

Friday 28 February 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Cain v New South Wales Land and Housing Corporation** (NSWCA) - judicial review - leases and tenancies - *termination order* refused - Tribunal's orders reinstated (I G)

**NSW Trustee & Guardian; In the Estate of Francis** (NSWSC) - intestate succession - inability to ascertain identity of deceased's father - *Benjamin order* granted (B)

**Eastmark Holdings v The Owners Corporation Strata Plan No 74602** (NSWSC) - strata titles - amount allegedly owing pursuant to levy imposed by management committee - summary judgment refused (I B C)

**Wingfoot Australia Partner Pty Ltd v Jovevski** (VSCA) - accident compensation - aggravation of work injury caused worker's psychiatric condition - appeal dismissed (I)

**Unsworth v Debsan Pty Ltd** (WASC) - leases and tenancies - lessee's entitlement to occupy units ended upon execution of assignment of lease - appeal dismissed (I G)



**Agapitos v Habibi** (WASC) - trademark - dentist's trademark incapable of distinguishing designated services from services of other persons - trademark cancelled (I B)

**Kaye v Dr Woods and John James Memorial Foundation Ltd** (ACTSC) - pleadings - medical negligence - delay - limited permission to amend pleadings granted (I)

## Summaries with links (5 minute read)

### **Cain v New South Wales Land and Housing Corporation [2014] NSWCA 28**

Court of Appeal of New South Wales

Basten, Gleeson & Leeming JJA

Judicial review - leases and tenancies - housing corporation was landlord of premises occupied by applicant under residential tenancies agreement (agreement) - applicant arrested and charged under *Drug Misuse and Trafficking Act 1985* (NSW) - housing corporation sought *termination order* from Consumer, Trader and Tenancy Tribunal pursuant to s91 *Residential Tenancies Act 2010* (NSW) (RTA) concerning use of premises for illegal purposes - Tribunal refused to make termination order - primary judge found it was mandatory for Tribunal to make termination order once condition in s91 RTA was satisfied - applicant sought to reinstate Tribunal's orders for specific performance of agreement - construction of s91 RTA - *may* - held: primary finding Tribunal had to make termination order once preconditions were established was erroneous - Tribunal did not take irrelevant matters into account - application granted.

[Cain](#) (I G)

### **NSW Trustee & Guardian; In the Estate of Francis [2014] NSWSC 123**

Supreme Court of New South Wales

Kunc J

Wills and estates - succession - intestacy - *Benjamin order* - deceased died intestate - NSW Trustee sought order giving it liberty to distribute deceased's estate in certain manner on basis it was unable to ascertain identity of deceased's father - s61B *Probate and Administration Act 1898* (NSW) - deceased had sibling who was brother or half-brother due to doubt about identity of sibling's father - held: Court satisfied on basis of extensive searches by Trustee that the deceased's father was either a certain individual who had predeceased the deceased, or could not be identified - Court satisfied that, if the certain individual was deceased's father, either he did not leave any



issue who survived deceased or, such issue were unable to be located - Trustee entitled to distribute deceased's estate in accordance with ss61B(6)(a) or 61B(6)(b) of the Act - estate to be distributed to deceased's sibling.

[NSW Trustee & Guardian; In the Estate of Francis](#) (B)

**Eastmark Holdings v The Owners Corporation Strata Plan No 74602 [2014] NSWSC 134**

Supreme Court of New South Wales

McDougall J

Summary judgment - strata title development - owners corporation was proprietor of lot comprising residential apartments - first plaintiff was proprietor of lot for commercial premises - second plaintiff was proprietor of lots for retail premises and car park - dispute arose over proposed redevelopment of complex - plaintiff sought summary judgment to recover amount allegedly owing by owners corporation pursuant to levy imposed by building management committee under strata management scheme (SMS) - plaintiffs argued SMS rendered owners' corporation liable to pay amount while disputes were worked out in accordance with SMS - construction of SMS - held: high degree of certainty of outcome was lacking - notice of motion dismissed.

[Eastmark Holdings](#) (I B C)

**Wingfoot Australia Partner Pty Ltd v Jovevski [2014] VSCA 21**

Court of Appeal of Victoria

Warren CJ; Tate & Osborn JJA

Accident compensation - respondent employed by appellants as rubber worker - worker injured shoulder in 1995 when his shoulder struck steel while he was picking up tyre - worker developed depressive illness following aggravation of shoulder pain in course of work in 2001 - worker sought leave to bring proceedings for damages pursuant to s134AB *Accident Compensation Act 1985* (Vic) in respect of 2001 aggravation - appellants contended trial judge erred in finding 2001 aggravation was a cause of worker's psychiatric condition - appellants submitted trial judge's finding that physical consequences of aggravation were not permanent was inconsistent with findings as to causation of psychiatric injury - appellants also contended trial judge erred in relying on psychiatric opinion of doctor and that he failed to give adequate reasons for his conclusions concerning causation - held: appellants' substantive causal hypotheses did not form proper basis for rejecting trial judge's reasoning and conclusions - basis on which case now put amounted to new case which should not in any event be entertained on appeal - appeal dismissed.

[Wingfoot Australia Partner](#) (I)

**Unsworth v Debsan Pty Ltd [2014] WASC 46**

Supreme Court of Western Australia

Le Miere J

Leases and tenancies - first appellant was lessee of retail shop owned by respondent company - lessee carried on pharmacy business from shop - lease entitled lessee to occupy two residential units at rear of shop rent free for term of lease and any extensions of lease provided that only lessee and not any assignee of lessee occupied units - lessee assigned lease of shop to herself jointly with second appellant - appellants sought leave to appeal against State Administrative Tribunal's decision that lessee's entitlement to occupy units rent free or at all came to an end upon execution of assignment of lease - ss3, 10(1) & 11(5)(b) *Commercial Tenancy (Retail Shops) Agreement Act 1985* (WA) - construction of lease - held: Tribunal correct to find that lessee's right to occupy units was not a transferable right - assignment of lease did not purport to assign to assignee assignor's personal, contractual right to occupy units - no statutory right to assign right to occupy units arising from s10(1) of the Act read together with definition of *lease* in s3 of the Act - appeal dismissed.

[Unsworth](#) (I G)**Agapitos v Habibi [2014] WASC 47**

Supreme Court of Western Australia

Le Miere J

Trademark - passing off - misleading or deceptive conduct - plaintiff dentist carried on business under name "Dental Excellence" and was owner of trademark of same name - plaintiff claimed defendant dentist infringed trade mark by using sign "South Perth Dental Excellence" and engaged in misleading or deceptive conduct in breach of s10 *Fair Trading Act 1987* (WA) (FTA) - plaintiff also claimed defendant passed off her business as plaintiff's business or as having connection in trade with plaintiff or his business - defendant denied plaintiff's claims and counterclaimed for order that plaintiff's trade mark be cancelled - ss88(1) & 41 *Trade Marks Act 1995* (Cth) - held: defendant did not use words "dental excellence" as trademark - no infringement of trademark - passing off claim failed - no misleading or deceptive conduct - trade mark not capable of distinguishing designated services from services of other persons - trade mark cancelled - claim dismissed - counterclaim granted.

[Agapitos](#) (I B)

**Kaye v Dr Woods and John James Memorial Foundation Ltd [2014] ACTSC 25**

Supreme Court of the Australian Capital Territory

Master Mossop

Pleadings - medical negligence - surgeon performed three operations on plaintiff - plaintiff sued surgeon and hospital in negligence following complications which she suffered due to infection which occurred after third operation - plaintiff sought leave to amend statement of claim five years after commencement of proceedings - rr52, 53, 245, 502 & 503 *Court Procedures Rules 2006* (ACT) - delay - medical evidence - held: Court not satisfied it was appropriate to grant leave to plaintiff to make amendments other than in relation to various elaborations on existing pleadings which did not raise substantial new issues likely to further delay the case.

[Kaye](#) (I)

**The Sound of Trees**

By Robert Frost

I wonder about the trees.  
Why do we wish to bear  
Forever the noise of these  
More than another noise  
So close to our dwelling place?  
We suffer them by the day  
Till we lose all measure of pace,  
And fixity in our joys,  
And acquire a listening air.  
They are that that talks of going  
But never gets away;  
And that talks no less for knowing,  
As it grows wiser and older,  
That now it means to stay.  
My feet tug at the floor  
And my head sways to my shoulder  
Sometimes when I watch trees sway,  
From the window or the door.  
I shall set forth for somewhere,



I shall make the reckless choice  
Some day when they are in voice  
And tossing so as to scare  
The white clouds over them on.  
I shall have less to say,  
But I shall be gone.

[Robert Frost](#)

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