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

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### Executive Summary (1 minute read)

**Bailey v Director General, Department of Natural Resources (No 2)** (NSWSC) - costs - offer of compromise - plaintiffs to pay successful defendants' costs on indemnity basis (I)

**Perpetual Trustee Company Ltd as custodian for the Balmain Aqua Construction Debt Pool and the Balmain AQUA Mezzanine Debt Pool v Batt** (NSWSC) - cross-vesting - guarantee - transfer to Queensland Supreme Court refused (B)

**Zagame v Zagame** (NSWSC) - succession - family provision - lump sum provision order in favour of deceased's son (B)

**AusNet Electricity Services Pty Ltd v Liesfield** (VSC) - Black Saturday bushfires - no legal professional privilege in technical analysis documents - appeal dismissed (I B C G)

**Knight Frank Australia Pty Ltd v Paley Properties Pty Ltd** (SASCFC) - costs - misconduct - miscarriage of discretion - parties at fault to pay own costs - appeal allowed (B)

**Astor Theatre WA Pty Ltd v Zimmermann Investments Pty Ltd** (WASC) - lease - no request by lessee under option renewal clause - summary judgment for lessor (B)

**Vizovitis v Ryan** (ACTSC) - solicitors' costs - costs agreements unreasonable and unfair - agreements not binding (I)

## Summaries with links (5 minute read)

### **Bailey v Director General, Department of Natural Resources (No 2) [2014] NSWSC 1227**

Supreme Court of New South Wales

Fullerton J

Costs - Court gave judgment for defendants - defendants sought indemnity costs from date of offer of compromise - plaintiffs contended defendants' offer of compromise did not comply with *Uniform Civil Procedure Rules 2005* (NSW) and was not a genuine or reasonable offer - rr20.26 & 42.15 - held: Court satisfied offer of compromise genuine and reasonable - defendants obtained judgment on claims made by plaintiffs that was no less favourable to them than offer of compromise - no discretionary considerations to displace rule allowing defendants indemnity costs from date of offer.

[Bailey](#) (I)

### **Perpetual Trustee Company Ltd as custodian for the Balmain Aqua Construction Debt Pool and the Balmain AQUA Mezzanine Debt Pool v Batt [2014] NSWSC 1211**

Cross-vesting - proceedings arising out of interstate transaction - NSW lender and Queensland borrower - defendant sought transfer of proceedings to Queensland Supreme Court - held: background facts were mostly connected with Queensland - however, on close examination, the Queensland based nature of those facts had no significant bearing on proceedings before the Court - practical considerations were in favour of continuance of proceedings in NSW - likely that more NSW witnesses would be called to prove formal but essential matters - likely that most records would be in NSW - interests of justice did not require transfer - transfer of proceedings refused.

[Perpetual Trustee Company Ltd](#) (B)

### **Zagame v Zagame [2014] NSWSC 1302**

Supreme Court of New South Wales

Hallen J

Succession - plaintiff was son of deceased - defendants were deceased's other children - son sought family provision order under *Succession Act 2006* (NSW) from deceased's estate and notional estate - plaintiff also sought order designating property held by trustee as notional estate - second defendant was registered proprietor of property transferred shortly before deceased's death - held: plaintiff was eligible person - deceased's Will did not make adequate provision for plaintiff - value of deceased's actual estate was nil - defendants conceded trust property could be designated as notional estate - Court not satisfied second defendant's property should be designated as notional estate - plaintiff to receive lump sum provision.

[Zagame](#) (B)

**AusNet Electricity Services Pty Ltd v Liesfield [2014] VSC 474**

Supreme Court of Victoria

Robson J

Legal professional privilege - class action arising out of Black Saturday bushfires - AusNet appealed against order for production of *technical analysis documents* it had created - ss118 & 119 *Evidence Act 2008* (Vic) - held: open to primary judge to conclude AusNet failed to discharge onus to establish the dominant purpose of creating the technical analysis documents was a privileged purpose - primary judge did not err in finding there were other non-privileged purposes for production of the documents - appeal dismissed.

[AusNet Electricity Services Pty Ltd](#) (I B C G)

**Knight Frank Australia Pty Ltd v Paley Properties Pty Ltd [2014] SASCFC 103**

Full Court of the Supreme Court of South Australia

Sulan, Blue & Parker JJ

Costs - Paley sued De Chellis company for breach of contract for sale of property and Mr De Chellis for breach of warranty of authority to act on behalf of company - Paley also sued its land agents for negligence and breach of contract - company brought third party claim against land agents - trial judge dismissed Paley's action against defendants and third party action - trial judge ordered land agents to pay Paley's costs against Mr De Chellis, and Mr De Chellis' costs, on basis of one land agent's misconduct - Paley to pay company's costs of action - held: trial judge's discretion miscarried because she did not clearly identify conduct of land agent said to constitute misconduct, analyse why it caused cost to be incurred, or consider costs consequences for land agent - inherent inconsistency in ordering land agents to pay Paley's costs against Mr De Chellis but not Paley's costs against land agents - land agent engaged in relevant misconduct which was one cause of proceedings being instituted - Paley also at fault in bringing proceedings when it was obvious action bound to fail - appropriate that each bear own legal costs - appeal allowed.

[Knight Frank Australia Pty Ltd](#) (B)

**Astor Theatre WA Pty Ltd v Zimmermann Investments Pty Ltd [2014] WASC 329**

Supreme Court of Western Australia

Chaney J

Summary judgment - lease - plaintiff was lessee of theatre premises under lease which commenced in 2009 and was due to expire on 1 September 2014 - plaintiff sought declaration that lease of theatre had been extended for further term of 5 years beginning on 2 September 2014 - plaintiff claimed it gave notice to defendant which was in substance the exercise of option to renew lease - lessor claimed notice was not an effective exercise of option to renew - sought summary judgment - O16 *Rules of the Supreme Court 1971* (WA) - held: clause was an option to renew - plaintiff's request not within clause - rather was an offer to take an extended term on different terms and conditions - lessor did not accept amended term - summary judgment for lessor.

[Astor Theatre WA Pty Ltd](#) (B)

**Vizovitis v Ryan [2014] ACTSC 243**

Supreme Court of the Australian Capital Territory

Harper M

Solicitors' costs - solicitor acted for client in two personal injury matters - solicitor and client signed two costs agreements in 1999 and 2002 - client sought declaration that agreements were void and orders setting them aside - ss190 & 191 *Legal Practitioners Act 1970* (ACT) - *Legal Profession Act 2006* (ACT) - held: client not give explanation about effect of agreements - agreements applied increased hourly rates retrospectively - certain clauses difficult to understand - agreements were unreasonable and unfair - costs agreements not binding on parties - declaration and orders made - judgment for plaintiff.

[Vizovitis](#) (I)**The Wind Sleepers**

By H. D.

Whiter  
 than the crust  
 left by the tide,  
 we are stung by the hurled sand  
 and the broken shells.

We no longer sleep  
 in the wind-  
 we awoke and fled  
 through the city gate.

Tear-  
 tear us an altar,  
 tug at the cliff-boulders,  
 pile them with the rough stones-  
 we no longer  
 sleep in the wind,  
 propitiate us.

Chant in a wail  
 that never halts,  
 pace a circle and pay tribute  
 with a song.

When the roar of a dropped wave  
breaks into it,  
pour meted words  
of sea-hawks and gull  
sand sea-birds that cry  
discords.

[H. D.](#)

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