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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Chi v Technical and Further Education Commission (No 2) - application for recall of judgment - whether allegation of act amounting to discrimination on grounds of race - procedural fairness - *comparator* group (I, B, C, G)

Coregas Pty Ltd v Penford Australia Pty Ltd (No 2) - application for special costs order - indemnity costs - *Calderbank* offer - clarity of terms of offer - exclusion of pre-judgment interest (I, B, C, G)

LGS v Barbagallo application for special costs order - indemnity costs - abuse of process - prospects of success - offers of compromise - *Calderbank* offer - gross sum order - *payment out* - third party costs order (I, B, C, G)

Drapac & Ors v Wain & Ors - stay pending appeal - *special or exceptional circumstances* - risk of appeal being rendered nugatory (I, B, C, G)



In the matter of Digital Satellite Warranty Cover Ltd and another v Financial Services Authority - insurance - winding-up - whether contracts of insurance which provided for benefits in kind required legislative authorisation (I)

Lambi v American Family Mutual Ins. Co - insurance - coverage dispute - whether insurer's coverage policy triggered by lawsuit against plaintiff for bodily operation of exclusion clauses (I)

National Union Fire v American Motors Insurance Company - insurance - coverage dispute - fall of scaffolding causing death and injury to motorists - covered affiliated entities - exclusion clause for professional services - *targeted tender* doctrine (I, C)

Summaries with links (5 minute read)

Chi v Technical and Further Education Commission (No 2) [2013] NSWCA 15

Court of Appeal of New South Wales

McCull & Barrett JJA; Gzell J

Redetermination of appeal - procedural fairness - allegation that appeal determined on a ground on which appellant was not heard - appellant alleged TAFE treated him less favourably than other students - appeal determined that appellant had not alleged an act amounting to racial discrimination under the *Anti-Discrimination Act 1977 (NSW) (Act)* - appellant sought that appeal judgment be recalled and appeal redetermined - *whether*: denial of procedural fairness; appeal had been determined on ground on which appellant not heard; appellant was on notice of issue in relation to *comparator* - inevitability of process of comparison in decision making process regarding discriminatory character of alleged conduct - identification of relevant *comparator* canvassed during appeal - application dismissed.

[Chi](#) (I, B, C, G)

Coregas Pty Ltd v Penford Australia Pty Ltd (No 2) [2013] NSWCA 11

Court of Appeal of New South Wales

Meagher & Hoeben JJA; Bergin CJ in Eq

Costs - special costs order - *Calderbank* offer - appeal allowed in part - respondent ordered to pay 50% of appellant's costs of appeal - appellant sought that costs order be vacated and that



respondent pay appellant's costs on indemnity basis - appellant made offer in accordance with the principles discussed in *Calderbank v Calderbank* (1975) 3 All ER 333 (**offer**) which was not accepted - *whether*: offer was in *Calderbank* form; offer embodied a compromise and its rejection was unreasonable: *Jones v Bradley (No 2)* [2003] NSWCA 258; if respondent had accepted offer appeal would not have proceeded and no costs incurred: *Commonwealth v Gretton* [2008] NSWCA 117; result of appeal was more favourable to appellant than basis on which it was prepared to settle; terms of offer were clear; offer made when only Notice of Intention to Appeal had been filed; offer implicitly excluded pre-judgment interest; to accept offer in terms in which it was expressed would have produced result less favourable to respondent than it achieved; requirement to disclose basis of proposed appeal in covering letter - application dismissed.

[Coregas](#) (I, B, C, G)

LGS v Barbagallo [2013] NSWSC 68

Supreme Court of New South Wales

McDougall J

Costs - indemnity costs - defendant applied for special costs order - *whether*: proceedings were abuse of process; decision to commence and prosecute an obviously hopeless case amounted to *relevant delinquency*: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [44]; *Calderbank* offer gave proper basis for award of costs on indemnity basis; *Calderbank* offer contained real element of compromise; inadequate time held open for acceptance of *Calderbank* offer; appropriate to make gross sum order: s98(4)(c) *Civil Procedure Act 2005* (NSW) - principles applicable to exercise of discretion to make gross sum order: *Harrison v Schipp* (2002) 54 NSWLR 738, *Idoport Pty Ltd v National Australia Bank Ltd* [2005] NSWSC 1273 - *whether*: to grant application for *payment out*; in interests of justice for defendant to have access to money held in court for security for costs; defendant would be able to repay money if it became necessary to do so; basis for making third-party costs order - plaintiff companies deregistered and during that time instructions given by holding company or shareholder - special costs order made including against third parties for period of deregistration.

[LGS](#) (I, B, C, G)



Drapac & Ors v Wain & Ors [2013] VSCA 19

Court of Appeal of Victoria

Neave JA & Vickery AJA

Stay - costs - appellants sought stay of orders that appellants pay respondents' costs of the trial until hearing and determination of appeal and that they pay amount of taxed costs into interest bearing deposit - principles applicable to stay of execution: rr64.25 & 66.16 *Supreme Court (General Civil Procedure) Rules (Rules)* - *whether*: special or exceptional circumstances that justify departing from the position that a successful party is entitled to the fruits of its judgment: *Cellante v G Kallis Industries Pty Ltd* [1991] VicRp 99 - special circumstances have been established: 1-5 *Grantham Street Pty Ltd v Glenrich Builders Pty Ltd* [2008] VSCA 228 - evidentiary onus on applicants to show *special or exceptional circumstances* justifying departure from position that successful party entitled to full benefit of judgment at first instance: *Gangemi v Osborne* [2008] VSCA 221 - *whether*: reasonable ground of appeal; real risk of appeal or substantial part thereof being rendered nugatory by reason of financial position of respondents; prejudice - application dismissed.

[Drapac](#) (I, B, C, G)

From the United Kingdom...

In the matter of Digital Satellite Warranty Cover Ltd and another v Financial Services Authority [2013] UKSC 7

Supreme Court of the United Kingdom

Neuberger P; Hale, Mance, Clarke & Sumption LJJ

Insurance - appeal from orders sought by Financial Services Authority to wind up appellant in public interest pursuant to s367(1)(c) *Financial Services and Markets Act 2000* (UK) (**Act**) for contravention of general prohibition in s19 of the Act which provided that no person may carry on a regulated activity unless he is either an authorised or an exempt person - regulated activities were specified by subordinate legislation and included wide range of insurance business, defined as business of carrying out any of 18 classes of insurance: Art10 *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) (**Order**) - appellants' business consisted of selling and performing extended warranty contracts for repair and replacement of satellite television dishes - appellants did not challenge assumption that contracts were contracts of insurance - appellants undertook only to provide benefits in kind with no contractual obligation to pay money - appellants were not authorised under the Act to carry on any kind of insurance business and no question of exemption arose - *whether*: even on footing that appellants' contracts were contracts of



insurance, the contracts were not of a kind requiring business to be authorised under the Act; Order must be construed as applying only to contracts of insurance providing for pecuniary benefits; appellants' business fell within any of the classes specified in the Order - appeal dismissed.

[Digital Satellite Warranty Cover](#) (I)

From the United States of America...

Lambi v American Family Mutual Ins. Co No: 12-2453 (8th Cir. Feb. 11, 2013)

United States Court of Appeals

Bye & Molloy, Circuit Judges; Kopf, District Judge

Insurance policy - construction - plaintiff sued homeowner's insurance carrier after insurer failed to defend him in lawsuit brought against him by person who alleged that plaintiff had infected him with HIV - appeal from award of summary judgment in favour of insurer - District Court held that insurer's coverage policy was not triggered by lawsuit and that, even if it was triggered, two exclusion clauses applied; being exclusion for infection by communicable diseases and for bodily injury arising from sexual contact - review *de novo* of District Court's judgment: *Clinkscale v St. Therese of New Hope*, 701 F.3d 825, 827 (8th Cir. 2012) - construction of insurance policy - whether injury to person bringing lawsuit was included in insurance policy's definition of bodily injury *and* those injuries could not fall within any exclusions in relation to bodily injury - appeal dismissed.

[Lambi](#) (I)

National Union Fire v American Motors Insurance Company Nos. 11-2500, 11-2533 (7th Cir. Feb. 13, 2013)

United States Court of Appeals

Posner, Wood & Tinder, Circuit Judges

Insurance - coverage dispute - exclusion clauses - *targeted tender* doctrine - scaffolding fell from building, killing and injuring motorists on street below - building owned and managed by two affiliated companies, six other affiliates of which were also involved in case (**Shorenstein entities**) - Shorenstein and one of its insurers, National Union Fire, sought indemnity from respondent insurer - question as to which of the Shorenstein entities were covered by policy - whether policy covered entities additional to the owner of the building - construction of insurance policy - operation of exclusion clauses - need to determine which of the Shorenstein entities had



contributed to settlement of tort claims and in what proportions - *whether*: Shorenstein's claim was barred by exclusion of coverage for personal or bodily injury due to rendering or failure to render any professional service; Shorenstein rendered professional services; Shorenstein gave up right of indemnity when it asked its other insurer to indemnify it - *targeted tender* doctrine allows an insured with multiple insurers to pick one to seek indemnity from and thus leave the others in peace: *Kajima Construction Services, Inc. v St. Paul Fire & Marine Ins. Co.*, 879 N.E.2d 305, 309 (Ill. 2007) - "complicated case made more so by the lawyers' deep immersion in the jargon and esoteric of insurance law" - remitted to District Court to recompute reimbursement to which Shorenstein entitled.

[National Union Fire](#) (I, C)

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