

Friday 1 August 2014

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Thompson t/as Staunton and Thompson Lawyers v Schacht (NSWCA)** - solicitors - professional negligence - erroneous assessment of damages - appeal allowed (I)

**Holshandon Pty Ltd; Rankin v Eakin (NSWSC)** - negligence - psychiatric injury - plaintiffs required to attend consultations with psychiatrist without medical expert present (I)

**ANZ Banking Group Ltd v Loftus (VSC)** - possession - loan agreement - summary judgment in favour of bank set aside on basis of new evidence (I B)

**In the estate of Osinski (deceased) (SASC)** - wills - handwritten will with additional notes - construction of will - trust variation scheme approved (B)

**Jamac Construction Group Pty Ltd v De Mol Investments Pty Ltd (WASC)** - pleadings - arbitration clause of construction contract did not preclude party from defending litigation - strike out application refused (I B C)

**Wilson v Coxon (WASC)** - pleadings - defamation - *Polly Peck* imputations struck out with leave to replead (I)



**Noakes v Beveridge** (ACTSC) - motor vehicle accident - third party insurance - reliance on medical reports served after compulsory conference permitted (I)

## Summaries with links (5 minute read)

### **Thompson t/as Staunton and Thompson Lawyers v Schacht [2014] NSWCA 247**

Court of Appeal of New South Wales

Basten, Barrett & Leeming JJA

Damages - professional negligence - solicitors acted for client in preparation of financial agreement dealing with division of property in event of marriage breakdown - validity of agreement governed by *Family Law Act 1975* (Cth) - primary judge upheld client's claim for damages in negligence arising from invalidity of agreement - liability not in issue - no disagreement damages to be calculated as difference between amounts payable under settlement and amounts which would have been payable pursuant to valid and enforceable agreement - solicitors challenged assessment of damages - whether certain components wrongly included by primary judge - ss5D, 5E, 50 *Civil Liability Act 2002* (NSW) - held: trial judge erred in calculation of damages for spousal maintenance and in failing to discount for contingencies - client failed to establish legal costs incurred were harm caused by solicitors' negligence - legal costs removed from award - appeal allowed - damages reduced.

[Thompson t/as Staunton and Thompson Lawyers](#) (I)

### **Holshandon Pty Ltd; Rankin v Eakin [2014] NSWSC 1028**

Supreme Court of New South Wales

Adamson J

Negligence - first plaintiff was trustee of family trust - second, third and fourth plaintiffs were parents and sisters of deceased - plaintiffs claimed deceased died as result of defendants' negligence - plaintiffs sought damages for psychiatric injury sustained as result of deceased's death - defendants sought orders that plaintiffs attend consultations with psychiatrist without medical expert being present - defendants sought that Court dispense with r23.5 *Uniform Civil Procedure Rules 2005* (NSW) - held: it would be denial of natural justice if Court permitted wishes of plaintiffs not to undergo any further examination to prevail over defendants' forensic interest in obtaining up-to-date opinion from psychiatrist as to plaintiffs' current mental state and any causal connection between such mental states and death of deceased - Court accepted psychiatrists' evidence that presence of another medical expert would have tendency to compromise medical assessment - orders made.

[Holshandon Pty Ltd](#) (I)

### **ANZ Banking Group Ltd v Loftus [2014] VSC 342**

Supreme Court of Victoria



Ginnane J

Summary judgment - loan agreement - possession - bank sued borrower for possession of property - borrower appealed from summary judgment in bank's favour - new evidence - interests of justice - O77 r6.9(3) *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - ss63 & 64 *Civil Procedure Act 2010* (Vic) - held: there was conflict arising from affidavits whether borrower signed second mortgage - borrower had sworn he did not - on summary judgment application, Court could not determine whether person had signed a document - borrower had real prospects of success - reasonably clear that, if borrower's evidence had been before Associate Justice, summary judgment would not have been granted to bank - appeal allowed on the basis of new material - bank's summons dismissed.

[ANZ Banking Group Ltd](#) (I B)

## **In the estate of Osinski (deceased) [2014] SASC 89**

Supreme Court of South Australia

Stanley J

Wills and estates - executor sought advice and direction pursuant to s69 *Administration and Probate Act 1919* (SA) and s60 *Trustee Act 1936* (SA) on administration of estate and construction of deceased's will - executor also sought to vary terms of charitable trust established pursuant to testator's will - testator prepared handwritten will using a will kit which included additional page with heading *additional notes for personal representative* - additional notes gave rise to questions concerning construction of will - held: real estate to be dealt with in terms of additional notes - terms of additional notes established charitable trust - not reasonably practicable to apply trust property in accordance with original purposes of charitable trust - variation of terms of trust proposed in trust variation scheme accorded as far as reasonably practicable with spirit of the trust established under will - orders made.

[In the estate of Osinski \(deceased\)](#) (B)

## **Jamac Construction Group Pty Ltd v De Mol Investments Pty Ltd [2014] WASC 273**

Supreme Court of Western Australia

K Martin J

Pleadings - construction contract - frustration - commercial arbitration - applicant sought to strike out paragraphs of respondent's defence and entire counterclaim - applicant claimed respondent had failed to comply with core dispute resolution prerequisites under general condition of contract - cl 47 Australian Standards AS2124-1992 - *Commercial Arbitration Act 2012* (WA) - held: cl 47 exhorted claimant to give proper notice of dispute and then to properly engage in meaningful conferral prior to commencement of arbitration or litigation - in present circumstances applicant had legitimately commenced arbitration and now litigation concerning money entitlements under a contract which parties agreed had come to an end - respondent not required in circumstances to give applicant notice of dispute under cl 47, then to confer before it was entitled to defend and counterclaim - on proper construction of cl 47 - application dismissed.

[Jamac Construction Group Pty Ltd](#) (I B C)



**Wilson v Coxon [2014] WASC 268**

Supreme Court of Western Australia

K Martin J

Pleadings - defamation - plaintiff sought to strike out defendant's *Polly Peck* alternate imputation as untenable - popular or false innuendos - words of the utterance - knowledge required in recipient of defamatory words required to derive alleged meaning - true essence deficiency - held: for certain of plaintiff's imputations to stand, they needed to be recast as true or legal innuendos - *Polly Peck* imputation did not satisfy test of being not substantially different from, or more injurious than, imputations alleged by plaintiff - imputation struck out with leave to replead.

[Wilson](#) (I)**Noakes v Beveridge [2014] ACTSC 177**

Supreme Court of the Australian Capital Territory

Mossop M

Motor vehicle accident - insurance - proceedings regulated by terms of *Road Transport (Third-Party Insurance) Act 2008* (ACT) - whether medical reports served after compulsory conference could be relied upon - ss139 & 156 - *Road Transport (Third Party Insurance) Amendment Bill 2011* (ACT) - held: no prohibition imposed by Act on obtaining new expert evidence - there was some indication that legislature contemplated additional evidence would be obtained after compulsory conference and mandatory final offer - nothing in Act which would permit implication that new expert evidence was not permitted to be relied upon - no basis on which plaintiff is precluded from putting on evidence - orders made.

[Noakes](#) (I)**A Bird Song**

By Christina Rossetti

It's a year almost that I have not seen her:  
Oh, last summer green things were greener,  
Brambles fewer, the blue sky bluer.

It's surely summer, for there's a swallow:  
Come one swallow, his mate will follow,  
The bird race quicken and wheel and thicken.

Oh happy swallow whose mate will follow  
O'er height, o'er hollow! I'd be a swallow,  
To build this weather one nest together.

[Christina Rossetti](#)



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