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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)

Valder v Fabrizi (NSWCA) - assault and battery - extension of time to appeal from decision on liability refused (I)

Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) (NSWCA) - environment and planning - unlawful calculation of contribution payable for waste received at facility - appeal dismissed (C G)

Polon v Dorian (NSWSC) - professional negligence - bridging finance scheme - proportionate liability - investor's claim against solicitor and firm upheld (I B)

Levy v Watt (VSCA) - limitation of actions - conversion - fraudulent concealment - commencement of limitation period postponed - appeal dismissed (I B)

Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd (VSC) - personal property - *security interest* - no entitlement to register financing statement - injunctions granted (I B C)

Millard v RI-CO (2004) Pty Ltd (In liq) (No. 2) (QSC) - costs - workers compensation - worker's claim for damages dismissed - worker to pay costs on standard basis (I)



Mortgage Ezy Australia Pty Ltd v Turco (WASC) - loan agreement - unjust enrichment - injunction restraining borrower from disposing of proceeds of sale refused (B)

Summaries with links (5 minute read)

Valder v Fabrizi [2014] NSWCA 152

Court of Appeal of New South Wales

Basten, Macfarlan & Emmett JJA

Assault - battery - unrepresented litigant - applicant sued respondent in tort for alleged assault which took place during fracas at family gathering - trial judge dismissed proceedings - applicant sought extension of time to appeal from decision on liability - whether reasonable grounds for challenging findings - admission of evidence - challenge to transcript - assessment of evidence - held: in absence objective evidence demonstrating that findings as to credibility and reliability were erroneous, applicant faced significant if not insuperable hurdle in inviting Court to set aside ultimate conclusion - on basis of material presented by applicant it was not possible to conclude an appeal would have reasonable prospects of success - application for extension of time refused.

[Valder](#) (I)

Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) [2014] NSWCA 149

Court of Appeal of New South Wales

Bathurst CJ; McColl & Leeming JJA

Environment and planning - occupier of waste facility required by s88(1) *Protection of the Environment Operations Act 1997* (NSW) to pay EPA contribution prescribed by regulations in respect of waste received - *Protection of the Environment Operations (Waste) Regulation 2005* (NSW) calculated contributions by reference to occupiers' records of tonnes of waste received at site - cl 6 applied where there were no or inadequate records and required EPA to estimate tonnes of waste - company in liquidation which operated quarry and received substantial amounts of waste from off-site had not kept accurate records - EPA claimed company required to pay a contribution calculated by reference to waste *at site* - liquidator rejected EPA's proof of debt - statutory interpretation - held: regulation to be construed as a whole and in context, adopting a construction which is within power- on its proper construction cl 6 only authorised an estimate of waste received at the land - contribution calculated by EPA did not comply with Act or regulation and therefore no error was disclosed by primary judge dismissing the EPA's appeal - not appropriate to deal with notice of contention - appeal dismissed.

[Environment Protection Authority](#) (C G)

**Polon v Dorian [2014] NSWSC 571**

Supreme Court of New South Wales

Hall J

Professional negligence - solicitors' duties - implied retainer - vicarious liability - concurrent wrongdoers - negligent misstatement - misleading and deceptive conduct - investor claimed damages from solicitor and firm for losses suffered after investing money in bridging finance scheme - scheme originally operated by companies now in liquidation and directors bankrupt - investor alleged solicitor made representations concerning scheme which played material part in her decision to invest - plaintiff claimed representations related to both security of scheme and security of transactions between companies and third-party borrowers - investor alleged firm vicariously liable for solicitor's conduct - credibility and demeanour of witnesses - whether reasonable reliance on representations - whether solicitor was mere conduit - held: representations made by solicitor and scheme's proponents - implied retainer between plaintiff and solicitor - defendants liable in negligence, breach of s42 *Fair Trading Act*, breach of retainer and breach of fiduciary duty - liability arose from failure to take reasonable care within meaning of s34(1)(a) *Civil Liability Act 2002* (NSW) - combined proportionate liability of directors of companies assessed at 60% - proportionate liability of first defendant, who introduced plaintiff to companies and took no part in proceedings assessed at 10% - proportionate liability of solicitor and firm assessed at 30% because role in promoting scheme was more than drafting documents on instructions - judgment for plaintiff.

[Polon](#) (I B)**Levy v Watt [2014] VSCA 60**

Court of Appeal of Victoria

Warren CJ; Tate & Santamaria JJA

Limitation of actions - conversion - fraudulent concealment - appellant solicitor was left Rupert Bunny painting by client - solicitor unaware painting stolen and of searches by its previous owner and by respondent executors - no evidence to suggest client involved in or knew about theft - police seized painting at solicitor's home - Magistrate ordered painting to be placed in executors' possession - solicitor sought declaration executors' proprietary rights had been extinguished - solicitor appealed from decision in which trial judge held s27(b) *Limitation of Actions Act 1958* (Vic) operated to postpone commencement of limitation period as executors' right of action in conversion had been concealed by fraud of original thief through whom solicitor was claiming - solicitor did not challenge conclusion that s27(a) did not apply as he had been given painting and had not established client was a bona fide purchaser for value without notice - ss3(4), 5(1), 5(1AAA), 6, 23B, 27(a) & 27(b) - held: no error in primary judge's ruling on fraudulent concealment - trial judge correctly dismissed executors' argument concerning scope of operation of s27(a) - rulings on s27(a) and s 27(b) affirmed - appeal dismissed.

[Levy](#) (I B)

**Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd [2014] VSC 217**

Supreme Court of Victoria

Robson J

Securities - personal property - injunctions - joint venture for purchase and development of golf course - plaintiffs sought to prevent registration by defendants of financing statement under *Personal Property Securities Act 2009* (Cth) - defendants claimed they had been deprived of interest in project and threatened to lodge new financing statements for registration if existing registrations removed - plaintiffs claimed that even if defendants held a proprietary interest in project that did not give rise to any *security interest* - consensual transaction - ss12, 150, 180, 181 & 182 - held: defendants not entitled to register financing statement as they did not have any interest in plaintiffs' personal property - third defendant accountant had not been involved in any transactions or dealings with plaintiffs - Court had jurisdiction to restrain defendants from engaging in threatened conduct - Court satisfied there was unacceptable risk that defendants would file a financing statement with respect to plaintiffs' personal property - injunctions granted.

[Sandhurst Golf Estates Pty Ltd](#) (I B C)**Millard v RI-CO (2004) Pty Ltd (In liq) (No. 2) [2014] QSC 100**

Supreme Court of Queensland

A Lyons J

Costs - negligence - work injury damages - worker's claim for damages dismissed - - defendant sought costs on standard basis - plaintiff said there should be no order as to costs - proceeding involved *certificate injury* - parties agreed that Ch 5 Pt 12 Div 1 (ss310 to 314) Reprint 2C *Workers Compensation & Rehabilitation Act 2003* (Qld) applied - s311 provided that if court had assessed damages in proceedings principles in ss312 -314 applied - amendments to Division were passed in 2010 on basis it was anomalous for plaintiff who recovered less than a defendant's offer to suffer cost consequences yet a plaintiff who received no damages to have no cost consequences - s311 specifically amended to include words: *if a court dismisses the claim* - effect of amendments - whether plaintiff had obtained a *judgment* within meaning of s313(1)(b) - held: in this case plaintiff's claim had been dismissed - s311 made it clear that ss312 to 314 did not apply and Court was required to consider general principles in relation to costs - case also governed by s221 *Supreme Court Act 1995* (Qld) and r681(1) *Uniform Civil Procedure Rules 1999* (Qld) - plaintiff to pay costs of and incidental to proceeding to be assessed on the standard basis.

[Millard](#) (I)**Mortgage Ezy Australia Pty Ltd v Turco [2014] WASC 172**

Supreme Court of Western Australia

Le Miere J

Interlocutory injunction - loan agreement - unjust enrichment - lender sought to restrain borrower from disposing of proceeds of sale of property or freezing order - lender had discharged mortgage of property without repayment of loan by mistake - defendants had executed mortgage over property to bank to secure new loan - borrowers continued to make payments under loan



agreement then defaulted - bank commenced proceeding against borrowers - deed of release provided bank entitled to sell property pursuant to power of sale under mortgage and that 50% of net proceeds of sale would be paid to borrower - lender claimed proprietary interest in fund to be paid by bank to borrower and that it had a prima facie case against lender under repayment covenant in loan agreement - construction of loan agreement - s123 *Transfer of Land Act 1893* (WA) - held: Court not persuaded borrower enriched by discharge of mortgage - lender did not make out prima facie case it had a proprietary claim to the money to be received - Court not satisfied lender made good arguable case based on covenant to repay in loan agreement - application dismissed.

[Mortgage Ezy Australia Pty Ltd](#) (B)

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