

JOURNAL OF CIVIL LITIGATION AND PRACTICE

Volume 2, Number 3

September 2013

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ARTICLES

Wavering alternations of valour and caution: Commercial and regulatory litigation in the French CJ High Court – Peta Spender

This article examines commercial and regulatory litigation in the High Court since Robert French was appointed Chief Justice in 2008. An analysis of six cases reveals a spectrum of valour and caution, courage and coyness. The French High Court has asserted judicial leadership and a public responsiveness in some areas but in others it has retreated to a narrow incrementalism that pulls away from broader issues and leaves important questions unanswered. Although the article concludes that it is too early to determine a particular judicial method of the French High Court (as compared to some of its predecessors), it raises questions about what should be expected of Australia’s highest appellate court in this area. 111

Class action settlement hurdles – Michael Legg

Settlement is an important and common method of resolving class actions. Two of the most important hurdles that need to be overcome to settle a class action are identifying the group members who will participate in the settlement and having the settlement approved. This article examines two Federal Court of Australia decisions where those steps were refused by the court. Those decisions provide guidance on the appropriate time at which to seek to identify group members through the procedure known as “the closing of the class” and how settlements involving strong and weak claims should be structured so as to pass the requirement of a “fair and reasonable” settlement. 131

Understanding the client’s perspective – overcoming the failure to communicate effectively – Bobette Wolski

This article concerns communication skills for lawyers. In the context of legal practice, communication may be defined as the process of accurately and perceptively receiving information from clients about their substantive, procedural and psychological needs and of giving information and advice to clients in a way that is most likely to be understood and remembered by them. Effective communication is fundamental to many aspects of

legal practice, including client interviewing, settlement negotiations and litigation. The article examines a number of components of communication with a focus on listening skills and non-verbal signals such as body language. It also identifies impediments to effective communication, including: flawed assumptions that clients and lawyers make about each other, the interviewing process, and the law; and cognitive biases, such as stereotyping to which every human being is prone. It offers a range of techniques for improving communication between clients and lawyers. 141

Where a negligent service provider fails to protect the lender’s interests in a loan transaction: High Court decision casts doubt on lender’s ability to recover its loss in full – Kylie Weston-Scheuber

Part IVAA of the Wrongs Act 1958 (Vic) provides for a regime of proportionate liability where multiple parties are responsible for economic loss or damage. Until recently, the Victorian Court of Appeal decision in *St George Bank Ltd v Quinerts* (2009) 25 VR 666 would have allowed a lender to recover its loss in full against a service provider whose negligence resulted in the lender not being able to rely on security in relation to a defaulting borrower. However, the High Court’s recent decision in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 87 ALJR 505 casts doubt upon the ability of lenders in this situation to recover their loss in full. It may be that a defaulting borrower/guarantor will now be considered to be a “concurrent wrongdoer” under the proportionate liability legislation, and thus proportionately liable for the lender’s loss, meaning the lender will be limited in its recovery against the negligent service provider. 153

Is the vendor’s solicitor the stakeholder of deposit monies? An Irish perspective – Caroline Bergin-Cross

As a result of the current economic downturn and the collapsed property market, the courts are being faced with a new type of litigation, specifically situations where a deposit is paid to the vendor’s solicitor but the contract for sale, which incorporates the Law Society of Ireland General Conditions of Sale (2001) does not proceed, for one reason or another. Thereafter, the vendor’s solicitor fails to return the deposit, and ultimately the vendor (a development company) goes into liquidation and the question faced is who is entitled to the deposit monies. Is the solicitor a stakeholder? 158