Tuesday 5 November 2013

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement

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Executive Summary (1 minute read)

Horsell International Pty Ltd v Divetwo Pty Ltd (NSWCA) - negligence - boat collision – insurance policy did not cover liability – broker negligent - appeal dismissed (I)

Commonwealth Bank of Australia v Ekes (NSWSC) - guarantee - estoppel - defence struck out - permission to file cross-claim refused (I B C)

Mainteck Services Pty Ltd v Stein Heurtey SA and Stein Heurtey Australia Pty Ltd (NSWSC) - costs - slip rule - misunderstanding of counsel's position - costs judgment corrected (I B C)

Cooper v McCormack (No. 2) (NSWSC) - succession - approval of settlement on behalf of person under legal incapacity (B)

Screenmasters Australia Pty Ltd v Key Recruitment Pty Ltd (NSWSC) - contract - Magistrate erred in construing contract for provision of recruitment services - appeal allowed (I B)

Victorian Workcover Authority v Centro Property Management (Vic) Pty Ltd (VSC) - accident compensation - third party statutory indemnity - operator of shopping centre liable to indemnify Authority for workers compensation payments (I G)

Gundy v Eatts (QSC) – succession – intestacy – family provision – strike out application refused (B)

From the Ontario Superior Court of Justice

Trieu v. Harrison (ONSC) – negligence – plaintiff struck by van's mirror when about to board street car – insurer's motion to strike out claim against it dismissed (I)

Summaries with links (5 minute read)

Horsell International Pty Ltd v Divetwo Pty Ltd [2013] NSWCA 368
Court of Appeal of New South Wales
Beazley P; McColl & Meagher JJA
Insurance – negligence - fisherman injured when director of scuba diving business was navigating a vessel which collided with his boat - director was engaged in recreational trip and pleaded guilty to offence of dangerous navigation causing grievous bodily harm under s52B(3)(b) *Crimes Act 1900* (NSW) - fisherman sued scuba business in negligence - respondents sought indemnity from insurer pursuant to insurance policy or, alternatively, from their insurance broker, the appellant - fisherman's claim settled and judgment ordered against scuba business - primary judge dismissed cross-claim against insurer on basis policy did not respond but upheld claim against broker for damages for negligence and breach of contract - held: no sufficient connection between activity engaged in and *Insured's Business* for recreational trip to fall within insuring clause - *criminal act or omission* referred only to intentional criminal act or omission - open to primary judge to find director's conduct not intentional - exclusion clause did not operate to

exclude claim - broker was negligent in failing to make clear to scuba business that policy did not cover liability arising from activities that were not connected to business - appeal and cross-appeal dismissed.

Horsell International Pty Ltd (I)

Commonwealth Bank of Australia v Ekes [2013] NSWSC 1264

Supreme Court of New South Wales

Davies J

Estoppel – loan agreement - bank sued defendants under two guarantees for amount owed by development company - motions - defendant sought to file cross-claim out of time - plaintiff sought to dismiss or strike out further amended defence and sought orders under s68 *Civil Procedure Act 2005* (NSW) for examination and production of documents – whether an estoppel arose from Federal Court's dismissal of proceedings brought by company against plaintiff - *res judicata* – issue estoppel - proper parties to leave to file a cross-clam - doctrine of reflective loss - held: unnecessary to make orders in motion about production of documents - further amended defence dismissed by reason of estoppels and loss was reflective of loss suffered by company - first defendant not permitted to file and serve proposed cross-claim because of delay - plaintiff entitled to judgment.

Commonwealth Bank of Australia (I B C)

Mainteck Services Pty Ltd v Stein Heurtey SA and Stein Heurtey Australia Pty Ltd [2013] NSWSC 1563

Supreme Court of New South Wales

Sackar J

Slip rule - costs - court misunderstood from submissions that parties were not agitating a certain issue relating to costs - court carved out those costs from indemnity costs consequences after date of *Calderbank* offer - principles applicable to application under slip rule - held: error capable of being corrected under r36.17 *Uniform Civil Procedure Rules 2005* (NSW) – error would have been corrected as a matter of course if brought to court's attention.

Mainteck Services Pty Ltd (I B C)

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Cooper v McCormack (No. 2) [2013] NSWSC 1588

Supreme Court of New South Wales

Slattery J

Succession - application for judicial advice - court previously advised that executor would not be justified in accepting an offer of settlement of litigation - parties engaged in further negotiations and reached settlement - application for approval of executed terms of settlement under s76 *Civil Procedure Act 2006* (NSW) - potential conflict of interest if sister appointed financial manager of disabled brother - s64, 65 & 55 *NSW Trustee and Guardian Act 2009* (NSW) - held: settlement of proceedings approved on behalf of person under legal incapacity - orders made.

Cooper (B)

Screenmasters Australia Pty Ltd v Key Recruitment Pty Ltd [2013] NSWSC 1569

Supreme Court of New South Wales

Harrison AsJ

Contract for provision of recruitment services - employer terminated contract for breach and sued recruiter for damages for failing to fulfil guarantee to provide suitable replacement candidate - Magistrate declined to find breach of contract and entered verdict in recruiter's favour - employer appealed from decision under s39 *Local Court Act 2007* (NSW) - employer contended Magistrate erred in construing clause of contract or alternatively erred in finding respondent had discharged its obligations - held: appeal allowed - Magistrate erred in construction of contract amounting to error of law by implying term where there was no ambiguity - clause of contract was not satisfied by recruiter - Magistrate's decision set aside - no utility in remitting matter to Local Court for determination according to law - judgment for employer.

Screenmasters Australia Pty Ltd (I B)

Victorian Workcover Authority v Centro Property Management (Vic) Pty Ltd [2013] VSC 587

Supreme Court of Victoria

Bell J

Accident compensation - negligence – employee of security company injured at defendant's shopping centre - plaintiff Authority claimed indemnity from shopping centre for compensation paid to employee – scope of defendant's duty of care to employee when she was present in centre performing security services during course of employment - held: Authority established defendant was liable to pay damages to employee because employee's injuries were caused by defendant's negligence - defendant therefore liable to indemnify Authority under s138(1) *Accident*

Compensation Act 1985 (Vic) for compensation paid to employee in respect of injuries - defendant's negligence - factor X in formula specified in s138(3)(b) of the Act was 75%.

[Victorian Workcover Authority](#) (I G)

Gundy v Eatts [2013] QSC 297

Supreme Court of Queensland

Atkinson J

Succession - intestacy - family provision - applicant sought orders for distribution of his aunt's estate on intestacy and family provision under Pts 3 & 4 *Succession Act 1981* (Qld) - respondent administrator of estate sought to strike out application as abuse of process - r16(e) *Uniform Civil Procedure Rules 1999* (Qld) - ss35, 36A, 40 & 41 *Succession Act 1981* (Qld) - *issue - child* - parent-child relationship in Aboriginal custom – anthropological evidence - *Status of Children Act 1978* (Qld) - *Child Protection Act 1999* (Qld) - held: respondent failed to satisfy court that applicant had only fanciful prospect of success – striking out application summarily could stultify development of law - no abuse of process - applicant given leave to amend originating application.

[Gundy](#) (B)

From the Ontario Superior Court of Justice

Trieu v. Harrison, 2013 ONSC 5738

Ontario Superior Court of Justice

J Wilson J

Negligence – plaintiff was about to board a Toronto Transit Commission (TTC) streetcar which was stopped with its doors open at a stop – defendant failed to stop his uninsured van and its mirror struck plaintiff in the head – Motor Vehicle Accidents Claims Fund (fund) brought claim against defendant's insurer and Toronto Transit Commission Insurance Company Ltd (TTCI) - insurer insured two other vehicles owned by defendant but denied coverage for uninsured van driven at time of accident - insurer would be liable if defendant was not using uninsured van for commercial purposes – fund asserted in the alternative that TTCI was liable because streetcar was *involved in the incident* - TTCI sought to strike out claim pursuant to r21(1)(b) *Rules of Civil Procedure, R.R.O. 1990*, Reg. 194 as disclosing no sustainable cause of action - held: TTCI was potentially liable to pay plaintiff's accident benefits under s268(2)(2)(iii) *Insurance Act RSO 1990* - no merit to TTCI's arguments that entitlement to pursue third party claim against TTCI required privity of contract between TTCI and either plaintiff or defendant - motion to strike out pleadings dismissed.

Trieu (I)

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