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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)

Hyland as executor of the estate of Luscombe v Healey (NSWSC) - wills and estates - onus of proof - purported later will not admitted to probate (B)

Permanent Custodians Ltd v Portland Terrace Pty Ltd (VSC) - loan agreement - possession of land - summary judgment refused (B)

Rasch Nominees Pty Ltd v Bartholomaeus (SASCFC) - costs - no error in exercise of discretion by trial judge - permission to cross-appeal refused - cross-appeal dismissed (I B)



Groves v Groves (QSC) - contract - restitution - evidence - fraud - claims arising from sale of plaintiffs' shares in company dismissed (B)

Platinum Systems Resourcing Pty Ltd v NRW Holdings Ltd (WASC) - pleadings - contract - defamation - fraud - paragraphs of defence struck out - particulars to be provided (I B C)

Insurance Australia Ltd t/as NRMA Insurance v Iuli and Afiabo (ACTSC) - third party insurance - cyclist's accident was motor accident under *Road Transport (Third-Party Insurance) Act 2008* (ACT) - declaration refused (I)

Naidu v Fergusson (ACTSC) - pleadings - medical negligence - leave to file further amended statement of claim (I)

Summaries with links (5 minute read)

Hyland as executor of the estate of Luscombe v Healey [2013] NSWSC 1513

Supreme Court of New South Wales

Kunc J

Wills and estates - deceased made will in July 2006 leaving everything to nephew and appointing him executor - deceased died in 2009 - probate granted to nephew – defendant, a person not known to the nephew, alleged deceased made will in October 2006 appointing her as executrix and leaving estate to her with exception of legacy to nephew - nephew died and proceedings carried on by his executor - defendant sought that court revoke probate and grant probate in her favour - ss140 & 142 *Evidence Act 1995* (NSW) - s7 *Wills, Probate and Administration Act 1898* (NSW) - onus of proof on defendant to dispel suspicions about second will - manner of proof - held: court not satisfied on balance of probabilities that second document was last will and testament of deceased made as a free and capable testator - question of revocation of probate did not arise - purported later will not admitted to probate.

[Hyland](#) (B)

**Permanent Custodians Ltd v Portland Terrace Pty Ltd [2013] VSC 544**

Supreme Court of Victoria

Derham AsJ

Summary judgment - loan agreement - possession of land - plaintiff sought summary judgment in respect loans made and secured over land - plaintiff contended defaults gave rights to judgment and that there was no basis for defendant's counterclaim that it was not in default under terms of agreements - defendant contended there had been no default or that it was arguable there had been no default, that there had been a breach of loan facilities by plaintiff giving it rights to damages, that loan agreement was still on foot and that it was entitled to specific performance of loan agreement or damages in lieu - held: issues raised by defendant in relation to existence of default, recovery of possession of land mortgaged as security for money lent and efficacy of Dobbs certificate provided by lender meant there were matters to be investigated as to whether defendant had defaulted under facilities - there were also facts in support of counterclaim - proceeding should go to trial despite liberalisation of test for summary judgment effected by s63 *Civil Procedure Act 2010* (Vic).

[Permanent Custodians Ltd](#) (B)**Rasch Nominees Pty Ltd v Bartholomaeus [2013] SASCFC 105**

Full Court of the Supreme Court of South Australia

Gray, Sulan & Stanley JJ

Costs – cross appeal - trial judge found first plaintiff not entitled to orders registering it as proprietor of land it had contracted to purchase from defendants - application for permission to cross-appeal against costs orders - first and second defendants complained trial judge erred in limiting order for party/party costs against first plaintiff to 25% of whole action and in limiting order for indemnity costs against second plaintiff to issue of damages and issues peculiar to second plaintiff's claim - third, fourth and fifth defendants complained judge erred in principle in differentiating between peculiar costs and common costs of second plaintiff's claim and that regard ought to have been had to punitive purpose of indemnity costs - ss40 & 50 *Supreme Court Act 1935* (SA) - rr264, 283 & 288 *Supreme Court Civil Rules 2006* (SA) - held: trial judge entitled to exercise his discretion as to costs in manner he adopted - no error of principle identified - orders did not give rise to a substantial injustice - cross-appellants failed to demonstrate judge's exercise of discretion so unreasonable or unjust as to require Court to substitute its own discretion - permission to cross-appeal refused - cross-appeal dismissed.

[Rasch Nominees Pty Ltd](#) (I B)

**Groves v Groves [2013] QSC 277**

Supreme Court of Queensland

Martin J

Contract - guarantee - margin loans - evidence - fraud - plaintiff alleged she did not execute relevant documents and claimed defendants had no right to sell her shares in company or to receive money from sale of them because she had no margin loans and had not guaranteed loans - plaintiff sought restitution of identified sums as money had and received - plaintiff denied signing documents relied on by defendants and claimed that if she was found to have executed documents she was not liable under the documents on various bases - *married woman's equity* - undue influence - unconscionability - s12GF(1) *Australian Securities and Investments Commission Act 2001* (Cth) - s82(1) *Practices Act 1974* (Cth) - evidence - held: plaintiff had signed and understood documents - exception to operation of married woman's equity existed in respect of plaintiff - third defendant was entitled to enforce guarantee and was entitled to the proceeds sale of plaintiff's shares whether it, or someone else, sold the shares - claim dismissed.

[Groves](#) (B)**Platinum Systems Resourcing Pty Ltd v NRW Holdings Ltd [2013] WASC 376**

Supreme Court of Western Australia

Le Miere J

Pleadings - contract - defamation - fraud - plaintiff agreed to provide technology consultancy services to defendant miner - plaintiff claimed defendant was indebted to it for amount of unpaid invoices and also claimed that second defendant made publications defamatory of second to fifth plaintiffs - plaintiff claimed first defendant unlawfully terminated agreement, unlawfully solicited consultants contracted by plaintiff to work for it and unlawfully interfered with agreement between plaintiff and its consultants - plaintiff applied to strike out paragraphs of defendant's defence and counterclaim which pleaded that second to fourth defendants had agreed to participate in a dishonest and fraudulent scheme and carried it out - O20, r9(1) *Rules of the Supreme Court 1971* (WA) - responsible use of court process - r36(3) *Legal Profession Conduct Rules 2010* (WA) - held: defendant had complied with obligation to specifically plead dishonest and fraudulent scheme - pleaded facts and particulars did not support certain pleadings - certain paragraphs struck out - defendants to provide particulars in respect of other paragraphs.

[Platinum Systems Resourcing Pty Ltd](#) (I B C)



Insurance Australia Ltd t/as NRMA Insurance v Iuli and Afiabo [2013] ACTSC 209

Supreme Court of the Australian Capital Territory

Master Mossop

Insurance - motor vehicle accident - vehicle ran out of control - first defendant cyclist collided with debris created by accident 40 minutes later when vehicle was still in position but not moving - plaintiff insurer sought declaration that cyclist's accident was not a motor accident within meaning of *s7 Road Transport (Third-Party Insurance) Act 2008* (ACT) - ss7, 8, 18, 19, 20, 21 & 22 of the Act - statutory interpretation - held: s7 of the Act required a causal link between personal injury and actions of motor vehicle but did not require that injury was caused during continuation of actions - subject to possibility that debris was moved after incident involving vehicle, the existence of a causal link between cyclist's personal injury and incident involving vehicle meant that driver's compulsory third party insurance policy would respond to cyclist's claim - not appropriate to make declaration sought by insurer - application dismissed.

[Insurance Australia Ltd](#) (I)

Naidu v Fergusson [2013] ACTSC 208

Supreme Court of the Australian Capital Territory

Master Mossop

Pleadings - medical negligence - amendment after pleading closed plaintiff sought leave to file further amended statement of claim adding material facts relevant to allegations of surgeons' failure to warn and clarifying that duty of care alleged was one which included duty to advise plaintiff in respect of appropriate procedure for insertion of catheter for chemotherapy - held: court prepared to draw inference that expert evidence not previously available to plaintiff - no deliberate forensic choice not to make claim now sought to be made - no significant prejudice in making amendment - whether or not amendment pleaded a new cause of action it was appropriate for purposes of r502 or 503(4) *Court Procedure Rules 2006* (ACT) to grant leave to make amendment - leave granted.

[Naidu](#) (I)

Ode on a Grecian Urn

By John Keats

Thou still unravish'd bride of quietness,
Thou foster-child of silence and slow time,



Sylvan historian, who canst thus express
A flowery tale more sweetly than our rhyme:
What leaf-fring'd legend haunts about thy shape
Of deities or mortals, or of both,
In Tempe or the dales of Arcady?
What men or gods are these? What maidens loth?
What mad pursuit? What struggle to escape?
What pipes and timbrels? What wild ecstasy?

Heard melodies are sweet, but those unheard
Are sweeter; therefore, ye soft pipes, play on;
Not to the sensual ear, but, more endear'd,
Pipe to the spirit ditties of no tone:
Fair youth, beneath the trees, thou canst not leave
Thy song, nor ever can those trees be bare;
Bold Lover, never, never canst thou kiss,
Though winning near the goal yet, do not grieve;
She cannot fade, though thou hast not thy bliss,
For ever wilt thou love, and she be fair!

Ah, happy, happy boughs! that cannot shed
Your leaves, nor ever bid the Spring adieu;
And, happy melodist, unwearied,
For ever piping songs for ever new;
More happy love! more happy, happy love!
For ever warm and still to be enjoy'd,
For ever panting, and for ever young;
All breathing human passion far above,
That leaves a heart high-sorrowful and cloy'd,
A burning forehead, and a parching tongue.

Who are these coming to the sacrifice?
To what green altar, O mysterious priest,
Lead'st thou that heifer lowing at the skies,
And all her silken flanks with garlands drest?



What little town by river or sea shore,
Or mountain-built with peaceful citadel,
Is emptied of this folk, this pious morn?
And, little town, thy streets for evermore
Will silent be; and not a soul to tell
Why thou art desolate, can e'er return.

O Attic shape! Fair attitude! with brede
Of marble men and maidens overwrought,
With forest branches and the trodden weed;
Thou, silent form, dost tease us out of thought
As doth eternity: Cold Pastoral!
When old age shall this generation waste,
Thou shalt remain, in midst of other woe
Than ours, a friend to man, to whom thou say'st,
"Beauty is truth, truth beauty,—that is all
Ye know on earth, and all ye need to know."

[John Keats](#)

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