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

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### Executive Summary (1 minute read)

**Fistar v Riverwood Legion and Community Club Ltd** (NSWCA) - equity - fraud - club and appellant were both victims of fraudster - club could not recover amount from appellant - appeal allowed

**Palermo Seafoods Pty Ltd v Lunapas Pty Ltd** (NSWCA) - pleadings - leases and tenancies - failure to address case pleaded by appellant - substantial miscarriage of justice - new trial - appeal allowed

**Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd** (NSWSC) - security of payments - no denial of procedural fairness by adjudicator in relation to determination whether plaintiff entitled to claimed set-off - application dismissed

**Application of Harnett and Cutts** (NSWSC) - Wills and estates - executors of deceased's estate granted Benjamin order

**Hendrex v Keating** (TASSC) - negligence - contract - plaintiff injured in fall from ladder while working on defendants' house - defendants liable

**Clarkson Williams Partners Pty Ltd v Vaughan (No 2)** (ACTCA) - costs - successful appellant succeeded on only one of five grounds of appeal - failed grounds significantly added to costs of appeal - no order as to costs of appeal

## Summaries With Link (Five Minute Read)

### **Fistar v Riverwood Legion and Community Club Ltd [2016] NSWCA 81**

Court of Appeal of New South Wales

Bathurst CJ, Leeming JA & Sackville AJA

Equity - fraud - appellant gave cheque to fraudster who was sole director of company and held herself out as financial adviser who could invest money - most funds provided by appellant dissipated - CEO of respondent club transferred amount from club's bank account to fraudster's company account - fraudster procured bank cheque made out to vendor of property and provided it to appellant's solicitors - solicitors delivered cheque to vendor's representatives - club sued fraudster, fraudster's company, CEO of club and appellant - appeal was against judgment obtained by club against appellant - appellant claimed personal action for money had and received could not be maintained and also challenged findings whether she was recipient of funds and volunteer - whether respondent club could recover against appellant where both were fraudster's victims - whether personal action for money had and received would "outflank" knowing receipt claim under *Barnes v Addy* - held: club's claim turned on whether appellant was a volunteer - appellant did not receive bank cheque as volunteer - appellant by solicitors had received bank cheque as repayment by fraudster's company of existing enforceable debt - appeal allowed.

[Fistar](#)

### **Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2016] NSWCA 82**

Court of Appeal of New South Wales

Simpson JA; Sackville & Emmett AJJA

Pleadings - leases and tenancies - self-represented litigant - appellant claimed declarations and orders arising out of lease of first respondent's premises - appellant claimed first respondent wrongfully prevented its access to premises - in first judgment primary judge answered certain questions and identified questions not properly addressed, calling for further submissions - in second judgment primary judge found appellant entitled to judgment against second respondent - second judgment was subject of appeal - grounds of appeal related to claim concerning alleged use of and refusal to return its goods - held: primary judge failed to address case which appellant pleaded and presented resulting in substantial wrong or miscarriage of justice - new trial necessary in interests of justice - appeal allowed.

[Palermo](#)

### **Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2016] NSWSC 462**

Supreme Court of New South Wales

Meagher JA

Security of payments - procedural fairness - plaintiff head contractor sought to quash adjudication determination made under *Building and Construction Industry Security of Payment Act 1999* (NSW) concerning first defendant's payment claim - plaintiff contended it was denied procedural fairness - plaintiff contended adjudicator rejected set-off claim on bases not

contended for - held: no denial of procedural fairness by adjudicator as to whether plaintiff entitled to claimed set-off - application dismissed.

[Probuild](#)

## **Application of Harnett and Cutts [2016] NSWSC 427**

Supreme Court of New South Wales

Pembroke J

Wills and estates - Benjamin order - application for Benjamin order by executors of deceased's estate arising from their inability to locate estate's "last known beneficiary" - executors sought to be excused from further attempts to locate beneficiary - held: Court satisfied all reasonable searches had been made- it would be expensive and time consuming to burden of further searches on executors - estate's size was modest and search for beneficiary had begun in 1998 - Benjamin order granted.

[Harnett and Cutts](#)

## **Hendrex v Keating [2016] TASSC 20**

Supreme Court of Tasmania

Blow CJ

Negligence - contract - damages - defendants were married and living together in house - defendant husband arranged for removal and replacement of roof cladding and for friends to help - plaintiff was one of the friends - defendant arranged to pay plaintiff for his work - defendant set up ladder for workers to use to travel to and from roof via roof of carport - plaintiff injured when he fell from ladder - plaintiff sued for negligence, breach of contract and breach of statutory duties under *Workplace Health and Safety Act 1995* (Tas) and *Workplace Health and Safety Regulations 1998* (Tas) - ss11 & 12(a) *Civil Liability Act 2002* (Tas) - held: claim for breach of statutory duties failed - defendants breached duty to take reasonable care to protect plaintiff from harm - damages reduced by 60% for contributory negligence - judgment for plaintiff in sum of \$1,126,904.

[Hendrex](#)

## **Clarkson Williams Partners Pty Ltd v Vaughan (No 2) [2016] ACTCA 8**

Court of Appeal of the Australian Capital Territory

Penfold, Burns & Rangiah JJ

Costs - misleading and deceptive conduct - damages - appellant succeeded on appeal and sought that respondent pay its costs - appellant succeeded on only one of five grounds of appeal - respondent sought that there be no order for costs on basis appellant failed on most grounds and that the costs of appeal were increased by the failed grounds - rr1705 & 1721 *Court Procedures Rules 2006* (ACT) - held: failed grounds had added to costs of appeal significantly enough to displace rule that costs follow event - no order for costs of appeal.

[Clarkson](#)

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