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

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### Executive Summary (1 minute read)

**Fordyce v Ho** (NSWCA) - legal costs - application for leave to appeal against ex parte search order dismissed (I)

**CBX2 Pty Ltd v National Australia Bank Ltd (No 2)** (NSWSC) - discovery - notice to produce in served form set aside - subpoena in issued form set aside (I)

**Ferguson v Singler (No 3)** (NSWSC) - costs - plaintiff succeeded on contested hearing seeking review - plaintiff succeeded in costs argument - costs to follow event (I G)

**NSW Trustee and Guardian v State of New South Wales** (NSWSC) - succession - intestacy - determination of sequences of deaths of mother and son - declarations and orders (B)

**SAB Closed 1 Pty Ltd v Bees & Honey Pty Ltd; Bees & Honey Pty Ltd v SAB Closed 1 Pty Ltd** (NSWSC) - costs - summons and cross-summons dismissed in proceedings - plaintiff to pay 80% of defendant's costs (I B)

**Honey v Richardson** (SASC) - motor accident - negligence - declaration refused prior to trial that Motor Accident Commission liable to indemnity third parties (I C G)

**Permanent Custodians Ltd v Bertola** (WASC) - caveat - order restricting lodging of further caveat in respect of property (B)

# Benchmark

## Summaries With Link (Five Minute Read)

### **Fordyce v Ho [2015] NSWCA 240**

Court of Appeal of New South Wales

Meagher & Gleeson JJA

Ex parte search order - proceedings concerning legal costs agreements - applicants were solicitor and corporation - applicants sought leave to appeal against search order made ex parte and against order dismissing motion to set aside search order - ss350 & 361 *Legal Profession Act 2004* (NSW) - applicants contended there was non-disclosure of six matters on ex parte application and that respondents had not established "strong prima facie case on an accrued cause of action" - if appeal successful applicants sought that search order be set aside ab initio and all copies of records taken and held by the forensic expert be destroyed - s101(2)(e) *Supreme Court Act 1970* (NSW) - rr25.20(a), 51.10(2) *Uniform Civil Procedure Rules 2005* (NSW) - held: amount in dispute not significant and likely to be matched by costs of proposed appeal - resolution of significant issue would not be advanced by prosecution of proposed appeal - refusal of application for leave did not prejudice applicants in relation to adducing of evidence - application for leave to appeal dismissed

[Fordyce](#) (l)

### **CBX2 Pty Ltd v National Australia Bank Ltd (No 2) [2015] NSWSC 1127**

Supreme Court of New South Wales

Button J

Discovery - defendant sought to set aside notice to produce addressed to it and subpoena addressed to its solicitors - ss118, 122, 122(3), 122(3)(a), 122(5)(a)(iii) & 126 *Evidence Act 1995* (NSW) - held: plaintiff established legitimate forensic purpose for notice to produce as narrowed - Court accepted notice to produce constituted neither "trawling of the lake" nor a "fishing expedition" - Court not satisfied notice to produce was oppressive - subpoena in current form founded on incorrect proposition there had been a waiver of client legal privilege - subpoena in its current form set aside - plaintiff should be permitted urgently to issue and have answer to subpoena in form specified by Court.

[CBX2](#) (l)

### **Ferguson v Singler (No 3) [2015] NSWSC 1154**

Supreme Court of New South Wales

Button J

Costs - Court upheld plaintiff's claim for judicial review of decision of costs review panel - plaintiff submitted costs should follow event - first defendant contended ground on which plaintiff succeeded was first relied on as late as day of hearing - defendant sought costs up until date of amendment given plaintiff's lack of success on his two other grounds - first defendant also sought that plaintiff should pay costs of subsequent costs argument because it was a direct result of plaintiff's late reliance on ground - held: plaintiff succeeded in contested hearing seeking judicial review. - costs should follow event - plaintiff also succeeded in costs argument

and should have those costs as well - first defendant to pay plaintiff's costs.

[Ferguson](#) (I G)

## **NSW Trustee and Guardian v State of New South Wales [2015] NSWSC 1121**

Supreme Court of New South Wales

Hallen J

Succession - intestacy - rights of succession - plaintiff administrator of deceased's estate sought determination as to order of deaths of deceased son and deceased mother, declarations and costs orders - principal question was sequence of deaths of mother and son, relevant to destination of their estates and person or persons entitled on intestacy - held: Court satisfied plaintiff established on balance of probabilities that son died before mother - it was not "uncertain" which of mother and son survived - Court able to determine who did survive the other without resort to statutory presumption referred to in s35 *Conveyancing Act 1919* (NSW) - declarations and orders made.

[NSW](#) (B)

## **SAB Closed 1 Pty Ltd v Bees & Honey Pty Ltd; Bees & Honey Pty Ltd v SAB Closed 1 Pty Ltd [2015] NSWSC 1162**

Supreme Court of New South Wales

Stevenson J

Costs - Court found defendant purchaser entitled to terminate agreement and plaintiff vendor not entitled to damages sought - Court found defendant not entitled to return of deposit - held: neither party achieved success sought - however overall defendant had been successful - it would produce undue cost and expense in assessment process were Court made costs orders for each issue won or lost by parties - plaintiff to pay 80% of defendant's costs - Court not prepared to make gross sums costs order under s98(4)(c) *Civil Procedure Act 2005* (NSW) - defendant to pay costs thrown away of arranging for witness to travel from France who was not ultimately required for cross-examination.

[SAB](#) (I B)

## **Honey v Richardson [2015] SASC 119**

Supreme Court of South Australia

Bampton J

Motor accident - negligence - plaintiff injured when prime mover driven by defendant collided with rear of grape tote bin he was towing behind tractor - plaintiff and wife sued defendant - defendant admitted collision occurred and alleges plaintiffs' injuries caused or contributed to by his negligence - defendant issued proceedings against third parties who were drivers in convoy, alleging that any injuries to plaintiff and wife caused or contributed to by third parties' negligence in driving and state of illumination of vehicles - Motor Accident Commission (MAC) denied third parties covered by insurance in Sch 4 *Motor Vehicles Act 1959* (SA) - MAC joined as third party - defendant sought declaration prior to trial that MAC liable to indemnify third parties - held: premature to make finding of obligation to indemnify prior to finding of liability against third parties - defendant was seeking hypothetical order - for Court to make declaration



sought it would have to presume defendant's liability and then consider third parties' liability - declaration refused.

[Honey](#) (I C G)

**Permanent Custodians Ltd v Bertola [2015] WASC 301**

Supreme Court of Western Australia

Master Sanderson

Caveat - plaintiff sought order against first defendant for removal of caveat over property - there was no serious question to be tried as interest of prior registered mortgagee was paramount and indefeasible against alleged subsequent interest - caveat lapsed by time matter came for hearing - plaintiff sought order that no further caveat be lodged by first defendant in relation property without leave of Court - held: first defendant was serial caveator - caveats entirely without merit in relation to matters involving plaintiff - orders made restricting first defendant from lodging any further caveats.

[Permanent](#) (B)

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