



Friday, 8 May 2015

Daily Banking A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Dallas Buyers Club LLC v iiNet Ltd (No 3) (FCA) - costs - preliminary discovery - resolution of issues following principal judgment

Warton v Yeo (NSWCA) - Wills and estates - costs - 'children' in clause of Will referred both to biological child and step-children - appeal allowed

Australia & New Zealand Banking Group Ltd v Fink (NSWSC) - contract - loans - no unjust contract - no breach by bank of National Credit Code - judgment for bank

Hammersley v National Transport Insurance (TASFC) - motor vehicle accident insurance policy - insurer could not rely in exclusion clauses - appeal allowed

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Summaries With Link (Five Minute Read)

Dallas Buyers Club LLC v iiNet Ltd (No 3) [2015] FCA 422

Federal Court of Australia

Perram J

Costs - preliminary discovery - issues requiring resolution following principal judgment - whether prospective applicant to bear costs of proceeding - whether security should be ordered for past and future costs - whether ISPs adopted adversarial position - whether appropriate to make orders regulating DPC's conduct - held: ISP's were adversarial - Dallas Buyers Club had less than complete victory - amount of time which Court spent on issue on which DBC was unsuccessful was relatively modest - ISPs to pay 75% of DPC's costs - ISPs to pay DBC's costs of flying witness to Australia, and accommodation and living expenses - discovery order stayed until security issue finalised - DPC to formulate draft letter to account holders for Court's consideration - not appropriate to make orders regulating DBC's general conduct - DBC not required indemnify ISPs for claims brought against them in relation to disclosure by them of account information - ISPs refused order that their costs include costs of communicating with clients in relation to preliminary discovery - orders made.

[DallasBuyersClub](#)

Warton v Yeo [2015] NSWCA 115

Court of Appeal of New South Wales

Basten, Ward & Emmett JJ

Wills and estates - succession - costs - testator died in 2011 - probate of Will granted to first respondent - by clause of Will testator gave 25 % of residuary estate to sister with proviso that, should sister die before him, the share be given "to such one of her children as shall survive" testator - sister predeceased testator and was survived by second respondent only child - sister had been married to second respondent's father - second respondent's father had four children by first marriage - testator's sister raised the four children as step-children and to testator's knowledge treated them as her own children - primary judge declared that on proper construction of clause the whole of sister's share of deceased's residuary estate passed to her only natural child - two step-children appealed - appropriate construction to be given to clause of Will of testator - held: "children" referred both to sister's biological child and her four step-children - appeal allowed - first respondent's application for indemnity for costs of appeal proceedings rejected - costs of Will construction dispute were testamentary expenses - estate had been partially distributed - parties' costs of appeal to be paid out of proceeds of sale of testator's retirement village to extent indicated by Court.

[Warton](#)

Australia & New Zealand Banking Group Ltd v Fink [2015] NSWSC 506

Supreme Court of New South Wales

Adamson J

Contract - bank sought judgment against defendants for money they owed under two loans -

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loans secured by property - order for possession in respect of property previously made following bank's application for summary judgment - whether any basis other than that raised in summary judgment proceedings for relief to be granted under *Contracts Review Act 1980* (NSW) - whether interest provisions in Third Business Loan and Overdraft Facility void for uncertainty - whether defendants entitled to relief pursuant to National Credit Code (Code) or Act in respect of Third Business Loan and Overdraft Facility - whether Code was incorporated into Third Business Loan - whether bank breached Code and if so defendants suffered any damage - held: claim for relief under Act rejected - bank entitled to full amount of money owing under loans - relief under the Act in respect of Third Business Loan excluded by s6 - nothing unjust about Third Business Loan - interest provisions not void for uncertainty - defendants not entitled to relief under Code - Court not satisfied bank breached Code - defendants did not establish any loss - judgment for bank.

[ANZ](#)

Hammersley v National Transport Insurance [2015] TASFC 5

Full Court of the Supreme Court of Tasmania

Blow CJ; Porter & Pearce JJ

Insurance - motor vehicle accident insurance policy - exclusion clauses - second appellant company operated fleet of trucks - Kellera held policy of insurance issued by respondent insurer - first appellant, in course of employment by Kellera, was driving one of its prime movers - prime mover was towing trailer on which there was an excavator - excavator was positioned in unusual way - top of excavator collided with railway overpass causing damage - State of Tasmania owned overpass - State sued first appellant and Kellera for damages for negligence - appellants instituted third party proceedings claiming indemnity from the insurer - drivers covered by policy - primary judge gave judgment for State against appellants - primary judge dismissed appellants' claim against insurer - appellants appealed - held: Court satisfied overloading of trailer was neither intended, foreseen, looked for, expected, nor brought about by design - overloading was accidental within meaning of policy - liability under policy not excluded - vehicle not 'being used in an unsafe or unroadworthy condition' within meaning of exclusion - Court satisfied there was not any recklessness or reckless failure by first appellant that would entitle insurer to rely upon exclusion - appeal allowed - order dismissing third party proceedings set aside - judgment for appellants against insurer.

[Hammersley](#)



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Interim

By Lola Ridge

The earth is motionless
And poised in space ...
A great bird resting in its flight
Between the alleys of the stars.
It is the wind's hour off
The wind has nestled down among the corn
The two speak privately together,
Awaiting the whirr of wing

[LolaRidge](#)

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