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

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Executive Summary (1 minute read)

Clavel v Savage (NSWCA) – malicious prosecution – delay – credit - failure to prove lack of reasonable cause for prosecution – appeal dismissed (I)

Caltex Australia Petroleum Pty Ltd v Troost (NSWCA) – guarantee and indemnity – respondent bound by clauses constituting “Guarantee and Indemnity by Directors” (I B C)

Liu v The Age Company Pty Ltd (No 2) (NSWSC) – defamation – preliminary discovery order stayed (I)

National Australia Bank Ltd v C & O Voukidis Pty Ltd (No. 2) (NSWSC) – evidence – client legal privilege – privilege not waived by disclosure of material in affidavit (I B)

Wilson v The State of Queensland (QSC) – worker’s compensation – bankrupt refused leave to proceed in strike-out action in respect of statement of claim (I B)

Samsung C & T Corporation v Laing O’Rourke Australia Construction Pty Ltd (WASC) – contractor granted injunction for delivery to it of construction materials retained by subcontractor (I C)

B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar (ACTCA) – building and construction – order for rectification of defective or incomplete building work – appeal dismissed (I C G)

Summaries with links (5 Minute Read)

Clavel v Savage [2015] NSWCA 61

Court of Appeal of New South Wales

Macfarlan & Emmett JJA; Sackville AJA

Malicious prosecution – appellants commenced proceedings against former neighbours seeking damages for intentional infliction of emotional distress – appellants also sued State for malicious prosecution and collateral abuse of process – primary judge found in favour of defendants - appellants appealed – delay - held: substantial delay between hearing of evidence and delivery of judgment did not necessarily indicate findings of fact unsafe – even if primary judge’s assessment of credibility flawed, first appellant’s credit not material to conclusion appellants had not demonstrated lack of reasonable and proper cause to initiate prosecutions – no error in finding appellants failed to prove lack of reasonable cause for prosecution – no error in finding claims for collateral abuse of process not established – appellants did not advance any cogent reason for concluding primary Judge misapplied relevant principles or improperly exercised discretion as to costs – appeal dismissed.

[Clavel](#) (I)

Caltex Australia Petroleum Pty Ltd v Troost [2015] NSWCA 64

Court of Appeal of New South Wales

Meagher, Barrett & Emmett JJA

Guarantee and indemnity - company indebted to Caltex - Caltex claimed respondent liable to pay amount owing to company by reason of guarantee and indemnity signed by him - Caltex sued respondent for balance owed by company - loan application form called “Guarantee and Indemnity by Directors” divided into two columns with two signature blocks - respondent signed only one signature block - trial judge found respondent’s liability under guarantee clause discharged by variation in terms and conditions and that respondent never bound by indemnity clause because he had not signed indemnity in right-hand column - Caltex contended trial judge ought to have found respondent bound by indemnity clause - Pt 2K.2 *Corporations Act 2001* (Cth) - whether indemnity clause separate from guarantee clause - held: author of documentation intended guarantee and indemnity section create only one obligation for any director who signed that section - trial judge erred in concluding respondent not bound by clauses constituting “Guarantee and Indemnity by Directors” - contentions advanced on respondent’s behalf rejected - appeal allowed.

[Caltex](#) (I B C)

Liu v The Age Company Pty Ltd (No 2) [2015] NSWSC 276

Supreme Court of New South Wales

McCallum J

Discovery – defamation – plaintiff sought preliminary discovery orders against proprietor of

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newspaper and journalists to ascertain identity of sources for purpose commencing action against them – Court ordered discovery of all documents which were or had been in their possession, which related to identity or whereabouts of sources – defendants sought to have preliminary discovery order stayed on basis they now undertook not to rely on defence of qualified privilege and that preliminary discovery order not necessary to provide plaintiff with effective remedy – plaintiff claimed application was an abuse of process – held: Court persuaded that upon abandonment of qualified privilege defence, plaintiff had a remedy against defendants which was “no less effective” than an action against the source – application was not an abuse of process – preliminary discovery order stayed.

[Liu](#) (I)

National Australia Bank Ltd v C & O Voukidis Pty Ltd (No. 2) [2015] NSWSC 258

Supreme Court of New South Wales

Davies J

Evidence – client legal privilege – fourth defendant filed affidavit in support of motion to file amended cross-claim – affidavit concerned former solicitor’s advice – plaintiff issued subpoena to solicitors – fourth defendant claimed privilege over material sought to be produced – plaintiff asserted privilege had been waived by parts of fourth defendant’s affidavit – held: privileged material had not been used to fourth defendant’s advantage and was not relevant to remaining issues in proceeding – disclosure of material by service of affidavit did not bring about inconsistency which resulted in waiver of the privilege – privilege not waived.

[National](#) (I B)

Wilson v The State of Queensland [2015] QSC 56

Supreme Court of Queensland

Jackson J

Workers compensation – applicant teacher made claim for rescission of settlement deed in reliance on innocent representation, and claim for wrongful termination of employment by first respondent – applicant went bankrupt prior to hearing of application to strike out claim - whether claims were for personal injury or wrong done to applicant – whether to grant leave to proceed in strike-out application under *Bankruptcy Act 1966* (Cth) - held: neither of the two categories of claim was an action in respect of any personal injury or wrong done to plaintiff - proceeding was stayed by operation of s60(2) – Court unable to proceed to hear application for determination of whether the statement of claim should survive or proceeding be terminated – leave not granted to proceed under r72 *Uniform Civil Procedure Rules 1999* (Qld) – application for leave to proceed declined.

[Wilson](#) (I B)

Samsung C & T Corporation v Laing O’Rourke Australia Construction Pty Ltd [2015] WASC 83

Supreme Court of Western Australia

Edelman J

Injunction – plaintiff contractor sought urgent interlocutory injunction requiring defendant to

deliver up construction materials it needed to performance of duties as principal on mining project – contract materials retained by subcontractor pending payment of claim for work done - serious question to be tried – strength of plaintiff’s case that it owned materials – prejudice – balance of convenience - held: plaintiff had a very strong case that title to construction materials had passed to it – respondent’s case very weak – balance of convenience strongly favoured grant of injunction – injunction granted.

[Samsung](#) (I C)

B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar [2015] ACTCA 7

Court of Appeal of the Australian Capital Territory

Murrell CJ, Gilmour J & Cowdroy AJ

Building and construction – ACT Civil and Administrative Tribunal affirmed registrar’s decision to issue a rectification order to appellant under Pt 4 *Construction Occupations (Licensing) Act 2004* (ACT) – rectification order directed appellant to undertake rectification works to building – primary judge dismissed appellant’s appeal – Pt 4, ss4, 16, 31, 33A, 34, 35, 36, 38, 40, 55, 117 & 121 *Construction Occupations (Licensing) Act 2004* (ACT) – held (by majority): Court did not wrongly assume there was evidence of loss and damage under s36(1)(a) - Court did not misunderstand proper role of the public record, constituted by approved building plans – contention rejected that primary judge erred in assuming owners corporation could represent individual unit owners - no error in approach of primary judge in understanding of nature of appeal – appeal dismissed.

[B&T](#) (I C G)

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