




Friday, 29 November 2019

## Daily Civil Law 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.

### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Dinomyte Pty Ltd v Australian Securities & Investments Commission, in the matter of Hanwood Pastoral Co Pty Ltd** (FCA) - corporations - first and second plaintiffs sought to bring proceedings on company's behalf - Court satisfied there could be serious question to be tried - plaintiffs granted leave to adduce further evidence (I B)

**Gold Coast Marine Aquaculture Pty Ltd v HTC Trading Pty Ltd** (FCA) - preliminary discovery - 'prospective applicant' sought preliminary discovery from 'prospective respondents' - application granted (B C I G)

**J & M McNamee Holdings Pty Ltd v Mungerie Vale Pty Ltd trading as Greenwood Group Realtors** (NSWCA) - default judgment - primary judge refused application to set aside default judgment - appeal allowed - default judgment varied (I B C G)

**Angelis as trustee for the Angelis Family Trust v Pemba Capital Partners Fund I Partnership, LP** (NSWSC) - contract - shareholders agreement - determination of separate question (B I)

**McLean v Rykers: IMO the will and the estate of Nora Backman, deceased** (VSC) - wills and estates - family provision - family provision order granted - defendant liable for premature distribution of estate (B)

**Harburg Nominees Pty Ltd & Anor v Deen** (QSC) - contract - guarantee - plaintiffs sought judgment against defendant under guarantee - judgment entered against defendant (I B C G)

**Tomcsanyi v National Australia Bank Ltd [No 2]** (WASCA) - possession - enforcement - show cause - grounds of appeal did not have prospects of success - appeal dismissed (B)

## Summaries With Link (Five Minute Read)

### **Dinomyte Pty Ltd v Australian Securities & Investments Commission, in the matter of Hanwood Pastoral Co Pty Ltd [2019] FCA 1989**

Federal Court of Australia

Gleeson J

Corporations - first and second plaintiffs, pursuant to s237 *Corporations Act 2001* (Cth) (Act), sought to bring proceedings on second defendant company's behalf against six defendants - 'first proposed defendant' contended 'proposed pleading' was defective warranting conclusion there was 'no serious question to be tried' and that 'proposed action' had 'not been shown to be' in company's best interests - held: Court satisfied there could be serious question to be tried - plaintiffs granted leave to adduce further evidence.

[Dinomyte](#) (I B)

### **Gold Coast Marine Aquaculture Pty Ltd v HTC Trading Pty Ltd [2019] FCA 1995**

Federal Court of Australia

Anastassiou J

Preliminary discovery - 'prospective applicant' sought preliminary discovery from first to third 'prospective respondents' - first to third respondents were importers of 'uncooked prawns' - prospective applicant alleged importers could be responsible for outbreak of virus - two of the three importers consented to giving of discovery - one importer opposed application - prospective applicant also sought preliminary discovery from fourth respondent Department of Agriculture and Water Resources (Department) - Department opposed application - whether r7.23 *Federal Court Rules 2011* (Cth) satisfied - held: Court satisfied to grant preliminary discovery.

[Gold Coast Marine](#) (B C I G)

### **J & M McNamee Holdings Pty Ltd v Mungerie Vale Pty Ltd trading as Greenwood Group Realtors [2019] NSWCA 283**

Court of Appeal of New South Wales

Gleeson & Brereton JJA

Default judgment - respondent claimed sum against applicant for 'alleged unpaid commission' on sale of lots - respondent obtained default judgment - applicant sought to set default judgment aside - primary judge found applicant had 'arguable defence' but did not adequately explain delay - applicant sought to appeal - applicant contended primary judge erred in finding there

was 'no reasonable explanation for delay' - applicant also contended primary judge erroneously exercised discretion to set default judgment aside - whether in interests of justice to allow applicant to defend proceeding on merits - whether 'bona fide' defence - whether 'unreasonable or unjust result' warranting Court's interference - held: appeal allowed - default judgment varied.  
[View Decision](#) (I B C G)

**Angelis as trustee for the Angelis Family Trust v Pemba Capital Partners Fund I Partnership, LP [2019] NSWSC 1646**

Supreme Court of New South Wales  
Stevenson J

Contract - separate question - Court appointed 'independent expert' to express opinion on 'remaining question' concerning value of shares in sixth defendant 'unlisted insurance broker' ('Coverforce') - proceedings concerned determination of separate question in order to assist independent expert in dealing with remaining question - question was: "Does compliance with clause 9.1 of the 29 November 2017 Shareholders Agreement require: a. the party seeking an Exit to have the intention to achieve an Exit which maximises Shareholder value; or b. that the Exit maximises Shareholder value?" - construction of Shareholders Agreement - *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* [2019] HCA 13 - held: separate question answered.

[View Decision](#) (B I)

**McLean v Rykers: IMO the will and the estate of Nora Backman, deceased [2019] VSC 762**

Supreme Court of Victoria  
Daly AsJ

Wills and estates - family provision - plaintiff and defendant were children of deceased - defendant was 'sole executrix and sole beneficiary of' deceased's estate - plaintiff, under Part IV *Administration and Probate Act 1958* (Vic) (*Administration and Probate Act*) sought provision from deceased's estate - plaintiff also contended defendant breached duty as executrix by 'distributing the estate prematurely' - plaintiff contended defendant 'should be personally liable' for any loss plaintiff suffered - factors in s91A(2) *Administration and Probate Act* - whether deceased met 'moral obligation' to plaintiff - consequences of 'premature distribution' of estate assets - *Walters v Perton (No 3)* [2019] VSC 733 - held: family provision order granted - defendant liable for premature distribution of estate.

[McLean](#) (B)

**Harburg Nominees Pty Ltd & Anor v Deen [2019] QSC 291**

Supreme Court of Queensland  
Applegarth J

Contract - guarantee - plaintiffs lent money to company - plaintiffs, by loan agreement, agreed to advance company additional amount - defendant was company's sole director - plaintiffs sought judgment against defendant for money owing under guarantee in respect of company's 'due and proper performance' of loan agreement - defendant contended he was not liable due to



'alleged representations made on' plaintiffs' behalf - 'threshold issue' was whether 'director and representative' of plaintiffs made alleged representations - held: Court not satisfied defendant had proved alleged representations were made - held: judgment entered against defendant.

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

## **Tomcsanyi v National Australia Bank Ltd [No 2] [2019] WASCA 192**

Court of Appeal of Western Australia

Murphy & Mitchell JJA

Possession - enforcement - show cause - Court, by interlocutory judgment, dismissed application for stay of 'primary orders' in proceedings on basis appeal had no prospects of success - appellants filed 'appellants' case' - appellants appealed against enforcement orders in respect of respondent's entitlement to possession of property - show cause hearing - whether ground or grounds of appeal had prospects of success - whether appeal should be dismissed under r43(2)(g)(i) *Supreme Court (Court of Appeal) Rules 2005 (WA)* - held: no prospects of success demonstrated by appeal grounds - appeal dismissed.

[Tomcsanyi](#) (B)

## CRIMINAL

### Executive Summary

### Summaries With Link



**LXXXIII**

**By:** Emily Dickinson

JUST lost when I was saved!  
Just felt the world go by!  
Just girt me for the onset with eternity,  
When breath blew back,  
And on the other side  
I heard recede the disappointed tide!

Therefore, as one returned, I feel,  
Odd secrets of the line to tell!  
Some sailor, skirting foreign shores,  
Some pale reporter from the awful doors  
Before the seal!

Next time, to stay!  
Next time, the things to see  
By ear unheard,  
Unscrutinized by eye.

Next time, to tarry,  
While the ages steal,—  
Slow tramp the centuries,  
And the cycles wheel.

[https://en.wikipedia.org/wiki/Emily\\_Dickinson](https://en.wikipedia.org/wiki/Emily_Dickinson)

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