

Monday 21 October 2013

## 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)

**Ghali v Chief Commissioner of State Revenue** (NSWCA) - land tax – principal place of residence - no error in decision of appeal panel of Administrative Decisions Tribunal - appeal dismissed (B G)

**Attwells v Jackson Lalic Lawyers Pty Ltd** (NSWSC) - professional negligence – settlement - advocate's immunity - no order made on separate question (I B)

**Peipi v Peipi as Administrator of the Estate of the late Hilaney** (NSWSC) - probate - succession - family provision - intestacy - competing claims (B)



**Doshen v Pedisich** (NSWSC) - family provision - stepchild of deceased entitled to lump sum out of deceased's estate (B)

**Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd** (VSC) - security of payments - adjudication determination quashed for jurisdictional error (C)

**ZX Group Pty Ltd v LPD Corporation Pty Ltd** (VSC) - contract - sale of land - fraudulent misrepresentation by vendor induced purchaser to enter contract - damages (B)

**Fischetti v Classic Constructions (Aust) Pty Ltd and Vero Insurance Ltd** (ACTSC) - work injury damages - independent contractor injured while lifting concrete - principal liable (I C)

## Summaries with links (5 minute read)

### **Ghali v Chief Commissioner of State Revenue [2013] NSWCA 340**

Court of Appeal of New South Wales

Basten JA, Tobias AJA & McDougall J

Taxes and duties - land tax - Chief Commissioner assessed appellant as liable for land tax - appellant objected on basis land was his principal place of residence and therefore exempt pursuant to s10(1)(r) & Sch1A *Land Tax Management Act 1956* (NSW) - appellant did not live in property but intended to return to it in the future - Chief Commissioner rejected objection - appeal panel of Administrative Decisions Tribunal upheld Chief Commissioner's ruling - appellant appealed pursuant to s119 *Administrative Decisions Tribunal Act 1997* (NSW) - appellant contended reasons of appeal panel expressed findings of fact contrary to those made by Tribunal and were not open on the evidence - reference to analogous cases - held: no legal error demonstrated in error of appeal panel - appeal panel's conclusions, when read in context of decision from which appeal was brought, were correct - appeal dismissed.

[Ghali](#) (B G)

### **Attwells v Jackson Lalic Lawyers Pty Ltd [2013] NSWSC 1510**

Supreme Court of New South Wales

Harrison J

Professional negligence - settlement - plaintiffs provided guarantees to bank in respect of company's liabilities - company defaulted - bank proceeded against plaintiffs - matter settled by



consent judgment - plaintiffs alleged defendants negligently advised them to consent to judgment for amount greater than their own liability to bank - whether defence of advocate's immunity was a complete answer to claim against solicitor for negligent advice in relation to formation and legal effect of contract made after court had been informed proceedings had settled, when relevant contractual terms and impugned advice related to matters not in issue in proceedings that were said to give rise to defence and terms of contract had been recorded in consent orders - *the controversy that has been quelled* - held: advocate's immunity applied in circumstances - despite preliminary unfavourable opinion court formed about defendants' conduct, court should not attempt to conclude on prima facie liability in negligence - court could not finally decide whether plaintiff's claim defeated entirely on basis defendants were immune from suit - no order made on separate question.

[Attwells](#) (I B)

## **Peipi v Peipi as Administrator of the Estate of the late Hilaney [2013] NSWSC 1520**

Supreme Court of New South Wales

Slattery J

Probate - succession – statutory legacy to partner - family provision - competing claims - deceased died intestate - plaintiff claimed she was deceased's de facto spouse for two years before his death and entitled to statutory legacy under s113 *Succession Act 2006* (NSW) - deceased's disabled daughter otherwise entitled to inherit - if plaintiff not found to be de facto she sought to bring family provision claim as an *eligible person* under s57 of the Act - daughter also brought family provision claim - *spouse* - family provision discretion - held: plaintiff was deceased's de facto spouse for two years before his death and entitled to statutory legacy - deceased's daughter succeeded in claim for family provision under s59 of the Act as to 65% of estate - administration of estate granted to Public Trustee unless parties agreed on another neutral administrator to act.

[Peipi](#) (B)

## **Doshen v Pedisich [2013] NSWSC 1507**

Supreme Court of New South Wales

Hallen J

Succession - family provision - plaintiff applied for family provision order under Ch 3 *Succession Act 2006* (NSW) upon basis that, as stepchild, she was a person who was a member of deceased's household and was wholly, or partly, dependent upon her - ss57(1)(e) & 59 of the Act - *eligible person* - relationship of dependence - *member of a household* - onus - inadequacy of provision - held: court satisfied plaintiff was an eligible person and that there were factors warranting making of





plaintiff's application - estate was sufficiently large to enable some provision to be made for plaintiff - plaintiff had some *needs* and was not an *able-bodied adult* - court satisfied for purposes of s59(1)(c) of the Act that deceased did not make adequate provision for proper maintenance or advancement in life of plaintiff - plaintiff should receive a lump sum out of deceased's estate - orders made.

[Doshen](#) (B)

## **Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd [2013] VSC 552**

Supreme Court of Victoria

Vickery J

Security of payments - principal and contractor entered into building contracts - payment dispute arose - principal contended adjudication made under *Building and Construction Industry Security of Payment Act 2002* (Vic) in favour of contractor was invalid - alternatively principal sought declaration that settlement deed before adjudication released it from liability under payment claims and that contractor was estopped from relying on adjudication - ss9, 14(4), 14(5) & 14(8) of the Act - *single* or *one-off* payment claim - *milestone* payments - s40 *Domestic Building Contracts Act 1995* (Vic) - held: adjudicator erred in finding payment claim served after termination of settlement deed was validly made - determination was founded on invalid payment claim and was thus invalid - original payment claims served before parties entered settlement deed contravened s18(2) of the Act - to extent determination founded on original payment claims, it also lacked jurisdiction - determination quashed.

[Jotham Property Holdings Pty Ltd](#) (C)

## **ZX Group Pty Ltd v LPD Corporation Pty Ltd [2013] VSC 542**

Supreme Court of Victoria

Williams J

Contract - sale of land - misleading and deceptive conduct - plaintiff purchaser paid deposit on signing contract - balance of purchase money became overdue and was not paid - defendant vendor subsequently sold and transferred land - parties each purported to terminate contract and claimed to be entitled to deposit - parties were agreed that contract was at an end - pre-contractual and contractual warranties - rescission - repudiation - election - intermediate term - ss32(5) & 32(7) *Sale of Land Act* (Vic) - held: court not satisfied either party validly terminated contract unilaterally - vendor made fraudulent misrepresentation inducing plaintiff to enter contract however plaintiff did not validly rescind contract *ab initio* on ground of misrepresentation - vendor contravened ss52



& 53A *Trade Practices Act 1987* (Cth) by making misrepresentation - purchaser entitled to relief under both s82 and s87 TPA.

[ZX Group Pty Ltd](#) (B)

**Fischetti v Classic Constructions (Aust) Pty Ltd and Vero Insurance Ltd [2013] ACTSC 210**

Supreme Court of the Australian Capital Territory

Master Harper

Work injury damages - subcontractor claimed damages from builder for injuries suffered while lifting concrete blocks - subcontractor alleged builder negligently breached duty of care not to expose him to risk of injury which he suffered – subcontractor was concreter but lifting task was one for unskilled labourer - held: court satisfied builder owed duty of care to subcontractor to take precautions against risk of injury suffered - foreseeable that person in subcontractor's position might suffer the injury if precautions were not taken - court satisfied builder breached duty of care - if necessary, court would also find builder guilty of negligence for failure to comply with former *Occupational Health and Safety (Manual Handling) Regulation 1997* (ACT) - no contributory negligence - damages assessed.

[Fischetti](#) (I C)

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