

Friday 30 August 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)

**Dial D Pty Ltd as trustee for the Smith Street Unit Trust v Kingston Building (Australia) Pty Ltd (NSWCA)** - security of payments - Superintendent entitled to issue certificate - appeal allowed in part (C)

**McMahon v Permanent Custodians Ltd (NSWCA)** - farm mortgage - dismissal of application for declaratory relief and dissolution of injunction - leave to appeal refused (B)

**Allianz Australia Insurance Ltd v Anderson (NSWSC)** - motor accidents compensation - insurer admitted liability - certificate of claims assessor binding (I G)



**Cong Xu v Austino Property Development Pty Ltd** (NSWSC) - conveyancing - purchaser validly rescinded contract for sale and entitled to return of deposit from vendor (B)

**A & L Transport Pty Ltd v Fish** (VSC) - accident compensation - no error in opinion of medical panel - proceedings dismissed (I)

**Lee v Australia and New Zealand Banking Group Ltd** (QCA) - guarantees - primary judge erred in accepting bank representative's evidence - appeal allowed in part (B)

**Chapman v Wilson** (QCA) - equity - wills and estates - *income and profits* in life estate bequest did not extend to unrealised capital gains (B)

## Summaries with links (5 minute read)

### **Dial D Pty Ltd as trustee for the Smith Street Unit Trust v Kingston Building (Australia) Pty Ltd** [2013] NSWCA 27

Court of Appeal of New South Wales

Ward & Leeming JJA; Tobias AJA

Security of payments - appellant was principal and respondent was builder under contract for construction of medical centre - principal appealed from finding that progress certificate was void or of no effect - construction of contract - held: Superintendent contractually entitled to issue certificate - certificate valid - primary judge's declaration to contrary set aside - determination of appeal relevant only to assessment of interest and costs to which parties may be entitled - contract provided for final adjustment of all claims in connection with its subject matter following expiry of last defects liability period - nothing determined by primary judge or Court could affect either party's right to payment - appeal allowed in part.

[Dial D Pty Ltd as Trustee for the Smith Street Unit Trust](#) (C)

### **McMahon v Permanent Custodians Ltd** [2013] NSWCA 275

Court of Appeal of New South Wales

Meagher, Barrett & Ward JJA

Farm mortgage - statutory interpretation - applicants sought leave to appeal from dissolution of injunction restraining respondent from disposing of rural properties which were subject of farm mortgages - proper construction of s11(1)(a) *Farm Debt Mediation Act 1994* (NSW) - agreement in principle made at mediation - applicants failed to act as required under agreement and mortgagee



commenced possession proceedings - applicants contended there was ambiguity as to meaning of phrase *the farmer is in default under the farm mortgage* in s11(1)(a) of the Act, alleging agreement was altered at mediation - held: there was no ambiguity of phrase - no reason to expand words of s11(1)(a) to refer to default under both farm mortgage and any arrangement or agreement relating to farm mortgage reached at mediation - Court not persuaded decision subject of appeal attended with sufficient doubt to warrant reconsideration - leave to appeal not granted as appeal was bound to fail - summons dismissed.

[McMahon](#) (B)

**Allianz Australia Insurance Ltd v Anderson [2013] NSWSC 1186**

Supreme Court of New South Wales

Rothman J

Administrative law - motor accidents compensation - insurer sought orders that certificate issued by claims assessor was not binding on insurer - insurer contended notice under s81 *Motor Accidents Compensation Act 1999* (NSW) did not admit *liability* but *breach of duty of care* - insurer submitted *breach of duty of care* admission was an admission under s81(2) of the Act, that it never admitted liability for purposes of s95 of the Act and that assessment of liability by claims assessor was not accepted - interpretation of ss94 & 95 of the Act - whether there are formal requirements for admission of liability - construction of insurer's statements and conduct - held: by issue of s81 notice and subsequent document admitting soft tissue injury, insurer had admitted breach of duty of care and damage, thereby admitting liability - insurer had also admitted liability by acknowledging liability was not in issue - insurer was bound by assessment and required to pay damages specified in certificate to first defendant - no formal requirements for admission of liability.

[Allianz Australia Insurance](#) (I G)

**Cong Xu v Austino Property Development Pty Ltd [2013] NSWSC 1177**

Supreme Court of New South Wales

Darke J

Conveyancing - plaintiff claimed declaration that he validly rescinded contract for sale of land and was entitled to refund of deposit together with interest - plaintiff had rescinded in reliance on special condition which stated completion was conditional on registration of strata plan of subdivision by certain date - strata plan was not registered by specified date - no dispute that rights of rescission arose however defendant contended plaintiff's negotiations with defendant to take early occupation of property amounted to an affirmation of contract and that plaintiff had





thereby made election which precluded him from rescinding - held: plaintiff's conduct not an affirmation of contract which resulted in him losing right of rescission - plaintiff did not act in manner inconsistent with continued existence of right such that he should be taken to have abandoned it - declaration that plaintiff rescinded contract and order for return of deposit.

[Cong Xu](#) (B)

## **A & L Transport Pty Ltd v Fish [2013] VSC 448**

Supreme Court of Victoria

Kaye J

Accident compensation - employee was employed by first defendant as transport operator - employee lodged claim pursuant to *Accident Compensation Act 1985* (Vic) for weekly payments of compensation - claim admitted - employee applied to Victorian Workcover Authority for continuation of payments pursuant to s93CD of the Act whilst in part time employment after second entitlement period - VWA refused application and referred it to medical panel - plaintiffs sought judicial review to quash opinion of medical panel that *worker likely to continue indefinitely to be incapable of undertaking further or additional employment or work because of the injury* - held: plaintiffs did not establish any jurisdictional error or error of law by medical panel - medical panel provided proper and adequate reasons for its opinion - plaintiff's application failed - proceeding dismissed.

[A & L Transport](#) (I)

## **Lee v Australia and New Zealand Banking Group Ltd [2013] QCA 236**

Court of Appeal of Queensland

Fraser JA; Atkinson & McMurdo JJ

Loans and mortgages - guarantee - estoppel - appellant gave guarantees in favour of bank, securing bank guarantee and business overdraft provided by bank to two companies of which appellant was director and half owner - appellant sold shares in companies to other shareholder - appellant and shareholder had meetings with bank representative to procure discharge of guarantees and release of mortgage - appellant contended that by completing final meeting guarantees were discharged and bank was obliged to discharge mortgage - bank contended there was no discharge and that appellant remained liable for companies' debts - trial judge held representative was instructed to put on hold instructions concerning cancellation of finance - effect of prior District Court proceedings brought by appellant against shareholder - *Anshun* estoppel - held: primary judge erred in accepting representative's evidence concerning issue as to whether arrangements were put on hold - appellant's liability should have been limited to bank



guarantee facility - counterclaim for misleading and deceptive conduct of bank representative correctly dismissed - appeal allowed in part.

[Lee](#) (B)

**Chapman v Wilson [2013] QCA 235**

Court of Appeal of Queensland

Holmes & Gotterson JJA; Applegarth J

Equity - wills and estates - trusts and trustees - appeal by beneficiary of life interest from orders concerning construction of words *income and profits* in the will of testatrix - meaning of words was important as the words described and defined that which trustees were to pay to appellant - ground of appeal was that primary judge erred in holding that *income and profits* did not extend to unrealised capital gains - held: words of direction to trustees in clause of will excluded unrealised capital gains or profits - absence from will of any provision requiring valuations of trust property told against inclusion of unrealised capital gains or profits as *profit* - unlikely that settlor intended that monetary equivalent of unrealised capital gain or profit be paid, transferred or handed over to appellant periodically from trust property - pattern of gifts under will did not indicate appellant was to receive unrealised capital gains - appeal dismissed.

[Chapman](#) (B)



## **I Wandered Lonely as a Cloud**

By William Wordsworth

I wandered lonely as a cloud  
That floats on high o'er vales and hills,  
When all at once I saw a crowd,  
A host, of golden daffodils;  
Beside the lake, beneath the trees,  
Fluttering and dancing in the breeze.

Continuous as the stars that shine  
And twinkle on the milky way,  
They stretched in never-ending line  
Along the margin of a bay:  
Ten thousand saw I at a glance,  
Tossing their heads in sprightly dance.

The waves beside them danced; but they  
Out-did the sparkling waves in glee:  
A poet could not but be gay,  
In such a jocund company:  
I gazed—and gazed—but little thought  
What wealth the show to me had brought:

For oft, when on my couch I lie  
In vacant or in pensive mood,  
They flash upon that inward eye  
Which is the bliss of solitude;  
And then my heart with pleasure fills,  
And dances with the daffodils.

[William Wordsworth](#)

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