

Tuesday 6 May 2014

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Zahr v TAL Life Ltd (NSWSC) - disability policy - mental health - malingering - claim dismissed (I)

HP Mercantile Pty Ltd v Clements (NSWSC) - contract - agricultural managed investment scheme - claim by assignee under loans and farming agreements dismissed (B)

Re Estate Johnson, Deceased (NSWSC) - wills - spouses mistakenly executed each other's mirror wills - document prepared for husband admitted to probate as informal will (B)

Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd (QSC) - security of payments - jurisdictional error - denial of natural justice - adjudication decision void (C)

Carroll v Investments (WA) Pty Ltd (WASCA) - contract for sale of land as strata lot - specific performance order on terms to be settled - purchaser's appeal upheld (B C)

Daniels v Hall (as Administrator of the Estate of Daniels) (WASC) - family provision - no failure by deceased to make adequate provision for son - family provision order refused (B)



Financial Integrity Group Pty Ltd v Farmer (No 3) (ACTSC) - damages - interlocutory injunction wrongly obtained - undertaking as to damages given - damages assessed (I B)

Summaries with links (5 minute read)

Zahr v TAL Life Ltd [2014] NSWSC 358

Supreme Court of New South Wales

Pembroke J

Disability insurance - mental health - malingering - insured qualified as dentist in Romania and worked as dental hygienist in Sydney - insured made claim under disability insurance policy contending he was partially disabled within meaning of policy due to anxiety and depression caused by his failure to become dentist in Australia - insured claimed he was unable to work full-time - malingering - fragility of clinical judgments - credit - medical evidence - held: Court not satisfied insured was partially disabled and could not work full time - insured was malingering and Court did not regard him as reliable witness - insured had engaged in embellishment, exaggeration and deception in order to advance his own financial interests with doctor and had attempted to do same with neuropsychological assessor and at hearing - Court did not believe insured and was fortified in conclusion by evidence of neuropsychological assessor - judgment for defendant.

[Zahr \(I\)](#)

HP Mercantile Pty Ltd v Clements [2014] NSWSC 509

Supreme Court of New South Wales

Black J

Contract - loan agreement - managed agricultural investment scheme - growers' representative entered farming agreements with orchard management company - grower entered loan agreements with management company - orchard project failed - management company went into liquidation - plaintiff relied on sequence of assignments of claims to harvesting and marketing costs and loans owing to management company culminating in assignment of claims to it - whether grower incurred harvesting and marketing costs under farming agreements - whether grower made his income from the project available in its entirety to growers' representative for purpose of loan agreements - held: plaintiff established grower failed to pay harvesting and marketing costs but did not establish quantum of those cost so as to be entitled to judgment against him - plaintiff not entitled to judgment against defendant for balance of the principal and interest on loans beyond amounts he had already paid, by reason of loan agreements - proceedings dismissed.

[HP Mercantile Pty Ltd \(B\)](#)

**Re Estate Johnson, Deceased [2014] NSWSC 512**

Supreme Court of New South Wales

Lindsay J

Wills - deceased husband and defendant wife executed mirror wills prepared by same solicitor on joint instructions - husband and wife mistakenly executed form of will prepared for the other - plaintiffs sought grant of probate of husband's will - held: findings of fact sufficient to attract ss8 & 27 *Succession Act 2006* (NSW) as means of giving effect to will prepared for deceased's execution - common objective of ss8 & 27 was to give substantive legal effect to testator's intention - whether to use s8 to admit document as informal will or s27 to rectify document signed by deceased was a matter of discretion - for administrative convenience orders made pursuant to s8 for admission to probate of the text of document prepared for deceased's execution and intended to be (but not in fact) signed by him.

[Re Estate Johnson, Deceased](#) (B)**Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd [2014] QSC 80**

Supreme Court of Queensland

P McMurdo J

Security of payments - head contractor for construction project challenged adjudicator's decision under *Building and Construction Industry Payments Act 2004* (Qld) requiring it to pay subcontractor - held: adjudicator engaged in incorrect reasoning in awarding delay costs under contract - adjudicator upheld claim on erroneous view that although no notice had been given under contract prior to reference date, subcontractor could be awarded delay costs because relevant periods of delay preceded that date - adjudicator misinterpreted contract but intended to apply it so error did not amount to jurisdictional error - adjudicator denied head contractor natural justice by denying it an opportunity to persuade him of incorrectness of his reasoning on essential point - adjudicator made jurisdictional error in finding subcontractor entitled to variation costs notwithstanding contract - adjudication decision of no effect.

[Northbuild Construction Sunshine Coast Pty Ltd](#) (C)**Carroll v Investments (WA) Pty Ltd [2014] WASCA 92**

Court of Appeal of Western Australia

Martin CJ, Buss JA & Beech J

Contract for sale of land as strata lot - purchaser entered contract to purchase unit in apartment complex to be developed by seller - contract provided seller had right to terminate in event of refusals or conditional approvals of planning applications - seller made two planning applications, one of which was refused and the other conditionally approved - seller terminated contract - purchaser sought specific performance - trial judge found in favour of seller - construction of contract - held: seller had no power to amend proposed strata plan in contract so as to alter the common property as amendment was not *to procure the registration of the Strata Plan* as required by contract - condition of planning approval of strata title application did no more than to require

seller to perform contractual obligation to purchaser to include easement land as common property - condition did not give seller any right to terminate contract - appeal upheld - order for specific performance on terms to be settled.

[Carroll](#) (B C)

Daniels v Hall (as Administrator of the Estate of Daniels) [2014] WASC 152

Supreme Court of Western Australia

EM Heenan J

Family provision - deceased's son sought variation of will to make further provision for him pursuant to s6 *Inheritance (Family and Dependents Provision) Act 1972* (WA) - will divided estate equally between deceased's three other children and their immediate descendants - deceased transferred farming properties to plaintiff during his lifetime - liabilities of estate - deceased's natural wishes to provide adequately for other children from remaining assets by will - held: as result of transactions between deceased and plaintiff during deceased's lifetime, plaintiff was left much better off than any of deceased's other children - having regard to plaintiff's overall position it was apparent that he was reasonably secure and adequately provided for because, in the past, he had received very substantial provision from deceased - therefore there had been no failure by deceased to provide adequate provision for plaintiff having regard to all the circumstances - plaintiff did not satisfy jurisdictional test – provision order refused.

[Daniels](#) (B)

Financial Integrity Group Pty Ltd v Farmer (No 3) [2014] ACTSC 75

Supreme Court of the Australian Capital Territory

Refshauge J

Damages - undertaking - interlocutory injunction - first defendant financial planner left employment of plaintiff and commenced employment with second defendant - plaintiff obtained interlocutory injunction restraining planner from using confidential information acquired during employment - statement of claim struck out and injunction discharged - no judgment formally entered but Court satisfied injunction had been wrongly obtained - defendants sought damages suffered as result of injunction - whether undertaking as to damages was given - approach to damages payable under undertaking as to damages - r6906 *Court Procedures Rules 2006* (ACT) - held: reference in transcript amounted to kind of offering of usual undertaking as to damages - words of employer's counsel clearly indicated undertaking was required and would be given - giving of undertaking effective even though it was less than *expressly and unambiguously given* - Court satisfied damages sustained by defendants as result of granting of injunction must be assessed - damages awarded.

[Financial Integrity Group Pty Ltd](#) (I B)

[Click Here to access our Benchmark Search Engine](#)