

Friday 25 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)

**Freeman v Fleetmaster Services Pty Ltd** (FCA) - workers compensation - rights suspended for failure to undertake rehabilitation - no error by AAT - appeal dismissed (I G)

**Streller v Albury City Council** (NSWCA) - negligence - obvious risk - dangerous recreational activity - council not liable for appellant's injuries - appeal dismissed (I)

**Glad Retail Cleaning Pty Ltd v Alvarenga** (NSWCA) - workers compensation - leave to file amended notice of appeal - directions (I)

**National Australia Bank Ltd v Zerafa** (NSWSC) - loans and mortgages - fraud - forgery - summary judgment refused (B C)

**Victorian WorkCover Authority v BlueScope Steel Ltd** (VSC) - accident compensation - claim for indemnity for worker's compensation payments failed (I G)

**Lawrie v Hwang** (QSC) - succession - testamentary capacity - order granted for making of statutory will (B)

**Kalatzis Nominees Pty Ltd v Proton Development Group Pty Ltd** (QSC) - contract - second plaintiff was holder of units in trust - declaration and orders (I B)

## Summaries with links (5 minute read)

### **Freeman v Fleetmaster Services Pty Ltd [2013] FCA 1068**

Federal Court of Australia

Edmonds J

Workers compensation - appeal pursuant to s44(1) *Administrative Appeals Tribunal Act 1975* (Cth) from decision of AAT that applicant failed, without reasonable excuse, to undertake rehabilitation program under s37 *Safety, Rehabilitation and Compensation Act 1988* (Cth) with result that his rights to compensation were suspended - rr33.12 & 33.15 *Federal Court Rules 2011* (Cth) - competency of appeal - held: Tribunal's reasons disclosed that it considered and assessed applicant's subjective explanation for not participating in rehabilitation program as well as objective assessment of tasks required to be performed, bearing appellant's explanations in mind - appeal dismissed.

[Freeman](#) (I G)

### **Streller v Albury City Council [2013] NSWCA 348**

Court of Appeal of New South Wales

Meagher, Ward & Emmett JJA

Negligence – 16 year old appellant injured when attempting to do back flip using rope attached to tree branch overhanging river – accident occurred near Australia Day activities organised by council - primary judge held council was not liable to appellant - duty of care - ss5B, 5L, 5F(1) & 5K *Civil Liability Act 2002* (NSW) - materialisation of obvious risk - dangerous recreational activity



- held: risk would have been obvious to reasonable person in appellant's position - reasonable person of appellant's age and experience would not have assumed that rope had been deliberately placed in tree as part of recreational activities organised by council and that it was safe to use it - obvious risk which resulted in appellant's injury made the activity in which appellant was engaged *dangerous* - s5L(1) of the Act applied with result that council not liable - appeal against conclusion that council breached duty of care also failed - appeal dismissed.

[Streller](#) (I)

## **Glad Retail Cleaning Pty Ltd v Alvarenga [2013] NSWCA 350**

Court of Appeal of New South Wales

Emmett JA

Workers compensation – application by prospective appellant for extension of time to appeal - respondent injured when she fell at shopping centre - respondent sued manager/occupier of centre and cleaner - manager and cleaner both found negligent and liable to contribute as joint tortfeasors - manager sought extension of time to appeal - cleaner sought leave to file amended notice of appeal - ss149(1) & 151Z(1)(b) *Workers Compensation Act 1987* (NSW) – manager paid its proportion of damages unconditionally which may have triggered s151Z and caused respondent to lose rights to compensation - delay - prejudice - held: leave granted to cleaner to file amended notice of appeal - parties agreed, due to complex issues arising under s151Z of the Act, to reserve question whether manager should have extension of time until hearing of cleaner's appeal - directions given.

[Glad Retail Cleaning Pty Ltd](#) (I)

## **National Australia Bank Ltd v Zerafa [2013] NSWSC 1515**

Supreme Court of New South Wales

Davies J

Summary judgment - bank sought judgment for possession of land and money outstanding under loan agreement and mortgage - bank alleged defendants were in default under loan because information in supporting documentation was incorrect or misleading and that first defendant acted fraudulently in connection with loan - defendants contended any fraud and alteration of documents was perpetrated by lending manager and relied on *Contracts Review Act 1980* (NSW) to argue that to extent clauses were satisfied by person other than someone acting on defendants' behalf, those clauses were unjust terms and should be varied or read down - evidence - expert handwriting evidence - credit - held: no overwhelming probability that bank would succeed at



end of case - many suspicious aspects - bank had not established that defence so obviously untenable that it could not succeed - matter must be allowed to go to trial.

[National Australia Bank Ltd](#) (B C)

**Victorian WorkCover Authority v BlueScope Steel Ltd [2013] VSC 564**

Supreme Court of Victoria

Kaye J

Accident compensation - worker injured in course of employment while working on defendant's premises - Authority was liable to pay compensation pursuant to *Accident Compensation Act 1985* (Vic) (ACA Act) - Authority claimed indemnity from defendant under s138(1) of ACA Act because accident occurred in circumstances creating a liability in it to pay damages - held: court not satisfied defendant breached duty of care owed to worker pursuant to s14B *Wrongs Act 1958* (Vic) - Authority failed to establish injury sustained by worker was caused under circumstances creating legal liability in defendant to pay damages - claim dismissed.

[Victorian WorkCover Authority](#) (I G)

**Lawrie v Hwang [2013] QSC 289**

Supreme Court of Queensland

A Lyons J

Succession - applicant sought leave under s22 *Succession Act 1981* (Qld) to apply for order under s21 for statutory will to be made on behalf of his father who was suffering from dementia - father had no valid will - father's earlier will was revoked by marriage to respondent under s14 of the Act - father's capacity at time of marriage in doubt - applicant argued that if his father was able to give instructions as to making of will, he would want no part of his estate to pass to respondent given her allegedly dishonest conduct in transferring his assets - applicant argued father would want terms of current will to reflect those of earlier will - ss23, 24 & 25 of the Act - held: court satisfied father lacked testamentary capacity and would not regain it, that requirements of the Act had been met and order should be made authorising will to be made for father in terms of draft proposed will - court also satisfied that costs should be paid out of estate on an indemnity basis.

[Lawrie](#) (B)





## **Kalatzis Nominees Pty Ltd v Proton Development Group Pty Ltd [2013] QSC 283**

Supreme Court of Queensland

Jackson J

Contract - trusts and trustees - bankruptcy - first plaintiff agreed to lend money to company - loan secured by agreement, guarantees and transfer to first plaintiff of shares in second plaintiff - second plaintiff was to be holder of units in trust - plaintiffs sought declaration that second plaintiff was or was entitled to be holder of units in trust and order that first defendant enter its name in trust register - construction of loan agreement and deed of trust - rights and obligations engaged in case of transfer of units in small private unit trust - assignment of equitable property - s487 *Duties Act 2001* (Qld) - whether loan and security arrangements gave rise to escrow of unit transfer - oral agreement to vary loan agreement - estoppel - competing equities or equitable interests - surrender of security - s44 & 90 *Bankruptcy Act 1966* (Cth) - held: second plaintiff entitled to relief claimed .

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

### **On a Drop of Dew**

By Andrew Marvell

See how the orient dew,  
Shed from the bosom of the morn  
Into the blowing roses,  
Yet careless of its mansion new,

For the clear region where 'twas born  
Round in itself incloses:  
And in its little globe's extent,  
Frames as it can its native element.  
How it the purple flow'r does slight,  
Scarce touching where it lies,  
But gazing back upon the skies,  
Shines with a mournful light,  
Like its own tear,

Because so long divided from the sphere.  
Restless it rolls and unsecure,



Trembling lest it grow impure,  
Till the warm sun pity its pain,  
And to the skies exhale it back again.

So the soul, that drop, that ray  
Of the clear fountain of eternal day,  
Could it within the human flow'r be seen,

Remembering still its former height,  
Shuns the sweet leaves and blossoms green,  
And recollecting its own light,

Does, in its pure and circling thoughts, express  
The greater heaven in an heaven less.

In how coy a figure wound,  
Every way it turns away:  
So the world excluding round,  
Yet receiving in the day,  
Dark beneath, but bright above,  
Here disdaining, there in love.

How loose and easy hence to go,  
How girt and ready to ascend,  
Moving but on a point below,  
It all about does upwards bend.

Such did the manna's sacred dew distill,  
White and entire, though congealed and chill,  
Congealed on earth : but does, dissolving, run  
Into the glories of th' almighty sun.

[Andrew Marvell](#)

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