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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd (NSWCA) - insurance - member of fund did not satisfy definition of total and permanent disablement in group life insurance policy - appeal dismissed (I B)

Morocz v Marshman (NSWSC) - medical negligence - doctor did not fail to warn patient of risks or side effects of surgical procedure - doctor not negligent (I)

Geitonia Pty Ltd t/as Trustee for the Annandale Unit Trust v Westpac Banking Corporation (NSWSC) - mortgages - second mortgagee entitled to require first mortgagee to transfer mortgage to it (B)

Sierocki v Klerck (No 2) (QSC) - defamation - assessment of damages - injunctive relief (I)

Tschirn v Australian Executor Trustees Ltd (SASC) - Wills and estates - action alleging appellants unlawfully took advantage of deceased and diminished estate for own benefit - summary judgment refused - appeal dismissed (B)

Bride v Shire of Katanning (WASCA) - pleadings - dismissal of application to amend defence and counterclaim, and to join third parties - appeal dismissed (I B)

Field Deployment Solutions Pty Ltd v Jones (WASC) - judicial review - futility - availability of

alternative remedy - application to quash adjudication decisions dismissed (B C G)

Summaries With Link (Five Minute Read)

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd [2015] NSWCA 104

Court of Appeal of New South Wales

Basten, Meagher & Gleeson JJA

Insurance - trusts - primary judge determined appellant did not satisfy definition of Total and Permanent Disablement (TPD) in group life insurance policy issued by first respondent insurer to second respondent trustee of superannuation fund - determination made on evidence notwithstanding definition of TPD in policy provided relevant opinion as to incapacity be that of insurer - appellant challenged correctness of determination - ss13, 14 & 48A *Insurance Contracts Act 1984* (Cth) - ss6, 14, 18, 37, 41, 46 *Superannuation (Resolution of Complaints) Act 1993* (Cth) - held: primary judge did not err in not being satisfied appellant was within definition of TPD in policy - not necessary to consider questions concerning trustee's position and relief which would arise if the appeal successful - appeal dismissed.

[Birdsall](#) (I B)

Morocz v Marshman [2015] NSWSC 325

Supreme Court of New South Wales

Harrison J

Medical negligence - plaintiff suffered from condition causing sweaty palms - plaintiff contended defendant doctor failed to warn her of known risks and complications of surgery which he performed on her, and to tell her other things which he should have mentioned having regard to severity of symptoms and success rate of operation - duty to warn and informed consent - ss5B, 5C, 5D, 5H, 5I, 5O & 5P *Civil Liability Act 2002* (NSW) - held: plaintiff did not establish doctor failed to warn her of any material risk or side effect known or understood in 2007 to be inherent risk or side effect of surgery - Court not satisfied doctor failed to warn her of any other risk or side effect of procedure - no breach of duty - verdict for doctor.

[Morocz](#) (I)

Geitonia Pty Ltd t/as Trustee for the Annandale Unit Trust v Westpac Banking Corporation [2015] NSWSC 419

Supreme Court of New South Wales

Ball J

Mortgages - first plaintiff registered proprietor of property granted first ranking registered mortgage over property to first defendant bank - first plaintiff also granted second ranking registered mortgage second defendant - first plaintiff failed to make payment to second defendant - bank declared events of default and demanded amounts due - bank served notice under s57(2)(b) *Real Property Act 1900* (NSW) - first plaintiff attempted to exercise rights under s94(1) *Conveyancing Act 1919* (NSW) by requiring bank to transfer its mortgage first to it and then to a company it nominated - first plaintiff sought declaration it was entitled to obtain transfer of mortgage to company on payment to bank of amount owing to it - first plaintiff also sought to

restrain bank from transferring mortgage to second defendant - construction of s94(1) - whether second mortgagee could require first mortgagee to transfer its mortgage to second mortgagee, or whether second mortgagee must nominate third person to whom mortgage was to be transferred - *any third person* - held: nothing to prevent second defendant from requiring bank to transfer its mortgage to itself - that right took priority over any right first plaintiff had - proceedings dismissed.

[Geitonia](#) (B)

Sierocki v Klerck (No 2) [2015] QSC 92

Supreme Court of Queensland

Flanagan J

Damages - defamation - plaintiffs claimed damages for defamation arising from 10 publications - two publications occurred by email and balance posted on websites - plaintiffs were awarded judgment against first, second, third, fourth and fifth defendants conditional upon assessment of damages by Court under Ch 13, Pt 8 *Uniform Civil Procedure Rules 1999* (Qld) - entry of judgment stood as determination of elements of plaintiffs' claim for damages - ss34, 35(2), 36 & 39 *Defamation Act 2005* (Qld) - effect of defamatory publications on plaintiffs - damages assessed - injunctive relief granted.

[Sierocki](#) (I)

Tschirn v Australian Executor Trustees Ltd [2015] SASC 58

Supreme Court of South Australia

Parker J

Summary judgment - Master dismissed appellants' application for summary judgment in proceedings in which respondent executor alleged appellants unlawfully took advantage of relationship with deceased thereby diminishing estate for own benefit - appellants sought summary judgment on basis statement of claim did not identify which transactions were allegedly utilised for appellants' benefit and to what extent - held: real questions of fact and law to be decided at trial - Master did not err in not finding no reasonable basis for claim - r232(2) *Supreme Court Civil Rules 2006* (SA) not satisfied - Master did not err in declining to make summary judgment order - appeal dismissed.

[Tschirn](#) (B)

Bride v Shire of Katanning [2015] WASCA 77

Court of Appeal of Western Australia

Newnes & Murphy JJA

Pleadings - Shire sued appellant for unpaid rates on land - primary judge dismissed appellant's application to amend defence and counterclaim, and to join third parties - primary judge also dismissed counterclaim - application to amend defence and counterclaim had arisen after appellant failed to resist Shire's claims for rates and judgment had been entered in favour of Shire - proposed claim against bank and solicitors arose against background of orders made under *Vexatious Proceedings Restriction Act 2002* (WA) - Pt 5 rr32 & 43(2)(g)(i) *Supreme Court (Court of Appeal) Rules 2005* (WA) - held: no grounds of appeal had reasonable prospect of



succeeding - alternatively appellant failed to comply with pt 5 r 32 - appeal dismissed.

[Bride](#) (I B)

Field Deployment Solutions Pty Ltd v Jones [2015] WASC 136

Supreme Court of Western Australia

Mitchell J

Judicial review - Court held State Administrative Tribunal erred in finding agreement was not a construction contract under *Construction Contracts Act 2004* (WA) - applicant sought to quash adjudication decisions made between time of Tribunal's decision and determination of appeal - decisions had been made on basis the agreement was not a construction contract - ss28, 31(3) & 46 *Construction Contracts Act 2004* (WA) - held: even if jurisdictional error established, appropriate to dismiss application for the two discretionary reasons of futility due to operation of s31(3), and the availability of alternative remedy - application dismissed without determining whether jurisdictional error established.

[Field](#) (B C G)

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Executive Summary

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