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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Hockey v Fairfax Media Publications Pty Ltd (No 2) (FCA) - defamation - remedies - injunctions refused - judgment entered for applicant - costs orders (I)

Hillam v Iacullo (NSWCA) - contract - successive loans - later loan rescinded earlier loan - breach of loan agreement by lenders - borrower not required to pay "uplift"- appeal allowed (I B)

Baycorp Capital Ltd v Dex Consulting Pty Ltd (No 2) (NSWSC) - costs - offer of compromise - indemnity costs in favour of successful defendants (I B C)

Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd (VSCA) - building contract - refusal to provide records to principal - erroneous construction of phrase in side deed - appeal allowed (I B C)

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2) (VSCA) - contract - reformulated claim not remitted - appeal dismissed - costs orders (I B C)

Fast v Rockman (VSC) - Wills and estates - schedule incorporated by reference into clause of deceased's final Will (B)

Acquista Investments Pty Ltd v The Urban Renewal Authority (SASCFC) - administrative

law - deed granting option for purchase of land - decision to enter deed not amenable to judicial review - appeal dismissed (I B C)

Summaries With Link (Five Minute Read)

Hockey v Fairfax Media Publications Pty Ltd (No 2) [2015] FCA 750

Federal Court of Australia

White J

Defamation - remedies - costs - Court upheld applicants claims in respect of poster by which Sydney Morning Herald promoted its print edition of 5 May 2014, and two tweets published by The Age - Court assessed applicant's damages at \$120,000 in respect of poster and \$80,000 in respect of tweets - interest - injunctions - costs - form of orders - held: judgment entered for applicant - applicant's claims for injunctions dismissed - costs orders made.

[Hockey](#) (I)

Hillam v Iacullo [2015] NSWCA 196

Court of Appeal of New South Wales

Basten, Ward & Leeming JJA

Contract - successive loan agreements - appellant entered three written loan agreements with respondents - first loan agreement dealt with advance, second with both original advance and further advance, and third with the two prior advances and final advance - appellant promised to repay principal of each loan plus interest on fixed date and to transfer an "uplift" equal to double principal at end of term - third loan agreement also required appellant to provide respondents with security - appellant contended third loan agreement substituted for second so respondents not entitled to any sum under second loan agreement - appellant contended he was not obliged to pay "uplift" owing because respondents failed to advance final amount promised under agreement - held: third loan agreement dealt with prior advances in manner inconsistent with second loan agreement - third loan agreement necessarily rescinded second - third loan agreement not abandoned - respondents breached third loan agreement by failing to advance final tranche of loan on particular date, an obligation independent of appellant's obligation to procure charge - obligation to pay "uplift" dependent upon obligation to loan principal - not open to respondents to require appellant to pay uplift of double promised loan of when unwilling to lend all of amount on promised terms - appeal allowed.

[Hillam](#) (I B)

Baycorp Capital Ltd v Dex Consulting Pty Ltd (No 2) [2015] NSWSC 975

Supreme Court of New South Wales

Adams J

Costs - Court gave judgment for defendants - defendants sought indemnity costs on basis of offers of settlement - rr20.26, 42.1 & 42.15A *Uniform Civil Procedure Rules 2005* (NSW) - held: offer of compromise not accepted by plaintiff - offer complied with r20.26 - defendants obtained

judgment more favourable than terms of offer - r42.15A applied - indemnity costs awarded to defendants.

[Baycorp](#) (I B C)

Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd [2015] VSCA 190

Court of Appeal of Victoria

Santamaria, Kyrou & McLeish JJA

Building contract - trial judge found applicant building contractor breached its obligations to respondents (principals) under a contract for design and construction of building - finding of breach of contract related to applicant's refusal to provide records to principal to enable principal to verify costs actually paid by applicant in completing project - held: trial judge erred in construction of 'actual trade, supplier, consultant or subcontract cost payable ...' in side deed and in accepting implied term that principal was entitled to be provided with records - leave to appeal granted - notice of contention dismissed - appeal allowed.

[Grocon](#) (I B C)

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2) [2015] VSCA 185

Court of Appeal of Victoria

Redlich, Whelan & Santamaria JJA

Contract - costs - appellant failed to establish on appeal that trial judge erred in dismissing claims based on 2002 contract and negligence - however Court found trial judge wrong to hold claims made in reliance on 2004 contract statute-barred - trial judge had retired by time of hearing of appeal - Court sought and received further written and oral submissions - whether claim under 2004 contract for damages should be remitted - held: it would be unsatisfactory and inherently unfair to respondent to permit appellant to amend and advance reformulated claim - 2004 contract claim should not be remitted - pleaded case bound to fail - reformulated claim should not be permitted to be advanced - appeal dismissed - costs orders made.

[Brirek](#) (I B C)

Fast v Rockman [2015] VSC 337

Supreme Court of Victoria

McDonald J

Wills and estates - dispute concerning construction of deceased's Will, which was admitted to probate pursuant to s9 *Wills Act 1997* (Vic) as informal will - plaintiffs sought order rectifying final Will by annexing schedule which was annexed to Will executed by deceased (April 2010 Will) or declaration schedule be incorporated by reference into final Will - held: Court concluded schedule incorporated by reference into clause of deceased's final Will - no basis for entertaining plaintiffs' alternative claim for rectification - final Will carried out intention albeit necessary to incorporate schedule into final Will to achieve outcome.

[Fast](#) (B)

Acquista Investments Pty Ltd v The Urban Renewal Authority [2015] SASCF 91

Full Court of the Supreme Court of South Australia

Vanstone & Lovell JJ; DeBelle AJ

Administrative law - appellants would have wished to tender for purchase of land held by Urban Renewal Authority had land been placed on the open market – land not placed on open market - land made subject of deed which granted options to third respondent to purchase land - trial judge found decision to enter deed unlawful because “mandatory considerations” in s11 *Public Corporations Act 1993* (SA) overlooked or not applied and unreasonable in *Wednesbury* sense due to insufficient investigation of land’s value and of alternative of putting it on market, but that contract was not rendered void - appellants argued trial judge should have declared deed void or unenforceable - held (by majority): findings that deed was unlawful and legally unreasonable set aside - in any event decision to enter into deed not susceptible of judicial review - appeal dismissed.

[Acquista](#) (I B C)

CRIMINAL

Executive Summary

R v Foulis (SASCFC) - criminal law - aggravated firearm possession whilst unlicensed - trafficking in methylamphetamine - theft by receipt - denial of procedural fairness - sentence not manifestly excessive - appeal dismissed

Summaries With Link

R v Foulis [2015] SASCFC 90

Full Court of the Supreme Court of South Australia

Gray, Sulan & Kelly JJ

Criminal law - appellant pleaded guilty to aggravated firearm possession whilst unlicensed, trafficking in methylamphetamine and theft by receipt - appellant subject to two-month suspended sentence bond at time he committed offences - suspended sentence revoked and appellant sentenced to total of imprisonment of five years with non-parole period of three years and four months - appellant contended sentence was manifestly excessive and that appellant not afforded procedural fairness as result of trial Judge referring to evidence of trafficking in ecstasy when sentencing, which was not subject of charge - s32(3) *Controlled Substances Act 1984* (SA) - ss11 & 34A *Firearms Act 1977* (SA) - s134(1) *Criminal Law Consolidation Act 1935* (SA) - held: trial judge did not accord appellant procedural fairness - reference to ecstasy indicated it was a factor relied upon by trial judge in sentencing and appellant was not given an opportunity to address the presence of ecstasy - sentence not manifestly excessive in all the circumstances - appeal dismissed.



R

La Belle Dame sans Merci: A Ballad

By John Keats

O what can ail thee, knight-at-arms,
Alone and palely loitering?
Thesedgehas withered from the lake,
And no birds sing.

O what can ail thee, knight-at-arms,
Sohaggardand so woe-begone?
The squirrel's granary is full,
And the harvest's done.

I see a lily on thy brow,
With anguish moist and fever-dew,
And on thy cheeks a fading rose
Fast withereth too.

I met a lady in themeads, Full beautiful—a faery's child,
Her hair was long, her foot was light,
And her eyes were wild.

I made a garland for her head,
And bracelets too, and fragrant zone;
She looked at me as she did love,
Andmade sweet moan

I set her on my pacing steed,
And nothing else saw all day long,
For sidelong would she bend, and sing
A faery's song.

She found me roots of relish sweet,
Andhoney wild, and manna-dew,
And sure in language strange she said—
'I love thee true'.

She took me to herElfin grot,
And there she wept and sighed full sore,
And there I shut her wild wild eyes



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With kisses four.

And there she lullèd me asleep,
And there I dreamed—Ah! woe betide!—
The latest dream I ever dreamt
On the cold hill side.

I saw pale kings and princes too, Pale warriors, death-pale
were they all;
They cried—‘La Belle Dame sans Merci
Thee hathin thrall!’

I saw their starved lips in the gloam,
With horrid warning gapèd wide,
And I awoke and found me here,
On the cold hill’s side.

And this is why Isojournhere,
Alone and palely loitering,
Though the sedge is withered from the lake,
And no birds sing.

[John Keats](#)

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