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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)

Austral Masonry (NSW) Pty Ltd v Cementech Pty Ltd (FCAFC) - contract - intellectual property licence agreement - appellant obliged to contribute to respondent's costs of litigation against alleged infringer of patent (B)

Aravanis v Gillespie (FCA) - trusts - bankruptcy - common intention - constructive trust - bankrupt estate not entitled to proceeds of sale of property (B)

Morris v Murray; Vergis v Morris (NSWSC) - family provision orders made in favour of two of deceased's children (B)

Lawrence v Australian War Memorial (NSWSC) - probate of lost will granted (B)

Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (NSWSC) - leases and tenancies - option to renew - equitable set-off - loss of chance (I B)

Wong v McConville (No. 2) (VSC) - costs - *Calderbank* offers - plaintiffs to pay defendants' costs of successful application to modify restrictive covenant (B)



City of Kwinana v Lamont (WASCA) - building and construction - builder made alteration to structure without approval - appeal allowed (C)

Summaries with links (5 minute read)

Austral Masonry (NSW) Pty Ltd v Cementech Pty Ltd [2014] FCAFC 72

Full Court of the Federal Court of Australia

Jagot, Nicholas & Yates JJ

Contract - intellectual property licence agreement permitted appellant to exploit patent owned by first respondent - before expiry of licence agreement licensor sued alleged infringer of patent - primary judge held licensee was liable for half of licensor's costs of proceedings pursuant to licence agreement - construction of agreement - common intention - commercial practicality - ss13 & 120(1) *Patents Act 1990* (Cth) - held: claim that licensee's obligation to pay costs was not engaged because licensee had not served infringement notice failed - once licensor had elected to commence proceedings, licensee's obligation to pay costs continued after agreement ended - primary judge's exercise of discretion to make declaration did not miscarry - appeal dismissed.

[Austral Masonry \(NSW\) Pty Ltd](#) (B)

Aravanis v Gillespie [2014] FCA 630

Federal Court Australia

Jagot J

Trusts - bankruptcy - dispute concerning proceeds of sale of unit held in solicitor's trust account - applicant was trustee of bankrupt estate - property purchased in bankrupt son's name for mother who mother contributed to purchase price - mother and respondent son lived in property and respondent contributed to mortgage- trustee claimed that the presumption of advancement from mother to bankrupt applied - trustee claimed subsequent sale of property to respondent was at under-value and thus bankrupt held equitable lien - alternatively trustee claimed sale was void pursuant to s120 *Bankruptcy Act 1966* (Cth) - held: evidence was against application of presumption of advancement and existence of resulting trust proportionally in favour of bankrupt and mother - common intention of parties was that respondent would hold legal title of property as constructive trustee for mother - bankrupt's constructive trust on behalf of mother came to end on sale - trustee's claims for unpaid vendor's lien could not be sustained - claims arising under Act did not arise.

[Aravanis](#) (B)

**Morris v Murray; Vergis v Morris [2014] NSWSC 756**

Supreme Court of New South Wales

Young AJA

Family provision - costs - applications by two children of deceased for family provision under *Succession Act 2006* (NSW) - applicants given small legacies under will and residue of estate given to sister deterioration in applicants' circumstances since will made - inaccuracy of stated reasons in will for benefitting one child over others - s59 *Succession Act 2006* (NSW) - high costs incurred in proceedings - held: provision orders made for both applicants - applicants' costs to be paid on party/party basis to reduce extent to which sister's residue would be reduced.

[Morris](#) (B)**Lawrence v Australian War Memorial [2014] NSWSC 757**

Supreme Court of New South Wales

Young AJA

Probate - application for probate of lost will of deceased - whether probate should be granted on terms identical to torn copy of will found among deceased's possessions - presumption of revocation - evidence of terms of will and execution - standard of proof - whether doctrine of dependant relative revocation excluded by ss8(2) & 15(1) *Succession Act 2006* (NSW) - whether doctrine could be used to grant probate of earlier will - held: strong evidence that deceased intended to die testate - presumption that will was destroyed rebutted - existence of will established - probate granted.

[Lawrence](#) (B)**Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2014] NSWSC 792**

Supreme Court of New South Wales

Young AJA

Leases - estoppel by convention - equitable set-off - dispute between tenant and landlord over shop and restaurant - plaintiff former tenant claimed damages for wrongful termination of its tenancy and for loss of chance to earn profits from business at site - landlord claimed option not properly exercised because tenant was in default under lease - whether landlord estopped from denying option duly exercised - construction of lease - credit - held: lease was varied to include option for further term of 3 years - tenant did not exercise option - landlord failed to give tenant notice under s133E *Conveyancing Act 1919* (NSW) so that default of tenant did not affect exercise of option - parties had agreed option was to be treated as having been exercised and that tenant had right to new lease - new lease was to be determinable on a month's notice - lease was determined on 14 day's notice and thus was wrongful - however tenant had accepted termination as a repudiation of lease - no issue as to who had right to possession - Court not persuaded plaintiff had suffered substantial loss - subject to further submissions, proceedings to be dismissed.

[Palermo Seafoods Pty Ltd](#) (I B)

**Wong v McConville (No. 2) [2014] VSC 282**

Supreme Court of Victoria

Derham AsJ

Costs - modification of restrictive covenant - Court granted application - three *Calderbank* offers were served on defendants each of which was rejected - costs in restrictive covenant applications - s84 *Property Law Act 1958* (Vic) - non-applicability of general rule that costs follow event - held: provided defendants conducted proceeding responsibly they should have costs - one offer failed as a *Calderbank* offer - rejection of other offers not unreasonable - defendants had conducted proceeding responsibly at least until plaintiff abandoned ground under s84(1)(a) of the Act on first day of trial - when defendants learnt there was no reliance s84(1)(a) there was little to be saved by seeking to resolve matter at that point - plaintiff to pay defendants' costs.

[Wong](#) (B)**City of Kwinana v Lamont [2014] WASCA 112**

Court of Appeal of Western Australia

Murphy & Mazza JJA; Edelman J

Building work - statutory interpretation - respondent carried out work on house - council alleged builder contravened s374(1)(b) *Local Government (Miscellaneous Provisions) Act 1960* (WA) in that he had altered a structure without necessary approval - council also issued a stop work notice under s401A - primary judge quashed Magistrate's convictions of builder on basis it was not proved beyond reasonable doubt that work was alteration of structure - *alter - structure* - held: there was an alteration within the meaning of s374(1)(b) by execution of the works - appeal allowed.

[City of Kwinana](#) (C)

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