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Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Enterprise ICT Pty Ltd v Pham (No 1) (NSWCA) - judgments and orders - adjournment - application to vacate listing - application to admit fresh evidence - application to add judgment to proceedings - applications dismissed (B C I G)

Donau Pty Limited v ASC AWD Shipbuilder Pty Limited (NSWSC) - contract - misleading and deceptive conduct - contract for construction of 'Blocks' in ships' hulls - proceedings concerning plaintiff's entitlement to recover fees under 'Second Heads of Agreement' (B C I G)

Butler Market Gardens Pty Ltd v GG & PM Burrell Pty Ltd (VSC) - security for costs - negligence - nuisance - plaintiff to provide security for costs - application for stay of proceedings adjourned (I B C G)

McNally v Commonwealth Bank of Australia [No 2] (WASC) - judgments and orders - pleadings - limitations - application to amend indorsement on writ of summons dismissed (I B C G)

Westgyp Pty Ltd v Northline Ceilings Pty Ltd (WASC) - contract - guarantee - misleading or deceptive conduct - claim for amount outstanding under contract for supply of products - action dismissed (I B C G)

Granitto v Gostelow (WASC) - pleadings - defamation - defendant to provide answers to

certain requests for further and better particulars - defendant to amend defence (I)

ACT v Gillan; Gillan v ACT (ACTSC) - medical negligence - damages - bus driver injured in bus accident - ACT's appeal against liability decision dismissed - cross-appeal against assessment of damages allowed (I B)

Summaries With Link (Five Minute Read)

Enterprise ICT Pty Ltd v Pham (No 1) [2018] NSWCA 180

Court of Appeal of New South Wales

Basten & Meagher JJA; Emmett AJA

Judgments and orders - adjournment - appellants sought, a week before hearing of appeal, that appeal's listing be vacated on basis second appellant now had access to funds enabling him to brief counsel - prior impecuniosity claim - delay - 'personal issues' - funds availability - "some medical issues" - 'other litigation' - prejudice - Pt 6 *Civil Procedure Act 2005* (NSW) - additional applications - application to admit fresh evidence - application to add a judgment of Slattery J to proceedings - held: applications dismissed.

[View Decision](#) (B C I G)

Donau Pty Limited v ASC AWD Shipbuilder Pty Limited [2018] NSWSC 1273

Supreme Court of New South Wales

Ball J

Contract - Commonwealth of Australia, defendant (ASC) and company (Raytheon) entered 'Alliance Based Target Incentive Agreement' - ASC agreed to build ships for Commonwealth - hulls' construction broken into 31 "Blocks" - ASC subcontracted with plaintiff formally known as Forgacs Engineering Pty Ltd (Forgacs) for certain Blocks' construction (Original Contract) - Original Contract varied several times - ASC and Forgacs, by Second Heads of Agreement (2HA), agreed to vary terms on which Forgacs would be paid for work - proceedings concerned whether Forgacs entitled to recover fees under 2HA - whether provisions of 2HA came into effect and if so when - whether ASC validly terminated 2HA - if termination effective, effect of 2HA on parties' rights and liabilities - whether ASC induced to enter 2HA by misleading or deceptive conduct by Forgacs and, if so, whether ASC to damages - held: date on which relevant clause of 2HA came into effect determined - ASC validly terminated 2HA - effect of clause of 2HA on 'Payable Fee' under Original Contract determined - claim by ASC for liquidated damages released under clause of 2HA - if it had been necessary to determine ASC's claim under s18 Australian Consumer Law, Court would have found it was not made out.

[View Decision](#) (B C I G)

Butler Market Gardens Pty Ltd v GG & PM Burrell Pty Ltd [2018] VSC 461

Supreme Court of Victoria

Richards J

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Security for costs - plaintiff sued defendant in negligence and nuisance in relation to damaged crop it grew on land leased from defendant - defendant sought that plaintiff provide security for costs and stay of proceedings until security provided - r62.02 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - s1335(1) *Corporations Act 2001* (Cth) - whether 'reason to believe' plaintiff would be able to meet costs order against it - consideration of 'discretionary factors' - held: Court satisfied that plaintiff should provide security for costs - application for stay adjourned.

[Butler Market Gardens](#) (I B C G (I B C G))

McNally v Commonwealth Bank of Australia [No 2] [2018] WASC 24

Supreme Court of Western Australia

Tottle J

Judgments and orders - pleadings - limitations - plaintiff sued defendant for losses allegedly due to defendant's refusal to loan him funds to complete house's construction, having lent him funds to commence the construction - defendant succeeded in striking out amended substituted statement of claim - plaintiff sought leave to amend indorsement on writ of summons - defendant objected to amendments, contending they 'raised new causes of action for which the applicable limitation periods had expired' - defendant also contended that the new causes of action did not arise from 'same facts or substantially the same facts' as those which 'original indorsement' had alleged - O21 r5 *Rules of the Supreme Court 1971* - held: application to amend indorsement on writ dismissed.

[McNally](#) (I B C G)

Westgyp Pty Ltd v Northline Ceilings Pty Ltd [2018] WASC 244

Supreme Court of Western Australia

Vaughan J

Contract - guarantee - misleading or deceptive conduct - plaintiff supplied plastering products to first defendant, which was associated with second defendant - plaintiff claimed it supplied the products under terms of '2009 credit application', which second defendant was party to as guarantor - plaintiff sought to recover amount - plaintiff contended that, by 'charging clause', it was entitled to equitable charge over second defendant's interest in properties - second defendant contended debt had arisen under terms of later '2012 credit application' in respect of which he was not guarantor - held: 2012 credit application governed supply of goods subject of debt - guarantee in 2009 credit application did not extend to the supplies or debt - second defendant signed 2012 credit application as director of first defendant - plaintiff did not establish its alternative misleading conduct claim - action dismissed.

[Wetgyp](#) (I B C G)

Granitto v Gostelow [2018] WASC 242

Supreme Court of Western Australia

Le Miere J

Pleadings - defamation - interlocutory application - action arising from publication of an email

which plaintiff contended was defamatory of her - defendant pleaded defence of truth and 'Polly Peck' defence of truth - plaintiff sought particulars of facts which defendant pleaded in support of truth pleas - plaintiff sought that defendant answer her request for further and better particulars - whether pleadings 'sufficiently specific and precise' - held: defendant to provide answers to certain requests - defendant to amend defence by deleting 'including' in each paragraph.

[Granitto \(I\)](#)

ACT v Gillan; Gillan v ACT [2018] ACTSC 223

Supreme Court of the Australian Capital Territory

Penfold J

Medical negligence - damages - bus driver (Mr Gillan) ruptured Achilles tendon in accident - Mr Gillan seen several times by different doctors at Canberra Hospital - Mr Gillan had 'no surgical intervention' and doctors did not discuss the possibility of surgery with him - Mr Gillan's leg healed with tendon lengthening which he said reduced his capacity to maintain bus driving employment - Mr Gillan sued ACT in negligence, contending that it, through Canberra Hospital, breached duty of care causing 'compensable injury' - Magistrate found ACT liable in negligence - Magistrate awarded Mr Gillan \$81,514.80, and costs - ACT appealed against liability decision - Mr Gillan cross-appealed against assessment of damages - held: ACT's appeal dismissed - error in damages' assessment established - cross-appeal allowed - new awards of damages made for past and future economic loss, and general damages.

[ACT \(I B\)](#)

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