



Tuesday, 22 December 2015

## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark\_Legal

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**The United States of America (Appellant) v Nolan (Respondent)** (UKSC) - employment law - closure of watercraft repair centre - redundancy - duty to consult with employee representative when proposing to dismiss employee - appeal dismissed (I B C G)

**Ferella v Official Trustee in Bankruptcy** (NSWCA) - real property - bankruptcy - statutory trust for sale - orders appointing trustees for sale of properties - appeal dismissed (I B C)

**Simic v New South Wales Land and Housing Corporation** (NSWCA) - contract - undertakings - no error in concluding words "New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940" meant Corporation - appeal dismissed (I B C G)

**Auzcare Pty Ltd v Idameneo (No 123) Pty Ltd** (NSWCA) - contract - money had and received - Deed of Settlement executed by the parties was not void, in whole or in part, as a penalty - appeal dismissed (I B)

**D B Mahaffy & Associates v Mahaffy** (NSWSC) - contempt - sentencing for proven contempt - sentence of 10 months imposed to commence from date of arrest (I B C G)

**Sutherland v GHR Accounting** (NSWSC) - pleadings - summary dismissal - property - claim against accounting firm and bank - embarrassing pleadings - statement of claim struck out with leave to replead against account firm (I B)

**Wehbe v Insurance Australia Ltd t/as NRMA Insurance Ltd** (NSWSC) - judicial review -



motor accident - causation - procedural fairness - no error in decision of Medical Review Panel - summons dismissed (I G)

**Grocon Constructions (Qld) Pty Ltd v Juniper Developer (No 2) Pty Ltd (QCA)** - construction contract - liquidated damages clause not a penalty - appeal dismissed (I B C)

**Farrar v Julian-Armitage (QCA)** - legal costs - costs assessor's decisions set aside - leave to appeal refused (I)

**Motor Accident Commission v Dinh (SASCFC)** - statutory insurance policy - erroneous incorporation of objective considerations into test for reckless indifference - not necessary to remit matter - appeal dismissed (I B)

## Summaries With Link (Five Minute Read)

### **The United States of America (Appellant) v Nolan (Respondent) [2015] UKSC 63**

Supreme Court of the United Kingdom

Lord Neuberger, President, Lady Hale, Deputy President, Lord Mance, Lord Reed & Lord Carnwath

Employment law - appellant closed watercraft repair centre at which respondent employed as a civilian budget assistant - respondent dismissed for redundancy day before closure - respondent brought Employment Tribunal proceedings under Pt IV Ch II, ss188 to 198 *Trade Union and Labour Relations (Consolidation) Act 1992* as amended by *Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995* (SI 1995/2587) (TULCRA) - respondent contended appellant failed to consult with any employee representative as required by TULCRA. - appellant denied it was under alleged duty - Employment Appeal Tribunal upheld order of Employment Tribunal in respondent's favour remunerating respondent for one month period - Court of Appeal referred question whether obligation to consult arose on proposal or only on decision to close base (UK Coal/Fujitsu issue) to Court of Justice, which declined jurisdiction- Court of Appeal ordered a further hearing of question - appellant contended in light of ruling in Court of Justice TULCRA should be construed as not applying to employment by public administrative establishment at least in relation to non-commercial activity, that it should not apply in light of principles of international law and EU law, and that Secretary of State had exceeded powers when making 1995 Regulations insofar as they went further than requirements of EU law - held (by majority): appellant's appeal dismissed - matter remitted to Court of Appeal to determine as far as necessary the UK Coal/Fujitsu issue.

[The United States of America](#) (I B C G)

### **Ferella v Official Trustee in Bankruptcy [2015] NSWCA 411**

Court of Appeal of New South Wales



Bergin CJ in Eq; Tobias & Emmett AJA

Real property - bankruptcy - statutory trust for sale - first and second appellants were registered proprietors as tenants in common in equal shares of properties - second appellant made bankrupt and his one half interest in properties vested in Official Trustee in Bankruptcy - appellants appealed against orders appointing trustees for sale of properties pursuant to s66G *Conveyancing Act 1919* (NSW) - s58(1)(a) *Bankruptcy Act 1966* (Cth) - s90 *Real Property Act 1900* (NSW) - effect of application to Federal Court under s179 *Bankruptcy Act* - held: appellants' submissions on appeal were hopeless - submissions should not have been made - appeal dismissed.

[Ferella](#) (I B C)

### **Simic v New South Wales Land and Housing Corporation [2015] NSWCA 413**

Court of Appeal of New South Wales

Bathurst CJ, Ward JA & Emmett AJA

Contract - appeal concerning two instruments (Undertakings) given by second respondent bank in favour of "New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940" described in Undertakings as "the Principal" - Undertakings given at request of company (Nebax) - first respondent Corporation made demand on bank for payment of sums - bank declined to meet demands as they were not made by "Principal" named in Undertakings - primary judge declared Principal should be construed to describe Corporation - primary judge also ordered judgment for Corporation against bank and declared bank was entitled to be indemnified by Nebax - primary judge also declared Guarantors were liable to bank under surety and guarantee agreements between guarantors and bank - guarantors appealed - held: primary judge did not err in concluding that words "New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940" meant the Corporation - appeal dismissed.

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

### **Auzcare Pty Ltd v Idameneo (No 123) Pty Ltd [2015] NSWCA 412**

Court of Appeal of New South Wales

Ward & Leeming JA; Emmett AJA

Contract - money had and received - appeal concerned question whether "Deed of Settlement executed by the parties is void, in whole or in part, as a penalty" - primary judge answered it question in negative - enforceability of provisions of deed - applicability of penalties doctrine - nature of claim compromised - acknowledgment of debt - held: no error in primary judge's analysis - leave to appeal granted - appeal dismissed.

[Auzcare](#) (I B)

### **D B Mahaffy & Associates v Mahaffy [2015] NSWSC 1959**

Supreme Court of New South Wales

Schmidt J

Contempt - sentencing - contempt established by defendant against plaintiff - defendant contended contempt warranted punishment by imprisonment - plaintiff had failed to obey costs orders which bound him and/or his company, deliberately failed to comply with subpoena,



pursued sustained, baseless, deliberate attack impartiality, honesty and integrity of judge and pursued baseless allegations against another judge - sentencing for proven contempt - *Civil Procedure Act 2005 (NSW) - Crimes (Sentencing Procedure) Act 1999 (NSW)* - held: plaintiff sentenced to 10 months imprisonment to commence from date of arrest.

[D B Mahaffy](#) (I B C G)

## **Sutherland v GHR Accounting [2015] NSWSC 1946**

Supreme Court of New South Wales

Hall J

Pleadings - summary dismissal - real property - plaintiff commenced proceedings against accounting firm and bank - plaintiff claimed economic loss due to negligence, breach of contract and negligent misstatement by defendants in relation to "business proposal" - defendants sought to dismiss statement of claim pursuant to r13.4 *Uniform Civil Procedure Rules 2005 (NSW)* or to strike it out pursuant to r14.28 - held: pleadings were embarrassing - deficiencies could not be remedied by provision of further particular - statement of claim struck out with liberty to replead against accounting firm in respect of claim for alleged loss separate from losses which may have been suffered by plaintiff's company.

[Sutherland](#) (I B)

## **Wehbe v Insurance Australia Ltd t/as NRMA Insurance Ltd [2015] NSWSC 1506**

Supreme Court of New South Wales

Davies J

Judicial review - plaintiff injured in motor vehicle accident - third party insurer disputed degree of whole person impairment - plaintiff sought to quash decision of Review Panel which assessed injuries caused by motor accident not greater than 10% and found no injuries related to motor accident - *Accident Compensation Act 1985 (Vic) - Civil Liability Act 2002 (NSW) - Motor Accidents Compensation Act 1999 (NSW)* - causation - procedural fairness - adequacy of reasons - held: Panel asked itself correct question and properly applied Guidelines - no denial of procedural fairness - reasons given satisfied requirements of *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 - summons dismissed.

[Wehbe](#) (I G)

## **Grocon Constructions (Qld) Pty Ltd v Juniper Developer (No 2) Pty Ltd [2015] QCA 291**

Court of Appeal of Queensland

Holmes CJ; Atkinson & McMeekin JJ

Construction contract - primary judge found liquidated damages clause of construction contract operated when there had been breach of obligation to achieve Practical Completion by relevant date and that liquidated damages clause was not affected by penalty doctrine - appeal concerned whether liquidated damages clause in was penal rather than compensatory and so void - held: all relevant factors against attempt to characterise clause as penal - primary judge correct to conclude clause not a penalty - appeal dismissed

[Grocon](#) (I B C)



## **Farrar v Julian-Armitage [2015] QCA 289**

Court of Appeal of Queensland

M McMurdo P, Morrison JA & Henry J

Legal costs - applicant and respondent former lawyers in dispute over legal costs - costs assessor's decisions reviewed and set aside in District Court - applicant sought leave to appeal - rr77 & 78 2007 *Barristers' Rule* - s 118(3) *District Court of Queensland Act 1967* (Qld) - ss308, 309, 310, 315, 335, 340, 341 & 342 *Legal Profession Act 2007* (Qld) - r742 *Uniform Civil Procedure Rules 1999* (Qld) - held: no error in relation to issue whether barrister directly retained - no error in interpretation of s315 in relation to whether barrister obliged to disclose change in estimated legal fees - leave to appeal refused on grounds concerning consequences of not disclosing as soon as practicable - no error in conclusion as to inadequacy of reasons - leave to appeal refused.

[Farrar](#) (I)

## **Motor Accident Commission v Dinh [2015] SASCFC 184**

Full Court of the Supreme Court of South Australia

Gray CJ; Sulan & Lovell JJ

Statutory insurance policy - respondent while driving vehicle was involved in collision with pedestrian - appellant was compulsory third party insurer under *Motor Vehicles Act 1959* (SA) - primary judge dismissed appellant's action for recovery of money paid out pursuant to statutory insurance policy - appellant had contended respondent breached policy by driving vehicle with intention of or with reckless indifference as to, causing death, injury or damage to property - formulation of test of reckless indifference - held: primary judge erroneously imported objective considerations into test of reckless indifference - however not necessary to remit matter having regard to clarification of issue of law and as appellant no longer sought any recovery from respondent - appeal dismissed.

[Motor Accident Commission](#) (I B)



**To Mrs K\_\_\_\_, On Her Sending Me an English  
Christmas Plum-Cake at Paris**

By Helen Maria Williams

What crowding thoughts around me wake,  
What marvels in a Christmas-cake!  
Ah say, what strange enchantment dwells  
Enclosed within its odorous cells?  
Is there no small magician bound  
Encrusted in its snowy round?  
For magic surely lurks in this,  
A cake that tells of vanished bliss;  
A cake that conjures up to view  
The early scenes, when life was new;  
When memory knew no sorrows past,  
And hope believed in joys that last! —  
Mysterious cake, whose folds contain  
Life's calendar of bliss and pain;  
That speaks of friends for ever fled,  
And wakes the tears I love to shed.  
Oft shall I breathe her cherished name  
From whose fair hand the offering came:  
For she recalls the artless smile  
Of nymphs that deck my native isle;  
Of beauty that we love to trace,  
Allied with tender, modest grace;  
Of those who, while abroad they roam,  
Retain each charm that gladdens home,  
And whose dear friendships can impart  
A Christmas banquet for the heart!

[Helen Maria Williams](#)

[Click Here to access our Benchmark Search Engine](#)