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

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Executive Summary (One Minute Read)

Mastronardo v Remo West Ryde Pty Ltd (NSWSC) - a caveat cannot be lodged to protect a mere contractual or personal right

van Camp v Bellahealth Pty Ltd (NSWSC) - binding death benefit notice executed in favour of de facto shortly before death was valid

Curmi v Blacktown City Council (NSWSC) - allegedly dangerous dog under sentence of death permitted to return home on terms, pending appeal

Re The Pickering Family Trusts (VSC) - Court approved arrangements varying family trusts that conferred benefits on underage and unborn persons

Moira Shire Council v JLT Risk Solutions (VSC) - Court granted leave to discontinue a class action

In the Will of Ardina Wilhelmina Theresia van Doore (QSC) - copy of will admitted to probate where the original will had been lost

Port Adelaide Salvage Pty Ltd & Anor v Barry (a public officer) (SASC) - convictions upheld relating to conducting a waste depot and assaulting an EPA officer

Minister for Primary Industries and Regional Development v Scali (SASC) - a fishing licence holder did not have exceptional circumstances justifying an increase in his quota

Prichard v M 6:8 Legal Pty Ltd (WASCA) - evidence of an offer at mediation and the response to that offer was inadmissible in negligence proceedings against solicitors who had acted in the mediation

Summaries With Link (Five Minute Read)

Mastronardo v Remo West Ryde Pty Ltd [2024] NSWSC 8

Supreme Court of New South Wales

Meek J

Caveats - a registered proprietor sought removal of a caveat - the registered proprietor's son appeared and said he had just been appointed director of the corporate caveator - son granted leave to appear for the company to argue the proceedings should be adjourned to him to obtain legal advice regarding a claim that the registered proprietor held the property on constructive trust for the company - held: the mere fact that a caveator is a creditor of the registered proprietor does not give rise to a caveatable interest - a caveat cannot be lodged to protect a mere contractual or personal right - the alleged payment appeared to be an unsecured loan rather than a payment specifically in respect of the property - the interests of justice favoured refusal of an adjournment - on the material provided to the Court, there was no sufficient interest to support the caveat - adjournment refused and caveat ordered withdrawn under s74A of the *Real Property Act 1900* (NSW).

[View Decision](#)

van Camp v Bellahealth Pty Ltd [2024] NSWSC 7

Supreme Court of New South Wales

Henry J

Superannuation - shortly before his death, a deceased signed a binding death benefit notice in favour of his de facto partner - the trustee claimed the BDBN was invalid and raised concerns about the deceased's capacity and unconscionable conduct by the de facto - the de facto sued - held: the capacity required by law is specific to the particular transaction - what is required is capacity to understand the nature and effect of the transaction when it is explained - a person must be capable of understanding the general purport and broad operation of the transaction, but not necessarily its precise legal consequences - the trustee had not shown incapacity on the balance of probabilities - for unconscionability, the trustee had to prove the deceased was at a special disadvantage vis-à-vis his de facto in the sense that the disadvantage adversely affected his ability to make a judgment about the BDBN; that the de facto had actual or constructive knowledge of the special disadvantage; and that the de facto unconscientiously took advantage of the special disadvantage, with the BDBN being the product of the unconscionable conduct - the deceased had been in a position of special disadvantage due to his ill health, position in an intensive care unit, and the medications he was receiving - however, the Court was not persuaded the de facto actually knew or ought to have known of this special disadvantage - from the perspective of the deceased, the transaction was not improvident in the

usual sense as the BDBN only took effect on his death - the BDBN was valid and the trustee was ordered to pay the benefit to the de facto.

[View Decision](#)

Curmi v Blacktown City Council [2024] NSWSC 10

Supreme Court of New South Wales

Slattery J

Administrative law - Council declared a German Shepherd named Max to be a dangerous dog - Max later allegedly attacked police officers - Max was seized under s58G(1) of the *Companion Animals Act 1998* (NSW), and ordered destroyed under s48 - Supreme Court granted a stay to allow an appeal to the District Court (see Benchmark 10 October 2023) - the owner now sought that Max be returned to her pending determination of the appeal - held: the case on appeal was well arguable - s58G relevantly authorises seizure if a dangerous dog attacks or bites "without provocation" - the dog had attacked police after they had forced entry to the premises to check on the owner's welfare, which was arguably a provocation - the dog had not been in a dangerous dog enclosure, but the incident occurred during the three month grace period the Act allowed to install such an enclosure - owner undertook to keep Max in a compliant dangerous dog enclosure or otherwise leashed and muzzled in accordance with the Act - Max permitted to return home pending determination of the appeal.

[View Decision](#)

Re The Pickering Family Trusts [2024] VSC 5

Supreme Court of Victoria

Lyons JA

Trusts - two brothers established family trusts in mirror terms - both trustees sought Court approval to arrangements on behalf of underage and potential unborn beneficiaries pursuant to s63A of the *Trustee Act 1958* (Vic) - held: s63A empowers the Court to approve an arrangement varying or revoking a trust on behalf of a number of different classes of persons not capable of providing consent, including underage persons and unborn persons - granting approval is a two-stage approach: (1) the Court must be satisfied that the carrying out of the arrangement would be for the benefit of the relevant person; and (2) if so satisfied, the Court may approve the arrangement if its nature is a proper and fair one - the required benefit is not limited to a financial benefit, but may include a benefit of any other kind including social, familial, moral, or educational benefits - where the arrangement or the carrying into effect of the arrangement involves a risk that any purported benefit is theoretical or illusory, it is not a "benefit" within the meaning of s63A - the Court had previously refused to approve arrangements for this reason, and the trustees now propounded revised arrangements - the family trusts here were discretionary, and any beneficiary only had an entitlement to be considered as an object of the relevant trust when distributions were made - the benefit to any underage or potential beneficiary had to be considered in that light - making the underage and potential beneficiaries of each trust beneficiaries of both trusts would increase the asset pool from which income or capital distributions might be made to them - a benefit had been

established - the revised proposed arrangement was, in its nature, a proper and fair one - arrangements approved.

[Re The Pickering Family Trusts](#)

Moira Shire Council v JLT Risk Solutions [2024] VSC 4

Supreme Court of Victoria

Lyons JA

Class actions - two Victorian Councils brought a class action on behalf of 16 other Victorian Councils against a defendant who had procured insurance for the Councils against property risks - the claims were for breach of contract and negligence in an alleged failure to identify and pursue property insurance options on the open market, and for breach of fiduciary duty in allegedly receiving underwriting fees not referable to underwriting services - the parties entered into a settlement deed, and the plaintiff Councils sought leave to discontinue the proceeding pursuant to s 33V of the *Supreme Court Act 1986* (Vic), and an order that any limitation period applicable to the claims continue to run for 30 days from the Court's approval of the discontinuance - held: the legal distinction between a settlement and a discontinuance in the class action context is that, in the case of a discontinuance, the applicant is free to commence a new proceeding against the same respondents if so advised, whereas a settlement agreement will be binding upon all group members who have not opted out of the representative proceeding - the discontinuance of the proceeding with no order as to costs satisfied the required test, whether that be that the Court must be satisfied that the proposed discontinuance was fair and reasonable in the interests of the group members as a whole, or that the Court must be satisfied that it is not unfair, unreasonable, or adverse to the interests of the group members as a whole - the Court did not consider it should make the order regarding the limitation period by consent, as it was not satisfied it had power to make that order based solely on the consent of the plaintiffs and a defendant in a group proceeding - leave to discontinue granted.

[Moira Shire Council](#)

In the Will of Ardina Wilhelmina Theresia van Doore [2024] QSC 8

Supreme Court of Queensland

Sullivan J

Probate - applicants sought that a copy will be admitted to probate, as the original will had been lost - held: the Court had to be satisfied: (1) there actually was a will; (2) the will revoked all previous wills; (3) the presumption that when a will is not produced it has been destroyed had been overcome; (4) there was evidence of the will's terms; and (5) there was evidence of the will's execution - the evidence established that the deceased had made a will in 2015, which was validly witnessed - a clause in a certified copy of the will provided that it revoked all previous testamentary acts - on the balance of probabilities, the original will has been lost by a bank while it was being held in secure storage for the benefit of the deceased - the presumption of destruction was overcome - the certified copy provided evidence of the will's terms and evidenced that the will was executed in accordance with the requirements of s10 of the

Succession Act 1981 (Qld) - copy will admitted to probate.

[In the Will of Ardina Wilhelmina Theresia van Doore](#)

Port Adelaide Salvage Pty Ltd & Anor v Barry (a public officer) [2024] SASC 7

Supreme Court of South Australia

Hughes J

Environmental law - Port Adelaide Salvage Pty Ltd and its director carried on a business demolishing residential buildings and removing and disposing of the waste materials - the director agreed with a landowner to deposit materials on his land - neither the company, the director, nor the landowner held a licence or authorisation to conduct a waste depot - the company and the director were convicted of offences under the *Environment Protection Act 1993* (SA) relating to conducting a waste depot and assaulting an officer of the Environment Protection Authority - they appealed - held: the primary judge had not erred by failing to exclude the out of court statements of the landowner, who had died before trial - the power to exclude this evidence under s34KD of the *Evidence Act 1929* (SA) was discretionary - the appellants had not established that the primary judge had committed *House v King* error in exercising this discretion - the primary judge had not erred in concluding that the conduct of the appellants had amounted to the conduct of a waste depot - the primary judge had not erred in finding that the EPA officer had been assaulted - appeal dismissed.

[Port Adelaide Salvage Pty Ltd & Anor](#)

Minister for Primary Industries and Regional Development v Scali [2024] SASC 4

Supreme Court of South Australia

Kimber AJ

Administrative law - Scali had a Marine Scalefish Fishery licence under the *Fisheries Management Act 2007* (SA), which was subject to a quota - Scali applied for additional units to be added to his quota on the basis of exceptional circumstances - the Minister found there were no exceptional circumstances - the South Australian Civil and Administrative Tribunal found there were exceptional circumstances and set aside the Minister's decision - the Minister appealed - held: the decision of the Tribunal was not a discretionary one, and so the principles in *House v The King* in relation to discretionary decisions did not apply - the Tribunal was in no better position than the Court to decide whether there were exceptional circumstances - "exceptional circumstances" meant something out of the ordinary, special or uncommon with respect to the regulatory scheme and the legislative context in which it sits - Scali's response to market conditions which must have impacted each participant in the fishery to some extent, albeit in different ways, in contrast to the response of others, did not amount to exceptional circumstances when evaluated in the context of the decision to allocate quota to those who had participated - Tribunal's decision set aside and substituted with a finding that Scali did not have exceptional circumstances, and original decision of Minister confirmed.

[Minister for Primary Industries and Regional Development](#)

Prichard v M 6:8 Legal Pty Ltd [2024] WASCA 4



Court of Appeal of Western Australia

Mitchell & Hall JJA, & Solomon J

Settlement of proceedings - a daughter sued her siblings in respect of their late father's estate - she alleged her solicitors had been negligent in advising her about, and formulating a response to, an offer which the siblings had made in a court-ordered mediation of the family dispute - she referred to the fact and content of the siblings' written settlement offer at the mediation conference, and her solicitors' response - the primary judge held this evidence was inadmissible under s71 of the *Supreme Court Act 1935* (WA), which provides that things done, or communications or admissions made, at court-ordered mediation are inadmissible - the daughter sought leave to appeal against this ruling - held: the fact that the primary judge had determined the matter in an "overwhelmingly favourable" way to the solicitors did not establish apprehended bias - the daughter appeared to argue that s71 does not apply where a party to a mediation claims their own solicitor was negligent - the statutory language of s71 and associated provisions presented an insurmountable obstacle to this construction - neither the siblings' offer nor the daughter's response were admissible in the primary proceedings - leave to appeal refused.

[Prichard](#)

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