

Thursday, 30 April 2015

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

 Follow @Benchmark\_Legal

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**Marshall v Prescott** (NSWCA) - equity - solicitors' duties - documents not confidential - no breach of confidence by solicitor - appeal dismissed (I)

**Workers Compensation Nominal Insurer v Zoud** (NSWSC) - pleadings - fraud - evidence - application for provision of further particulars dismissed (I)

**NBN Co Ltd v Pipe Networks Pty Ltd** (NSWSC) - statutory interpretation - owner/operator of telecommunications network authorised to plug equipment into power socket of premises and draw power without consent of owner/occupier (I C G)

**Bodycorp Repairers Pty Ltd v AAMI & Martin** (VSCA) - contract - clauses of contract imposed unreasonable restraints of trade - insurer and manager did not induce breaches of franchise agreements - appeal dismissed (I B)

**Victorian Workcover Authority v Stoddart (Vic) Pty Ltd** (VSC) - accident compensation - third party breached statutory duty of care and common law duty of care to injured worker - Authority entitled to indemnity (I C G)

**South Australian Superannuation Board (Super SA) v McIntyre** (SASCFC) - superannuation - entitlement to payment of basic invalidity insurance benefit - appeal dismissed (B G)

**Grass Tree Incorporated as Trustee of The Adelaide Club Trust** (SASC) - equity - variation of trust deed to provide borrowing power (B)



**Hulanicki v Walton (ACTCA)** - damages - motor vehicle accident - past and future domestic care - funds management - recalculation of damages (I)

# Benchmark

## Summaries With Link (Five Minute Read)

### **Marshall v Prescott [2015] NSWCA 110**

Court of Appeal of New South Wales

Beazley P; Macfarlan & Emmett JJA

Equity - contract - solicitors' duties - appellants were mother and son (Margaret Marshall and Kim Marshall) who retained respondent solicitor in relation to recovery of damages in US proceedings in respect of death of Neil Marshall in plane crash - at time of death deceased was separated from Mrs Marshall and in de facto relationship with Ms Carruthers - solicitor also acted for Ms Carruthers in US proceedings - appellants claimed damages against solicitor for disclosing information they alleged was confidential to them - Marshalls sought to recover solicitor/client component of costs in Supreme Court proceedings brought against Ms Carruthers in relation to entitlement to settlement sum in US proceedings - appellants alleged costs incurred by solicitor's breaches of confidence - terms on which solicitor retained by appellants and by Ms Carruthers - whether information confidential - held: solicitor retained by appellants in co-ordinating capacity only - solicitor retained by Ms Carruthers to act in co-ordinating and substantive role - appellants gave fully informed consent to solicitor acting for Ms Carruthers - information not confidential - even if breach of confidence occurred appellants did not demonstrate loss - appeal dismissed.

[Marshall \(I\)](#)

### **Workers Compensation Nominal Insurer v Zoud [2015] NSWSC 476**

Supreme Court of New South Wales

Wilson J

Pleadings - plaintiff insurer filed statement of claim against defendant medical practitioner asserting fraudulent conduct - defendant sought further and better particulars - plaintiff submitted defendant was seeking evidence rather than particulars - rr14.8, 15.1, 15.3 & 15.4 *Uniform Civil Procedure Rules 2005* - distinction between facts to be pleaded and evidence from which facts drawn - held: information sought went beyond what pleading must provide and what was necessary for defendant to understand and respond to case - some requested information was a request for service of evidence, not proper request for particulars - plaintiff not required to disclose evidentiary material at this stage - notice of motion dismissed.

[NominalInsurer \(I\)](#)

### **NBN Co Ltd v Pipe Networks Pty Ltd [2015] NSWSC 475**

Supreme Court of New South Wales

Kunc J

Statutory interpretation - plaintiff responsible for rolling out national broadband network throughout Australia - defendant owned and operates optical fibre telecommunications network - plaintiff sought declaration that Sch 3 *Telecommunications Act 1997* did not empower defendant, or its employees and contractors, to connect in-building subscriber connection equipment to power socket of owner or occupier of multi-dwelling unit and draw power from

# Benchmark

power supply of owner or occupier at socket on ongoing basis - held: on proper construction Sch 3 authorised defendant, its employees and contractors to install telecommunications equipment including by plugging it into power socket and drawing power from premises' power supply without consent of owner or occupier - plaintiff not entitled to declaration.

[NBN](#) (I C G)

## **Bodycorp Repairers Pty Ltd v AAMI & Martin [2015] VSCA 73**

Court of Appeal of Victoria

Warren CJ, Beach JA & Ginnane AJA

Contract - restraint of trade - respondent (Bodycorp) entered franchise agreements with smash repairers - appellant (AAMI) entered agreement with Bodycorp to provide that if at any time before certain date franchisee who was an AAMI recommended repairer ceased to be Bodycorp franchisee, AAMI would take steps, effect of which would be that former Bodycorp franchisee could no longer conduct business as a recommended repairer of AAMI for six months - Bodycorp contended AAMI breached agreement, and that AAMI and manager induced certain franchisees to breach franchise agreements - trial judge dismissed Bodycorp's claims against AAMI and manager - trial judge found AAMI breached the AAMI agreement in respect of certain franchisees but that relevant clauses of AAMI agreement were unenforceable because they imposed unreasonable restraints of trade - held: no error in finding of unreasonable restraints of trade - no error in rejection of claims for inducing breach of contract - no basis on which trial judge was obliged to assess or award damages - appeal dismissed.

[Bodycorp](#) (I B)

## **Victorian Workcover Authority v Stoddart (Vic) Pty Ltd [2015] VSC 149**

Supreme Court of Victoria

J Forrest J

Accident compensation - worker injured when he fell from roof of house under construction - worker settled his claim against employer and roofing company - determination of recovery claim under s138 *Accident Compensation Act 1985* (Vic) by Victorian WorkCover Authority (VWA) against roofing company - VWA held roofing company partly responsible for injuries and payment of compensation - VWA conceded employer must also carry share of responsibility for injuries - whether roofing company owed duty of care to worker and if so, whether it breached duty - percentage responsibility which roofing company should bear as required by s138 if it breached duty - ss49 & 51 *Wrongs Act 1958* (Vic) - held: roofing company owed statutory duty of care to worker arising under *Occupational Health and Safety Regulations 2007* (Vic) - roofing company also owed common law duty of care to worker - roofing company breached both statutory duty of care and common law duty of care - VWA entitled to be indemnified by roofing company in relation to payments of compensation by it for worker's injuries - Factor X of formula prescribed by s138 was 50 per cent.

**NB:** the above summary, which originally appeared in Benchmark issue dated 28 April 2015, has been updated to include a reference to the defendant's breach of a statutory duty of care. We apologise for the omission.

[VWA](#) (I C G)

## **South Australian Superannuation Board (Super SA) v McIntyre [2015] SASCFC 57**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Stanley & Nicholson JJ

Superannuation - appellant administered superannuation scheme established by *Southern State Superannuation Act 1994* (SA) - respondent employee of Department of Education and Child Development became member of scheme - respondent ceased working as groundskeeper in part due to heart condition - respondent sought payment of basic invalidity insurance benefit - appellant declined claim on basis respondent had not ceased working due to invalidity but that incapacity arose after surgery which he had after ceasing employment - District Court allowed respondent's appeal - appellant appealed - held: primary judge erred in finding respondent satisfied all requirements for basic invalidity insurance as it was not demonstrated that employment was terminated by employer as required by s34(8) - respondent satisfied all other requirements - failure to satisfy requirement was not an issue raised and argued before primary judge - appellant should not be permitted to raise issue for first time on appeal - appeal dismissed.

[SuperannuationBoard](#) (B G)

## **Grass Tree Incorporated as Trustee of The Adelaide Club Trust [2015] SASC 60**

Supreme Court of South Australia

Master Withers

Equity - trusts and trustees - applicant sought to vary trust deed pursuant to s59C *Trustee Act 1936* (SA) to provide borrowing power - ss4, 90, 91 & 92 - held: Court satisfied Master had jurisdiction under Act and could proceed to determine application - Court satisfied that factors supported Court's exercise of power to authorise trust to be varied as sought.

[GrassTree](#) (B)

## **Hulanicki v Walton [2015] ACTCA 14**

Court of Appeal of the Australian Capital Territory

Murrell CJ; Refshauge & Penfold JJ

Damages - motor vehicle accident - appellant suffered brain injury in motor vehicle accident - respondent admitted breach of duty of care - appellant appealed against assessment of damages for past and future domestic care and funds management, and contended payment of money to Health Insurance Commission and Centrelink should not have resulted in reduction in judgment sum - held: no error in primary judge's approach to assessment of appellant's past and future needs for domestic assistance - primary judge overlooked provision of buffer in relation to increased care in the future when calculating damages - modest buffer allowed - reduction in future care damages effected a double discount for vicissitudes - damages for funds management to be reassessed - fact that insurer had repaid sums to third parties on appellant's behalf should not reduce the amount of the judgment recorded - orders made for recalculation of damages.

[Hulanicki](#) (I)



[Click Here to access our Benchmark Search Engine](#)