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A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Satchithanatham v National Australia Bank [2010] NSWCA 243 - civil procedure - applicants had lost on the merits up to and including a special leave application to the High Court - applicants sought further review - Court not bound to entertain argument where the proceedings were clearly abusive (I, B)

Frumar v the Owners of Strata Plan 36957 [2010] NSWCA 172 - costs - recovery of instalments of assessed costs that were paid under a compromise - the costs order was later overturned - order for restitution made (I, C)

Leerac Pty Ltd v Fay [2010] NSWSC 1088 - trusts - previous judicial advice approving payment of legal fees from trust estate - further advice sought whether those fees could be paid forthwith - approval given (B)

Metropolitan Petar v Mitreski [2010] NSWSC 1067 - civil procedure - application for leave to further amend defence - no utility in allowing the amendments (I)

Permanent Mortgages Pty Ltd v MacFadyen [2010] NSWSC 1053 - civil procedure - proceedings for possession of a mortgaged property - defendant sought to bring cross-claims against the mortgage manager and a solicitor who had drawn up some of the documentation - cross-claims struck out (B)



Re Dimidium Group Pty Ltd [2010] NSWSC 1086 - corporations law - voluntary administration - application for extension of time in which to hold second creditors' meeting - balance between need for swift procedure and need to maximise return to creditors - extension granted (B)

MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq) [2010] VSCA 245 - construction contracts - release in Deed of Novation construed to apply only prospectively - warranty by subcontractor was misleading or deceptive (I, B, C)

Transport Accident Commission v Serwylo [2010] VSC 421 - accident compensation - whether injuries came within Category II or Category IV of the AMA Guides to the Evaluation of Permanent Impairment - Tribunal did not err in its construction of the Guides (I)

Re Mitchell Communication Group [2010] VSC 423 - corporations law - application for a meeting of its shareholders to consider a scheme of arrangement under which the company would be taken over - meeting ordered to be convened (B)

Summaries with links (5 minute read)

Thursday 23 September 2010

Satchithanantham v National Australia Bank [2010] NSWCA 243

Court of Appeal of New South Wales

Macfarlan JA; Handley & Sackville AJJA

Civil procedure - abuse of process - the bank respondent to these proceedings had brought proceedings for possession of real property against the applicants - the applicants had lost before the Supreme Court, had lost an appeal to the Court of Appeal, and had lost an application for special leave to appeal to the High Court - the applicants sought further review of several interlocutory decisions and the final decision in the possession proceedings - held: the merits of the Court's judgment could no longer be re-examined in any court anywhere - the Court was not bound to entertain argument where the proceedings were clearly abusive.

[Satchithanantham](#) (I, B)



Frumar v the Owners of Strata Plan 36957 [2010] NSWCA 172

Court of Appeal of New South Wales

Giles & Macfarlan JJA; Handley AJA

Costs - Frumar sued the Owners of Strata Plan 36957 in the District Court, lost, and was ordered to pay the Owners' costs - these costs were assessed by a costs assessor, and reassessed by a review panel - the Owners filed the review panel's certificate in the District Court, and it was then taken to be a judgment - Frumar brought an appeal against the review panel's decision - the Owners brought proceedings to enforce the deemed judgment - the parties agreed to compromise the Owner's proceedings on terms requiring payment of some of the costs by instalments, and requiring repayment if the amounts paid exceeded the amount ultimately required to be paid as varied on Frumar's appeal - the Court of Appeal eventually set aside the review panel's decision and the deemed judgment was permanently stayed - Frumar brought proceedings in the District Court to recover the amount paid under the compromise agreement - the District Court dismissed these proceedings - held: the judgment of the Court of Appeal setting aside the review panel's decision deprived the deemed judgment of its only legal foundation - the permanent stay of the deemed judgment deprived it of all legal effect or operation - appeal allowed and order for restitution made.

[Frumar](#) (I, C)

[Benchmark 23-07-2009](#) - of Review Panel set aside - matter remitted - detailed review of case law including *Frumar v the Owners of Strata Plan 36957* [2006] NSWCA 278. Randall ...

[benchmark 27-07-2009](#) - dismissed - detailed consideration of legislation& case law detailed review of case law including *Frumar v the Owners of Strata Plan 36957* & *Randall Pty Ltd v Willoughby City* ...

Leerac Pty Ltd v Fay [2010] NSWSC 1088

Supreme Court of New South Wales

Brereton J

Trusts - the late Claude Augustus Fay left several testamentary and *inter vivos* trusts - certain beneficiaries of the testamentary trusts brought proceedings in the Supreme Court to have the trustees of the testamentary trusts removed - these proceedings were unsuccessful, and the beneficiaries were ordered to pay the trustee's costs - Leerac Pty Ltd, the trustee of the *inter vivos* trusts, and whose directors were the trustees of the testamentary trusts, sought judicial advice as to whether it would be justified in paying the testamentary trustee's costs out of the of the *inter vivos* trust estates, and, of so, to what extent - Brereton J gave the judicial advice that Leerac would be justified in paying the testamentary trustees' costs, to the extent that those costs were not



recovered from the beneficiaries pursuant to the costs order, and which were not recoverable from Fay's estate pursuant to the trustees' right of indemnity - Leerac sought further advise as to whether it would be justified in paying the testamentary trustees' costs forthwith, and for the testamentary trustees to refund Leerac at a later time, if money were recovered from the beneficiaries pursuant to the cost order, or from the testamentary trust estates pursuant to a right of indemnity - held: Leerac would be justified in doing so.

[Leerac \(B\)](#)

Metropolitan Petar v Mitreski [2010] NSWSC 1067

Supreme Court of New South Wales

Brereton J

Civil procedure - in the substantive proceedings, the Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand alleged that certain defendants held real and personal property on charitable trust for the purposes of the Macedonian Orthodox Church, and had acted in breach of that trust - the defendants sought leave to further amend their defence - judgment had previously been given on certain separate questions - the proposed amendments would alter the basis on which the separate questions had been decided - held: as the defendants had eschewed any intention to impugn the judgments on the separate questions, there was no utility in allowing the amendments.

[Metropolitan Petar \(I\)](#)

Permanent Mortgages Pty Ltd v MacFadyen [2010] NSWSC 1053

Supreme Court of New South Wales

Harrison AsJ

Civil procedure - Permanent Mortgages Pty Ltd was suing MacFadyen for possession of a mortgaged property, alleging that MacFadyen had defaulted under the mortgage - MacFadyen sought to bring cross-claims against the mortgage manager and a solicitor who had drawn up some of the documentation - held: the cross-claims disclosed no causes of action against the proposed cross defendants - cross-claims struck out.

[Permanent Mortgages \(B\)](#)

**Re Dimidium Group Pty Ltd [2010] NSWSC 1086**

Supreme Court of New South Wales

Barrett J

Corporations law - 19 related companies were in voluntary administration - there were numerous intercompany loans - the administrators applied for a six month extension of the period for convening the second meeting of creditors - held: the Court should strike an appropriate balance between the legislature's expectation that the administration will be a relatively swift and summary procedure, and the requirement that undue speed should not be allowed to prejudice sensible and constructive actions directed towards maximising the return for creditors - in the circumstances of this case, delay may work to the benefit of creditors - extension granted.

[Re Dimidium Group](#) (B)

MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq) [2010] VSCA 245

Court of Appeal of Victoria

Warren CJ; Buchanan & Nettle JJA

Construction contracts - in 1996, Barwon Region Water Authority awarded a tender for the design, construction, and commissioning of two sewerage treatment plants to a head contractor - there was also a chain of sub-contractors, including MWH - MWH subcontracted the structural design component of its contract to Wynton Stone - after completing the required design work, Winton Stone merged with TTW - MWH, Wynton Stone, and TTW then executed a Deed of Novation, under which TTW replaced Wynton Stone as the party to the structural design contract with MWH - in the Deed of Novation, MWH released Wynton Stone from all claims and demands in respect of the structural design contract, and Wynton Stone warranted that it had performed all work under the structural design contract in accordance with that contract's terms - later, certain tanks cracked, due to negligent design by Wynton Stone - as part of the morass of litigation between Barwon Region Water Authority, the head contractor, and all the sub-contractors, MWH's claimed against Wynton Stone - this claim failed at first instance, due to the release in the Deed of Novation, and due to the trial judge's finding that the warranty given by Wynton Stone was not misleading or deceptive - held: the release in the Deed of Novation, on its proper construction, applied only to conduct that occurred after execution of that Deed - Wynton Stone did engage in misleading or deceptive conduct by warranting that had performed all work under the structural design contract in accordance with that contract's terms.

[MWH Australia](#) (I, B, C)



Transport Accident Commission v Serwylo [2010] VSC 421

Supreme Court of Victoria

Kaye J

Accident compensation - the appellant was injured while participating in a volunteer art project creating a community mural - she was struck by a motor vehicle driven by her supervisor - she sustained injuries to her spine and knee, and psychological injury - the appellant made a claim on the Victorian Transport Accident Commission - the Victorian Civil and Administration Tribunal assessed her degree of permanent whole person impairment at 34% - the dispute was whether the appellant's impairment fell within Category II or Category IV of the AMA Guides to the Evaluation of Permanent Impairment (4th edition) - held: the construction of the Guides is a question of law, whereas the determination of a level of impairment, according to the Guides, is a question of fact - the Tribunal did not err in its construction of the Guides - appeal dismissed.

[Transport Accident Commission \(I\)](#)

Re Mitchell Communication Group [2010] VSC 423

Supreme Court of Victoria

Davies J

Corporations law - The plaintiff applied for an order under section 411(1) of the *Corporations Act 2001* (Cth) that a meeting of its shareholders be convened to consider a scheme of arrangement under which Aegis Group would acquire all of the plaintiff's issued shares - a break fee was payable in the event that the acquisition by Aegis Group did not proceed - held: the Court was satisfied that sufficient disclosure had been made to shareholders - the Court would decline to order that a meeting be convened if it is satisfied that the break fee were so large so as to be likely to coerce the shareholders into agreeing to the scheme, rather than assessing the offer on its merits, but that was not the case here - the Court was satisfied that ASIC had been given proper notice of the application and had a reasonable opportunity to examine the proposed scheme - meeting ordered to be convened.

[Re Mitchell Communication Group \(B\)](#)

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