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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement



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Executive Summary (1 minute read)

May v Brahmhatt (NSWCA) - contract - guarantee not unjust - leave to appeal granted - appeal dismissed (B)

Nettleton v Rondeau (NSWSC) - negligence - motor vehicle accident - separate determination of liability and damages (I)

Hancock v Rinehart (NSWSC) - commercial arbitration - no dispute under deed requiring transfer of proceedings to arbitration - stay refused (B C)



Toppi v Lavin (NSWSC) - equitable contribution - joint venturers equally liable as co-sureties for money paid under guarantee (B)

Masterton v Coles Supermarkets (VSC) - administrative law - *significant injury* - no error in decision of medical review panel - proceeding dismissed (I G)

Rapuano (t/as Raps Electrical) v Frisan (SASCFC) - costs - misconduct - trial judge erred into taking invalid offer into account when making costs order - costs order made (I B)

Davies v Apted (SASCFC) - contract - oral loan agreement - borrower acting in own right not as director of company - appeal dismissed (B)

Summaries with links (5 minute read)

May v Brahmhatt [2013] NSWCA 309

Court of Appeal of New South Wales

Beazley P, Basten JA & Bergin CJ in Eq

Contract - procedural fairness - trial judge gave judgment for respondent for rental payments which applicant had guaranteed under lease between construction company and respondent - applicant sought leave to appeal from decision - applicant contended District Court did not have jurisdiction to determine proceedings and that trial judge denied him procedural fairness by failing to consider whether guarantee invalid under *Contracts Review Act 1980* (NSW) - held: District Court had jurisdiction - s6(2) of the Act did not preclude appellant from relief - guarantee not unjust at time it was made so as to enliven Court's jurisdiction under s7 of the Act - leave to appeal granted - appeal dismissed.

[May](#) (B)

Nettleton v Rondeau [2013] NSWSC 1321

Supreme Court of New South Wales

Hall J

Negligence - plaintiff claimed damages in respect of motor vehicle accident said to have occurred while plaintiff was cycling - plaintiff sought order under r28.2 *Uniform Civil Procedure Rules 2005* (NSW) that question of liability be separately determined from question of damages - plaintiff's onus to establish normal position should be departed from - principles applicable to considering determination of separate questions - held: no overlap of issues or evidence on liability and



quantum which militated against severing liability from damages hearing - no overlap involving issues of credibility concerning plaintiff - plaintiff only at relatively early stages since accident's occurrence - no real countervailing circumstances against application - application granted.

[Nettleton](#) (I)

Hancock v Rinehart [2013] NSWSC 1352

Supreme Court of New South Wales

Bergin CJ in Eq

Stay - commercial arbitration - plaintiffs sought relief against first defendant in respect of her conduct as trustee of trust established by deed - plaintiffs claimed first defendant misconducted herself in administration of trust and breached obligations of trustee - defendants sought to stay proceedings and transfer of all or part of proceedings to arbitration/mediation - defendants claimed that, on issues joined on amended pleadings, there was a dispute *under* the deed within meaning of a clause of the deed - defendants contended dispute was a *matter which is the subject of an arbitration agreement* within meaning of s8(1) *Commercial Arbitration Act 2012* (WA) and must be referred to arbitration - plaintiffs alleged defendants were attempting to relitigate matters subject of Court of Appeal judgment - construction of deed - held: there was no dispute under the deed disclosed by the amended claims and defences - motion dismissed.

[Hancock](#) (B C)

Toppi v Lavin [2013] NSWSC 1361

Supreme Court of New South Wales

Rein J

Equity - equitable contribution - joint venture - plaintiffs sought contribution from defendants in respect of money paid by plaintiffs under guarantee - company purchased property with funds advanced by bank - purchase was part of business venture between first plaintiff and first defendant - bank provided funds for building work and a business loan facility to company - all loans guaranteed - conflicts arose between joint venturers - company's property sold - net proceeds paid to bank but insufficient to discharge loans - principles of contribution relevant to guarantee - effect of deed of settlement and covenant not to sue - co-sureties - *do equity - want of proof* - held: first and second plaintiffs' claim for equitable contribution soundly based - subject to adjustment, first and second plaintiffs entitled to recover contribution for half of difference between what they paid and what first and second defendants paid, plus interest.

[Toppi](#) (B)



Masterton v Coles Supermarkets [2013] VSC 498

Supreme Court of Victoria

Beach J

Administrative law - plaintiff alleged she suffered injury when she slipped in supermarket - plaintiff sought to recover damages for non-economic loss from respondent - certificate of assessment satisfied *significant injury* requirements of PtVBA *Wrongs Act 1958* (Vic) - first defendant disputed assessment - medical panel determined whole person impairment from physical and psychiatric injuries did not satisfy threshold level in s28LB of the Act - plaintiff sought review of panel's decision - plaintiff contended it was not open to panel to conclude her injury had stabilised - held: commencement of medical panel review process by plaintiff presupposed her injury had stabilised - no dispute between parties at any stage that plaintiff's injury had not stabilised - proceeding dismissed.

[Masterton](#) (I G)

Rapuano (t/as Raps Electrical) v Karydis [2013] SASFC 93

Full Court of the Supreme Court of South Australia

Vanstone, David & Peek JJ

Costs - plaintiff electrician sought to recover fees for services and cost of materials from defendants - plaintiff succeeded on quantum meruit claim - plaintiff sought order for costs - trial judge found one of defendants' offers was within r187 *District Court Civil Rules 2006* (SA) and that plaintiff had not bettered offer - trial judge found plaintiff had exaggerated claims and defendants had engaged in misconduct - plaintiff appealed from trial judge's order that defendants pay 70% of plaintiff's costs up to specified date and that plaintiff pay 85% of defendants' costs subsequent to that date - held: defendants' offer was not a valid offer within r187 of the Rules - plaintiff's pre-action offer and defendants' counter-offer were not admissible pursuant to r33(7)(b) of the Rules - none of the offers were admissible by s67C(2) *Evidence Act 1929* (SA) - trial judge erroneously took offer into account when making costs order - plaintiff should be deprived of full order for costs due to misconduct - defendants failed to establish entitlement to order for costs due to their misconduct - plaintiff awarded 50% of costs on party-party basis.

[Rapuano](#) (I B)



Davies v Apted [2013] SASCFC 92

Full Court of the Supreme Court of South Australia

Kourakis, Vanstone & Peek JJ

Contract - oral loan agreement - lender handed borrower blank cheque for amount which was borrowed from trustees of superannuation fund - cheque paid initially into account of company of which borrower was controlling director - most of amount then placed into account of borrower's wife and most used to purchase stake in bar business - name of purchaser appearing in share sale agreement was company - lender sought to recover amount advanced and interest - lender contended loan was made to borrower personally, not to company - borrower claimed advance was made to company and that this was borne out by use to which money was put - trial judge found in favour of lender - borrower argued judge wrongly denied himself resort to surrounding facts and circumstances in construing terms of oral contract - borrower also argued trial judge misused evidence - held: reasons of trial judge comprehensive concise and compelling - no error in decision - appeal dismissed.

[Davies](#) (B)

The Sign-Post

By Edward Thomas

The dim sea glints chill. The white sun is shy,
 And the skeleton weeds and the never-dry,
 Rough, long grasses keep white with frost
 At the hilltop by the finger-post;
 The smoke of the traveller's-joy is puffed
 Over hawthorn berry and hazel tuft.
 I read the sign. Which way shall I go?
 A voice says: You would not have doubted so
 At twenty. Another voice gentle with scorn
 Says: At twenty you wished you had never been born.

One hazel lost a leaf of gold
 From a tuft at the tip, when the first voice told
 The other he wished to know what 'twould be
 To be sixty by this same post. "You shall see,"
 He laughed — and I had to join his laughter —



“You shall see; but either before or after,
Whatever happens, it must befall,
A mouthful of earth to remedy all
Regrets and wishes shall freely be given;
And if there be a flaw in that heaven
’Twill be freedom to wish, and your wish may be
To be here or anywhere talking to me,
No matter what the weather, on earth,
At any age between death and birth,
To see what day or night can be,
The sun and the frost, the land and the sea,
Summer, Autumn, Winter, Spring, —
With a poor man of any sort, down to a king,
Standing upright out in the air
Wondering where he shall journey, O where?”

[Edward Thomas](#)

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