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Daily Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

MT Hojgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd & Anor (UKSC) - contract - 'design and build' contract between parties - failure of foundation structures of two off shore wind farms - respondent liable for remedial costs - appeal allowed

Leary v NSW Trustee and Guardian (No 2) (NSWSC) - costs - indemnity costs - family provision - plaintiff presented 'an admittedly false case' - conduct amounted to abuse of process - plaintiff to pay defendant's costs on indemnity basis

Muranna Park Pty Ltd & Ors v Southern Mortgages Ltd & Ors (VSC) - summary dismissal - loans and mortgages - *Farm Debt Mediation Act 2011 (Vic)* - no error in dismissal of proceedings against respondents - appeal dismissed

Carbone v Toyota Motor Corporation Australia Ltd (VSCA) - accident compensation - refusal of leave to proceed against employer in respect of injuries suffered in course of employment - credit - procedural fairness - adequacy of reasons - appeal dismissed

Multiplex Bluewater Marina Village Pty Ltd & Anor v Harbour Tropics Pty Ltd (QCA) - easements - construction of easement which encompassed car parks - erroneous finding that respondent could limit parking in car parks to 10 hours continuous use - declaration varied - appeal allowed

RV Pty Limited v Connector Park Pty Ltd (No 3) (TASSC) - costs - contract - defendant unreasonable to reject offer of compromise - plaintiff granted indemnity costs order

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Summaries With Link (Five Minute Read)

MT Hojgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd & Anor [2017] UKSC 59

United Kingdom Supreme Court

Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Contract - 'design and build' contract - proceedings arising from failure of foundation structures of two off shore wind farms - parties disputed who bore remedial costs - appellants were two companies in group (E.ON) - MTH were successful bidders on appellants' tender documents, which included "Technical Requirements" stating the requirements which were to be taken into account by MTH - Technical Requirements required that foundations be in accordance with document (J101) - MTH prepared tender in accordance with Technical Requirements and J101 - J101 affected by error which meant foundation structures' strength overestimated - parties entered contract - contract stated MTH should carry out work "fit for purpose" including adherence to Technical Requirements - whether paragraphs of Technical Requirements infringed - construction of Technical Requirements - "The design of the foundations shall ensure a lifetime of twenty years in every aspect without planned replacement" - whether inconsistency between paragraphs and other provisions such as adherence to J101 - held: MTH breached Technical Requirements - foundations did not have a twenty year life time - foundations' design was not fit to ensure twenty year life time - no different construction required by reference to J101 - MTH liable - appeal allowed.

[MT Hojgaard](#)

Leary v NSW Trustee and Guardian (No 2) [2017] NSWSC 1226

Supreme Court of New South Wales

Ward CJ in Eq

Costs - indemnity costs - Court dismissed plaintiff's application for provision from deceased mother's estate - plaintiff had presented 'an admittedly false case as to his personal and financial circumstances' - plaintiff sought that there be no orders as to his costs and the defendant's costs be paid from estate on indemnity basis - defendant sought that plaintiff should pay its costs on indemnity basis - rr42.1, 42.2 & 42.15 *Uniform Civil Procedure Rules 2005* (NSW) - Calderbank offer - offer of compromise - held: leaving aside the ordinary consequence of rejection of an offer of compromise 'far more favourable' than outcome received, plaintiff's conduct amounted to abuse of process and called for indemnity costs order - plaintiff to pay defendant's costs on indemnity basis.

[View Decision](#)

Muranna Park Pty Ltd & Ors v Southern Mortgages Ltd & Ors [2017] VSC 522

Supreme Court of Victoria

Croft J

Summary judgment - loans and mortgages - appellants made claims against respondents in reliance on application of *Farm Debt Mediation Act 2011* (Vic) (FDMA) - respondents sought

summary dismissal pursuant to s63 *Civil Procedure Act 2010* (Vic) on basis FDMA did not apply to enforcement action which second respondent took to recover loan and enforce mortgage - alternatively summary dismissal sought on basis proceeding had no real prospects of success because third respondent bank was not a creditor and did not take enforcement action under FDMA against appellants - associate judge found FDMA did not apply to respondents' enforcement action - associate judge also found third respondent was not a creditor and did not take enforcement action - associate judge granted dismissal of proceedings - held: no error in decision of associate judge - appeal dismissed.

[Muranna](#)

Carbone v Toyota Motor Corporation Australia Ltd [2017] VSCA 249

Court of Appeal of Victoria

Osborn, Priest & Kaye JJA

Accident compensation - applicant sought leave under s134AB *Accident Compensation Act 1985* (Vic) to proceed against respondent employer for pain and suffering damages, and loss of earning capacity in relation to injuries in course of employment - primary judge dismissed application - whether primary judge erred by failure to provide reasons disclosing 'intelligible path of reasoning - whether primary judge erred by denying applicant procedural fairness in relation to conclusion he exaggerated injury's consequences - credit - held: applicant failed to make out grounds of appeal - appeal dismissed.

[Carbone](#)

Multiplex Bluewater Marina Village Pty Ltd & Anor v Harbour Tropics Pty Ltd [2017] QCA 202

Court of Appeal of Queensland

Morrison & Philippides JJA; Flanagan J

Easements - appellant owned lot on which marina located - adjacent and owned by respondent on which it operated tavern - lot contained car parks adjacent to tavern - respondent granted easement to appellant encompassing car parks - appeal concerned whether easement gave appellant unlimited use of car parks or whether respondent could impose time limit on use of car parks - primary judge found the right of access was to facilitate use of vessels moored at marina and access to the vessels, and that right to use car parks was for a limited time - primary judge found respondent could limit parking in car parks to 10 hours continuous use - proper construction of easement - whether basis for adopting 10 hour time limit, which neither side had proposed - held: primary judge erred in finding carparks' use may not exceed 10 hour continuous period - rights of appellant and Marina Berth Users were not unlimited, but limited under easement's terms - declaration sought by appellant refused - declaration varied to delete words: "and that such use of any of the 64 carparks may be for a continuous period not exceeding 10 hours" - appeal allowed.

[Multiplex Bluewater](#)

RV Pty Limited v Connector Park Pty Ltd (No 3) [2017] TASSC 53



Supreme Court of Tasmania
Blow CJ

Costs - plaintiff succeeded in proceedings against defendant for breach of contract - defendant succeeded in counterclaim against plaintiff for money payable pursuant to contract. - judgment made in plaintiff's favour for \$2,520,000, and in defendant's favour on counterclaim for \$440,000 on the counterclaim - determination of costs - plaintiff sought indemnity costs in reliance on offer of settlement - defendant sought that costs should follow event - held: costs arising from defendant's applications, 'a few days' prior to trial, for adjournment, mediation, amendment of defence, and further discovery, related 'almost entirely to the plaintiff's claim' and were to be treated as costs of plaintiff's claim - defendant was unreasonable in refusal to accept Calderbank offer - indemnity costs order granted in plaintiff's favour - orders made.

[RV Pty Limited](#)

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