

Friday 20 December 2013

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Clark v Macourt** (HCA) – contract - damages - breach of warranty - purchaser of unusable sperm entitled to recover amount paid to alternative supplier for replacement sperm (I B)

**Unions NSW v New South Wales** (HCA) - constitutional law - provisions of *Election Funding, Expenditure and Disclosures Act 1981* (NSW) impermissibly burdened implied freedom of communication contrary to Constitution (G)

**Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski** (NSWCA) - workers compensation - mandatory referral of dispute to accredited medical specialist - appeal dismissed (I G)

**Cassegrain v Gerard Cassegrain & Co Pty Ltd** (NSWCA) - corporations - estoppel - limitation of actions - director of company not entitled to sum credited to company's loan account pursuant to deed of settlement - appeal dismissed (I B C)



**Gerard Cassegrain & Co Pty Ltd v Cassegrain** (NSWCA) - real property - exceptions to indefeasibility - fraud - director's wife held property on trust for company - appeal allowed (B)

**QBE Insurance (Australia) Ltd v Miller** (NSWCA) - motor accidents compensation - permanent impairment - material was not *additional* or *capable of having material effect* - appeal dismissed (I G)

**Salta Constructions Pty Ltd v St George Bank** (VSC) - loans and mortgages - principle in *Hopkinson v Rolt* - bank entitled to proceeds of sale of property (B)

## Summaries with links (5 minute read)

### Clark v Macourt [2013] HCA 56

High Court of Australia

Hayne, Crennan, Bell, Gageler & Keane JJ

Contract - damages - appellant and respondent were registered medical practitioners - appellant agreed to buy assets of company controlled by respondent which provided assisted reproductive technology services - company agreed to sell assets including frozen donated sperm - respondent guaranteed company's obligations under contract - 1,996 straws of sperm were not as warranted and unusable - primary judge entered judgment for appellant against company for breach of warranty and against respondent as guarantor - Court of Appeal held appellant should have no damages for breach of warranty because appellant had bought straws of sperm from American supplier and charged patients a fee which covered costs incurred - valuing what should have been received - mitigation - held: appellant should recover amount it would have cost, at date of the breach of warranty, to acquire 1,996 straws of sperm from American supplier - appeal allowed.

[Clark](#) (I B)

### Unions NSW v New South Wales [2013] HCA 58

High Court of Australia

French CJ; Hayne, Crennan, Kiefel, Bell & Keane JJ

Constitutional law - implied freedom of communication - plaintiffs intended to make political donations to Australian Labor Party, Australian Labor Party (NSW Branch) or other entities and to incur electoral communication expenditure within meaning of *Election Funding, Expenditure and Disclosures Act 1981* (NSW) - certain plaintiffs were authorised to appoint delegates to annual conference of Australian Labor Party (NSW Branch) and participate in pre-selection of party's



candidates for State elections - ss7, 24, 96 & 128 *Constitution* - Pt5, Div2, Pt 6, ss83, 95G(6), 96D of the Act - freedom of communication in State context - sources of communication - statutory construction - held: ss96D & 95G(6) of the Act were invalid because they impermissibly burdened implied freedom of communication on governmental and political matters contrary to Commonwealth Constitution.

[Unions NSW](#) (G)

## **Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski [2013] NSWCA 449**

Court of Appeal of New South Wales

Beazley P, Leeming JA & Tobias AJA

Workers compensation – treatment dispute - worker injured knee in 2007 - claim for compensation accepted - worker's request for approval for hip replacement refused on basis there was no causal connection between injury to hips and 2007 injury - Workers Compensation Commission found worker had not discharged onus of proving he suffered from condition in hips as a result of knee injury - Presidential Member revoked decision and matter was remitted for referral to accredited medical specialist pursuant to s60(5) *Workers Compensation Act 1987* (NSW) - employer contended Presidential Member erred in holding it was mandatory to refer dispute or disputes between parties to accredited medical specialist before determining causation - held: no basis to depart from ordinary grammatical meaning of s60(5) of the Act - s60(5) required in every case the referral of the dispute for assessment under Pt7, Ch7 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - appeal dismissed.

[Zanardo & Rodriguez Sale & Services](#) (I G)

## **Cassegrain v Gerard Cassegrain & Co Pty Ltd [2013] NSWCA 454**

Court of Appeal of New South Wales

Beazley P; Basten & Macfarlan JJA

Corporations - estoppel - limitation of actions - directors' fiduciary duties - fraud - statutory derivative action on behalf of company against director and wife relating to sum credited to director's loan account - sum was purportedly owing to director arising from settlement of proceedings - payment of sum condition precedent to deed of settlement - director drew on loan account for personal and other expenses and used credit balance to purchase property which company transferred to director and wife - held: director not entitled to rely on deed as defence to company's claim because it was not argued below - even if director entitled to rely on deed its terms did not establish director's entitlement to sum - director and company bound by issue estoppels arising from findings made in oppression proceedings in Federal Court - even if director





not bound by issue estoppels, director's fraud proved by evidence before primary judge - company's entitlement to relief not extinguished by operation of the *Limitation Act 1969* (NSW) - period in receivership was akin to disability so limitation period suspended - appeal dismissed.

[Cassegrain](#) (I B C)

## **Gerard Cassegrain & Co Pty Ltd v Cassegrain [2013] NSWCA 453**

Court of Appeal of New South Wales

Beazley P; Basten & Macfarlan JJA

Real property - estoppel - exceptions to indefeasibility of title - fraud - statutory derivative action on behalf of company against director of company and wife relating to money credited to director's loan account - company alleged director fraudulently debited amount to loan account in breach of fiduciary duty to company - director drew on loan account for personal and other expenses and used credit balance to purchase property which company transferred to director and wife as joint tenants (first transfer) - director executed transfer of interest in property wife's favour for nominal consideration of \$1 (second transfer) - held: wife's title defeasible pursuant to fraud exception in s42 *Real Property Act 1900* (NSW) because director was acting as her agent in both transfers - wife's title infected by director's fraud because director and wife were joint tenants - proceedings could be brought for recovery of property from wife pursuant to s118(1)(d) of the Act - even if wife not bound by issue estoppels, director's fraud independently proved in proceedings before the primary judge - wife held property on trust for company - appeal allowed.

[Gerard Cassegrain & Co](#) (B)

## **QBE Insurance (Australia) Ltd v Miller [2013] NSWCA 442**

Court of Appeal of New South Wales

Basten & Ward JJA; Young AJA

Motor accidents compensation – driver claimed damages from other driver - third party insurer disputed degree of permanent impairment - dispute referred to Motor Accidents Authority - medical dispute referred to assessors for determination - certificate issued stating psychological injuries gave rise to permanent impairment greater than 10% - insurer sought further assessment in accordance with s62(1)(a) *Motor Accidents Compensation Act 1999* (NSW) on basis additional relevant information had become available - insurer sought to quash proper officer's refusal to make referral - *additional relevant information - capable of having a material effect* - held: no error in decision that material was not additional or capable of having material effect - appeal dismissed.

[QBE Insurance \(Australia\)](#) (I G)



## **Salta Constructions Pty Ltd v St George Bank [2013] VSC 685**

Supreme Court of Victoria

Judd J

Loans and mortgages – rule in *Hopkinson v Rolt* - guarantee – company granted first mortgage to bank over property to secure liability of group members - bank granted bill facility to company - plaintiff construction company contracted with another group member (development company) for construction of building - development company had difficulty funding works - plaintiff secured second mortgage over property (first Salta mortgage) - plaintiff alleged company granted further mortgage (second Salta mortgage) over property - plaintiff alleged bank had notice of first Salta mortgage before expiry of bill facility and that reinstatement of facility was grant of further accommodation with knowledge of Salta mortgage - plaintiff contended each rollover thereafter and establishment of overdraft also constituted further advances - plaintiff alleged it was entitled to proceeds of sale of property - application of principle in *Hopkinson v Rolt* that prevents a first mortgagee, having received notice of a subsequent mortgage, from gaining priority for further voluntary advances over other advances secured by subsequent mortgage - held: there was no further advance by rollovers that took place and establishment of overdraft account - bank entitled to proceeds of sale of property, which had been appropriated and applied against debt due under mortgage which included mortgagor's liability under overdraft and guarantees.

[Salta Constructions](#) (B)

### **Santa Claus**

By Andrew Barton ('Banjo') Paterson

"Halt! Who goes there?" The sentry's call  
Rose on the midnight air  
Above the noises of the camp,  
The roll of wheels, the horses' tramp.  
The challenge echoed over all --  
"Halt! Who goes there?"

A quaint old figure clothed in white,  
He bore a staff of pine,  
And ivy-wreath was on his head.  
"Advance, O friend," the sentry said,



"Advance, for this is Christmas Night,  
And give the countersign."

"No sign or countersign have I.  
Through many lands I roam  
The whole world over far and wide.  
To exiles all at Christmastide  
From those who love them tenderly  
I bring a thought of home.

"From English brook and Scottish burn,  
From cold Canadian snows,  
From those far lands ye hold most dear  
I bring you all a greeting here,  
A frond of a New Zealand fern,  
A bloom of English rose.

"From faithful wife and loving lass  
I bring a wish divine,  
For Christmas blessings on your head."  
"I wish you well," the sentry said,  
"But here, alas! you may not pass  
Without the countersign."

He vanished -- and the sentry's tramp  
Re-echoed down the line.  
It was not till the morning light  
The soldiers knew that in the night  
Old Santa Claus had come to camp  
Without the countersign.

[Andrew Barton \('Banjo'\) Paterson](#)

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