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## Daily Banking A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Bates v Cooke** (NSWCA) - succession - adult son of deceased refused family provision order out of notional estate - appeal dismissed

**The Concept Developer Pty Ltd v Conroy** (VSC) - judicial review - alteration of lot entitlements and liabilities in subdivision plan - VCAT's decision affirmed - proceedings dismissed

**Commonwealth Bank of Australia v Pseudos** (SASC) - security for costs - special circumstances - appeal against costs order stayed pending payment of amount for security for costs

**Quarmby v Oakley** (TASFC) - pleadings - claim for damages for unnecessary and vexatious lodgement of caveats lodged in support of judgment struck out - appeal dismissed

**In the Estate of McFadyen** (ACTSC) - Wills and estates - deceased lacked testamentary capacity when making second Will - second Will invalid - first Will declared last will and testament of deceased

# Benchmark

## Summaries With Link (Five Minute Read)

### **Bates v Cooke [2015] NSWCA 278**

Court of Appeal of New South Wales

Meagher & Leeming JJA; Sackville AJA

Succession - family provision - mirror wills - appellant was adult son of deceased - respondent was deceased's husband and appellant's stepfather - respondent was executor named in deceased's Will - appellant sought family provision order pursuant to Pt 3.2 *Succession Act 2006* (NSW) - common ground there were no significant assets in deceased's estate but that there were substantial assets which could be designated as notional estate - appellant also sought order designating property as notional estate - primary judge dismissed summons - appellant contended primary judge wrongly disregarded appellant's parlous financial position and wrongly found there was no real risk respondent would change Will to exclude appellant as beneficiary - whether appellant precluded from claiming provision due to improvident investment decisions - s9 *Family Provision Act 1982* (NSW) - ss57, 59, 60, 73, 87; Pt 3. & Pt 3.3 *Succession Act 2006* (NSW) - held: primary judge erred in approach to claim by elevating element which to be weighed in mix of factors into principle which disqualified an adult claimant - however primary judge's alternative approach was answer to claim - open primary Judge to accept evidence there was no real risk respondent would change his Will to reduce appellant's entitlement - appeal dismissed.

[Bates](#)

### **The Concept Developer Pty Ltd v Conroy [2015] VSC 464**

Supreme Court of Victoria

John Dixon J

Judicial review - proceeding before Victorian Civil and Administrative Tribunal concerned lot entitlements and lot liabilities of owners in subdivision - first and second defendants applied under s34D(1)(a) *Subdivision Act 1988* (Vic) for order altering lot entitlements and liabilities in subdivision plan - VCAT concluded lot entitlements and liabilities should be altered - VAAT ordered owners corporation to apply to Registrar of Titles to alter lot entitlement and lot liability in subdivision plan - plaintiff owner contended VCAT erred in construing ss32 & 33, and misconstrued the meaning of 'just and equitable' in s33(3) - relationship between ss32 & 33 - statutory construction - whether irrelevant considerations - held: challenges to VCAT's conclusion failed - proceedings dismissed - orders of VCAT affirmed.

[TheConcept](#)

### **Commonwealth Bank of Australia v Pseudos [2015] SASC 139**

Supreme Court of South Australia

Bampton J

Security for costs - Commonwealth Bank of Australia and trustee for trust made loans to company - company granted mortgage to each lender over real property - dispute concerning priority of mortgage arose - bank's mortgage found to have priority over trustee's mortgage -

# Benchmark

trustee sought to appeal against costs order against him - bank sought security for security for costs - whether special circumstances existed to justify making order - held: special circumstances existed - appeal stayed pending payment of security for costs.

[Commonwealth](#)

## **Quarmby v Oakley [2015] TASFC 11**

Full Court of the Supreme Court of Tasmania

Porter, Estcourt & Pearce JJ

Pleadings - appellant claimed damages for unnecessary and vexatious lodgement of caveats - caveats lodged in support of judgment - appellant also sought declarations in relation to costs and interest - appellant contended primary judge erred in striking out statement of claim in action and dismissing action - s165 *Supreme Court Civil Procedure Act 1932* (Tas) - held: caveats not lodged in support of malicious claim - caveats consequent on respondents obtaining judgment against appellant - no possibility caveats lodged in support of unmeritorious or malicious claim - appellant had no actionable claim by writ - no statement of claim could overcome difficulty - statement of claim in as far as it was claim for damages for unlawful maintenance of caveats should be struck out - no prospect of claim succeeding - interest payable on amount stated in certificate of taxation from time of trial - appeal dismissed.

[Quarmby](#)

## **In the Estate of McFadyen [2015] ACTSC 219**

Supreme Court of the Australian Capital Territory

Burns J

Wills and estates - testamentary capacity - deceased left Will (second Will) by which she appointed applicant trustee of Will and left residuary estate to first respondent - deceased had also executed earlier Will dated (first Will) - in first Will she appointed second respondent and another as joint trustees and executors - first Will provided for gifts to be made to charities and friends - residue to be applied to foundation - applicant sought order that Second Will be revoked on ground deceased lacked requisite testamentary capacity and order declaring first Will was deceased's last will and testament - medical evidence - held: deceased did not possess requisite testamentary capacity in *Banks v Goodfellow* when she executed Second Will - Second Will declared invalid - First Will declared last will and testament of deceased.

[McFadyen](#)

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