

Friday 31 May 2013

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Rasmussen v South Western Sydney Local Health District** (NSWSC) - medical negligence - defendant liable for death of plaintiff's child - damages assessed (I)

**Permanent Custodians Ltd v McLanders** (NSWSC) - contract - loan agreement not unjust - lender entitled to possession of land and payment of debt (I, B)

**Simmon v Globe-Tech International Pty Ltd** (NSWSC) - personal injury proceedings in District Court - cross-claim against Taiwanese manufacturer - transfer to Supreme Court to effect service and enable enforcement of any judgment (I)

**Saad v Saad Properties Pty Ltd** (NSWSC) - contract - estoppel - solicitor entitled to occupy defendant's premises for as long as he practised as a solicitor from those premises (B)

**Marijancevic v Ferraro & Anor** (VSCA) - agency - solicitor's disbursement of trust funds expressly authorised - appeal dismissed (I, B)



**Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino** (QSC) - contract - loan facility - breach of funding agreement by lender - nominal damages - enforcement of guarantee by lender (I, B, C)

**Retirement Benefits Fund Board v Elmore** (TASSC) - superannuation - decision of Board to refuse payment of benefits set aside (I, B, G)

## Summaries with links (5 minute read)

### **Rasmussen v South Western Sydney Local Health District [2013] NSWSC 656**

Supreme Court of New South Wales

Adamson J

Negligence - damages - defendant liable for death of plaintiff's child - defendant admitted liability and accepted plaintiff suffered recognisable psychiatric injury - quantum of damages - assessment of heads of damage - provisions of *Civil Liability Act 2002* (NSW) - non-economic loss - loss of past earning capacity - interest on past wage loss - past loss of superannuation - buffer approach to future economic loss - past and future treatment - past domestic assistance - judgment for plaintiff for \$366,903.60.

[Rasmussen](#) (I)

### **Permanent Custodians Ltd v McLanders [2013] NSWSC 627**

Supreme Court of New South Wales

Rothman J

Contract - loans and mortgages - unjust contract - mortgagee sued borrower for possession of land and/or payment of loan - borrower alleged money was never provided and, if it were, terms of loan were unjust - held: claim under *Contracts Review Act 1980* (NSW) failed - no unjustness perpetrated by lender - improper conduct by borrower's agent - lender entitled to possession and payment of debt - cross-claim against lender failed - cross-claim against agent upheld - judgment for lender on statement of claim - judgment for borrower on cross-claim against agent.

[Permanent Custodians](#) (I, B)

**Simmon v Globe-Tech International Pty Ltd [2013] NSWSC 658**

Supreme Court of New South Wales

Harrison J

Transfer of proceedings - plaintiff alleged she was injured using equipment - defendant cross-claimed against manufacturer of equipment located in Taiwan - defendant sought proceedings be removed from District Court to Supreme Court to effect service of cross-claim overseas - defendant argued this constituted one *other sufficient reason* for transfer under 140(3)(b)(ii) *Civil Procedure Act 2005* (NSW) - another reason was that District Court had no jurisdiction to enforce any judgment against manufacturer outside Australia - held: sufficient reasons to transfer proceedings - proceedings transferred.

[Simmon](#) (I)

**Saad v Saad Properties Pty Ltd [2013] NSWSC 648**

Supreme Court of New South Wales

Windeyer AJ

Contract - estoppel - family business owned premises from which plaintiff ran his legal practice - at brother's request plaintiff gave up directorships and shareholdings - plaintiff sought declarations that he had an interest in land being a life interest in the property or a lease or licence without the need to pay rent - claim based in contract and estoppel - held contract claim failed for uncertainty - plaintiff succeeded on estoppel claim - plaintiff acted to his detriment in relying on representations of defendant as to his continued right to occupy office - plaintiff entitled to an irrevocable licence to occupy premises until death or cessation of practice so long as he pays his reasonable share of outgoings - injunction granted permanently restraining defendant from interfering with plaintiff's right of occupation of premises - defendant's cross-claim for possession and mesne profits dismissed.

[Saad](#) (B)

**Marijancevic v Ferraro & Anor [2013] VSCA 124**

Court of Appeal of Victoria

Maxwell P, Tate JA & Garde AJA

Agency - authority - solicitor and client - appeal concerning authority of solicitor to disburse funds from the firm's trust account - funds were proceeds of sale of property of which appellant was registered proprietor - property restrained under *Confiscation Act 1997* (Vic) - funds were held on trust for appellant and disbursed by solicitor in accordance with terms of two written authorities both drafted by appellant's uncle - one authority signed by appellant the other by appellant's



father (uncle's brother) - ostensible authority - express authority - held: primary judge correct to find disbursement of trust funds was expressly authorised - appeal dismissed.

[Marijancevic](#) (I, B)

**Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino**

**[2013] QSC 135**

Supreme Court of Queensland

Applegarth J

Contract - loan agreement - guarantee - proposed development did not proceed due to lack of funds - in first proceeding, developer sued over alleged failure of lender to provide funds - lender contended special conditions not satisfied - in second proceeding, lender sued director and sole shareholder of developer under guarantee for money payable by developer under terms of earlier facility agreement - construction of contract - implied terms - remoteness of damage - held: in first proceeding, breach of contract established but only nominal damages awarded - in second proceeding, judgment for lender.

[Kosho](#) (I, B, C)

**Retirement Benefits Fund Board v Elmore [2013] TASSC 22**

Supreme Court of Tasmania

Blow CJ

Superannuation - judicial review - respondent commenced temporary employment in 1991 - respondent made contributions to superannuation scheme from time his employment became permanent in 1994 - in 2011 respondent applied to Board under *Retirement Benefits Regulations 2005* (Tas) to receive benefits he would have received if he joined scheme in 1992 - Board refused application - respondent required Board to apply to court for declaration - jurisdiction exercised on review is hearing *de novo* on the merits: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 - held: Board's determination set aside - respondent had otherwise than through his own fault, lost right under *Retirement Benefits Fund Act 1982* (Tas) to obtain certificate for purposes of s5 of the Act and to elect to become contributor pursuant to s5(1) - equitable that respondent should have enjoyment of lost right with effect from one month after first anniversary of commencing temporary employment.

[Retirement Benefits Fund Board](#) (I, B, G)



**From 'Bell Birds'**

By Thomas Henry Kendall

By channels of coolness the echoes are calling,  
And down the dim gorges I hear the creek falling;  
It lives in the mountain where moss and the sedges  
Touch with their beauty the banks and the ledges.  
Through brakes of the cedar and sycamore bowers  
Struggles the light that is love to the flowers.  
And, softer than slumber, and sweeter than singing,  
The notes of the bell-birds are running and ringing.

The silver-voiced bell-birds, the darlings of day-time,  
They sing in September their songs of the May-time;  
When shadows wax strong and the thunder-bolts hurtle,  
They hide with their fear in the leaves of the myrtle;  
When rain and the sunbeams shine mingled together,  
They start up like fairies that follow fair weather;  
And straightway the hues of their feathers unfolden  
Are the green and the purple, the blue and the golden

...

[Bell Birds](#)

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