

Tuesday, 11 August 2015

Daily Composite 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)

Treasury Wine Estates Vintners Ltd v Garrett (FCA) - corporations - statutory demands set aside - application for injunction refused (I B)

Balven v Thurston (NSWSC) - trespass to land - appeal against award of damages and costs - leave to appeal refused insofar as required - summons dismissed (I)

Moy v Emoleum Services Pty Ltd (NSWSC) - workers compensation - permanent impairment - deduction for pre-existing condition - error by Medical Panel - decision quashed (I G)

Re Estate of Wai Fun CHAN, Deceased (NSWSC) - Wills and estates - formal Will and video Will admitted to probate (B)

Mackowiak v Hagipantelis,; Bickhoff v Hagipantelis (NSWSC) - solicitors' costs - preparation of itemised bill ordered - assessment of costs to be dealt with by costs assessor (I)

BRB Modular Pty Ltd v AWX Constructions Pty Ltd (No 2) (QSC) - costs - first respondent to pay half of successful applicant's costs of hearing of application for interlocutory injunction (I C)

Daniel v Van Zwol (SASCFC) - costs - succession - appellant to pay 90 per cent of first respondent's costs of appeal on party-party basis - appellant to bear own costs (B)

Benchmark

Summaries With Link (Five Minute Read)

Treasury Wine Estates Vintners Ltd v Garrett [2015] FCA 797

Federal Court of Australia

Davies J

Corporations - plaintiff sought orders that nine statutory demands for payment of debt served on it by defendant be set aside - plaintiff also sought that defendant be restrained from serving any additional statutory demand in connection with deed of settlement - ss459G, 459H & 459J *Corporations Act 2001* (Cth) - held: statutory demands served in contravention of s37AQ(1) and stayed by operation of s37AQ(2) - statutory demands served for improper purpose - genuine disputes existed - lack of standing - description of debt vague - if debt claim existed all claims had vested in trustee in bankruptcy - any claim made under certain clause of deed of settlement was not a "debt" which could be subject of a statutory demand - demands set aside - demands ineffective to achieve statutory purpose not a breach of Act in sense relevant to grant of injunction - application for injunction refused.

[Treasury](#) (I B)

Balven v Thurston [2015] NSWSC 1103

Supreme Court of New South Wales

Wilson J

Trespass - plaintiff appealed against Local Court decision awarding damages against him for trespass - plaintiff contended damages awarded on remitter too high in light of findings that assaults not made out - plaintiff contended magistrate should have applied provisions of *Civil Liability Act 2002* (NSW) limiting damages for non-economic loss - held: Magistrate assessed acts constituting trespass in context of whole of conduct - pattern of conduct indicated stalking, intimidation, and oppression of defendant - acts of trespass committed as part of and in furtherance of pattern - damages had to be assessed in that context - mental harm clearly capable of being viewed as probable and/or intended consequence of trespass - no error in award of damages - CLA excluded because plaintiff's acts intentional and intended to cause injury within meaning of s3B - leave to appeal refused on grounds concerning orders as to costs - leave to appeal insofar as required refused - summons dismissed.

[Balven](#) (I)

Moy v Emoleum Services Pty Ltd [2015] NSWSC 1062

Supreme Court of New South Wales

Davies J

Workers compensation - permanent impairment - plaintiff sought judicial review of decision of Medical Panel to revoke Medical Assessment Certificate - pre-existing condition - adequacy of reasons - reasonableness of conclusion - *Workers Compensation Act 1987* (NSW) - *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - held: Panel erred in assessing proportion of impairment due to pre-existing condition - reasons given by Panel entirely inadequate - deduction based on assumption or hypothesis - conclusion not supported

by probative or logical grounds - decision of Medical Panel quashed.

[Moy](#) (I G)

Re Estate of Wai Fun CHAN, Deceased [2015] NSWSC 1107

Supreme Court of New South Wales

Lindsay J

Wills and estates - probate - application for orders admitting digital video disc (DVD) recording of oral statement of testamentary intentions deliberately recorded as 'video will' to probate - DVD served as codicil to formal Will - ss6 & 8 *Succession Act 2006* (NSW) - held: Court satisfied testatrix's formal will satisfied requirements of s6 and that DVD satisfied requirements of s8 for admission to probate as a codicil to Will - Court satisfied declaration should be made under s10(3)(c) insofar as s10 applied to video Will - testatrix knew and approved of dispositions she made in recording DVD - dispositions plainly given or made freely and voluntarily - Court satisfied any suspicious circumstances adequately and properly explained - both formal Will and video Will should be admitted to probate.

[Chan](#) (B)

Mackowiak v Hagipantelis.; Bickhoff v Hagipantelis [2015] NSWSC 1087

Supreme Court of New South Wales

Garling J

Solicitors' costs - plaintiff sought itemised bill of costs from solicitors and assessment of costs by costs assessor - adequacy of explanation for lapse in time - awareness of rights to challenge costs - prejudice - ss322A, 350 & 728 *Legal Profession Act 2004* (NSW) - held: Court satisfied it should exercise discretion under s728 to order preparation of itemised bill - Court satisfied it was just and fair for application for assessment of costs to be dealt with by costs assessor even though there had been delay greater than 12 months.

[Mackowiak](#) (I)

BRB Modular Pty Ltd v AWX Constructions Pty Ltd (No 2) [2015] QSC 228

Supreme Court of Queensland

Applegarth J

Costs - Court dismissed applicant's originating application and ordered it to pay first respondent's costs of proceedings other than reserved costs of hearing of applicant's application for an interlocutory injunction - applicant argued it should have costs order in its favour in respect of its application in which it was successful - first respondent described relevant 'event' as disposition of substantive proceeding, not application for interlocutory relief, and sought that applicant pay its costs - r681(1) *Uniform Civil Procedure Rules 1999* (Qld) - held: having regard to course of interlocutory application, reasonableness of first respondent's resistance, judge's primary considerations in granting injunction and applicant's success, Court considered appropriate that first respondent pay one half of applicant's costs of and incidental to hearing.

[BRB](#) (I C)



Daniel v Van Zwol [2015] SASCFC 93

Full Court of the Supreme Court of South Australia

Kourakis CJ; Stanley & Parker JJ

Costs - succession - appellant sought orders setting aside Master's judgment and orders on claim pursuant to *Inheritance (Family Provision) Act 1972 (SA)* - Court allowed appeal to limited extent of adjusting award in favour of first respondent to provide he receive share of residual estate equal other beneficiaries - parties at issue as to appropriate order as to costs of appeal - held: principle that costs generally follow event applied to appeals under Act - appellant, in substance, failed on appeal - there should be reduction of amount of first respondent's costs payable by appellant due to fact that first respondent put submissions in oral argument against approach adopted by Court appellant in personal capacity pay 90 per cent of first respondent's costs of appeal on party-party basis - appellant to bear her own costs.

[Daniel](#) (B)

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