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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)

Berzins v QBE Insurance (Australia) Ltd (NSWCA) - insurance - accident insurance policy - employee totally disabled for entire benefit period - appeal allowed (I B)

Sydney Water Corporation v McGrath (NSWCA) - corporations - no preference for one insurance creditor over others in winding up of insurer - appeal dismissed (I)

FAL Management Group v Denham Constructions (NSWSC) - security of payments - company not permitted to appropriate payment made in earlier payment claim against later claim - relief refused (C)

Ozden v Commonwealth Bank of Australia (VSCA) - loan contract - equity - bank entitled to possession of property under loan agreements (B)

Lakic v TAC (VSC) - accident compensation - motor vehicle accident - serious injury - subsequent motor vehicle accidents - pain and suffering damages reduced (I)

Mandie v Memart Nominees Pty Ltd (VSC) - trusts and trustees - discretionary family trust - information requested by beneficiaries protected by trustee's immunity (B)



In the Estate of Pearson (SASC) - wills and estates - probate - informal will - handwritten document admitted to probate as last will (B)

Summaries with links (5 minute read)

Berzins v QBE Insurance (Australia) Ltd [2014] NSWCA 196

Court of Appeal of New South Wales

Gleeson JA, Sackville AJA & Simpson J

Insurance - employee injured in course of employment - employee succeeded in claim against insurer for benefits payable under accident insurance policy taken out by employer - sum awarded to employee calculated on basis that maximum period for which benefits payable was 104 weeks, that employee was totally disabled for only part of benefit period and that part of settlement sum paid to employee by employer's workers compensation insurer should be deducted from award - held: no error in finding benefit period under policy was 104 weeks - primary judge should have found employee was totally disabled for entire benefit period - primary judge erred in reducing award by reason of payment of settlement sum as there was no evidence any part of sum represented weekly benefits payable to employee under Western Australian workers compensation scheme - insurer denied leave to file notice of contention because it was attempting to raise new point on appeal - granting leave would be unfair and in any case futile - appeal allowed.

[Berzins](#) (I B)

Sydney Water Corporation v McGrath [2014] NSWCA 197

Court of Appeal of New South Wales

Macfarlan, Barrett & Ward JJA

Corporations - winding up - Sydney Water was insured under policies with group of companies(HIH) - HIH reinsured risk under policies with reinsurers in UK - before liquidation HIH accepted claim by Sydney Water following water contamination incident - indemnity accepted - Sydney Water received money from HIH - HIH claimed under its reinsurance policies in relation to Sydney Water's claim - liquidators subsequently received funds from UK reinsurance syndicate referable to HIH reinsurance policies - primary judge refused to exercise power under s562A(4) *Corporations Act 2001* (Cth) to cause funds to be applied to advantage Sydney Water rather than being applied rateably for benefit of insurance creditors as a body - held (by majority):no error of fact vitiating primary judge's exercise of discretion - primary judge's decision that it was not just and equitable to afford Sydney Water preference over other insurance creditors in winding up of HIH did not miscarry - appeal dismissed.

[Sydney Water Corporation](#) (I)

**FAL Management Group v Denham Constructions [2014] NSWSC 747**

Supreme Court of New South Wales

McDougall J

Security of payments - company and builder parties to construction contract - builder served payment claim on company - company paid builder scheduled amount which was less than amount claimed - dispute arose - before adjudicator prepared determination under *Building and Construction Industry Security of Payment Act 1999* (NSW) builder served another payment claim - adjudicator found company had not provided adjudication response in time and made adjudication - company claimed adjudicator applied wrong test because he looked at date when notice was given and not date when notice was received - company did not challenge determination in builder's favour but sought to have it quashed because it wished to have amount paid by it in excess of scheduled amount appropriated towards obligations under second payment claim - whether denial of natural justice in failure to consider adjudication response - held: builder effectively seeking to have Court cure or reverse consequences of company's commercial decision to pay balance due once adjudicator had made determination on first payment claim - company not influenced in its decision by builder - not appropriate to grant interlocutory relief.

[FAL Management Group\(C\)](#)**Ozden v Commonwealth Bank of Australia [2014] VSCA 127**

Court of Appeal of Victoria

Tate & Beach JJA; Sifris AJA

Loan contract - equity - bank sought possession of property owned by appellant lenders after they defaulted under mortgage arrangement plus amounts owing under loans - lenders admitted loan arrangements in arrears - argued bank's right to enforcement limited by duty to cooperate and act reasonably and in good faith - primary judge entered judgment for bank but found bank breached duty to cooperate under loan contract in failing to return certificate of title of marina berth belonging to lenders - awarded \$5000 to lenders for breach - held: no error in assessment of damages on basis of loss of chance - no other failure to cooperate - no error in granting leave to commence proceeding *nunc pro tunc* given admitted retention of certificate of title - no error by primary judge in accepting bank's evidence as to amount owing - lenders' claim for unliquidated damages associated with wrongful retention of the marina birth certificate of title did not impeach bank's claim - although final result may diminish bank's claim by way of set-off it did not at this stage affect demand or bank's right to make it - appeal dismissed.

[Ozden and Ozden](#) (B)**Lakic v TAC [2014] VSC 291**

Supreme Court of Victoria

Rush J

Accident compensation - damages - psychiatric injury - self-represented litigant - plaintiff alleged she suffered serious injury in motor vehicle accident when she swerved to avoid motorcycle - driver of motorcycle unable to be identified - plaintiff claimed damages from Transport Accident



Commission pursuant to s96 *Transport Accident Act 1986*(Vic) - plaintiff involved in two subsequent motor vehicle accidents - ss93, 96, 96(2)(a) & 96(2)(b) - held: plaintiff suffered significant injuries due to negligent driving of unidentified driver in first accident - plaintiff not capable of employment since first accident - no contributory negligence - first accident represented 90% of plaintiff's present incapacity - award of pain and suffering damages discounted by 10% - damages assessed.

[Lakic](#) (I)

Mandie v Memart Nominees Pty Ltd [2014] VSC 290

Supreme Court of Victoria

Macaulay J

Trusts and trustees - discretionary family trust - trustees' duties - plaintiffs were general beneficiaries of discretionary family trust - trustee had not made any distribution in favour of either beneficiary since mid-1990's if ever - beneficiaries sought order that trustee provide information about administration of trust and basis of trustee's actions - trustee argued it was not bound to disclose information sought and that a beneficiary could not initiate investigation into trustee's exercise of its discretion and powers - trustee also relied on protection of confidentiality - held: information requested protected from disclosure by trustee's immunity from having to give reasons - trustee had not volunteered information that would allow Court to examine its reasons or potential basis for exercise of its absolute and unfettered discretion - application dismissed.

[Mandie](#) (B)

In the Estate of Pearson [2014] SASC 77

Supreme Court of South Australia

Gray J

Wills and estates - probate - informal will - handwritten document - executors and trustees sought order under s12(2) *Wills Act 1936* (SA) admitting handwritten document to probate - deceased instructed solicitor in 2008 for preparation of new will - solicitor asked deceased whether he wished to sign handwritten will pending preparation of more formal document - deceased agreed and signed handwritten document - typewritten draft will posted to deceased but deceased did not reply - no indication what deceased did with typewritten draft will - deceased died in 2013 - held: deceased intended handwritten document to operate as last will and not merely as stopgap will to have effect only until deceased had opportunity to make formal will - handwritten document admitted to probate as last will of the deceased.

[In the Estate of Pearson](#) (B)

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