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## Insurance, Banking, Construction & Government

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

#### Important Announcement



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#### Executive Summary (1 minute read)

**Clarke v State of New South Wales** (NSWSC) - pleadings - pleading of tort of conspiracy struck out - other intentional torts to be repleaded (I G)

**Sciacca v Langshaw Valuations Pty Ltd** (NSWSC) - loans and mortgages - variation of freezing orders refused (I B C)

**Ulladulla Fish Traders Pty Ltd v Ulladulla Fisherman's Co-op** (NSWSC) - contract - permitted use - exclusivity clause - proposed sublease of shop would breach subleases of two other shops (B)



**Batty v Doherty** (NSWSC) - real property - appointment of trustees for sale - outstanding issues - court annexed mediation ordered (B)

**Walsh v Walgett Shire Council** (NSWSC) - negligence - separate hearing of liability in advance of damages refused (I)

**Munday v Court** (VSCA) - negligence - transport accident - jury's award of damages not manifestly inadequate - appeal dismissed (I)

**Chapman v Wilson** (QCA) - costs - wills and estates - unsuccessful appellant to pay remaindermen beneficiaries' costs of appeal on standard basis (B)

## Summaries with links (5 minute read)

### **Clarke v State of New South Wales [2013] NSWSC 1436**

Supreme Court of New South Wales

Harrison AsJ

Pleadings - summary judgment - intentional torts - joinder - three proceedings for damages for conspiracy, wrongful arrest and malicious prosecution - State sought to strike out statements of claim and dismissal of conspiracy proceedings - claim against police and judicial officers - rr13.4(1), 14.28(1) & 14.28(2) *Uniform Civil Procedure Rules 2005* (NSW) - s44A & 44B(1) *Judicial Officers Act 1986* (NSW) - held: wrongful arrest and malicious prosecution to be pleaded in one amended statement of claim - tort of conspiracy not made out - complaints made against Magistrate arose from performance of her duties for which she had judicial immunity - abuse of process to allow conspiracy action to continue - pleading could not be cured by amendment - proceeding dismissed.

[Clarke](#) (I G)

### **Sciacca v Langshaw Valuations Pty Ltd [2013] NSWSC 1393**

Supreme Court of New South Wales

Bellew J

Freezing orders - loans and mortgages - plaintiffs sought variation of freezing orders against property development company and its shareholder - variation sought to prevent developer disposing of net proceeds of sale of land and seeking plaintiffs' consent to any disbursement over \$1,000 - held: balance of convenience favoured defendants - variation would place burden on

developer which was unwarranted on evidence - there had been no breach of orders since they were made in 2011 - plaintiffs had not adduced evidence of danger of assets being disposed of or otherwise dealt with - variation of orders refused.

[Sciacca](#) (I B C)

## **Ulladulla Fish Traders Pty Ltd v Ulladulla Fisherman's Co-op [2013] NSWSC 1453**

Supreme Court of New South Wales

Rein J

Contract - leases - proceedings concerning lease of three shops at wharf - plaintiff lessee of shop 1 and shop 3 objected to proposed sublease of shop 2 - plaintiff contended that permitted use clause in proposed sublease infringed exclusivity clause in the shop 1 and shop 3 sublease - construction of sublease - meaning of *fresh seafood* in exclusivity clause - relevance of whether sale was for export as opposed to retail and wholesale within Australia - evidence - held: defendant would breach sublease with plaintiff by entering into a sublease for shop that allowed sublessee to sell live seafood of any description - defendant not in breach by permitting sublessee of other shop to sell frozen seafood or bait and berley (whether frozen or not).

[Ulladulla Fish Traders](#) (B)

## **Batty v Doherty [2013] NSWSC 1441**

Supreme Court of New South Wales

Slattery J

Real property - application for appointment of trustees for sale under s66G *Conveyancing Act 1919* (NSW) on behalf of three of six owners of property - outstanding issues requiring resolution before consideration whether to make orders - necessity to join all parties to proceedings - whether to join trustee in bankruptcy of one co-owner - proof of service - dispute concerning property-related payments made by two co-owners - potential promissory estoppel claim by one owner told she could live in the property if she paid mortgage - public interest in resolution of matter - Court annexed mediation ordered and orders made to set out claim and defence before mediation.

[Batty](#) (B)

## **Walsh v Walgett Shire Council [2013] NSWSC 1434**

Supreme Court of New South Wales

Adamson J



Negligence - plaintiff catastrophically injured when he hit his head on the bottom of pool - plaintiff claimed damages for alleged negligence by defendant council - council sought separate hearing on liability before hearing on damages - r28.2 *Uniform Civil Procedure Rules 2005* (NSW) - ss56, 57 & 58 *Civil Procedure Act 2005* (NSW) - held: if defendant did not have to consider assessment of damages unless and until liability was finally determined, it was less likely to determine amount to be offered to settle claim - plaintiff would suffer more significant injustice if liability and damages separated than defendant might suffer if proceedings determined in single hearing - single hearing more efficient use of court resources - unjust to deprive plaintiff of potential post judgment interest - motion dismissed.

[Walsh](#) (I)

## **Munday v Court [2013] VSCA 279**

Court of Appeal of Victoria

Warren CJ, Priest JA & Robson AJA

Negligence - transport accident - damages - appellant appealed from jury verdict awarding her damages for loss arising from car accident - appellant claimed award was manifestly inadequate and therefore no reasonable jury could have given verdict on basis of evidence - credit - medical evidence - held: jury took view that was open to them - no inadequacy of damages - no error by trial judge in charging the jury - appeal dismissed.

[Munday](#) (I)

## **Chapman v Wilson [2013] QCA 282**

Court of Appeal of Queensland

Holmes & Gotterson JJA; Applegarth J

Costs - wills and estates - trustees sought determination of meaning of expression in trust fund established under will - second respondent remaindermen beneficiaries were joined as parties to proceedings - trustees succeeded on appeal and sought order that costs of appeal be paid by appellant on standard basis - whether any order should be made in respect of remaindermen's costs - held: interests of remaindermen beneficiaries did not coincide with those of trustees - legitimate for remaindermen to be represented to protect interests by resisting appeal - manner in which appeal argued justified separate representation - unsuccessful appellant ought also pay remaindermen's costs of appeal on standard basis.

[Chapman](#) (B)



**Sonnet LXV: Since brass, nor stone, nor earth, nor boundless sea**

By William Shakespeare

Since brass, nor stone, nor earth, nor boundless sea  
But sad mortality o'er-sways their power,  
How with this rage shall beauty hold a plea,  
Whose action is no stronger than a flower?  
O, how shall summer's honey breath hold out  
Against the wrackful siege of batt'ring days,  
When rocks impregnable are not so stout,  
Nor gates of steel so strong, but time decays?  
O fearful meditation! where, alack,  
Shall time's best jewel from time's chest lie hid?  
Or what strong hand can hold his swift foot back?  
Or who his spoil of beauty can forbid?  
O, none, unless this miracle have might,  
That in black ink my love may still shine bright.

[William Shakespeare](#)

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