

Friday 12 July 2013

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Shoalhaven City Council v Pender** (NSWCA) - negligence - slip and fall on ferry ramp - occupier not liable (I, C)

**Zurich Australian Insurance Ltd v The Workers Compensation Nominal Insurer** (NSWSC) - insurance - workers compensation insurer contractually bound to contribute to motor vehicle insurer's payment to injured passenger (I)

**Firth v Hsu** (NSWSC) - solicitors' costs - disputed sum paid into court (I)

**Sharpe v W H Bailey & Sons Pty Ltd** (NSWSC) - stay granted pending appeal from refusal to set aside judgment (I, B)

**Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd** (VSC) - mandatory dispute resolution scheme - decision not to invoke power to refuse to consider dispute - no breach of contract or error of law (I, B, G)



**Marrone v Employers Mutual Ltd as an Agent for WorkCover Corporation of South Australia** (SASCFC) - permanent impairment - circumstances in which multiple disabilities were *arising from the same trauma* (I, G)

**Galaxy Homes Pty Ltd v The National Mutual Life Association of Australasia Ltd (No 2)** (SASCFC) - life insurance - terminal illness benefit - determination of issues raised in notice of contention (I)

## Summaries with links (5 minute read)

### **Shoalhaven City Council v Pender [2013] NSWCA 210**

Court of Appeal of New South Wales

McColl, Barrett & Ward JJA

Negligence - occupier's liability - respondent injured when he slipped and fell on concrete ferry ramp - respondent did not succeed in claim that council negligently failed to modify ferry, but succeeded in claim it was negligent for failure to have in place a pro-active maintenance system to clean the ramp - provisions of *Civil Liability Act 2002* (NSW) - evidence - causation - risk of harm - held: respondent failed to establish how he came to slip on ramp, that he fell because ramp was unreasonably slippery, that appellant had breached its duty of care or that any omission by appellant had caused his injuries - appeal allowed.

[Shoalhaven City Council](#) (I)

### **Zurich Australian Insurance Ltd v The Workers Compensation Nominal Insurer [2013] NSWSC 915**

Supreme Court of New South Wales

Rein J

Insurance - contract - passenger injured when minibus overturned - driver and passenger employed by same employer - minibus owned by another company - passenger made workers compensation claim against employer - nominal insurer (GIO) accepted claim on employer's behalf - passenger made claim against owner - owner's insurer (Zurich) accepted liability - Zurich claimed GIO was liable to contribute to payment which Zurich paid to passenger, by way of offset against money due to GIO from Zurich pursuant to s151Z *Workers Compensation Act 1987* (NSW) - held: no double insurance - Zurich failed on claim for contribution based on general principles, but succeeded on basis that GIO was contractually bound to contribute to amount imposed by



*Motor Accidents Compensation Act 1999* (NSW) assessment by contract formed by correspondence between lawyers - judgment for Zurich.

[Zurich Australian Insurance](#) (I)

**Firth v Hsu [2013] NSWSC 910**

Supreme Court of New South Wales

Schmidt J

Payment of funds into court - solicitor acted in claim against client's previous law firm for overcharging - plaintiff sought that sum owing to them by client for work undertaken be paid into its trust account or into court - sum was presently held by trustee in bankruptcy of partners of previous law firm - client disputed sum on various bases - held: disputed sum paid into court - client to be given opportunity to be heard of question of disputed costs.

[Firth](#) (I)

**Sharpe v W H Bailey & Sons Pty Ltd [2013] NSWSC 913**

Supreme Court of New South Wales

Campbell J

Stay - application for stay in support of appeal from Local Court's refusal to set aside judgment for defendant - defendant commenced proceedings for money owing for farm supplies - parties agreed on terms of settlement - plaintiff defaulted on settlement and court entered judgment - plaintiff contended judgment was void by force of s6 *Farm Debt Mediation Act 1994* (NSW) because terms of settlement gave rise to a new farm debt which could not be validly enforced unless s8 of the Act had been complied with - *farm mortgage* - interests of justice - held: plaintiff demonstrated it was arguable that obligations under terms of settlement were secured by a fresh instrument of mortgage - stay granted.

[Sharpe](#) (I, B)

**Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd [2013] VSC 333**

Supreme Court of Victoria

Digby J

Contract - administrative law - plaintiff was financial services provider - plaintiff was member of dispute resolution scheme pursuant to s912A *Corporations Act 2001* (Cth) - scheme operated by first defendant (FOS) - plaintiff was in dispute with second and third defendants - plaintiff sought declaration that FOS's decision not to invoke power in scheme's terms of reference to refuse to consider dispute was in breach of contract between plaintiff and FOS - plaintiff also sought



injunction restraining FOS from hearing and determining dispute - requirements on FOS when deciding whether to exercise power to exclude dispute - limitations on judicial review of decision on basis of error of law - held: court rejected implied term alleged by plaintiff - no error of law in FOS's decision - declaration and injunction refused.

[Cromwell Property Securities](#) (I, B, G)

**Marrone v Employers Mutual Ltd as an Agent for WorkCover Corporation of South Australia [2013] SASCF 67**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Sulan & White JJ

Workers compensation - question of law referred by Full Bench of Workers Compensation Tribunal concerning proper construction and application of s43(6) *Workers Rehabilitation and Compensation Act 1986* (SA) - whether, in determining worker's entitlement to lump sum compensation for non-economic loss under s43 of the Act, two compensable disabilities having more than one cause were to be treated as *arising from the same trauma* if at least one of the causes was common to both - statutory construction - held: s43(6) should be understood as referring to worker who suffered two or more compensable disabilities arising from one and the same trauma.

[Marrone](#) (I, G)

**Galaxy Homes Pty Ltd v The National Mutual Life Association of Australasia Ltd (No 2) [2013] SASCF 66**

Full Court of the Supreme Court of South Australia

Anderson, Peek & Stanley JJ

Life insurance - court found illness did not meet the standard of imposed by terminal illness policy - special leave to appeal to High Court sought - Full Court required to determine of issues in respondent's notice of contention - held: insuring clause of policy was triggered by suffering illness during a policy period - entitlement to claim for event occurring during currency of policy not extinguished by termination of plan - facts which became known after policy period are not admissible - judge misconstrued exclusion clause for pre-existing illness - s47 *Insurance Contracts Act 1984* (Cth) did not preclude application of exclusion clause.

[Galaxy Homes](#) (I)



## **The Cat and the Moon**

By William Butler Yeats

THE CAT went here and there  
And the moon spun round like a top,  
And the nearest kin of the moon  
The creeping cat looked up.  
Black Minnaloushe stared at the moon,  
For wander and wail as he would  
The pure cold light in the sky  
Troubled his animal blood.  
Minnaloushe runs in the grass,  
Lifting his delicate feet.  
Do you dance, Minnaloushe, do you dance?  
When two close kindred meet  
What better than call a dance?  
Maybe the moon may learn,  
Tired of that courtly fashion,  
A new dance turn.  
Minnaloushe creeps through the grass  
From moonlit place to place,  
The sacred moon overhead  
Has taken a new phase.  
Does Minnaloushe know that his pupils  
Will pass from change to change,  
And that from round to crescent,  
From crescent to round they range?  
Minnaloushe creeps through the grass  
Alone, important and wise,  
And lifts to the changing moon  
His changing eyes.

[William Butler Yeats](#)

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