



Monday 3 December 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Nicholls & Ors v Michael Wilson & Partners Ltd** - equitable compensation - fiduciary duties of employees and consultants (I, B)

**Payne v Rowe & Anor (No 2)** - costs - respective interests in property - whether each party should bear own costs (B)

**HP Mercantile Pty Ltd v Dierickx & Ors (No 2)** - costs - indemnity costs - offers of compromise - issue on which party succeeded not raised at time of offers - delay in amendment of defence (I, B, C, G)

**IWD No 2 Pty Ltd v Level Orange Pty Ltd** - security of payments legislation - construction contract - jurisdictional error (C)

**Gani v Maiolo** - leases - costs - appeal from decision of the Administrative Decisions Tribunal New South Wales and decision of Appeal Panel (B, G)



**McGarry v 14 Hiscock Street Pty Ltd & Ors** - funds in court - balance of proceeds of sale of land - priority of interests of mortgagee and chargee (B)

**SMEC Australia Pty Ltd & Anor v McConnell Dowell Constructors (Aust) Pty Ltd & Ors (No 3)** - contract - trade practices - misleading or deceptive conduct - complex proceeding - application to strike out second further amended statement of claim - case management directions (I, B, C, G)

**Savage v Dangan Pty Ltd** - work injury damages - negligence - statutory duty - duty of care - implied term of employment contract (I)

**MTP v PAH (No 2)** - costs - offer of settlement - indemnity costs - interest on judgment sum - security (I, B, C, G)

## Summaries with links (5 minute read)

### **Nicholls & Ors v Michael Wilson & Partners Ltd [2012] NSWCA 383**

Court of Appeal of New South Wales

Meagher & Barrett JJA; Sackville AJA

Equitable compensation - evidence - fiduciary duties of employees and consultants - respondent carried on legal practice and business consultancy in Kazakhstan - primary judge awarded equitable compensation to respondent for breaches of fiduciary duty by appellants which occurred mainly in Kazakhstan - matter remitted by High Court to Court of Appeal for further consideration of grounds in amended notice of appeal filed by appellants and cross-appeal filed by respondent - assessment of respondent's entitlement to equitable compensation - *whether*: award could not stand because there was no sufficient causal connection between claimed loss and appellants' breaches of fiduciary duty; erroneous admission of report into evidence: s79 Evidence Act 1995 (NSW), *Dasreef Pty Ltd v Hawchar* (2011) HCA 21; any basis for award for lost opportunity and/or failure to give adequate reasons for such award; appellants had asked wrong question; cross-appeal identified proper approach to limits of equitable compensation; primary judge attributed too little value to respondent's lost opportunity - principles to be applied to assessment of equitable compensation: *McKenzie v McDonald* (1927) VLR 134, *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262.

[Nicholls](#) (I, B)



## Payne v Rowe & Anor (No 2) [2012] NSWSC 1406

Supreme Court of New South Wales

Ball J

Costs - proceedings concerning parties' respective interests in property - general principle in relation to costs: r42.1 *Uniform Civil Procedure Rules 2005 (NSW)* - *the event: Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3) (1998) 30 ACSR 20* - *whether: order should be made under s66G Conveyancing Act 1919 (NSW)*; costs should be borne out of proceeds of sale of property: *Kardos v Sarbutt (No 2) (2006) NSWCA 206*; plaintiffs nor defendants succeeded in their respective claims; appropriate for each party to bear own costs; plaintiff gave deliberately false evidence.

[Payne \(B\)](#)

## HP Mercantile Pty Ltd v Dierickx & Ors (No 2) [2012] NSWSC 1430

Supreme Court of New South Wales

White J

Costs - *Calderbank* offers - offers of compromise - first and second defendants sought order that plaintiffs pay costs of proceeding on indemnity basis - *prima facie* costs follow event: r42.1 *Uniform Civil Procedure Rules 2005 (NSW)* - *relevant event: Reid, Hewitt & Company v Joseph (1918) AC 717* - *whether: defendants should have some costs assessed on indemnity basis; each party should pay own costs; plaintiff's failure to accept Calderbank offers was unreasonable having regard to issues that were then raised; issue on which defendants succeeded had not been raised at time plaintiff served offer of compromise; defences were unreasonably raised by defendants - effect of defendants having failed on majority of issues which were severable and distinct from issue on which they succeeded: Griffith v Australian Broadcasting Corporation (No 2) (2011) NSWCA 145* - effect of delay in raising issue on which defendants ultimately relied: *Beoco Ltd v Alpha Laval Co Ltd (1995) QB 137* - whether fair to deprive successful party of costs because it failed on particular severable or dominant issues: *Cretazzo v Lombardi (1975) 13 SASR 4* - exercise of costs discretion - whether a *middle course* was called for.

[HP Mercantile \(I, B, C, G\)](#)



## IWD No 2 Pty Ltd v Level Orange Pty Ltd [2012] NSWSC 1439

Supreme Court of New South Wales

Stevenson J

Security of payments legislation - construction contract - proceedings relating to dispute under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) - plaintiff sought declaration that determination of adjudicator appointed under Div2 of the Act was made without jurisdiction, contained jurisdictional errors, and was void and of no effect - *whether*: there was a construction contract between parties within the meaning of s4 of the Act; if there was a construction contract, it contained provisions by which plaintiff undertook to guarantee payment of money owing to defendant or to provide indemnity to defendant within the meaning of s7(3)(c) of the Act, so that the Act did not apply; adjudicator fell into jurisdictional error.

[IWD No 2](#) (C)

## Gani v Maiolo [2012] NSWSC 1417

Supreme Court of New South Wales

Hall J

Leases - costs - dispute between plaintiff lessee and defendant lessors - plaintiff sought to appeal decision of the Administrative Decisions Tribunal New South Wales (**Tribunal**) and decision of Appeal Panel under the *Administrative Decisions Tribunal Act 1997* (NSW) - *whether*: plaintiff established error in Tribunal or Appeal Panel involving question of law; Tribunal or Appeal Panel failed to properly consider issue of commencement date of lease; Tribunal misconstrued terms of lease; evidence established proper basis, having regard to the terms of the lease, for a contractual right of lessors to terminate the lease; errors of law with respect to findings on return of chattels, bond forfeiture or cost of awning or costs of appeal.

[Gani](#) (B, G)





## McGarry v 14 Hiscock Street Pty Ltd & Ors [2012] VSC 573

Supreme Court of Victoria

Lansdowne AsJ

Funds in court - loan agreement - sale of land - priority of interests - application by plaintiff for payment out of funds in court balance of proceeds of sale of land by second mortgagee (**funds**) - second defendant claimed whole of funds on basis that its interest in the land predated the plaintiff's - whether associate judge had power to hear application: r77.01(2)(b) *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* - *whether*: plaintiff had proved an equitable interest as mortgagee arising on execution of loan agreement between herself and first defendant which predated interest of second defendant as chargee; in making advance to first defendant plaintiff was acting as lender or purchaser; if plaintiff a lender, the loan agreement created a charge, mortgage, or only contingent interest as asserted by second defendant - construction of loan agreement.

[McGarry](#) (B)

## SMEC Australia Pty Ltd & Anor v McConnell Dowell Constructors (Aust) Pty Ltd & Ors (No 3) [2012] VSC 557

Supreme Court of Victoria

Vickery J

Trade practices - misleading or deceptive conduct - contract - complex proceeding - application by first and second defendants to strike out second further amended statement of claim pursuant to r23.02 *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* (**Rules**) - analysis of claims contained in second further amended statement of claim - *whether*: *trade practices* claims made under ss82 & 87 *Trade Practices Act 1974 (Cth)* (**Act**) were deficient and should be struck out under rr23.02(a) & (c) of the Rules; claim under s51A of the Act must also fail; claims for *extensions of time, disruption/loss of productivity, and services and expenses* were founded in contract and sufficiently disclosed a cause of action; *delay damages* claim was sufficient - form and complexity of second amended statement of claim - appropriate case management directions.

[SMEC Australia](#) (I, B, C, G)



## **Savage v Dangan Pty Ltd [2012] QSC 375**

Supreme Court of Queensland

Henry J

Work injury damages - negligence - statutory duty - contract - plaintiff claimed damages for breach of statutory duty and common law in negligence and contract - *whether*: civil liability imposed by *Workplace Health and Safety Act 1995 (Qld) (Act)*: s28 of the Act; wording of s28(1) as it was at time of incident did not give rise to civil liability: *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* (2001) 1 Qd R 518; breach of statutory duty; defendant made out a defence under s27 of the Act; breach of employer's duty to take reasonable care for safety of its employees at work (co-extensive with implied term of employment contract): *Kondis v State Transport Authority* (1984) 154 CLR 672, *Wyong Shire Council v Shirt* (1980) 146 CLR 40 - fundamental difference in assessing the reasonableness of defendant employer's response at common law compared with mandatory requirements of the Act.

[Savage](#) (I)

## **MTP v PAH (No 2) [2012] QSC 368**

Supreme Court of Queensland

Atkinson J

Costs - offer of settlement - proceedings under Pt19 *Property Law Act 1974 (Qld)* - application for order that respondent pay applicant's costs on indemnity basis pursuant to 341(4)(f) of the Act - applicant also sought interest on amount of judgment sum and orders to secure payment of judgment sum and any assessment of costs of these proceedings - *whether*: reason to vary order for costs; offer was an offer of settlement under Pt5 Ch9 *Uniform Civil Procedure Rules 1999 (Qld)*; appropriate to make order for interest under s58 *Civil Proceedings Act 2011 (Qld)*; appropriate to make orders in relation to security: s333(1)(e) of the Act.

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

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