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

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Executive Summary (1 minute read)

Rubino v Australia and New Zealand Banking Group Ltd (NSWCA) - possession - serious question to be tried - stay of execution of writs (B)

Courts v Essential Energy (aka Country Energy) (NSWSC) - negligence - independent contractor electrocuted while unloading sheep - authority and occupier liable (I)

RCR Resolve FM v Serco Australia (NSWSC) - proceedings dealing with same legal and factual issue - District Court proceedings transferred to Supreme Court (I B C)

In the matter of MK Group Phoenix Pty Ltd (NSWSC) - corporations - winding up - statutory demand set aside (B)

Little v Shell Refining Australia Pty Ltd (VSC) - discovery - deficient discovery - order for provision of third affidavit of documents - defence not struck out (I C)

R K Property Holdings Pty Ltd v BCOOL Pty Ltd (VSC) - joint venture - determination of joint venturers' entitlements to balance of proceedings (I B C)

GWC Property Group Pty Ltd v Higginson (QSC) - summary judgment - leases - penal clauses of incentive deed unenforceable against guarantors (I B)

Summaries with links (5 minute read)

Rubino v Australia and New Zealand Banking Group Ltd [2014] NSWCA 362

Court of Appeal of New South Wales

Basten, Ward & Emmett JJA

Possession - appellant sought leave to appeal from dismissal of application for stay of execution of writs for possession of adjoining parcels of land - appellant asserted there were unusual features surrounding relevant transactions such that inference should be drawn that bank knew of and participated in a fraud - held: Court satisfied there was sufficient material to indicate arguable case that bank, through its employee, was aware of circumstances that would cause an honest and reasonable person to make further enquiries as to understanding of appellant and husband about transactions, and that bank, through employee, wilfully and recklessly failed to make enquiries - evidence of delay without satisfactory explanation did not bar granting interlocutory relief - appeal allowed - stay of execution of writs granted.

[Rubino](#) (B)

Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483

Supreme Court of New South Wales

Adamson J

Negligence - joint tortfeasors - plaintiff independent contractor electrocuted when he came into contact with an uninsulated electric power wire while unloading sheep from vehicle - plaintiff claimed damages in negligence from electricity authority and occupier of property - held: authority's failure to take reasonable precaution of constructing line so as to give a ground clearance in accordance with its design of 6ms was negligent - accident would not have happened if power line had had a ground clearance at the relevant location - occupier was in breach of duty by not intervening to instruct plaintiff, through station manager, not to unload sheep at a location where any part of truck would be under power line - occupier's negligence was material cause of plaintiff's accident - plaintiff contributorily negligent by parking truck under power line - contributory negligence 40% - liability apportioned at two thirds to authority and one third to occupier - damages assessed - judgment for plaintiff.

[Courts](#) (I)

RCR Resolve FM v Serco Australia [2014] NSWSC 1477

Supreme Court of New South Wales

McDougall J

Transfer of proceedings - two sets of proceedings in different courts dealt with same factual and legal issue - plaintiff sought transfer of District Court proceedings to Supreme Court and consolidation of proceedings - held: manifestly undesirable that same issue of fact or law or both between same parties should be considered by different judges in different courts - any

incremental delay would not be of such magnitude that interest would not be sufficient solatium - appropriate to transfer proceeding - no benefit in reconstituting the two sets of proceedings into one, and repleading all the claims - consolidation of proceedings refused - proceedings to be transferred and heard together.

[RCR Resolve FM](#) (I B C)

In the matter of MK Group Phoenix Pty Ltd [2014] NSWSC 1467

Supreme Court of New South Wales

Black J

Corporations - winding up - plaintiff sought to set aside statutory demand issued by company - application brought under ss459H or 459J *Corporations Act 2001* (Cth) - held: genuine dispute established - unnecessary to determine whether sufficient evidence of offsetting claim - company's issue of a statutory demand which claimed that fee was due and payable prior to expiry of the period by which payment of the debt had been required gave rise to a defect that would cause substantial injustice for purposes of s459J(1)(a) and would be an abuse of statutory demand procedure for purposes of s459J(1)(b) - demand set aside.

[In the matter of MK Group Phoenix Pty Ltd](#) (B)

Little v Shell Refining Australia Pty Ltd [2014] VSC 546

Supreme Court of Victoria

Zammit AsJ

Discovery - plaintiffs alleged first plaintiff was exposed to asbestos at Alcoa's aluminium smelter and that second plaintiff was exposed to asbestos through first plaintiff's clothes - plaintiffs claimed there had been an absence of proper discovery by Alcoa and failure to comply with *Supreme Court (General Civil Procedure) Rules 2006* (Vic) to provide necessary documents and/or explanation - held: Alcoa's discovery was deficient - Alcoa should provide third affidavit of documents - Court did not consider any orders should be made pursuant to *Evidence (Miscellaneous Provisions) Act 1958* (Vic) - striking out Alcoa's defence pursuant to s89B at this stage was not proportionate to the offending conduct under the Rules.

[Little](#) (I C)

R K Property Holdings Pty Ltd v BCOOL Pty Ltd [2014] VSC 548

Supreme Court of Victoria

Almond J

Joint venture - dispute between joint venturers who developed properties - joint venturers undertook two projects - no written joint venture agreement - arrangement was that each party would contribute according to profit share - parties each alleged the other breached joint venture agreement and sought orders including compensation and taking of accounts - parties agreed upon their respective contributions and drawings but could not agree upon discrete matters, which meant reconciliation of entitlements to balance of proceeds of joint venture could not occur - held:

no GST input credits for joint venture project which were not transferred to the joint venture account - plaintiff entitled to fee for project management for one project - no agreement that value of apartments in one project would be of equal value - parties liable for project costs in excess of agreed construction costs of project - parties obliged to share equally general interest charge for late payment of GST - adjustments to be made to reflect amounts conceded by parties during course of trial and issues which had been determined.

[R K Property Holdings Pty Ltd](#) (I B C)

GWC Property Group Pty Ltd v Higginson [2014] QSC 264

Supreme Court of Queensland

Dalton J

Summary judgment - leases - incentive deed - plaintiff owned office premises - predecessor in title let premises to law firm in liquidation - first, second and third defendants guaranteed obligations of law firm pursuant to lease and incentive deed - proceeding involved no claim on lease and no claim against tenant law firm - first second and third defendants were sued as guarantors under incentive deed - plaintiff claimed amount of incentives which law firm received pursuant to provisions of incentive deed and had failed to repay on termination in accordance with the terms of deed - defendants contended provisions pursuant to which plaintiff claimed were penalties and sought summary judgment pursuant to r293 *Uniform Civil Procedure Rules 1999* (Qld) - held: plaintiff had sued upon clauses which were wholly penal and which should not be enforced - no injustice in not enforcing penalty clauses because plaintiff had rights at common law pursuant to lease and guarantees - summary judgment granted.

[GWC Property Group Pty Ltd](#) (I B)

III (from Mont Blanc)

By Percy Bysshe Shelley

Some say that gleams of a remoter world
 Visit the soul in sleep, that death is slumber,
 And that its shapes the busy thoughts outnumber
 Of those who wake and live. I look on high;
 Has some unknown omnipotence unfurl'd
 The veil of life and death? or do I lie
 In dream, and does the mightier world of sleep
 Spread far around and inaccessibly
 Its circles? For the very spirit fails,
 Driven like a homeless cloud from steep to steep
 That vanishes among the viewless gales!
 Far, far above, piercing the infinite sky,

Mont Blanc appears - still, snowy, and serene;
Its subject mountains their unearthly forms
Pile around it, ice and rock; broad vales between
Of frozen floods, unfathomable deeps,
Blue as the overhanging heaven, that spread
And wind among the accumulated steeps;
A desert peopled by the storms alone,
Save when the eagle brings some hunter's bone,
And the wolf tracks her there - how hideously
Its shapes are heap'd around! rude, bare, and high,
Ghastly, and scarr'd, and riven. Is this the scene
Where the old Earthquake-daemon taught her young
Ruin? Were these their toys? or did a sea
Of fire envelop once this silent snow?
None can reply - all seems eternal now.
The wilderness has a mysterious tongue
Which teaches awful doubt, or faith so mild,
So solemn, so serene, that man may be,
But for such faith, with Nature reconcil'd;
Thou hast a voice, great Mountain, to repeal
Large codes of fraud and woe; not understood
By all, but which the wise, and great, and good
Interpret, or make felt, or deeply feel.

[Percy Bysshe Shelley](#)

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