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

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### Executive Summary (1 minute read)

**Brown Brothers v Pittwater Council** (NSWCA) - contempt - bias - arguable defence to criminal charge of contempt - permission to withdraw guilty pleas - appeal allowed

**LCM Litigation Fund Pty Ltd v Coope; Coope v LCM Litigation Fund Pty Ltd** (NSWSC) - contract - plaintiff entitled to terminate defendant's employment contract for serious misconduct

**Deal v Kodakkathanath** (VSCA) - accident compensation - cause of action for breach of statutory duty was unavailable - jury verdict not perverse or not open on evidence - appeal dismissed

**Frost v Miller** (QSC) - solicitors' costs - conditional costs agreement void for violating formality requirements - declaration

**WY Properties Pty Ltd v O3 Capital Pty Ltd** (WASC) - administrative law - leases and tenancies - claim for repayment of rental payments as wasted money - error of law by State Administrative Tribunal - appeal allowed

**Kronenberg v Bridge (No 2)** (TASFC) - damages - interest - *Hungerfords v Walker* damages assessed on compound interest basis

**Calvert v Badenach** (TASFC) - Wills and estates - solicitors' duties - breach of duty to testator to advise in relation to risk of family maintenance claim - erroneous failure to consider or find solicitors breached duty to intended beneficiary - appeal allowed

# Benchmark

## Summaries With Link (Five Minute Read)

### **Brown Brothers v Pittwater Council [2015] NSWCA 215**

Court of Appeal of New South Wales

McColl & Macfarlan JJA; Tobias AJA

Bias - procedural fairness - contempt - appellant operated waste skip business on land zoned Light Industrial 4(b1) under *Pittwater Local Environmental Plan 1993* - in 2011 respondent charged two directors of appellant with contempt of court in respect of alleged activities in business in contravention of consent orders - appellant pleaded guilty to charges - directors each sought to withdraw their guilty pleas - directors contended they were made on basis of incorrect legal advice and that they had a viable defence - primary judge refused appellants leave to withdraw guilty pleas - held: prima facie primary judge ought to have recused herself on basis of adverse findings made in respect of director's credit in earlier proceedings but appellants had waived right to object by failing to object to primary judge continuing to hear withdrawal application - no denial of procedural fairness - appellants had pleaded guilty on basis of incorrect legal advice - it was arguable that on the proper construction consent orders there was real question about their guilt - appellant's pleas not attributable to a consciousness of guilt - appellants permitted to withdraw pleas of guilt - alternative would to condone a miscarriage of justice - exceptional case where public interest in finality of litigation and avoiding inconsistent decisions could not be permitted to perpetuate potential injustice - appeal allowed.

[Brown](#)

### **LCM Litigation Fund Pty Ltd v Coope; Coope v LCM Litigation Fund Pty Ltd [2015] NSWSC 992**

Supreme Court of New South Wales

Stevenson J

Contract - defendant was joint managing director of plaintiff pursuant to employment contract, clause of which provided for termination of employment if defendant 'guilty of any serious misconduct' - plaintiff purported to terminate defendant's employment on basis of clause - whether defendant was guilty of 'serious misconduct' warranting termination of employment - failure to disclose in course of making 'Separation Proposal', terms of 'Employment Proposal' - ss200B & 200F(2) *Corporations Act 2001* (Cth) - held: defendant engaged in serious misconduct warranting termination of employment - defendant's conduct 'repugnant to the relationship of employee and employer', 'incompatible with the fulfilment of' his duty to plaintiff and 'involved an opposition, or conflict between his interest and his duty' to plaintiff - plaintiff entitled to terminate defendant's employment contract for misconduct.

[LCM](#)

### **Deal v Kodakkathanath [2015] VSCA 191**

Court of Appeal of Victoria

Warren CJ, Ashley JA & Digby AJA

Accident compensation - appellant claimed pain and suffering damages against employer for

# Benchmark

knee injury suffered in course of employment as primary school teacher - jury rejected claim injury suffered due to breach by employer of non-delegable duty of care - ss2, 4 & 20 *Occupational Health and Safety Act 2004* (Vic) - regulations 1.1.1, 1.1.5, 3.1.1, 3.1.2 & 3.1.3 *Occupational Health and Safety Regulations 2007* (Vic) - appellant contended jury's verdict perverse and not open on evidence, and that judge wrongly ruled cause of action for breach of statutory duty which appellant advanced was unavailable - held: primary judge's ruling concerning breach of statutory duty claim was correct - no inadequacy of reasons - no merit in contention jury's verdict on appellant's claim at common law was perverse or not open on the evidence - appeal dismissed.

[Deal](#)

## **Frost v Miller [2015] QSC 206**

Supreme Court of Queensland  
Chief Justice

Solicitors' costs - conditional costs agreement - applicant sought declaration under s327(1) *Legal Profession Act 2007* (Qld) that conditional costs agreement executed by applicant and respondent was void for violation of prescribed formality requirements under ss323(3)(d)-(e) in relation to inclusion of a statement that client had been informed of right to seek independent legal advice, and a cooling-off period - respondent claimed contract substantially complied with prescribed formality requirements - whether formality requirements mandatory or recommendatory - whether breach of formality requirements under s323 rendered conditional costs agreement void or voidable - held: conditional costs agreement void for violating ss323(3)(d)-(e) - respondent could recover reasonable legal costs under void costs agreement calculated in accordance with applicable scale or at fair and reasonable value - declaration.

[Frost](#)

## **WY Properties Pty Ltd v O3 Capital Pty Ltd [2015] WASC 268**

Supreme Court of Western Australia  
K Martin J

Administrative law - leases and tenancies - appellant claimed back all rental payments made to respondent landlord prior to landlord's termination of lease as wasted money - lease governed by provisions of *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) - appellant sought leave to appeal against State Administrative Tribunal's adverse decision - false statements in disclosure statement - misleading and unconscionable conduct - reliance by appellant on statements or conduct by entering into five-year lease with respondent for premises - held: Tribunal erred in law in not finding that making of 'Relevant Payments' caused appellant to suffer loss and/or pecuniary loss and/or damage - leave to appeal granted - appeal allowed - respondent to pay appellant amount of repayment of rental payments.

[WY](#)

## **Kronenberg v Bridge (No 2) [2015] TASFC 9**

Full Court of the Supreme Court of Tasmania  
Blow CJ; Porter & Pearce JJ

# Benchmark

Damages - interest - Court made final orders disposing of appeal - point of controversy concerned appellants' entitlement to damages in nature of interest in accordance with *Hungerfords v Walker* [1989] HCA 8 - appellants contended they were entitled to compound interest - respondent conceded only entitlement to simple interest - held: award of simple interest inadequate to compensate appellants for losses incurred due to respondent's contraventions of *Fair Trading Act 1990* (Tas) - appellants could only be properly compensated by award of compound interest - appropriate to assess appellants' *Hungerfords v Walker* damages on compound interest basis.

[Kronenberg](#)

## **Calvert v Badenach [2015] TASFC 8**

Full Court of Tasmania

Tennent, Porter & Estcourt JJ

Solicitors' duties - legal practitioner took instructions from client for preparation of Will - Will prepared and executed by testator - testator left whole estate to appellant - testator died - testator made no provision for daughter- daughter made application under *Testator's Family Maintenance Act 1912* (Tas) - judge ordered payment of amount out of estate - plaintiff contended solicitor and firm negligent in failing to advise testator of risk of daughter making claim and failing to advise him of options to arrange affairs so as to avoid claim - Court accepted solicitor owed testator duty to take instructions in relation to possible claim under Act and that he breached duty - Court not satisfied that had solicitor discharged duty to testator, testator would have taken steps to frustrate possible claim - Court therefore not required to decide whether solicitor owed plaintiff, as an intended beneficiary, any duty to advise as to risk of claim being made or steps to reduce or extinguish testator's estate in order to avoid consequences of claim - appellant appealed - held: grounds of appeal made out that trial judge erred in failing to find solicitors owed and breached duty of care to plaintiff, in failing to consider plaintiff's claim as one for the loss of an opportunity, failing to assess chance of testator acting as plaintiff contended had solicitors not breached duty, failing to consider whether solicitors owed and/or breached duty of care to plaintiff, and in failing to make any findings as to damages - appeal allowed.

[Calvert](#)

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