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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)

Vassallo Constructions Pty Ltd v Andergrove Lakes Pty Ltd (FCA) - pleadings - summary judgment - no reasonable prospect of establishing claim - leave to amend statement of claim refused (B C)

Daley v Hughes (NSWCA) - solicitors' costs - appeal from costs assessor's "Draft Reasons" was incompetent - "Draft Reasons" not a *decision* - appeal allowed (I G)

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (NSWCA) - corporations - statutory demands - no statement of belief of absence of genuine dispute in affidavit - demands set aside (B)

GM Amalgamated Investments (Dulwich Hill) Pty Ltd v Mills (NSWCA) - solicitors' costs - solicitors not entitled to costs of motion abandoned at hearing (I)

Bleyer v Google Inc (NSWSC) - defamation - principle of proportionality - proceedings permanently stayed (I)

Re Davies (VSC) - administration and probate - further provision from deceased's estate made for deceased's grandsons in sum to be held on trust (B)



Simpson v Jackson (QSC) - contract - sale of property - sellers' termination of contract valid, following buyers' failure to provide notice by 5 pm - caveat removed (B)

Summaries with links (5 minute read)

Vassallo Constructions Pty Ltd v Andergrove Lakes Pty Ltd [2014] FCA 862

Federal Court of Australia

Dowsett J

Summary judgment - pleadings - builder sued property developer for recovery of debt pursuant to contract, damages for breach of contract, and damages pursuant to s236 *Competition and Consumer Act 2010* (Cth) - developer sought summary dismissal of major part of builder's claim in contract on ground builder had no reasonable prospect of establishing alleged acceptance of offer - builder pleaded that, if alleged acceptance did not constitute acceptance, then it constituted misleading or deceptive conduct - developer denied any misrepresentation - builder sought to amend statement of claim to allege that, if no contract was formed on date of alleged acceptance, subsequent negotiations between the parties led to the formation of a contract - held: alleged acceptance did not result in a binding contract - builder had no reasonable prospect of establishing that an agreement was ever concluded - leave to amend refused.

[Vassallo Constructions Pty Ltd](#) (B C)

Daley v Hughes [2014] NSWCA 268

Court of Appeal of New South Wales

Meagher & Emmett JJA; Tobias AJA

Solicitors' costs - client retained solicitors in 2003 to act in claim arising from motor vehicle accident - solicitors did not disclose costs until 2005 - counsel's costs estimate not disclosed until one month before matter settled in 2011 - client contended solicitors costs were capped by *Motor Accidents Compensation Regulation (No 2) 1999* (NSW) - solicitors argued they contracted out of statutory caps pursuant to cl 11 of the Regulation - costs assessor issued "Draft Reasons" indicating he would assess costs on basis caps applied from time retainer commenced until time costs disclosure made in 2005 - client appealed to Supreme Court against *decision* of costs assessor - s208L *Legal Profession Act 1987* (NSW) - primary judge found appeal competent and solicitors' fees were capped - solicitors argued appeal incompetent because costs assessor had not made *decision* within meaning of s208L and that they were entitled to uncapped costs notwithstanding defects in disclosure - held: "Draft Reasons" no more than expression of intention as to how costs assessor would complete assessment - not a decision from which appeal could be brought - because appeal was incompetent, neither primary judge nor Court had jurisdiction to determine whether solicitors' costs were capped - appeal allowed.

[Daley](#) (I G)

**Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [2014] NSWCA 262**

Court of Appeal of New South Wales

Beazley P; Barrett & Gleeson JJA

Corporations - winding up - statutory demand - Kisimul applied under s459G *Corporations Act 2001* (Cth) to set aside two statutory demands served on it by Clear Position - primary judge dismissed each application - affidavit accompanying statutory demand did not contain statement *I believe that there is no genuine dispute about the existence or amount of the debt* - whether omission constituted *some other reason* within s459J(1)(b) why demand should be set aside - held: statement by a deponent of s459E(3) affidavit of belief of absence of genuine dispute provides significant measure of assurance that objectives of Pt 5.4 are being observed by creditor - absence of statement meant that this measure of assurance was lacking and put Kisimul into position of uncertainty from which legislation intended it should be protected - primary judge erred in conclusion as to absence of *some other reason why the demand should be set aside* - appeal allowed.

[Kisimul Holdings Pty Ltd](#) (B)**GM Amalgamated Investments (Dulwich Hill) Pty Ltd v Mills [2014] NSWCA 271**

Court of Appeal of New South Wales

Leeming JA

Solicitors' costs - solicitor formerly acted for client in proceedings determined favourably - solicitor claimed he had not been paid - solicitor sought to recover outstanding fees and obtained certificate of determination of costs from costs assessor - solicitor sought orders that amount be paid directly to him in satisfaction of judgment debt created by registration of costs assessor's certificate - solicitor abandoned motion at hearing but sought that client pay his costs of the motion - held: no power under s46 *Supreme Court Act 1970* (NSW) for Judge of Appeal to make injunctive orders in relation to fruits of judgment - no sound basis for exercise of a cost discretion favourable to solicitor following his acceptance that the notice of motion should be dismissed - amended notice of motion dismissed.

[GM Amalgamated Investments \(Dulwich Hill\) Pty Ltd](#) (I)**Bleyer v Google Inc [2014] NSWSC 897**

Supreme Court of New South Wales

McCallum J

Defamation - plaintiff alleged Google Inc published items defamatory of him to three people in form of Google search results - Google Inc sought order that proceedings be permanently stayed or summarily dismissed as abuse of process - principle of proportionality - whether Google Inc was publisher of its search engine results - innocent dissemination - unenforceability of Australian judgment in United States - complexity of issues - held: in all circumstances, Court persuaded that resources of Court and parties that would be expended to determine the claim were out of all proportion to interest at stake - proceedings permanently stayed.

[Bleyer](#) (I)

**Re Davies [2014] VSC 248**

Supreme Court of Victoria

McMillan J

Administration and probate - testator's family maintenance - plaintiffs were grandsons of deceased - plaintiffs sought further provision from deceased's estate for proper maintenance and support pursuant to s91 *Administration and Probate Act 1958* (Vic) - defendant executor accepted deceased had a responsibility to make provision for plaintiffs, and that distribution under Will did not make adequate provision for them - extent of provision - held: determination of amount of provision which Court should order required balance between claims of other beneficiaries, needs of plaintiffs, and size of estate - further provision made for each of plaintiffs in sum to be held on trust for their benefit until each of them attained 28 years.

[Re Davies](#) (B)**Simpson v Jackson [2014] QSC 191**

Supreme Court of Queensland

Applegarth J

Contract - buyers sought specific performance of contract for sale of property - seller contended contract was terminated and sought order that caveat over property be removed - contract required buyers to provide notice of satisfactory building inspection by 5pm on day of inspection - notice not given by 5pm - seller sent notice of termination at 5:06pm - buyers sent notice of satisfactory building inspection later that day - held: clause stating notices given after 5pm were taken to be given on the next business day did not mean that notices were taken to be given simultaneously, or in a different order to that in which they were, in fact, given - to construe contract as if it provided that notices given after 5pm were given simultaneously would give rise to surprising and unintended results which might negate rights, including a right to terminate - notice of termination effective - specific performance refused - caveat removed.

[Simpson](#) (B)

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