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

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### Executive Summary (1 minute read)

**McKenzie v Wood** (NSWCA) - damages - motor vehicle accident - no appellable error in assessment of damages by primary judge (I)

**The Trust Company (RE Services) Ltd** (NSWSC) - equity - trusts and trustees - construction of trust instrument - judicial advice given (B)

**Morris v Redland City Council** (QSC) - negligence - plaintiff injured in fall from cliff onto beach at night while trying to locate stairs - Council not liable (I)

**Stephens v Chee** (QSC) - equity - trusts and trustees - trustees advised to bring proceedings against companies for repayment of money to trust (B)

**CFC Consolidated Pty Ltd v Cooper** (WASC) - contract - restraint of trade - search order refused (B C)

**Gerrard v Wang** (WASC) - contract for sale of land - termination of contract for repudiation by purchaser - purchaser liable to pay damages to vendors for breach of contract (I B)

**Moon v Whitehead** (ACTCA) - negligence - trespass to the person - respondent did not consent to sexual intercourse - appeal on liability failed - award of aggravated damages set aside (I)

# Benchmark

## Summaries With Link (Five Minute Read)

### **McKenzie v Wood [2015] NSWCA 142**

Court of Appeal of New South Wales

Ward & Leeming JJA; Sackville AJA

Damages - negligence - respondent passenger injured in motor vehicle accident on work-related journey - appellant was driver of other vehicle - liability admitted - appeal from aspects of assessment of damages in relation to hip replacement, non-economic loss and allowance for vicissitudes - held: no appellable error in primary judge's conclusion that appellant had failed to prove on balance of probabilities respondent would have incurred expenses of hip replacement in due course in any event - no appellable error in relation to economic loss or use of figure of 15% for vicissitudes - appeal allowed in respect of two grounds of appeal resolved by agreement - appeal otherwise dismissed.

[McKenzie](#) (I)

### **The Trust Company (RE Services) Ltd [2015] NSWSC 617**

Supreme Court of New South Wales

Darke J

Equity - trusts and trustees - company was responsible entity of trust registered as managed investment scheme under Ch 5C *Corporations Act 2001* (Cth) - plaintiff sought opinion advice and direction of Court pursuant to 63(1) *Trustee Act 1925* (NSW) as to whether it was justified in proceeding on basis that on true construction of clause of trust terms in Constitution of Trust it may only give Issuer Realisation Notice (Notice) under clause if it had received notice from ordinary unit holder or Paperlinx LLC under clause - construction of constitution of trust - held: plaintiff justified in proceeding on basis it may only give an Issuer Notice under clause if it had received notice from Paperlinx Limited or Paperlinx LLC - advice given.

[Trust](#) (B)

### **Morris v Redland City Council [2015] QSC 135**

Supreme Court of Queensland

Martin J

Negligence - plaintiff who had consumed alcohol injured in fall from cliff onto beach at Point Lookout on North Stradbroke Island at night while trying to locate stairs to beach - plaintiff sued council in negligence - plaintiff elected not to lead evidence against second defendant trustee of trust - plaintiff claimed track/path leading off from boardwalk had caused belief that path led to beach - ss13 15 & 47 *Civil Liability Act 2003* - Council admitted duty to take reasonable care to avoid foreseeable risk of harm to plaintiff while he was at Point Lookout - held: Council did not cause or allow grassy path to exist - there was no path through headland to cliff - risk that someone might fall from top of cliff was not reasonably foreseeable - claim against Council dismissed - parties agreed on judgment for second defendant trustee of trust - plaintiff's claim against trustee of trust had such remote prospect of success that action should not have been brought or continued - plaintiff to pay trustee of trust's costs on indemnity basis.

[Morris](#) (I)

**Stephens v Chee [2015] QSC 138**

Supreme Court of Queensland

P McMurdo J

Equity - trusts and trustees - trustees brought 'Beddoe' application seeking Court's advice whether to bring proceedings, and an order indemnifying them from trust's assets for costs incurred - trustees also sought order they should not provide trust's documents to one of the beneficiaries, who would be principal defendant in proposed litigation - ss96 & 63(1) *Trusts Act 1973* - held: trustees advised that proceedings could and ought to be brought against companies for repayment of money to trust according to subject trust's account - trustees directed to seek further advice on proceedings after completion of disclosure if proceedings not determined earlier - Court not prepared to make order sought in relation to documents - Court found it preferable that costs burden fall upon parties who stood to gain from the litigation.

[Stephens](#) (B)

**CFC Consolidated Pty Ltd v Cooper [2015] WASC 185**

Supreme Court of Western Australia

Mitchell J

Contract - restraint of trade - claim arising out of termination of employment contract between plaintiff and defendant - plaintiff claimed defendant breached restraint of trade provision of contract - plaintiff sought search orders under O52B *Rules of the Supreme Court 1971* enabling search of defendant's residence for documents - held: Court not satisfied there was a strong prima facie case that defendant had breached restraint of trade clause in employment contract or that plaintiff would suffer serious loss or damage if search order not made - Court not satisfied there was real possibility defendant might destroy important evidentiary material - Court not prepared to make search order - alternative injunctive relief granted.

[CFC](#) (B C)

**Gerrard v Wang [2015] WASC 173**

Supreme Court of New South Wales

Contract for sale of land - damages - repudiation - plaintiffs were vendors who claimed damages for defendant's failure to complete contract for purchase of their land - because of defendant's failure to perform contractual obligation plaintiffs had terminated contract and sold land for price less than price defendant bound to pay - held: plaintiffs' claim established existence and validity of contract, breach of contract by failure to pay the purchase price, and termination of the contract for failure to perform - defendant liable to plaintiffs for breach of contract - judgment for vendors.

[Gerrard](#) (I B)

**Moon v Whitehead [2015] ACTCA 17**

Court of Appeal of the Australian Capital Territory

Murrell CJ; Penfold & Burns JJ

Negligence - trespass to the person - sexual assault - appellant appealed against decision in which Master awarded damages to respondent for injury caused by non-consensual sexual intercourse imposed on her by appellant - whether respondent had consented to engaging in the sexual conduct - held: there was ample evidence upon which Master entitled to find appellant had not satisfied onus of proving respondent had consented to sexual intercourse - impossible to say Master's finding was against evidence or weight of evidence - Master erred by failing to afford procedural fairness to appellant in relation to award of aggravated damages - award of aggravated damages set aside - judgment varied.

[Moon \(I\)](#)

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