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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)

Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd (FCAFC) - corporations - winding up - liquidators removed for lack of impartiality or independence (B G)

Corby v Allen & Unwin Pty Ltd (NSWCA) - pleadings - defamation - imputations struck out - appeal upheld (I)

In the matter of HIH Insurance Ltd (in liq); Smith v McGrath; Baldock v McGrath (NSWSC) - insurance - solicitors not authorised to sue liquidators on behalf of shareholders - proceedings dismissed (I B)

Re Kevin McNamara & Son Pty Ltd (VSC) - corporations - arbitral award against builder - trustee in bankruptcy of one joint creditor acquired only equitable interest in debt - statutory demand from other joint creditor stating full amount valid (B C)

You v Thomas (No. 2) (VSC) - costs - offer of compromise - costs of successful application quashing decision Building Appeals Board - indemnity costs refused (I C)



Queensland Building and Construction Commission v Lifetime Securities (Australia) Pty Ltd (QCA) - building and construction - Commission's claim for recovery under statutory scheme not bound to fail - summary judgment refused (I B C G)

Fraser v Bursewood Resort (Management) Ltd (WASCA) - negligence - employee injured in car accident while driving home from work - employer not liable (I)

Summaries with links (5 minute read)

Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd [2014] FCAFC 85

Full Court of the Federal Court of Australia

Jessup, Robertson & White JJ

Corporations - winding up - bias - creditors of company resolved it should be wound up and that respondents be appointed as liquidators - appeal from decision refusing ASIC's application for removal of liquidators - ss15, 60, 79, 180-184, 436A 436DA, 436E, 439A, 439C, 446A, 491, 497, 499, 503, 588FB, 588FDA, 1311 *Corporations Act 2001* (Cth) - s97 *Evidence Act 1995* (Cth) - held: primary judge erred in holding that there was no apprehended or perceived lack of independence or impartiality on part of liquidators - primary judge did not err in holding respondents as administrators did not contravene s436DA - appeal allowed.

[Australian Securities and Investments Commission](#) (B G)

Corby v Allen & Unwin Pty Ltd [2014] NSWCA 227

Court of Appeal of New South Wales

Bathurst CJ; McColl & Gleeson JJA

Pleadings - defamation - mother, brother and sister of Schapelle Corby sued writer and publisher of book concerning Schapelle Corby's culpability for importation of marijuana into Bali - primary judge struck out certain defamatory imputations pleaded by appellants as either incapable of arising from book or not capable of being defamatory - bane and antidote principle - held (by majority): great caution mandated before striking out an imputation - determination of capacity of matter complained of to convey imputations was exercise in generosity not parsimony - test to be applied was whether challenged imputation could reasonably be found by jury - *drug syndicate* imputations, *fish shop* imputations and *lying* imputations could reasonably be found by a jury - primary judge erred in concluding that *drug syndicate imputations* not conveyed - appeal upheld for all imputations.

[Corby](#) (I)

In the matter of HIH Insurance Limited (in liq); Smith v McGrath; Baldock v McGrath [2014] NSWSC 922

Supreme Court of New South Wales



Brereton J

Insurance - solicitors - retainer - proceedings commenced by solicitors in name of 117 shareholders seeking reversal of liquidators' decision not to admit or adjudicate on proofs of debt and claims submitted by the shareholders - liquidators sought dismissal of proceedings on basis solicitors lacked sufficient authority to commence proceedings - s1321 *Corporations Act 2001* (Cth) - *take any further such action in relation to this matter* - held: solicitors insufficiently authorised to institute and maintain proceedings - proceedings by shareholders who had not expressly authorised institution of appeal to be dismissed.

[In the matter of HIH Insurance Limited \(in liq\); Smith](#) (I B)

Re Kevin McNamara & Son Pty Ltd [2014] VSC 337

Supreme Court of Victoria

Robson J

Corporations - winding up - bankruptcy - builder built pool for defendant - dispute arose concerning construction - arbitrator made award in favour of defendant - builder conceded he was indebted to defendant for arbitral award amount but did not pay it - defendant's husband became undischarged bankrupt - builder sought to set aside or amend statutory demand on basis defendant not entitled to whole amount, that there was dispute between defendant and trustee in bankruptcy as to entitlement to amount, that demand had defects, or that defendant was only entitled to half amount - held: before bankruptcy defendant and husband held arbitral award amount as joint creditors - upon bankruptcy joint tenancy severed at equity - trustee in bankruptcy and defendant now held debt at equity as tenants in common in equal shares - defendant and husband continued hold the legal interest in the debt as joint tenants - defendant entitled to claim entire arbitral award amount in the statutory demand.

[Re Kevin McNamara](#) (B C)

You v Thomas (No. 2) [2014] VSC 338

Supreme Court of Victoria

McMillan J

Costs - offers of compromise - applicant and second respondent were neighbours - applicant was performing construction work on his property - second respondent sought determination by Building Appeals Board that insurance policy taken out in respect of work did not comply with *Building Act 1993* (Vic) - applicant sought judicial review of Board's decision in second respondent's favour - Court ordered Board's decision be set aside - applicant sought costs against second respondent on indemnity basis - held: offers of compromise not unreasonably rejected - not appropriate to make indemnity costs order - in circumstances where second respondent appeared at trial and made submissions in support of Court upholding Board's decision, the appropriate order was that costs should follow the event - second respondent should pay applicant's costs of application on standard basis - second respondent should be entitled to an indemnity certificate on basis proceeding necessitated by error of Board.

[You](#)(I C)



Queensland Building and Construction Commission v Lifetime Securities (Australia) Pty Ltd [2014] QCA 161

Court of Appeal of Queensland

M McMurdo P, Gotterson JA & A Lyons J

Building and construction - summary judgment - company entered contract with owner for construction work on dwelling - owner made claims against company under statutory insurance scheme pursuant to *Queensland Building and Construction Commission Act 1991* (Qld) - Queensland Building and Construction Commission (QBCC) gave company 28 days to rectify defects - Commission sought costs of rectification work from company and director - company sought dismissal of Commission's claim - orders made substantially in terms sought - QBCC sought leave to appeal - ss71, 72, 74, & 116C(6) - held: primary judge erred in holding QBCC's claim was bound to fail - sufficient facts set out in statement of claim to plead claim for recovery under s71(1) - appeal allowed - orders set aside - application for summary judgment dismissed.

[Queensland Building and Construction Commission](#)(I B C G)

Fraser v Bursewood Resort (Management) Ltd [2014] WASCA 130

Court of Appeal of Western Australia

Martin CJ, McLure P & Newnes JA

Negligence - motor vehicle accident - employer's duty of care - employee driving home after shift in pre-dawn light injured when car left sealed section of road and rolled over onto median strip - employee claimed accident due to her falling asleep and that employer breached duties which would have reduced risk of that occurring - s5C *Civil Liability Act 2002* (WA) - *Civil Liability Amendment Act 2003* (WA) - onus of proof - causation - held: no error in primary judge's finding employee had not established accident was caused by her falling asleep at wheel - no error in finding that, if employer had performed duty of warning employee of risk of falling asleep while driving home, such warning would not have altered her actions or events which occurred - appeal dismissed.

[Fraser](#) (I)

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