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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)

Yesilhat v Calokerinos (NSWSC) - wills and estates - succession - summary dismissal of family provision claim refused - security for costs refused - notice of motion dismissed (B)

Thomas v Arthur Hughes Pty Ltd (NSWSC) - corporations - disposition of company's assets - breach of directors' duties - declarations and orders (I B)

Lahoud v Hooper (NSWSC) - discovery - application for preliminary discovery order to ascertain name of person who communicated with defendant - failure to make reasonable inquiries - summons dismissed (I C)

De Armas v Peters (NSWSC) - motor vehicle accident - insurance - subrogation - leave to appeal and cross-appeal refused (I)

St Kilda Arts and Events Company (Vic) Pty Ltd v Apes with Wings Pty Ltd (VSCA) - contract - application for stay of execution of judgment dismissed (B)

Bensons Funds Management Pty Ltd v Body in Balance Chiropractic Pty Ltd (VSCA) - administrative law - landlord and tenant - refusal of application to discharge injunction - leave to appeal refused (B C G)

Cruise Oz Pty Ltd v AAI Ltd (QSC) - insurance contract - motor dealers insurance policy -

damage or loss caused to applicant's insured vehicles in flood at trade show - insurer required to indemnify applicant (I)

Summaries With Link (Five Minute Read)

Yesilhat v Calokerinos [2015] NSWSC 1028

Supreme Court of New South Wales

White J

Summary dismissal - wills and estates - succession - security for costs - defendant sought summary dismissal of plaintiff's application for provision from deceased's estate pursuant to Pt 3.2 *Succession Act 2006* (NSW) - defendant contended it was not seriously arguable that plaintiff was an eligible applicant for a family provision order - defendant claimed no reasonable cause of action was disclosed and that proceedings were abuse of process and vexatious - defendant's submissions focused on requirement for existence of a *de facto* relationship that *de facto* partners lived together as a couple - held: arguable that present case was an exceptional case in which two people, who had not lived in common residence and had not made actual provision for mutual support, might be said to have been 'living together as couple on a genuine domestic basis' - summary judgment refused - security for costs refused - notice of motion dismissed.

[Yesilhat](#) (B)

Thomas v Arthur Hughes Pty Ltd [2015] NSWSC 1027

Supreme Court of New South Wales

White J

Corporations - equitable remedies - directors' duties - proceedings concerning disposition of company's assets - liquidator of company claimed that director breached duty to act in good faith and not for improper purpose - transfer of shares and securities and provision of loans to companies controlled by director - held: director breached fiduciary and statutory duties - director entered transactions not for company's benefit and where she had conflict between duty to company and personal interest - director also breached duty under s181(1) *Corporations Act 2001* (Cth) - contracts rescinded - property transferred and fruits of property held on constructive trust - director and son personally liable to compensate company - corporate accessories liable as constructive trustees to re-transfer property and account for profit - orders and declarations - parties to bring in short minutes.

[Thomas](#) (I B)

Lahoud v Hooper [2015] NSWSC 1026

Supreme Court of New South Wales

Adamson J

Discovery - plaintiff sought order for preliminary discovery against defendant in order to ascertain name of person who communicated with defendant concerning damage to building in

which plaintiff had interest - Pt 6, Div 1 *Civil Procedure Act 2005* (NSW) - ss14 & 15 *Defamation Act 2005* (NSW) - ss94 & 96 *Environmental Planning and Assessment Act 1979* (NSW) - held: plaintiff had failed to make reasonable inquiries and had therefore not established entitlement to relief sought - summons dismissed.

[Lahoud](#) (I C)

De Armas v Peters [2015] NSWSC 1050

Supreme Court of New South Wales

Wilson J

Motor vehicle accident - insurance - dispute arising from motor vehicle collision - plaintiff was owner and driver of one of the cars - defendant owned other vehicle which was being driving by his wife - defendant insured by NRMA - plaintiff insured by AAMI - defendant's wife, later substituted by defendant, sued plaintiff in negligence - plaintiff cross-claimed that wife negligent and sought order for payment by defendant of value of damage to her vehicle and all associated loss - defendant brought second set of proceedings against plaintiff seeking damages for costs of repair, towing charges and hire car costs - proceedings brought in his name by NRMA pursuant to alleged right of subrogation - Local Court gave verdict for plaintiff in first proceedings - plaintiff sought to dismiss second set of proceedings on basis of *res judicata* - defendant sought that Local Court's orders be set aside as being entered irregularly or against good faith - Court found that as two proceedings brought by two different entities, plaintiff's notice of motion raising issues of *res judicata* and provisions s24 *Civil Procedure Act 2005* (NSW) could not be granted - defendant's notice of motion dismissed - parties appealed and cross-appealed - held: plaintiff refused leave to appeal against - leave to cross-appeal also refused - summonses dismissed.

[DeArmas](#) (I)

St Kilda Arts and Events Company (Vic) Pty Ltd v Apes with Wings Pty Ltd [2015]VSCA 199

Court of Appeal of New South Wales

Weinberg JA & Garde AJA

Judgment and orders - applicants brought proceedings against respondents arising out of contract for sale and purchase of properties - respondents obtained judgment against applicants - applicants had foreshadowed appeal and sought stay of orders for payment of damages and costs - no application for leave to appeal filed - need to show special or exceptional circumstances - prospects of winding up or bankruptcy if judgment debt enforced - held: applicants did not discharge heavy burden of persuasion in applying for stay - prospects of success were only speculative in the realms of conjecture - application for stay dismissed.

[StKilda](#) (B)

Bensons Funds Management Pty Ltd v Body in Balance Chiropractic Pty Ltd [2015] VSCA 198

Court of Appeal of Victoria

Whelan & Ferguson JJA; Robson AJA

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Administrative law - landlord and tenant - applicant leased premises to respondent - respondent claimed to have exercised option for further five years - applicant had decided to develop premises - there was dispute between parties in Victorian Civil and Administrative Tribunal - respondent obtained interlocutory injunction restraining applicant from taking possession of leased premises - undertaking in usual form given by respondent - Tribunal refused applicant's application which in effect sought discharge of injunction if guarantor under lease who was also director of respondent failed to give undertaking as to damages - applicant sought leave to appeal - whether applicant must positively establish damage would be suffered as result of injunction before an adequate undertaking as to damages required - strength of evidence as to damage before an undertaking would be required - held: Court satisfied there was real prospect of success in sense it was not fanciful, however Court not satisfied there would be substantial injustice if leave to appeal refused - leave to appeal refused.

[Bensons](#) (B C G)

Cruise Oz Pty Ltd v AAI Ltd [2015] QSC 215

Supreme Court of Queensland

Carmody J

Insurance contract - motor dealers insurance policy - applicant sought declaration that on proper construction, insurance agreement executed by parties extended to cover flood damage sustained by caravans displayed at trade show - whether open for applicant to claim insurance under agreement - proper construction of "your premises" in definition of "your vehicle" in Section 3 of agreement - held: applicant successfully established Section 3 responded to its insurance claim - Section 3 was subject to perils exclusion clause which would substantially preclude recovery in respect of several insured vehicles - the Two Section Exclusion Clause prescribed Section 3 would respond to claim - respondent must indemnify applicant in respect of damage or loss caused to the applicant's insured vehicles on under Section 3 - declaration.

[Cruise](#) (I)

CRIMINAL

Executive Summary

Adamson v The Queen (VSCA) - criminal law - child sexual offences - use of internet - presumption of harm - appeal against sentences - appeal on one ground dismissed - leave to appeal refused in respect of two other grounds

R v Lovell; Ex parte Attorney-General (QCA) - criminal law - referred point of law - disfigurement which was remedied by medical treatment was capable of amounting to a serious disfigurement within meaning of 'grievous bodily harm' in s1 of the Criminal Code

Summaries With Link

Adamson v The Queen [2015] VSCA 194

Court of Appeal of Victoria

Warren CJ; Redlich & Weinberg JJA

Criminal law - appellant pleaded guilty to charges arising from two indictments - on first indictment appellant sentenced on multiple charges of using carriage service to procure person under 16 for sexual activity, to groom person under 16 years of age for sexual activity and to transmit indecent communications to a person under 16 - appellant also sentenced on indictment on charges of producing child pornography, procuring minor for child pornography and possessing child pornography - all offences on first indictment committed via internet - on second indictment appellant sentenced on charge of conspiracy to commit blackmail and two charges of blackmail - appellant granted leave to appeal from sentences on first indictment - appellant contended presumption of harm in respect of child victims did not arise in respect of 'cybersex' offending - appellant sought leave to appeal from sentences in relation to both indictments on grounds sentence manifestly excessive and that sentencing judge failed to give allowance for reduction in applicant's moral culpability - held: persuasive presumption that child had suffered harm as a result of prohibited sexual activity applied no less to cybersex offences than to 'in person' offences - judge made no error in concluding appellant harmed each child victim - appeal dismissed - leave to appeal on other grounds refused.

[Adamson](#)

R v Lovell; Ex parte Attorney-General (Qld) [2015] QCA 136

Court of Appeal of Queensland

Holmes, Gotterson & Philippides JJA

Criminal law - respondent charged with doing grievous bodily harm under s320 *Criminal Code* (Qld) - complainant suffered disfiguring injury to face which was repaired by surgery - primary judge ruled that Crown was required to show existing serious disfigurement in order to prove grievous bodily harm - Crown presented a *nolle prosequi* - jury was discharged from returning a verdict - Attorney-General referred point of law to Court pursuant to s669A(2) of *Criminal Code* question was whether a disfigurement which was remedied by medical treatment capable of amounting to a serious disfigurement within meaning of 'grievous bodily harm' in s1 of the *Criminal Code* - held: primary judge's ruling not correct - Court of Appeal answered question in the affirmative.

[Lovell](#)



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Letter from Town: The Almond Tree

By D. H. Lawrence, 1885 - 1930

You promised to send me some violets. Did you forget?
White ones and blue ones from under the orchard hedge?
Sweet dark purple, and white ones mixed for a pledge
Of our early love that hardly has opened yet.

Here there's an almond tree—you have never seen
Such a one in the north—it flowers on the street, and I stand
Every day by the fence to look up for the flowers that
expand
At rest in the blue, and wonder at what they mean.

Under the almond tree, the happy lands
Provence, Japan, and Italy repose,
And passing feet are chatter and clapping of those
Who play around us, country girls clapping their hands.

You, my love, the foremost, in a flowered gown,
All your unbearable tenderness, you with the laughter
Startled upon your eyes now so wide with hereafter,
You with loose hands of abandonment hanging down.

[DHLawrence](#)

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