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## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Hawkins v Ross Human Directions Ltd** (NSWCA) - negligence - employee injured while lifting boxes to return them to storage - employer not liable - appeal dismissed (I)

**AAI Ltd v Fitzpatrick (No 2)** (NSWSC) - costs - no departure from usual rule that costs follow event - no power to issue certificate under *Suitors' Fund Act 1951* (NSW) (I G)

**O'Toole v Kent** (VSC) - contract - sale of land - application to set aside default judgment dismissed (B)

**1165 Stud Road Pty Ltd v Power** (VSC) - evidence - business record exemption - representations inadmissible (B C)

**Acteon Middle East Fze t/as Team Energy Dubai v Smith** (QSC) - private international law - application granted to register judgment obtained in Norwich County Court England (I)

**Haynes v St George Bank a Division Of Westpac Banking Corporation** (SASC) - pleadings - contract - late application to amend statement of claim granted (I B)

**Sims v Suda Ltd [No 2]** (WASCA) - security for costs - employment contract - indemnity clause - respondent granted security for costs of appeal (I B)

# Benchmark

## Summaries With Link (Five Minute Read)

### **Hawkins v Ross Human Directions Ltd [2015] NSWCA 265**

Court of Appeal of New South Wales

Gleeson & Leeming JJA; Beech-Jones J

Negligence - employee injured while lifting boxes to return them to storage - system of work involved lifting boxes of up to 9.8 kg - primary judge found box lifted by employee weighed no more than 7 kg - primary judge found employer not negligent - employee contended primary judge failed to consider evidence she had to bend and twist at the same time while lifting boxes, that there was failure to consider or properly to consider aspects of the evidence, and that primary judge erred in finding there was no requirement to keep runners present until all boxes put away - whether employee established breach of duty - whether real risk of injury in employee lifting boxes weighing no more than 9.8 kg - r51.53 *Uniform Civil Procedure Rules 2005* (NSW) - held: error established in some of primary judge's reasoning - however no substantial miscarriage of justice arising from errors - breach of duty not established - even if breach established it remained difficult to see how employee could establish causation - appeal dismissed.

[Hawkins](#) (I)

### **AAI Ltd v Fitzpatrick (No 2) [2015] NSWSC 1272**

Supreme Court of New South Wales

Schmidt J

Costs - Court gave judgment for AAI - first defendant sought departure from usual order that costs follow event - first defendant contended AAI succeeded on case which was materially different to case advanced in summons and that given proceedings brought under s69 *Supreme Court Act 1970* (NSW) parties' relative positions irrelevant - first defendant claimed AAI was stakeholder CTP insurer and he was private person not responsible for decision makers' errors but had acted to provide contradicter - held: no misconduct by AAI established - AAI's case in summons was clearly strong - decision actively to oppose application for judicial review carried risk of costs order being made against first defendant - no proper basis for any departure from usual order - AAI did not oppose first defendant's claim for certificate under *Suitors' Fund Act 1951* (NSW) - proceedings were not appeal proceedings and did not concern the decision of a court - Court not empowered to issue certificate under s6 *Suitors' Fund Act*.

[AAI](#) (I G)

### **O'Toole v Kent [2015] VSC 470**

Supreme Court of Victoria

Mukhtar AsJ

Contract - sale of land - plaintiff alleged first defendant purchaser defaulted under contract for sale of property by failing to complete or settle purchase - plaintiff obtained default judgment in default of defence against defendants - there was also judgment against second defendant who was purchaser's guarantor - defendants sought to set aside judgment - plaintiff opposed setting

aside judgment on basis explanation for failure to provide defence unsatisfactory or unmeritorious, and that asserted defences had no merit - keynote defence was that purchasers could not complete because expected source of funds did not come good - defendants contended contracts should not be enforced because they could not obtain expected finance - held: defences bound to fail - purchasers risked agreeing to buy land under contract not expressed to be or sought to be subject to finance - assertion contract subject to finance legally unsustainable on facts - purchasers did not have money for deposit or to complete - defences were attempt to extricate from financial consequences of breach - even if purchasers subject to scam plaintiff not implicated in misfortune - application to set aside default judgment dismissed.  
[O'Toole](#) (B)

## **1165 Stud Road Pty Ltd v Power [2015] VSC 476**

Supreme Court of Victoria

Vickery J

Admissibility of evidence - third defendant sought admission of documents as business records - respondents to summons object on basis documents did not satisfy requirements of s69 *Evidence Act 2008* (Vic) - held condition for admissibility of 'First Representation' on which third defendant sought to rely, contained in business record comprised in 'Report', did not satisfy s69(2) and therefore did not fall within exception to hearsay rule - Court had taken into account potential importance of evidence - representation containing asserted fact was not admissible - even if representation admissible and did give rise to exception to hearsay rule Court would exclude it pursuant to s135 - second category or representation excluded on ground of lack of relevance under s56(2).

[Stud](#) (B C)

## **Acteon Middle East Fze t/as Team Energy Dubai v Smith [2015] QSC 265**

Supreme Court of Queensland

P Lyons J

Private international law - applicant obtained default judgment against respondent in Norwich County Court, England - Acteon sought to register judgment under *Foreign Judgments Act 1991* (Cth) - held: Court was the 'appropriate Court' under s6(2) - Pt 2 applied to County Courts of England - Court satisfied that judgment of Norwich County Court was a final and conclusive judgment for purposes of s 5(4) - judgment was enforceable - Pt 2 applied to judgment - s6(3) required Court to order that judgment be registered subject to Act's requirements and to proof of matters prescribed by applicable rules of Court - affidavit with application generally complied with r947E *Uniform Civil Procedure Rules 1999* (Qld) - judgment to be registered with amount expressed in pounds sterling.

[Acteon](#) (I)

## **Haynes v St George Bank a Division Of Westpac Banking Corporation [2015] SASC 136**

Supreme Court of South Australia

Nicholson J

Pleadings - plaintiff brought late application to amend statement of claim to permit him to rely on

new particular of breach of contract - application made when plaintiff's case at trial was nearing end - justice of the case - fair trial - held: amendment would likely have significant costs consequences for parties - Court not satisfied potential argument being pursued had earlier come to plaintiff's attention at all or sufficiently to preclude him from relying on it now - Court satisfied delay largely contributed to by exigencies of this litigation - potential importance of proposed amendment was significant - significance of proposed case outweighed prejudice to bank - application granted.

[Haynes](#) (I B)

## **Sims v Suda Ltd [No 2] [2015] WASCA 180**

Court of Appeal of Western Australia

McLure P & Newnes JA

Security for costs - appellant claimed damages for alleged breach by respondent of an indemnity clause in the appellant's contract of employment - action dismissed - respondent sought security for its costs of appeal - r44(1) *Supreme Court (Court of Appeal) Rules 2005* (WA) - held: Court satisfied appellant unlikely to be able to meet order for costs if appeal unsuccessful - appellant did not have strong prospects of success - appellant would not be shut out of appeal if security for costs ordered - no material delay by respondent in applying for security for costs - respondent entitled to security for costs - security for costs ordered.

[Sims](#) (I B)

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