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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Commissioner of Taxation v Bargwana - High Court of Australia - *Income Tax Assessment Act 1997* (Cth) - administration of charitable trusts - construction & operation of Div 50 of Pt 2-15 - appeal allowed - respondents' application for special leave to cross-appeal dismissed (B)

Commissioner of Taxation v Noza Holdings Pty Ltd - s25-90 *Income Tax Assessment Act 1997* (Cth) - s254V(2) *Corporations Act 2001* (Cth) (B)

Mbuzi v Favell (No 2) - Service of bankruptcy notices - reg 16.01 *Bankruptcy Regulations 1996* (Cth) (B)

Correa & the Spanish Club Ltd (subject to Deed of Company Arrangement) v Whittingham - Experts reports - s56-s58 *Civil Procedure Act 2005* (NSW) - r31.28 *Uniform Civil Procedure Rules 2005* (NSW) (I, B, C, G)

Barescape Pty Ltd & Anor v Bacchus Holdings Pty Ltd & Anor (No 6) - Experts' reports - Rule 31.28 *Uniform Civil Procedure Rules 2005* (NSW) - s69 *Evidence Act 1995* (NSW) (I, B, C, G)



Break Fast Investments Pty Ltd v Perikles Giannopoulos (also known as Perry Giannopoulos) & Anor (No 6) - Restitution - unjust enrichment - costs (B)

Langford v Deva & Reddy & Ors - Constructive trusts - s129(1) *Real Property Act* 1900 (NSW) - *Contracts Review Act* 1980 (NSW) - s55 *Limitation Act* 1969 (NSW) (B)

Rixon v Perpetual Trustees Victoria Ltd - Equity - *Fair Trading Act* 1987 (NSW) - *Trade Practices Act* 1974 (Cth) (B)

Perry & Anor v Powercor Australia Ltd - Group proceeding - settlement approved (I)

Dover v Doyle & Anor - s56(2) *Road Safety Act* 1986 (Vic) order in the nature of certiorari made (I)

McKenzie v Vella's Plant Hire Pty Ltd & Mistranch Pty Ltd & Ors - Personal injuries - ss6 & 7 *Law Reform Act* 1995 (Qld) - principal & independent contractor - duty of care (I)

Fazio v Fazio - Partnerships (B)

Delphin v Martin - Professional negligence claim - contracts - verdict for plaintiff (I)

Millar v ABC Marketing & Sales Pty Ltd - *Workers Rehabilitation & Compensation Act* (NT) - *Work Health Court Rules* - appeal allowed (I)

Summaries with links (5 minute read)

Commissioner of Taxation v Bargwanna [2012] HCA 11

High Court of Australia

French CJ; Gummow, Hayne, Heydon & Crennan JJ

Income Tax Assessment Act 1997 (Cth) - administration of charitable trusts - construction & operation of Div 50 of Pt 2-15, headed "Exempt income" - s85 *Trustee Act* 1925 (NSW) - appeal allowed & respondents' application for special leave to cross-appeal dismissed - appeal to Full



Court of Federal Court dismissed - charitable trust - income tax exemption - misapplication of trust monies - purposes for which it was established.

[Commissioner of Taxation](#) (B)

[Bargwana](#) - decision Full Court of the Federal Court of Australia 8 October 2010 reported at (2010) 191 FCR 184 at 210 - appeal be allowed; matter to be remitted to Administrative Appeals Tribunal

[Commissioner of Taxation](#) - decision 12 June 2009: see Benchmark B & IBC Tuesday 16 June 2009 - *Income Tax Assessment Act 1997* (Cth) - respondents the trustees of a trust fund established for public charitable purposes - entitlement to be endorsed as exempt from income tax under Subdiv 50-B - appeal from decision of Administrative Appeals Tribunal that Fund entitled to be so endorsed - fund not applied for the purposes for which it was established - appeal allowed - Tribunal's decision set aside.

Commissioner of Taxation v Noza Holdings Pty Ltd [2012] FCAFC 43

Full Court of the Federal Court of Australia

Edmonds, Jessup & Robertson JJ

Income Tax Assessment Act 1997 (Cth) - whether dividend declared an allowable deduction under s25-90 in year of declaration - operation of s254V(2) *Corporations Act 2001* (Cth) - appeals brought by Commissioner concerning Noza Holdings - appeal brought by Commissioner concerning ITW AFC Pty Ltd - see par 93 of judgment - extensive consideration of case law from USA, UK & Australia.

[Commissioner of Taxation](#) (B)

[Noza Holdings](#) - decision Federal Court of Australia 4 February 2011: see Benchmark B, C & IBC Friday 11 February 2011 - Taxation - s254V *Corporations Act 2001* (Cth) - dividends - consequences of transactions between Australian subsidiaries of ITW Group (CSA & AFC) & US subsidiaries of ITW Group - customer-based intangibles - application of s177D(b) *Income Tax Assessment Act 1936* (Cth): dominant purpose - counterfactuals - Australian, UK & US case law considered - income, debt deduction, incurred, retained cost base asset.

Mbuzi v Favell (No 2) [2012] FCA 311

Federal Court of Australia

Collier J

Service of bankruptcy notices - appeal against sequestration order made by Federal Magistrate - reg 16.01 *Bankruptcy Regulations 1996* (Cth) - appeal allowed - UK & Australian case law considered.

[Mbuzi](#) (B)



Correa & the Spanish Club Ltd (subject to Deed of Company Arrangement) v Whittingham
[2012] NSWSC 266

Supreme Court of New South Wales

Black J

Experts reports - whether the Court should grant leave to admit further expert report - non-compliance with earlier directions - s56-s58 *Civil Procedure Act* 2005 (NSW) - r31.28 *Uniform Civil Procedure Rules* 2005 (NSW) - whether exceptional circumstances warranting grant of leave - Leave to read expert report for purposes of earlier order of Court & r31.28 *Uniform Civil Procedure Rules* 2005 (NSW) not granted.

[Correa](#) (I, B, C, G)

Barescape Pty Ltd & Anor v Bacchus Holdings Pty Ltd & Anor (No 6) [2012] NSWSC 257

Supreme Court of New South Wales

Black J

Experts' reports - Rule 31.28 *Uniform Civil Procedure Rules* 2005 (NSW) - whether exceptional circumstances exist - certain MYOB (ie: accounting & finance software package) records were business records admissible under s69 *Evidence Act* 1995 (NSW) - tender of MYOB records by defendants/cross-claimant allowed - defendants/cross-claimant granted leave to tender identified parts of three expert's reports reserving specific objections as to admissibility of specific paragraphs of those reports to plaintiff/cross-defendants.

[Barescape](#) (I, B, C, G)

Break Fast Investments Pty Ltd v Perikles Giannopoulos (also known as Perry Giannopoulos) & Anor (No 6) [2012] NSWSC 286

Supreme Court of New South Wales

Black J

Restitution - unjust enrichment - determination of extent of first defendant's retained enrichment after judgment in proceedings - costs - extensive consideration of text & UK & Australian case law.

[Break Fast](#) (B)

[Break Fast Investments](#) - decision 9 December 2011: see Benchmark Tuesday 13 December 2011 - trusts - real property - indefeasibility - restitution - claim in unjust enrichment against first & second defendants - liability of volunteer recipient of funds - whether payments unauthorised - estoppel defence - change of position defence - s42 *Real Property Act* 1900 (NSW)- claim under *Black v sFreedman & Co* not successful, but quantum of such a claim considered - subrogation - claim in knowing receipt failed - claim in knowing assistance failed - s129 *Corporations Act* 2001 (Cth) defence - claim in unjust enrichment established - comprehensive consideration of UK & Australian case law.



[Black](#) - *Black & Black v sFreedman & Co* [1910] HCA 58; (1910) 12 CLR 105 - decision High Court of Australia 28 October 1910

Langford v Deva & Reddy & Ors [2012] NSWSC 289

Supreme Court of New South Wales

Sackar J

Constructive trusts - equitable interest - life estate - property at Chifley - claim for compensation against third defendant pursuant to s129(1) *Real Property Act* 1900 (NSW) did not succeed - *Contracts Review Act* 1980 (NSW) - s55 *Limitation Act* 1969 (NSW) - case against fourth defendant did not succeed - declaration of constructive trust in favour of the plaintiff proposed - extensive consideration of UK & Australian case law including as to unconscionable conduct & undue influence.

[Langford](#) (B)

Rixon v Perpetual Trustees Victoria Ltd [2012] NSWSC 106

Supreme Court of New South Wales

Sackar J

Equity - judgment on liability - plaintiff contending conduct of defendant in response to plaintiff's attempts to discharge mortgage was unconscionable pursuant to general law, under *Fair Trading Act* 1987 (NSW) & *Trade Practices Act* 1974 (Cth) - at par 126 of judgment: error committed on part of defendant by reason of miscalculation of amount allegedly owing under mortgage, but bona fide belief that the figure was correct - claim dismissed - Australian case law considered.

[Rixon](#) (B)

Perry & Anor v Powercor Australia Ltd [2012] VSC 113

Supreme Court of Victoria

Beach J

Group proceeding - application for approval of settlement of group proceeding - whether Court should approve settlement of group proceeding - Black Saturday Coleraine bushfire - settlement approved: it is both fair & reasonable as between the parties & as between plaintiffs & group members.

[Perry](#) (I)

**Dover v Doyle & Anor [2012] VSC 117**

Supreme Court of Victoria

Bell J

S56(2) *Road Safety Act* 1986 (Vic) - refusal to allow doctor to take blood sample - appellant contending offence only applied to conscious & voluntary refusals - application for judicial review granted - see par 58 of judgment - order in the nature of certiorari made quashing primary judge's order - order remitting proceeding to primary judge.

[Dover](#) (I)**McKenzie v Vella's Plant Hire Pty Ltd (1st def.) & Mistranch Pty Ltd (2nd def.) & Ors [2012] QSC 77**

Supreme Court of Queensland

McMeekin J

Personal injuries - ss6 & 7 *Law Reform Act* 1995 (Qld) - principal & independent contractor - duty of care - injury to plaintiff operator of a D7G dozer who was employed by first defendant - proceedings between worker & plaintiff were settled - first defendant contending that those parties who engaged it to do the work on which plaintiff was employed when injured & their principal should also bear responsibility for the damages - in addition to primary question of who should bear responsibility for damages suffered, defendants contending that settlement reached with injured worker was not reasonable - defendants not liable to make any contribution to the damage suffered by plaintiff - judgment for second defendant & first & second third parties against first defendant - very detailed analysis of Australian case law.

[Vella's Plant Hire](#) (I)**Fazio v Fazio [2012] WASCA 72**

Court of Appeal of Western Australia

Pullin, Newnes & Murphy JJA

Partnership - appeal against judgment dismissing appellant's claim for declaration that appellant was a partner in limestone quarrying & stone masonry business - drawing of inferences: appellate review - dissolution of partnership contracts - equitable estoppel - comprehensive consideration of UK & Australian case law.

[Fazio](#) (B)

[Fazio](#) - decision Supreme Court of WA 1 October 2010 - trusts - partnerships - abandonment - abrogation - repudiation



Delphin v Martin [2012] TASSC 13

Supreme Court of Tasmania

Blow J

Professional negligence claim - contracts - duty of care - dental treatment - facial nerve damage - failure to warn patient of risks associated with treatment embarked upon - assessment of damages - social security benefits - verdict for plaintiff in sum of \$677,037 - detailed analysis of Australian case law.

[Delphin \(I\)](#)

Millar v ABC Marketing & Sales Pty Ltd [2012] NTSC 21

Supreme Court of the Northern Territory

Mildren J

Workers Rehabilitation & Compensation Act (NT) - Work Health Court Rules - Hopkins Agreement (Hopkins v Collins/Angus & Robertson Publishers Pty Ltd: decision Northern Territory Supreme Court, Angel J 21 May 1997) - onus of proof - comprehensive & detailed review of UK & Australian case law - appeal allowed.

[Millar \(I\)](#)

[Millar](#)

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