



Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Hallgath v Australian Community Pharmacy Authority (No 2) - *National Health Act 1953* (Cth) - construction of an item in second schedule to the Ministerial Determination made under the Act - construing a legislative instrument (B)

Miwa Pty Ltd v Siantan Properties Pte Ltd & Macquarie Bank Ltd - Commercial leases - guarantee - right of recoupment - set-off - appeal allowed (B)

GIO General Ltd v Smith & Ors; Insurance Australia Ltd t/as NRMA Insurance v Smith & Ors (No 2) - Costs (I)

Szekeres (as Executor of the Estate of the late Elizabeth Nadai) v The State of New South Wales - ss61B & s61F *Probate & Administration Act 1898* (NSW) - Will without residuary clause - *bona vacantia* (B)

Mark Gerard Ireland as Executor of the Estate of the late Charles Stuart Gordon v Sandra Jane Retallack & Ors (No 2) - Costs - ss98(4)(c) & 99(2)(ii) *Civil Procedure Act 2005* (NSW) - s93(3) *Trustee Act 1925* (I, B, C)

Break Fast Investments Pty Ltd v Perikles Giannopoulos (also known as Perry Giannopoulos) & Anor - Joinder (B)



Feiglin & Anor v Ainsworth & Ors - *Limitation of Actions Act 1958* (Vic) - application for leave to amend pleadings (I, B)

Commonwealth Bank of Australia v Perrin - Contracts - real property - Torrens title - indefeasibility of title - exceptions - agency - implied authority - plaintiff's claim dismissed (I, B, C)

Summaries with links (5 minute read)

Wednesday 21 September 2011

Hallgath v Australian Community Pharmacy Authority (No 2) [2011] FCA_1074

Federal Court of Australia

Logan J

National Health Act 1953 (Cth) - construction of an item in second schedule to the Ministerial Determination made under the Act – construing a legislative instrument - Australian Community Pharmacy Authority obliged to make recommendations, in respect of applications under that Act, with respect to approval of premises for supply of pharmaceutical benefits - “proposed premises”.

[Hallgath](#) (B)

Miwa Pty Ltd v Siantan Properties Pte Ltd & Macquarie Bank Ltd [2011] NSWCA 297

Court of Appeal of New South Wales

McColl, Basten & Campbell JJA

Commercial leases – guarantee – right of recoupment, set-off, abatement or reduction - applicant lessee of commercial premises owned by first respondent - lessee provided bank guarantee, payable by the second respondent in favour of lessor - whether lease required lessor to make a payment of \$45,000 on exercise of option to renew & if it did, whether lessee was entitled to recoup amount by deduction from the rent - *Limitation Act 1969* (NSW) – whether lessor was entitled to call upon Bank to pay guarantee, after the expiration of the limitation period with respect to debts due by way of unpaid rent - “without deduction” - appeal allowed – order made that first respondent be permanently restrained from making any demand in writing on second respondent pursuant to guarantee – extensive consideration of text & United Kingdom & Australian case law.

[Miwa](#) (B)



[Miwa](#) – decision 21 October 2010: see ‘Benchmark’ B & IBC Thursday 28 October 2010 - leases – guarantees – set off – s24 *Limitation Act* 1969 (NSW) - premises in O’Connell Street Sydney - whether plaintiff entitled to permanent injunction restraining first defendant from calling on or dealing with proceeds of guarantee bond issued in its favour by second defendant.

GIO General Ltd v Smith & Ors; Insurance Australia Ltd t/as NRMA Insurance v Smith & Ors (No 2) [2011] NSWSC 998

Supreme Court of New South Wales

Hoeben J

Costs – for decision 5 August 2011, see ‘Benchmark’ I & IBC Wednesday 17 August 2011 & link below – s6 *Suitors Fund Act* 1961.

[GIO](#) (I)

[GIO](#) – decision 5 August 2011 - *Motor Accidents Compensation Act* 1999 (NSW) – Motor Accidents Authority Permanent Impairment Guidelines 1 October 2007 - apportionment of impairment - two successive motor accidents - claimant suffering permanent psychiatric impairment arising from both motor accidents - referral to Medical Assessor - Review Panel revoked certificates of Medical Assessor & issued its own certificates - error of law on the face of the record – orders sought by GIO & NRMA should be made.

Szekeres (as Executor of the Estate of the late Elizabeth Nadai) v The State of New South Wales [2011] NSWSC 1119

Supreme Court of New South Wales

Rein J

ss61B & 61F *Probate & Administration Act* 1898 (NSW) – Will without residuary clause – declaration that residue of estate not dealt with by the will pass to the Crown *bona vacantia*.

[Szekeres](#) (B)

Mark Gerard Ireland as Executor of the Estate of the late Charles Stuart Gordon v Sandra Jane Retallack & Ors (No 2) [2011] NSWSC 1096

Supreme Court of New South Wales

Pembroke J

Costs – solicitors – executor - ss98(4)(c) & 99(2)(ii) *Civil Procedure Act* 2005 (NSW) - gross sum costs - Court’s equitable jurisdiction over trustees – “without reasonable cause” - s93(3) *Trustee Act* 1925

[Mark Gerard Ireland](#) (I, B, C)

[Mark Gerard Ireland](#) – decision 5 August 2011 – wills – construction - declaration that gift of real property in a clause in Will, and the gift of the residue of the estate in another clause are valid and effectual.



Break Fast Investments Pty Ltd v Perikles Giannopoulos (also known as Perry Giannopoulos) & Anor [2011] NSWSC 1117

Supreme Court of New South Wales

Black J

Joinder – plaintiff’s application for joinder of proposed third defendant refused - at par 9 of judgment: plaintiff also seeking that a fourth defendant be joined as a party to proceedings since plaintiff is seeking a declaration that it should be subrogated to fourth defendant’s rights in respect of a property to the extent that relevant monies were used to pay or discharge any mortgages held by fourth defendant over that property & another property – application for transfer of proceedings to Supreme Court of Victoria refused.

[Break Fast Investments](#) (B)

Feiglin & Anor v Ainsworth & Ors [2011] VSC 454

Supreme Court of Victoria

Mukhtar AsJ

Limitation of Actions Act 1958 (Vic) – plaintiffs’ application for leave to amend statement of claim to introduce an additional case in the form of an action for an account - defendants contending leave should be refused because proposed claim time-barred – proceedings in which plaintiffs claiming that second defendant holds home in St Kilda East as constructive trustee, or that third defendant holds the home on a resulting trust - defendants contending plaintiffs have no rights to the property except as periodic tenants under arrangements which they have repudiated – defendants’ counterclaim for possession of the property, & also for unpaid rent & continuing losses - an interesting review of United Kingdom & Australian case law.

[Feiglin](#) (I, B)



Commonwealth Bank of Australia v Perrin [2011] QSC 274

Supreme Court of Queensland

McMurdo J

Contracts - real property – Torrens title – indefeasibility of title – exceptions – fraud or forgery – s185(1A) *Land Titles Act* 1994 (Qld) – amendment or variation of title record – agency – implied authority – ratification - plaintiff Bank lent money to defendant’s husband – defendant was sole registered proprietor of matrimonial home – Bank suing to recover under guarantee & seeking declaratory relief as to enforceability of mortgages – whether Bank an equitable mortgagee - whether defendant signed documents – s59 *Evidence Act* 1977 (Qld): comparison of disputed handwriting - plaintiff’s claim dismissed.

[Commonwealth Bank of Australia](#) (I, B, C)

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