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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)

Commissioner of Taxation v McGrouther (FCAFC) - taxation - taxpayers could withdraw notices given to Commissioner - Commissioner's appeal allowed (B)

Nazero Group Pty Ltd v Top Quality Construction Pty Ltd (NSWSC) - security of payments - plaintiff seeking to quash adjudication decision required to pay unpaid portion of adjudication amount into Court (C)

Sung v Malaxos (NSWSC) - succession - family provision order in favour of de facto wife of deceased refused (B)

Wong v Maroubra Automotive Refinishers Pty Ltd; Ayres v Maroubra Automotive Refinishers Pty Ltd (No 2) (NSWSC) - detinue - repairer not entitled to withhold possession of cars until payment of towing and storage fees - damages (I B)

122 Pitt Street Pty Ltd ACN 104 825 961 v Universal 1919 Pty Ltd (NSWSC) - landlord and tenant - independent valuer complied with lease - parties bound by valuation (I B)

McIntyre v Fish (VSC) - judicial review - adequate reasons for opinion of medical panel - judicial review refused (I B)

Idameneo (No 123) Pty Ltd v Suszko (SASC) - pleadings - dismissal of application to amend defence and plead set-off and counterclaim - fresh evidence not admitted - recall of order refused (I B)

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Summaries with links (5 Minute Read)

Commissioner of Taxation v McGruther [2015] FCAFC 34

Full Court of the Federal Court of Australia

Allsop CJ; Pagone & Davies JJ

Taxation - respondents gave Commissioner notices requiring him to make objection decision - notices given two days after Commissioner served first respondent with notice under s264 *Income Tax Assessment Act 1936* (Cth) requiring him to attend examination - respondents "withdrew" their notices before end of 60 day period referred to in s14ZYA(3) as condition of Commissioner agreeing to adjourn examination of first respondent - despite withdrawal, respondents commenced appeal under Pt IVC against the disallowance of objections after expiry of 60 day period - Commissioner sought to strike out or dismiss appeal on basis there was no objection decision - respondents contended that once election made by taxpayer to give notice it could not be withdrawn by taxpayer and objections were deemed to have been disallowed - primary judge found in favour of respondents - statutory construction - *quilibet potest renunciare juri pro se introducto* - whether rights given to taxpayer under s14ZYA capable of waiver held: primary judge erred in finding notice could not be withdrawn - leave to appeal granted - appeal allowed.

[Commissioner](#) (B)

Nazero Group Pty Ltd v Top Quality Construction Pty Ltd [2015] NSWSC 232

Supreme Court of New South Wales

Hammerschlag J

Security of payments - plaintiff and first defendant entered agreement under which first defendant would do formwork and concreting for plaintiff - payment dispute arose - adjudicator made determination in first defendant's favour - plaintiff sought to quash adjudication - first defendant sought order requiring plaintiff to pay unpaid portion of adjudicated amount as security into Court pending final determination of proceedings - s25(4)(b) *Building and Construction Industry Security of Payment Act 1999* (NSW) required payment of such amount into Court pending determination of proceedings to set aside a judgment based on adjudication, however in this case first defendant had not filed adjudication as judgment for a debt - exercise of discretion in particular circumstances of case - s25 held: policy of not served by removing first defendant's protection pending determination of plaintiff's challenge even though s25(4)(b) did not apply in terms - manifestly unfair use of Court's process to permit plaintiff to mount its challenge without having to pay money into Court - proceedings stayed unless plaintiff paid unpaid portion of amount into Court.

[Nazero](#) (C)

Sung v Malaxos [2015] NSWSC 186

Supreme Court of New South Wales

Pembroke J

Succession - family provision - claim by plaintiff de facto wife of testator - deceased left Will

dividing estate between daughter and plaintiff - adequate and proper provision - freedom of testamentary disposition - held: manner in which testator divided estate was carefully considered and appropriate - totality of evidence supported testator's wisdom and justice of testator's apportionment - to grant litany of plaintiff's requirements would flout reasonable, fair and rational scheme of testamentary disposition and seriously disadvantage testator's daughter and husband - plaintiff's claim not justified by statutory criteria in Ch 3 *Succession Act 2006* (NSW) - claim dismissed.

[Sung](#) (B)

Wong v Maroubra Automotive Refinishers Pty Ltd; Ayres v Maroubra Automotive Refinishers Pty Ltd (No 2) [2015] NSWSC 222

Supreme Court of New South Wales

McCallum J

Detinue - two separate proceedings concerning a repairer's entitlement to withhold possession of cars until payment by owner or NRMA of towing and storage fees - each plaintiff was owner of a car insured by NRMA - each car damaged in accident - in each case tow truck driver nominated the premises of particular repairer as a destination to which car could be towed - owners consented to course and did not request repairer to make repairs - plaintiffs contended repairer wrongly refused to deliver up possession of the cars upon demand and was liable in detinue - repairer sought payment of disputed towing and storage fees from each plaintiff or NRMA - s53 *Fair Trading Act 1987* (NSW) - s62 *Tow Truck Industry Act 1998* (NSW) - held: no contract of bailment for reward or work and labour came into existence - defendant's reliance on Motor Vehicle Insurance and Repair Industry Code of Conduct misconceived - defence to claim in detinue failed - cross-claim dismissed - amounts paid into Court released to plaintiff.

[Wong](#) (I B)

122 Pitt Street Pty Ltd ACN 104 825 961 v Universal 1919 Pty Ltd [2015] NSWSC 234

Supreme Court of New South Wales

Kunc J

Landlord and tenant - plaintiff lessor leased part of building to defendant lessee - lease was term of 10 years with option for further 10 years - lessee exercised option - lease provided for market review of base rent upon exercise of option to renew - lessor proposed new base rent - lessee engaged rent dispute mechanism under lease resulting in appointment of independent valuer - valuer determined market rent approximately \$500,000 less than figure proposed by lessor - if valuer complied with lease by disregarding value of fitout parties accepted they were bound by determination - held: valuer complied with lease - valuation binding on parties - summons and cross-summons dismissed

[122Pitt](#) (I B)

McIntyre v Fish [2015] VSC 82

Supreme Court of Victoria

Zammit J

Judicial review - plaintiff sought review of opinion of medical panel concerning injury suffered



during course of her employment - medical panel found plaintiff suffering from condition not relevant to claimed injury and that plaintiff had no ability to return to preinjury employment - plaintiff sought to quash opinion on basis of inadequate reasons - ss65 & 68 *Accident Compensation Act 1985* (Vic) - held: reasons adequately demonstrated Panel's path of reasoning - Panel not required to embark on explanation of which medical opinions it agreed or disagreed with - judicial review refused.

[McIntyre](#) (I B)

Idameneo (No 123) Pty Ltd v Suszko [2015] SASC 39

Supreme Court of South Australia

Stanley J

Pleadings - defendant sought recall of order dismissing application to amend defence and to plead set-off and counterclaim in reliance on "fresh" evidence - Court's power to recall order previously made - test for reception of fresh evidence - held: Court did not consider evidence would probably have had important influence on outcome of application - fresh evidence not admitted - application to recall order refused.

[Idameneo](#) (I B)

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