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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)

Rogers v MHM Metals Ltd (FCAFC) - corporations - dishonest and fraudulent design - knowing assistance - director and his company liable to pay compensation to respondent company (I B)

Coshott v Commissioner of Taxation (FCAFC) - administrative law - costs base of CGT event - Tribunal failed to discharge review function - matter remitted (B G)

Jojeni Investments Pty Ltd v Mosman Municipal Council (NSWCA) - environment and planning - existing use of land was as a "building containing flats" - appeal allowed - declaration (I B C)

Application of Tate and Chung (NSWSC) - succession - judicial advice - trustees' power to vary deed to substitute other persons as principal beneficiaries (B)

Ostron Pty Ltd v Rose Dion Pty Ltd (NSWSC) - real property - no binding agreement to enter into lease documents - no estoppel arose - summons dismissed (B)

Ikosidekas v Karkanis (VSCA) - administrative law - bias - procedural fairness - Tribunal's decision set aside - Tribunal to be reconstituted (I G)

Xiao Hui Ying v Perpetual Trustees Victoria Ltd (VSCA) - trusts - fraudulent design - transfer of land by husband to wife without valuable consideration - land held on trust for husband -

leave to appeal refused (B)

Summaries With Link (Five Minute Read)

Rogers v MHM Metals Ltd [2015] FCAFC 67

Full Court of the Federal Court of Australia

Middleton, Gilmour & Gleeson JJ

Corporations - appellants appealed from single judge's order that they pay compensation to respondent pursuant to s1317H *Corporations Act 2001* in sum comprising amounts spent by respondent to purchase and refit yacht although property in yacht never passed to respondent - judge found compensation payable by director of trustee of family trust for contraventions of ss181, 182 & 183 involving misappropriation of respondent company's funds, and trustee as it was "knowingly concerned" in misconduct - held: open to primary judge to conclude ownership never passed to respondent - no error in conclusion trustee of family trust liable by reason of having given knowing assistance to fiduciary with knowledge of dishonest and fraudulent design - appeal dismissed.

[Rogers](#) (I B)

Coshott v Commissioner of Taxation [2015] FCAFC 71

Full Court of the Federal Court of Australia

Allsop CJ; Kenny & Besanko JJ

Administrative law - dispute concerning CGT event said to have occurred in settlement of proceedings brought by taxpayer and husband against solicitor - appeal from Administrative Appeal's Tribunal refusal of judicial review on bases including that taxpayer had failed to discharge onus of proof because of lack of proper records - Commissioner accepted there had been an error of law in relation to approach of AAT concerning relationship between onus and records - held: there was prima facie failure by AAT to discharge its review function in relation to assessing incidental costs incurred by taxpayer in second element of costs base of CGT event - AAT's decision set aside - matter remitted to AAT.

[Coshott](#) (B G)

Jojeni Investments Pty Ltd v Mosman Municipal Council [2015] NSWCA 147

Court of Appeal of New South Wales

Macfarlan, Gleeson & Leeming JJA

Environment and planning - Council approved building alteration works to convert a two storey house into two flats in 1933 - appellant sought to demolish existing building and construct building containing three flats - land zoned R2 - appellant's proposed development prohibited on land zone R2 - application turned on existing use rights - primary judge declared land "has the benefit of existing use rights as two flats in a house" - appellant appealed - held: In 1933 it was possible for owner of property to use property as two residences without Council's approval - use of building as modified for residential purposes answered description of "existing

use” under s106(a) *Environmental Protection and Assessment Act 1979* - characterisation of determined by having regard to purpose served by activities undertaken on land - use of building for three flats is not “different in kind” from use as a building for two flats - appropriate declaration of existing use was as a “building containing flats - appeal allowed.

[Jojeni](#) (I B C)

Application of Tate and Chung [2015] NSWSC 639

Supreme Court of New South Wales

Slattery J

Succession - trustees of trust sought Court’s judicial opinion, advice or direction pursuant to s63 *Trustee Act 1925* as to interpretation of deed constituting trust - principal beneficiaries of trust deceased - two people taking under Wills of deceased principal beneficiaries contended trustees should exercise powers under deed to appoint distribution date or wind-up trust because it had no beneficiaries - whether trustees justified in varying deed to substitute other persons as principal beneficiaries construction of deed - held: trustees justified in exercising the power they sought seek to exercise if they were so minded - deed conferred powers trustees claimed it conferred - trustees’ questions answered.

[Tate&Chung](#) (B)

Ostron Pty Ltd v Rose Dion Pty Ltd [2015] NSWSC 643

Supreme Court of New South Wales

Darke J

Real property - leases - estoppel - plaintiff sought declaratory relief and decree of specific performance in relation to alleged lease of properties by defendants to it - plaintiff also propounded an estoppel precluding defendants from denying existence of agreement - whether parties at any stage entered into binding contract to enter into leases of premises - held: Court not satisfied parties reached a binding agreement to enter into lease documents - no estoppel arose - summons dismissed.

[Ostron](#) (B)

Ikosidekas v Karkanis [2015] VSCA 121

Court of Appeal of Victoria

Mandie & Kyrou JJA

Administrative law - bias - procedural fairness - applicant instituted proceeding in Victorian Civil and Administrative Tribunal in relation to mother seeking appointment of administrator - applicant sought leave to appeal from dismissal of application for reconstitution of Tribunal on basis of reasonable apprehension of bias and denial of procedural fairness - held: VCAT’s comments went beyond interlocutory application before it and constituted apparent pre-judgment of issues yet to be decided - fair minded lay observer might reasonably apprehend VCAT as presently constituted might not bring an impartial and unprejudiced mind to resolution of questions to be decided at substantive hearing - appeal allowed - VCAT’s order set aside - VCAT to be reconstituted pursuant to s108(2)(a) *Victorian Civil and Administrative Tribunal Act 1998* .

[Ikosidekas](#) (I G)

Xiao Hui Ying v Perpetual Trustees Victoria Ltd [2015] VSCA 124

Court of Appeal of Victoria

Beach & McLeish JJA; Dixon AJA

Trusts - transfer of land - fraudulent design - applicant and another lived on land as husband and wife - primary judge gave judgment for respondent against applicant and Fitzgerald in amount following default on loans - primary judge held that the land, previously transferred by Fitzgerald to Xiao without payment of any purchase price, was held on resulting trust for Fitzgerald with result land was held by Xiao on trust for Fitzgerald - primary judge made orders for appointment of receiver and trustee for sale of land to satisfy the judgment debt- applicant sought to appeal from order declaring that she held land on trust for Fitzgerald's benefit and from orders requiring sale of land - natural love and affection - presumption or resulting trust - whether presumption of advancement - held: declaration should not be disturbed - application did not raise point with prospect of success that was real in sense of not being fanciful - submission that transfer made for valuable consideration was without substance - challenges to finding as to Fitzgerald's intention misconceived - leave to appeal refused.

[Ying](#) (B)

CRIMINAL

Executive Summary

Harris (a pseudonym) v The Queen (VSCA) - criminal law - charges of sexual offences - coincidence evidence inadmissible - appeal allowed

B v R (NSWCCA) - criminal law - removal of child from jurisdiction in breach of s65Y *Family Law Act 1975* (Cth) - appeals from conviction and sentence dismissed

Summaries With Link

Harris (a pseudonym) v The Queen [2015] VSCA 112

Court of Appeal of Victoria

Priest & Kaye JJA; Croucher AJA

Criminal law - evidence - applicant charged with eight charges of sexual offences involving two complainants - applicant sought leave to appeal against interlocutory decision of County Court judge to admit coincidence evidence in trial of applicant - ss98(1) & 101 *Evidence Act 2008* (Vic) - held: Court considered the coincidence evidence would be of probative value, but did not consider it had such cogency that it would have significant probative value - coincidence

evidence not admissible under s98(1)(b) - if Court had concluded evidence had necessary significant probative value, it would not be satisfied probative value substantially outweighed any prejudicial effect it may have on fair trial - test for admissibility under s101 not established - leave to appeal granted - appeal allowed.

[Harris](#)

B v R [2015] NSWCCA 103

Court of Criminal Appeal of New South Wales

Ward JA; Simpson & Wilson JJ

Criminal law - appellant convicted of offence against s65Y *Family Law Act 1975* for removing her child from jurisdiction, without consent of father of child, or Court, on basis of belief that child had been sexually abused by father and that there had not been, and would not be, a proper investigation into sexual abuse allegations - appellant appealed from conviction and sentence - principal ground of appeal in respect of conviction concerned trial judge's decision that appellant had not satisfied evidential burden necessary for the two defences she wished to raise for jury's consideration - held: primary judge did not err in conclusions as to evidential burden, in ruling regarding the irrelevance of fact of sexual abuse or in relation to admissibility of doctor's report - appeal from conviction dismissed - appeal against sentence dismissed.

[B](#)

On Virtue

By Phillis Wheatley

O thou bright jewel in my aim I strive
To comprehend thee. Thine own words declare
Wisdom is higher than a fool can reach.
I cease to wonder, and no more attempt
Thine height t'explore, or fathom thy profound.
But, O my soul, sink not into despair,
Virtue is near thee, and with gentle hand
Would now embrace thee, hovers o'er thine head.
Fain would the heaven-born soul with her converse,
Then seek, then court her for her promised bliss.

Auspicious queen, thine heavenly pinions spread,
And lead celestial Chastity along;
Lo! now her sacred retinue descends,
Arrayed in glory from the orbs above.
Attend me, Virtue, thro' my youthful years!
O leave me not to the false joys of time!
But guide my steps to endless life and bliss.
Greatness, or Goodness, say what I shall call thee,



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To give an higher appellation still,
Teach me a better strain, a nobler lay,
O Thou, enthroned with Cherubs in the realms of day!

[Phillis Wheatley](#)

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