial judge, the jury may attach weight to the accomplice's plea of guilty - appeals against conviction and sentence dismissed

DKA v The State of Western Australia (WASCA) - criminal law - propensity evidence did not rationally effect, to a significant degree, the assessment of the probability as to whether the appellant had done the acts alleged - no significant probative value - should not have been admitted - appeal against conviction allowed and retrial ordered

Summaries With Link

McIntosh v The State of Western Australia [2017] WASCA 45
Court of Appeal of Western Australia
Buss P, Mazza JA, & Beech J
Criminal law - evidence of accomplice - appellant convicted of murder and sentenced to life imprisonment with non-parole period of 20 years - appeals against conviction and sentence - accomplice had pled guilty to murder and had given evidence at trial against the appellant - appellant argued that the trial judge should not have told the jury of the effect of s37A of the*Sentencing Act 1995* (WA) - s37A provides that a sentence that has been reduced due to an undertaking to cooperate with the authorities may be increased if the offender subsequently fails to cooperate - appellant also argued that the trial judge should have directed the jury that the accomplice's plea of guilty was not evidence admissible against the appellant - held: it was in the interests of justice that the trial judge remind the jury that the accomplice had an obvious self-interest in maintaining her original account of events, even if it were false - s37A was a reason to scrutinise her evidence - in drawing attention to s37A, the trial judge had assisted the jury's understanding of a relevant and important circumstance - the direction was appropriate - defence counsel had made a forensic or tactical decision that the accomplice's plea of guilty, her cooperation, and her reduced sentence were important aspects of the defence - there was no real risk that, absent a direction from the trial judge, the jury might attach weight to the accomplice's plea of guilty in assessing whether the appellant had murdered the victim - appeal against conviction dismissed - regarding the appeal against sentence, held: the length of the non-parole period was neither unreasonable nor plainly unjust - the disparity between the appellant's sentence and the accomplice's sentence did not give rise to a legitimate or

justifiable sense of grievance on the appellant's part, or the appearance in the mind of an objective observer that justice was not done - leave to appeal against sentence refused and appeal dismissed.
(CL)
McIntosh

DKA v The State of Western Australia [2017] WASCA 44
Court of Appeal of Western Australia
Buss P, Mazza JA, & Beech J
Criminal law - propensity evidence - appellant convicted of 17 serious sexual offences - appeal against conviction on the ground that propensity evidence should not have been admitted, or that the admission of that evidence occasioned a miscarriage of justice - held: under s31A(2) of the *Evidence Act 1906* (WA), propensity evidence is admissible if the court considers that it would, either by itself or having regard to other evidence, have significant probative value, and that that probative value, when compared to the degree of risk of an unfair trial, was such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial - the task of an appellate court in an appeal against conviction after trial is to decide this question for itself, and the principles in *House v The King* [1936] HCA 40; 55 CLR 499 are not applicable - it is for the jury to decide whether evidence is to be accepted, and what weight to give it - therefore, in assessing whether evidence has significant probative value, the evidence is to be taken at its highest - probative value is not to be assessed in isolation from other evidence - the inquiry into probative value begins with the identification of the fact in issue to which the evidence is said to be relevant - the fact in issue here was whether the appellant had committed each or any of the alleged acts - the propensity evidence admitted in this case did not rationally effect, to a degree that could properly be characterised as significant, the assessment of the probability whether the appellant had done the alleged acts - therefore, it did not have significant probative value - it should not have been admitted - its admission had occasioned a miscarriage of justice - appeal against conviction allowed and retrial ordered.
(CL)
DKA

The Solitary Reaper
By William Wordsworth
Behold her, single in the field,
Yon solitary Highland Lass!
Reaping and singing by herself;
Stop here, or gently pass!
Alone she cuts and binds the grain,
And sings a melancholy strain;
O listen! for the Vale profound
Is overflowing with the sound.

No Nightingale did ever chaunt
More welcome notes to weary bands
Of travellers in some shady haunt,
Among Arabian sands:
A voice so thrilling ne'er was heard
In spring-time from the Cuckoo-bird,
Breaking the silence of the seas
Among the farthest Hebrides.

Will no one tell me what she sings?—
Perhaps the plaintive numbers flow
For old, unhappy, far-off things,
And battles long ago:
Or is it some more humble lay,
Familiar matter of to-day?
Some natural sorrow, loss, or pain,
That has been, and may be again?

Whate'er the theme, the Maiden sang
As if her song could have no ending;
I saw her singing at her work,
And o'er the sickle bending;—
I listened, motionless and still;
And, as I mounted up the hill,
The music in my heart I bore,
Long after it was heard no more.

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