

Friday 2 November 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Deputy Commissioner of Taxation v Starpicket Pty Ltd** - corporations - winding-up in insolvency - irregularity of service of statutory demand (B)

**Mather v Mather (2)** - indemnity costs - rejection of offer of compromise - circumstances warranting court's departure from normal rule (I, B, C, G)

**ANZ Banking Group Ltd v Tiricovski** - contract - loan agreements - whether director's personal guarantee extended to company's obligations under guarantee - indoor management rule (B)

**Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd [2012] NSWSC 1318** - contract - corporations - entitlements under share-sale agreement - whether change in control of company (B)



**Perpetual Trustees Victoria Ltd v Malouf** - insurance - possession proceedings - application to join insurer as defendant to cross-claim against former solicitor (I, B)

**Milich v The Council of the City of Canterbury (No. 3)** - costs - offer of compromise - whether plaintiff obtained judgment not less favourable than offer (I, B, C, G)

**VPlus Holdings Pty Ltd v Bank of Western Australia Ltd** - corporations - pleadings - derivative actions - disclosure of reasonable cause of action - reflective loss rule (I, B)

## Summaries with links (5 minute read)

### **Deputy Commissioner of Taxation v Starpicket Pty Ltd [2012] FCA 1196**

Federal Court of Australia

Greenwood J

Corporations - winding-up in insolvency - service - application for order under r39.05 *Federal Court Rules* 2011 (Cth) setting aside order that applicant be wound up in insolvency under provisions of the *Corporations Act* 2001 (Cth) - alternatively applicant sought order under s482 of the Act that winding-up be terminated immediately - whether: irregularity of service of statutory demand, originating proceedings and supporting material - methods of service: s109X of the Act - whether letters failed to correctly recite or transparently reveal the full correct details of the registered office - presumptions arising under ss160 & 163 *Evidence Act* 1995 (Cth) (**Evidence Act**) and s29 *Acts Interpretation Act* 1901 (Cth) - applicant's onus to establish non-service - no distinction between delivery of an article to a *place*, and its receipt *at that place*: *Scope Data Systems Pty Ltd v Goman as Representative of the Partnership BDO Nelson Parkhill* (2007) NSWSC 278 - whether: on balance of probabilities letters sent were not likely to have been delivered to the relevant place; whether evidence to *raise doubt* about presumption in Evidence Act; order to be set aside subject to question whether order was sustainable on footing that applicant was insolvent.

[Deputy Commissioner of Taxation](#) (B)

**Mather v Mather (2) [2012] NSWSC 1264**

Supreme Court of New South Wales

Macready AsJ

Costs - indemnity costs - claim by adopted son for whom deceased made no provision - defendants served offer of compromise under Pt20 Div4 *Uniform Civil Procedure Rules* 2005 (NSW) (**Rules**) - offer was not accepted - defendants sought order for indemnity costs in reliance on r42.15 of the Rules - *whether*: court should make order otherwise than in accordance with rule relied on by defendant; plaintiffs had established circumstances which as a matter of justice warranted departure from what r42.15 contemplated as usual result of refusal of offer; plaintiff established existence of *exceptional circumstances*: *South Eastern Sydney Area Health Service v King* (2006) NSWCA 2, *Hillier v Sheather* (1995) 36 NSWLR 414; court should consider matters referred to in *Sherborne Estate (No.2): Vanvalen v Neaves* (2005) 65 NSWLR 268.

[Mather](#) (I, B, C, G)**ANZ Banking Group Ltd v Tiricovski [2012] NSWSC 1304**

Supreme Court of New South Wales

Adams J

Contract - action in respect of loan agreements and cross-guarantees entered into with plaintiff by defendants - *whether*: guarantees executed in respect of loans were operative; guarantee was binding on company by virtue of *indoor management rule*: ss127, 128 & 129 *Corporations Act* 2001 (Cth); if guarantee binding, director's personal guarantee extended to obligation which arose because company was estopped from denying it was bound; contract of guarantee signed by director in respect of company's obligations was entered into for business purpose: s6 *Contracts Review Act* 1980 (NSW) (**Act**); director able to invoke provisions of the Act; unconscionable for plaintiff to enforce director's personal guarantee of company's obligations on basis that plaintiff was on notice that guarantee required verification of propriety of execution: *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; plaintiff permitted to enforce director's personal guarantee of company's obligations under guarantee.

[ANZ Banking Group](#) (B)



**Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd [2012] NSWSC 1318**

Supreme Court of New South Wales

Stevenson J

Contract - corporations - sale agreement (**agreement**) - plaintiffs sought entitlements to *Accelerated Deferred Payment* in lieu of *Deferred Payment* and to exercise put and call options under agreement on basis there had been a *change in control* of defendant company by virtue of merger of company - whether a *change in control* for the purposes of agreement occurred in company as a result of merger effected by scheme of arrangement under s411 *Corporations Act 2001 (Cth)* (**Act**) - effect of merger - steps in merger - result of merger - construction of agreement - principles concerning proper construction: *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2012) NSWCA 184 - meaning of *entitlement* in definition of *change in control* (**definition**) - meaning of *associates* in definition: ss12(2) & 15(1) of the Act - *whether: relevant agreement* for the purpose of controlling or influencing the composition of company's board or the conduct of its affairs: ss12(2)(b), 9 & 411(1) of the Act - *scheme's purpose*: s12(2)(b) of the Act - *whether parties acting in concert*: ss12(2)(c) & 15(1)(a) of the Act - *whether other association*: s15(1)(c) of the Act.

[Perpetual Custodians](#) (B)

**Perpetual Trustees Victoria Ltd v Malouf [2012] NSWSC 1119**

Supreme Court of New South Wales

Davies J

Insurance - possession proceedings - application by second defendant to join insurer as defendant to cross-claim brought against former solicitor pursuant to s6(4) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - when event giving rise to claim for damages occurred: s6 of the Act - when recoupment became impossible: *Hawkins v Clayton* (1988) 164 CLR 539, *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 - meaning of *the event* in s6 of the Act: *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 - examination of insurance policy to determine what was insured by it and cause of action alleged against former solicitor - *whether*: policy responded to the claim; policy in existence at time of event giving rise to claim for damages.

[Perpetual Trustees Victoria](#) (I, B)



## Milich v The Council of the City of Canterbury (No. 3) [2012] NSWSC 1280

Supreme Court of New South Wales

Davies J

Costs - offer of compromise - first defendant served offer of compromise on plaintiff (**offer**) - plaintiff did not accept offer - *whether*: plaintiff obtained an order or judgment on claim not less favourable to plaintiff than terms of offer; offer complied with *Uniform Civil Procedure Rules 2005* (NSW) (**Rules**) by reason of reference to *defendant to pay plaintiff's costs*; r42.15 of the Rules denied plaintiff costs by reason of fact that proceedings were in Supreme court: r42.34 of the Rules; net position appropriate consideration for purposes of r42.15(1) of the Rules - relevance of inclusion of word *favourable* in r42.15 - whether appropriate to consider workers compensation payback.

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

## VPlus Holdings Pty Ltd v Bank of Western Australia Ltd [2012] NSWSC 1327

Supreme Court of New South Wales

Stevenson J

Corporations - pleadings - derivative actions - defendants sought order that proceedings be dismissed pursuant to r13.4(1)(b) *Uniform Civil Procedure Rules 2005* (NSW) (**Rules**) or for statement of claim to be struck out pursuant to rr14.28(1)(a) or (b) of the Rules - *whether*: statement of claim disclosed reasonable cause of action - nature of plaintiffs' claims: ss423, 536, 447E & 233 of the Act, negligence and conspiracy - test for disclosure of reasonable cause of action: *General Steel Industries Inc v Commissions for Railways (NSW)* (1964) HCA 69 - whether claims for loss reasonably arguable - *reflective loss rule*: *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) (1982) 1 Ch 204, *Johnson v Gore Wood & Co* (2002) 2 AC 1 - *proper plaintiff rule* in *Foss v Harbottle* (1843) 2 Hare 461 (**rule**): Austin & Black's, *Annotations to the Corporations Act*, vol 1 at (2F.236) - abolishment of rule and establishment of statutory derivative action: s236(3) *Corporations Act 2001* (Cth) - claims for declaratory relief, inquiries, in respect of guarantees and mortgages, trespass and pursuant to *Contracts Review Act 1980* (NSW) - plaintiff's application to join, as plaintiff, members of company.

[VPlus Holdings](#) (I, B)



## **A Slumber did my Spirit Seal**

By William Wordsworth

A slumber did my spirit seal;  
I had no human fears:  
She seemed a thing that could not feel  
The touch of earthly years.

No motion has she now, no force;  
She neither hears nor sees;  
Rolled round in earth's diurnal course,  
With rocks, and stones, and trees.

<http://www.poetryfoundation.org/bio/william-wordsworth>

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