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

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Kendirjian v Lepore** (NSWCA) - professional negligence - solicitors' duties - conduct protected by advocate's immunity - appeal dismissed (I)

**Russo v Desiatnik (No 3)** (NSWSC) - costs - barristers' costs - unreasonable rejection of offer of settlement - indemnity costs ordered (I)

**Note Printing Australia Ltd v Leckenby** (VSCA) - corporations - entitlement to be indemnified prior to verdict in criminal proceedings - appeal dismissed (I)

**Driesen v Gold Coast City Council** (QCA) - environment and planning - extension of time to appeal against Council's grant of development permit (B C)

**MJ Arthurs Pty Ltd v Portfolio Housing Pty Ltd** (QCA) - construction contract - time at which entitlement to profit share under oral agreement arose - appeal allowed (I B C)

**Massey v Smith** (QSC) - Wills and estates - document did not operate as codicil to earlier Will - no trust demonstrated to exist - declarations refused (B)

**Lee v RACQ Insurance Ltd** (QSC) - motor accidents insurance - insurer enjoined from reducing rehabilitation services provided pursuant to s51(3) *Motor Accident Insurance Act 1994* (Qld) (I)

## Summaries With Link (Five Minute Read)

### **Kendirjian v Lepore [2015] NSWCA 132**

Court of Appeal of New South Wales

Macfarlan & Leeming JJA

Professional negligence - solicitors' duties - advocate's immunity - applicant travelling in vehicle - applicant injured when vehicle collided with other vehicle - first respondent solicitor commenced proceedings on applicant's behalf against driver of other vehicle - driver admitted liability - date fixed for hearing on quantum - solicitor briefed second respondent barrister to appear for applicant - driver's legal representatives communicated offer to settle to respondents - applicant alleged respondents did not advise him of amount of settlement offer and rejected it absent instructions on basis it was too low - applicant sued respondents in negligence claiming difference between settlement offer and judgment as damages - primary judge summarily dismissed proceedings on basis respondents immune from suit under advocates' immunity principle - held: allegedly negligent advice or omission to advise constituted out of Court conduct which led to continuation of Court proceedings - conduct protected by advocate's immunity - appeal dismissed.

[Kendirjian](#) (I)

### **Russo v Desiatnik [2015] NSWSC 606**

Supreme Court of New South Wales

Button J

Indemnity costs - solicitors' costs - dispute concerning whether barrister's fees were valid and whether he was entitled to interest up to judgment - Court dismissed solicitor's appeal and upheld barrister's cross-appeal - barrister sought indemnity costs from date of offer of settlement - held: Court persuaded it was unreasonable for solicitor to reject offer of settlement - indemnity costs ordered.

[Russo](#) (I)

### **Note Printing Australia Ltd v Leckenby [2015] VSCA 105**

Court of Appeal of Victoria

Tate, Whelan & Ferguson JJA

Corporations - applicant sought leave to appeal from trial judge's orders upholding respondent's entitlement to be indemnified by applicant for legal costs and expenses incurred in defending criminal proceedings in Supreme Court which remained on foot - whether respondent entitled to be indemnified for ongoing legal costs during course of criminal proceedings and before verdict, or whether entitlement did not arise until and unless criminal proceedings had ended and there was 'not guilty' verdict in favour of respondent - construction of deed of indemnity - prohibition in s199A(3)(b) *Corporations Act 2001* - held: respondent had present entitlement to be indemnified prior to verdict - leave to appeal granted - appeal

dismissed.

[Note](#) (I)

## **Driesen v Gold Coast City Council [2015] QCA 85**

Court of Appeal of Queensland

Holmes & Morrison JJA; Dalton J

Environment and planning - Planning and Environment Court dismissed applicant's application for extension of time to appeal against Council's grant of development permit to second respondent property developer - applicant sought leave to appeal - ss337, 361, 363, 366, 462, 497 & 498 *Sustainable Planning Act 2009* - held: primary judge took irrelevant considerations into account when exercising discretion contained in s497- application for extension of time should be granted - significant injustice to applicant in its refusal warranting granting of leave to appeal - appeal allowed.

[Driesen](#) (B C)

## **MJ Arthurs Pty Ltd v Portfolio Housing Pty Ltd [2015] QCA 86**

Court of Appeal of Queensland

Gotterson and Philippides JJA & A Lyons J

Construction contract - appellants appealed against finding by primary judge as to time at which respondents' entitlement to profit share arose under oral agreement between them and appellants - appellants contended entitlement arose in respect of any given construction contract only when contract completed and actual profit could be ascertained - respondents contended entitlement arose when all administration work necessary for procuring it was completed by first respondent's director - held: primary judge erred in finding respondents' entitlement to profit share on construction contract arose when first respondent presented it for execution - in order to derive entitlement respondents required to perform tasks and responsibilities after presentation of construction contract for execution and up to point of completion - appeal allowed.

[MJArthurs](#) (I B C)

## **Massey v Smith [2015] QSC 86**

Supreme Court of Queensland

Martin J

Wills and estates - succession - executor sought declaration that handwritten document was a codicil to last Will of deceased, and declaration that document created trust of share in property - s18 *Succession Act 1981* (QSC) - s96 *Trustees Act 1973* - held: evidence did not support finding that document was executed with testamentary intention or any intention it operated as codicil to earlier Will - no trust demonstrated to exist - application dismissed.

[Massey](#) (B)

## **Lee v RACQ Insurance Ltd [2015] QSC 120**

Supreme Court of Queensland

Dalton J

Motor accidents insurance - applicant insured was travelling in vehicle - applicant injured in head-on collision with another vehicle - insurer stated it would meet 'reasonable and appropriate cost' of insured's rehabilitation without admitting liability under s39(1)(a)(iv) *Motor Accident Insurance Act 1994* (Qld) - insurer gave notice to insured that it would not pay rehabilitation costs past set date - insured claimed insurer prevented from rescinding decision to pay costs by s51 - insurer contended claim against it was fraudulent - insured sought interlocutory injunction restraining insurer from ceasing to pay the costs - whether prima facie case - balance of convenience - held: insured had shown prima facie case - Court satisfied in all circumstances to make order that insurer was enjoined from reducing any rehabilitation services provided pursuant to s51.

[Lee](#) (l)

## CRIMINAL

### Executive Summary

**Pate (a pseudonym) v The Queen** (VSCA) - criminal law - sexual penetration of child under 16 - appeal against sentence - forensic disadvantage direction deficient - appeal allowed - retrial

### Summaries With Link

**Pate (a pseudonym) v The Queen [2015] VSCA 110**

Court of Appeal of Victoria

Weinberg & Priest JJA; Dixon AJA

Criminal law - appellant convicted of two charges of sexually penetrating child under 16 - appellant sentenced to 4 years' imprisonment with non-parole period of 2 years and 6 months - appellant appealed against sentence - appellant contended there had been substantial miscarriage of justice because of admission of certain hearsay evidence, that trial judge erred in failing to exclude certain evidence, and that trial judge failed to adequately direct jury as to significant forensic disadvantages suffered by accused - held : forensic disadvantage direction was deficient - appeal allowed - retrial.

[Pate](#)



# Benchmark

## **Among the Rocks**

By Robert Browning

Oh, good gigantic smile o' the brown old earth,  
    This autumn morning! How he sets his bones  
To bask i' the sun, and thrusts out knees and feet  
For the ripple to run over in its mirth;  
    Listening the while, where on the heap of stones  
The white breast of the sea-lark twitters sweet.

That is the doctrine, simple, ancient, true;  
    Such is life's trial, as old earth smiles and knows.  
If you loved only what were worth your love,  
Love were clear gain, and wholly well for you:  
    Make the low nature better by your throes!  
Give earth yourself, go up for gain above!

[Robert Browning](#)

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