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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)

National Australia Bank Ltd v Savage (NSWSC) - loan agreements - *Yerkey v Jones* equity - guarantee in respect of one facility set aside - bank awarded possession of properties (I B)

Hannaford v The Royal Society for the Prevention of Cruelty to Animals, NSW (NSWSC) – waiver of legal professional - onus – independence of lawyers not proved - privilege waived by conduct (I B C)

Application by NSW Trustee and Guardian (Estate of the late Czml) (NSWSC) - succession - intestacy - *Benjamin* order granted to trustee (B G)



Mainstream (Aust) Pty Ltd v Gilpip Bayside Projects Pty Ltd (VSC) - building contract - injunction restraining recourse to bank guarantee (I B C)

Caruana v Caruana (VSC) - probate - costs - executor and trustee unreasonably caused litigation - personal costs order (I B)

Skorpos v United Petroleum Pty Ltd (SASCFC) - lease between petrol retailer and site owners - termination - damages - appeal allowed in part (B C)

Australia & New Zealand Banking Group Ltd -v- Olawa Pty Ltd (WASC) - loans and mortgages - summary judgment for bank and possession of properties (B)

Summaries with links (5 minute read)

National Australia Bank Ltd v Savage [2013] NSWSC 1718

Supreme Court of New South Wales

Adamson J

Equity - guarantee - husband and wife were registered proprietors of properties - bank claimed possession of properties in reliance on facilities and guarantee under which wife was co-borrower in five facilities and guarantor of business loan facility - wife accepted bank entitled to possession unless transactions set aside on basis of principles in *Yerkey v Jones* [1939] HCA 3 - held: court satisfied wife did not understand purport and effect of guarantee - wife had brought herself within principles identified in *Yerkey v Jones* - wife was volunteer in respect of guarantee though not in respect of other facilities - inequitable to enforce guarantee against wife since she was a volunteer whom bank knew was married to debtor and who did not understand nature and purport of transaction - bank took no steps either to explain guarantee - guarantee set aside – as there was agreement that the bank was entitled to possession unless all agreements were set aside, judgment for bank.

[National Australia Bank](#) (I B)

Hannaford v The Royal Society for the Prevention of Cruelty to Animals, NSW

[2013] NSWSC 1708

Supreme Court of New South Wales

Schmidt J

Legal professional privilege - waiver - plaintiffs sought damages for malicious prosecution - plaintiffs sought access documents over which RSPCA claimed privilege under ss118 & 119



Evidence Act 1995 (NSW) - plaintiffs contended independence of solicitor and counsel (who were board members) from RSPCA had not been established, that RSPCA had not led evidence about dominant purpose for which disputed documents were created and thus dominant purpose had not been established, that RSPCA had waived any privilege in documents and that s122 of the Act had no application - confidential communication - confidential document - disclosure - imputed waiver - held: RSPCA did not meet onus to establish privilege where is failed to call relevant witnesses – in any event, privilege in documents had been waived as result of RSPCA’s conduct - s122(5) of the Act did not apply - plaintiffs given access sought to disputed documents.

[Hannaford](#) (I B C)

Application by NSW Trustee and Guardian (Estate of the late Czml) [2013] NSWSC 1683

Supreme Court of New South Wales

Black J

Succession - intestacy - trustee was administrator of intestate estate of deceased - trustee sought *Benjamin* order to distribute estate on particular factual basis - r54.3 *Uniform Civil Procedure Rules 2005 (NSW)* - ss61A-61F & 61B(1) *Wills, Probate and Administration Act (NSW) 1898* - held: trustee’s investigations had established that the most likely position on the evidence was that deceased’s sister was entitled to intestate estate of deceased and on her death, her four children - order granted with proviso protecting against position if ultimately it was established that deceased had children whose identity has not been disclosed by trustee’s investigations - orders made.

[Application by NSW Trustee and Guardian \(Estate of the late Czml\)](#) (B G)

Mainstream (Aust) Pty Ltd v Gilpip Bayside Projects Pty Ltd [2013] VSC 610

Supreme Court of Victoria

Vickery J

Injunction - building contract - company engaged builder to refurbish building and construct additional accommodation - builder sought to restrain company from having recourse to bank guarantee in amount which company claimed builder was required to pay pursuant to final certificate issued under contract by superintendent – complex web of litigation commenced by builder - held: balance of convenience favoured injunction being granted in builder’s favour - facts arguably pointed to company having made contractual promise not to call on second bank guarantee - builder had shown sufficient likelihood of success to justify preservation of the status quo pending trial - if there was no injunction but builder’s claim ultimately vindicated it would be likely to have suffered harm for which damages would not be adequate remedy - injunction granted.

[Mainstream \(Aust\)](#) (I B C)

**Caruana v Caruana [2013] VSC 643**

Supreme Court of Victoria

McMillan J

Probate - costs - plaintiffs sought removal of executor and trustee of deceased's estate - executor in position of alleged conflict – plaintiffs sued and at hearing, executor consented to his removal - executor submitted costs should be paid from estate on basis proceeding settled without adjudication as to merits of claim and that an executor or trustee had a right of indemnity out of estate in respect of litigation if his conduct had been honest but mistaken - held: executor's position reflected a clear case of conflict of interest and duty which had created hostility and friction between parties with consequent failure by him to administer deceased's estate - executor had caused unnecessary costs to what should have been straightforward administration of small estate - executor had unreasonably caused litigation - costs to be paid by executor personally - orders made.

[Caruana \(I B\)](#)**Skorpos v United Petroleum Pty Ltd [2013] SASCFC 117**

Full Court of the Supreme Court of South Australia

Kourakis, David & Peek JJ

Leases and tenancies - petrol retailer agreed to enter lease with owners of sites subject to tank and line tests and environmental site assessment reports - retailer entered leases before it had arranged tests or reports - retailer terminated leases over two sites on grounds reports revealed contamination - primary judge concluded retailer entitled to damages for costs of tank and line work performed and reports - owners' rent claim dismissed but judge found owners entitled to damages for retailer's failure to leave two sites in tenantable state of repair - owners appealed against dismissal of rent claim on ground judge ought to have made award in their favour on abandoned claims for rent - owners also appealed against adequacy of award for making good one site, retailer's award for costs of repairing tank and lines at another site and costs order - held: threshold test for party raising on appeal issue abandoned below is high - appeal allowed against retailer's award for costs of repair because there was no evidential basis for holding owners liable for those costs - judgment in favour of owners increased for tank and line work - appeal otherwise dismissed.

[Skorpos \(B C\)](#)



Australia & New Zealand Banking Group Ltd v Olawa Pty Ltd [2013] WASC 415

Supreme Court of Western Australia

Master Sanderson

Loans and mortgages - bank applied for summary judgment for amount owed under two loans to defendants and for possession of properties - purpose of loans was to refinance another loan facility - held: no unconscionable conduct by bank - no force in allegation bank's facility was deliberately structured to force borrower into early default - bank had provided defendants with opportunity to market and sell properties to allow eventual repayment of debt - no defence to bank's claim - judgment for bank.

[Australia & New Zealand Banking Group \(B\)](#)

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