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## Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Gray v Richards** (HCA) - damages - motor vehicle collision - fund management damages to include amount to offset trustee's cost of managing them - appeal allowed in part (I B)

**Batterham v Goldberg** (FCAFC) - bankruptcy notice - judgment debt in reliance on costs assessment for fees incurred in High Court proceedings - notice not set aside (B)

**Marsh Pty Ltd v Vickery (No 2)** (FCA) - pleadings - alleged breach of employment contract - amendment of statement of claim to add lost clients allowed (I B)

**Kelly v Westpac Banking Corporation** (NSWCA) - guarantee - self-represented litigant - injustice arising from late service of new evidence - hearing vacated (B)

**Lu v Heinrich** (NSWCA) - damages - motor vehicle accident - inadequacy of reasons - substantial wrong or injustice - new trial (I)

**In the matter of Treadtel International Pty Ltd** (NSWSC) - private international law - stay of proceedings pending determination of foreign proceedings refused (B)

**William Hare UAE LLC v Aircraft Support Industries Pty Ltd** (NSWSC) - international commercial arbitration - breach of natural justice - partial enforcement of foreign award (I B C)

## Summaries with links (5 minute read)

### **Gray v Richards [2014] HCA 40**

High Court of Australia

French CJ, Hayne, Bell, Gageler & Keane JJ

Damages - negligence - appellant suffered brain injury in collision with motor vehicle driven by respondent - appellant sued driver in negligence - proceedings compromised on terms that driver pay appellant \$10 million (compromise money) plus damages to cover expenses associated with managing compromise money (fund management damages) - appellant declared incapable of managing own affairs - private trustee appointed to manage estate - trustee charged management fees on funds under management comprising both compromise money and fund management damages - Supreme Court of New South Wales determined fund management damages should include amount to offset cost of managing the fund management damages and further amount to offset cost of managing fund's predicted future income - Court of Appeal reversed decision - held: Court of Appeal erred in deciding no allowance should be made for cost of managing fund management damages but was correct in deciding no allowance should be made for cost of managing fund's predicted future income - appeal allowed in part.

[Gray](#) (I B)

### **Batterham v Goldberg [2014] FCAFC 136**

Full Court of the Federal Court of Australia

Jacobson, White & Gleeson JJ

Bankruptcy - Federal Circuit Court dismissed appellant's application to set aside bankruptcy notice - notice was founded on judgment of NSW Local Court for unpaid legal costs - judgment debt obtained in reliance on costs assessment for counsel fees under *Legal Profession Act 2004* (NSW) incurred in relation to High Court proceedings - held: solicitor-client costs not governed by costs rules contained in *High Court Rules 2004* (Cth) so as to render invalid, by reason of s109 Constitution, the assessment made under State legislation - relevant High Court rules concerned only with party and party costs and not directed to costs between solicitor and client - solicitors were creditors and entitled to issue a bankruptcy notice - primary judge did not make errors of fact.- appeal dismissed.

[Batterham](#) (B)

### **Marsh Pty Ltd v Vickery (No 2) [2014] FCA 1100**

Federal Court of Australia

Besanko J

Pleadings - applicant operated insurance brokerage business - applicant employed respondent in business - applicant gave respondent notice that employment would end by reason of redundancy - applicant claimed respondent obtained information about its business and clients and that he has

used information in breach of various obligations owed to applicant - applicant claimed it lost clients due to respondent's wrongful conduct and that conduct caused applicant to suffer loss and damage - applicant sought to amend statement of claim by adding five clients to list of lost clients - held: Court satisfied applicant would suffer fairly substantial prejudice if amendment not allowed - applicant had proffered explanation for delay - respondent had not filed affidavit outlining any prejudice - only prejudice which might be inferred was that respondent may require additional time to file evidence - relevant factors favoured grant of leave to amend - leave to amend allowed.

[Marsh Pty Ltd](#) (I B)

### **Kelly v Westpac Banking Corporation [2014] NSWCA 348**

Court of Appeal of New South Wales

McCull & Gleeson JJA; Sackville AJA

Guarantee - mortgage - self-represented litigant - bank sued appellant to recover sum by enforcing guarantee supported by mortgage over appellant's home - appellant sought relief under *Contracts Review Act 1980* (NSW) - bank did not serve evidence in accordance with court orders - bank served evidence raising new issues during adjournment application 7 business days before hearing - new evidence included documents that should have been disclosed to appellant during discovery - appellant contended there was inadequate time for him to prepare for hearing as well as respond to new evidence - primary judge refused application to adjourn hearing date - held: material error for primary judge to reject adjournment on ground appellant had failed to demonstrate either practical injustice or prejudice arising from late service of new evidence - also material error to fail to take into account that appellant would have great difficulty preparing for trial and respond to new evidence in 7 days, and that bank's conduct had placed appellant in invidious position - appeal allowed - hearing date vacated.

[Kelly](#) (B)

### **Lu v Heinrich [2014] NSWCA 349**

Court of Appeal of New South Wales

McCull & Basten JJA; Sackville AJA

Damages - motor vehicle accident - appellant injured when motor vehicle he was driving was struck from behind by a motor vehicle driven by respondent - appellant's vehicle stationary at the time of the collision - driver admitted breach of duty of care but pleaded contributory negligence - primary judge found no contributory negligence - primary judge found appellant suffered soft tissue injury as result of accident and that, while he may suffer "some psychotic condition", it was not caused by accident - primary judge awarded damages of \$5,296.30 representing one month lost wages and medical expenses which he found were reasonably referable to treatment for minor injury caused by accident - held (by majority): appellant established primary judge failed to give adequate reasons - process of fact-finding miscarried - appellant had arguable case of both physical and psychiatric conditions caused by accident which was not adequately considered -

there had been substantial wrong or miscarriage requiring a new trial - appeal allowed - new trial ordered limited to damages.

[Lu \(I\)](#)

## **In the matter of Treadtel International Pty Ltd [2014] NSWSC 1406**

Supreme Court of New South Wales

Brereton J

Private international law - stay - plaintiff claimed order pursuant to s175 *Corporations Act 2001* (Cth) that share register of company be rectified so as to record that one ordinary share was held by him - sole director of company sought order that proceedings be stayed until plaintiff discontinued or terminated proceedings instituted by him in Italy (Italian proceedings) or Italian proceedings were stayed or determined by judgment - director claimed that, having instituted proceedings in Italy, it was vexatious and oppressive for plaintiff to maintain proceedings with respect to same matter in NSW - director also sought security for costs, removal of the matter from Corporations List, and an order that proceedings continue on pleadings - *lis alibi pendens* - held: no basis for a stay, permanent or temporary, or adjournment of NSW proceedings - proceedings should continue on pleadings - security for costs ordered - matter to remain in Corporations List.

[In the matter of Treadtel International Pty Ltd \(B\)](#)

## **William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403**

Supreme Court of New South Wales

Darke J

International commercial arbitration - plaintiff was company incorporated under laws of Abu Dhabi in United Arab Emirates - defendant was Australian company - plaintiff sought order under s8(2) *International Arbitration Act 1974* (Cth) for enforcement of arbitral award made in the United Arab Emirates - dispute arising from payment of retention monies under agreement for construction works - agreement governed by laws of UAE - clause of agreement provided for arbitration of disputes to be governed by rules of Abu Dhabi Chamber of Commerce and Industry and take place in Abu Dhabi - decision of such arbitration stated to be final and binding upon the parties - held: there had been breach of rules of natural justice in respect of one aspect of arbitration - parts of award affected by breach severed - balance of award enforced in accordance with s8(7) *International Arbitration Act 1974* (Cth) - judgment for plaintiff.

[William Hare UAE LLC \(I B C\)](#)



## **Aedh Wishes for the Cloths of Heaven**

By W. B. Yeats

Had I the heavens' embroidered cloths,  
Enwrought with golden and silver light,  
The blue and the dim and the dark cloths  
Of night and light and the half light,  
I would spread the cloths under your feet:  
But I, being poor, have only my dreams;  
I have spread my dreams under your feet;  
Tread softly because you tread on my dreams.

[W. B. Yeats](#)

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