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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)

**Kanakaridis v Westpac Banking Corporation** (FCA) - summary dismissal - loans and mortgages - estoppel - bank entitled to dismissal of applicants' whole claim - proceeding dismissed (I B)

**Stambolziovski v Nestorovic and Camanaro Prestige Properties Pty Ltd t/as Sydneyhome Real Estate** (NSWCA) - negligence - slip and fall at premises - circumstances of accident - water on ground - owner and manager of premises not liable - appeal dismissed (I)

**State of New South Wales v Plum** (NSWSC) - transfer of proceedings - nervous shock - complexity of issues to be determined - transfer of proceedings from District Court refused (I)

**Kern v Qantas Airways Ltd** (NSWSC) - summary dismissal - pleadings - claim arising from engine failure on Qantas flight - amended statement of claim struck out - proceedings dismissed (I)

**Sharp v Attorney General of NSW** (NSWSC) - trusts and trustees - judicial advice - gift in Will effective to create valid charitable trust - declarations and orders (B)

**CBX2 Pty Ltd v National Australia Bank Ltd (No 3)** (NSWSC) - security for costs - threshold issue - plaintiff discharged onus that it ought not provide security for costs - security for costs declined (I B)

**Wandel v Halloran** (SASCFC) - contract - primary judge's findings as to contract supported by

evidence - disconformity between pleaded cases and accepted evidence did not lead to procedural fairness or miscarriage of justice - appeal dismissed (I B C)

## Summaries With Link (Five Minute Read)

### **Kanakaridis v Westpac Banking Corporation [2015] FCA 1146**

Federal Court of Australia

Beach J

Summary dismissal - loans and mortgages - estoppel - res judicata - applicants sought to set aside or prevent enforcement of loan agreements and mortgages entered into with respondent bank - issues applicants sought to litigate had already been litigated to finality in Supreme Court of Victoria - summary judgments had been given in favour of bank - bank sought summary dismissal on grounds of res judicata, issue estoppel, Anshun estoppel and that proceeding was abuse of process - bank also contended that claims untenable with no reasonable prospects of success - held: bank entitled to judgment dismissing whole of applicants' claims pursuant to s31A (2) *Federal Court of Australia Act 1976* (Cth) or r26.01 *Federal Court Rules 2011* (Cth) - certain claims subject of issues estoppel, Anshun estoppel and were abuse of process - other claims had no prospects of success - proceeding dismissed.

[Kanakaridis](#) (I B)

### **Stambolziovski v Nestorovic and Camanaro Prestige Properties Pty Ltd t/as Sydneyhome Real Estate [2015] NSWCA 332**

Court of Appeal of New South Wales

Beazley P, Ward JA & Emmett AJA

Negligence - first respondent owned premises - second respondent was managing agent of premises - appellant claimed she was injured when she slipped on water on floor of laundry and that water was result of a toilet leak which was present due to owner's failure to take reasonable steps to ensure laundry was safe and to ensure water did not leak from toilet - primary judge found in favour of respondents - primary judge's conclusion based on assessment of credit of witnesses and analysis of probabilities based on objective evidence - held: ground of appeal contending failure to draw 'Ferrcom' inference rejected - challenges to findings relating to claim toilet was leaking failed - hospital notes did not support finding that most likely cause of accident was that appellant fell in water whilst mopping - primary judge's erroneous treatment of hospital notes had influenced view as to more likely cause of accident - however even if statement as to more likely cause of accident was erroneous separate finding, there was no substantial miscarriage of justice - appeal dismissed.

[Stambolziovski](#) (I)

### **State of New South Wales v Plum [2015] NSWSC 1566**

Supreme Court of New South Wales

Harrison AsJ

Transfer of proceedings - defendant's son arrested by police and detained in police vehicle - defendant sued State for nervous shock under s31 *Civil Liability Act 2002* (NSW) alleging it owed duty of care to son take reasonable precautions against him suffering injury; and duty to her to take reasonable care not to cause her mental harm - State sought transfer of District Court proceedings to Supreme Court - complexity of issues to be determined - held: State did not show sufficient reason to transfer proceedings - law as to whether police officers owed son duty of care was not complex - if police did not owe son duty of care, they did not owe plaintiff duty of care - proceedings to remain in District Court.

[State of New South Wales](#) (I)

## **Kern v Qantas Airways Ltd [2015] NSWSC 1565**

Supreme Court of New South Wales

Harrison AsJ

Summary dismissal - pleadings - limitations - aviation law - personal injury claims - engine failure occurred during flight from Singapore to Sydney - plaintiff passenger sought damages of \$3,301,502,000,000 against first defendant Qantas as carrier, second defendant Airbus Australia as manufacturer of aircraft and third defendant Rolls Royce as manufacturer of engine - applications for dismissal and to strike out statement of claim - held: claim against Qantas statute-barred and dismissed - second-named defendant was non-entity - leave not granted to replead - on fair reading of amended statement of claim against Rolls Royce not clear what case it was expected to meet - amended statement of claim struck out against Rolls Royce - proceedings dismissed.

[Kern](#) (I)

## **Sharp v Attorney General of NSW [2015] NSWSC 1580**

Supreme Court of New South Wales

Stevenson J

Trusts and trustees - judicial advice - wills and estates - by testator's Will whole of estate after payment of debts and expenses was to be held in trust known as "Street of Dreams Martin Sharp Trust" - executors sought judicial advice and declarations - whether Will created valid charitable trust - ambit of clause allowing "my trustees to deal with my assets" - whether corporate trustee of trust could be appointed in lieu of the executors and literary executors - whether trustees had power to sell property - held: gift in Will effective to create valid charitable trust - declarations and orders proposed by parties made.

[Sharp](#) (B)

## **CBX2 Pty Ltd v National Australia Bank Ltd (No 3) [2015] NSWSC 1555**

Supreme Court of New South Wales

Harrison AsJ

Security for costs - threshold issue - defendant sought security for costs of proceeding pursuant to r42.21 *Uniform Civil Procedure Rules 2005* (NSW) and/or s1335 *Corporations Act 2001* (Cth) - whether it appeared to Court by credible testimony that there was reason to believe plaintiff would be unable to pay defendant's costs if successful in its defence - bona fides of



claim/prospects of success - impecuniosity of plaintiff - stultification - whether impecuniosity/financial position caused by defendant's actions - held: exercise of discretion a finely balanced task having taken matters into account - plaintiff discharged onus that it ought not provide security for costs - security for costs declined.

[CBX2](#) (I B)

**Wandel v Halloran [2015] SASCFC 155**

Full Court of the Supreme Court of South Australia

Nicholson J; Bampton & Parker JJ

Contract - primary judge found respondents entitled to amounts due under contracts for repair to river crossing and water supply made orally between parties - appellant contended contract claims as found by primary judge were not pleaded and evidence insufficient to establish them - held: primary judge's findings as to contracts were supported by evidence - disconformity between respondents' pleaded cases and evidence accepted by primary judge did not give rise to procedural unfairness or miscarriage of justice - appeal dismissed.

[Wandel](#) (I B C)

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