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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)

Adicho v Dankeith Homes Pty Ltd - contract - intention to enter into legal relations - oral agreement (I, B, C)

Hudson v State of New South Wales - injury to child at school - application for leave to appeal on findings of fact (I, G)

Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd - defamation - non-trading corporation (I)

Reid v Wright - personal injury - cross vesting (I, B, C, G)

Bluescope Steel Ltd v Allianz Australia Insurance Ltd - discontinuance - parallel proceedings (I, B, C, G)

OAMPS Gault Armstrong Pty Ltd & Anor v Andrew Glover & Anor - employment contracts - application for interlocutory injunction restraining defendants from undertaking employment with competitor (I, B)

Fitness First Australia Pty Ltd v McNicol - contract - application for permanent injunction for performance of deed of settlement (I, B)

Hughes as Administrator of Westgem Investments Pty Ltd (Receivers and Managers Appointed) v The Receivers and Managers of Westgem Investments Pty Ltd (Receivers and Managers Appointed) (Administrator Appointed) - corporations - external administration - application for appointment of special purpose administrator (B)

Summaries with links (5 minute read)

Adicho v Dankeith Homes Pty Ltd [2012] NSWCA 316

Court of Appeal of New South Wales

Meagher JA; Sackville & Tobias AJJA

Contract - claim for damages for breach of contracts for sale of units - respondent also sued appellant's solicitor for negligence in failure to ensure deposits paid on exchange of contracts - appellant sought orders for judgment in favour of respondent to be set aside and for verdict and judgment in favour of appellant - *whether*: by exchange of contracts appellant and respondent were to be taken to have intended to enter into legal relations: *Allen v Carbone* [1975] HCA 14; oral agreement as to deposits could be enforced: *Maybury v Atlantic Union Oil Co Ltd* [1953] HCA 89; collateral agreement unenforceable because inconsistent with contract for sale; any parol variation of contract required to be in writing is ineffective to enforce varied contract or prevent enforcement of original contract: s54 A(1) *Conveyancing Act* 1919 (NSW) *Phillips v Ellinson Brothers Pty Ltd* [1941] HCA 35.

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

**Hudson v State of New South Wales [2012] NSWCA 319**

Court of Appeal of New South Wales

Meagher & Barrett JJA

Personal injury - child plaintiff suffered broken foot in game of hide and seek with friends during lunch break at school - appeal from judgment dismissing applicant's claim for damages in negligence - appeal against findings of fact - *whether*: to grant leave to appeal: *Carolann v AMF Bowling Pty Ltd* [1995] NSWCA 69; failure to find that applicant's injury resulted from respondent's negligence; award for damages for non-economic loss was *manifestly unreasonable*; award of non-economic loss involved error; applicant has shown that it was reasonably arguable that primary judge erred in conclusion as to causation; leave to appeal should be refused in interests of justice.

[Hudson](#) (I, G)**Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd [2012] NSWSC 1136**

Supreme Court of New South Wales

McCallum J

Defamation - non-trading corporation - publication of two articles in print and internet version of newspaper and in online publication - defendants sought summary dismissal of first plaintiff's claim on grounds that articles did not identify first plaintiff as subject of defamatory meaning, and that first plaintiff could not maintain action because it was a non-trading corporation with no corporate reputation capable of being defamed - defamatory claim not actionable unless published *of and concerning* plaintiff - where plaintiff not expressly named, matter must have been published to at least one person who had knowledge of extrinsic facts that would provide necessary identification: *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 - necessity for provision of particulars: r15.19(d) *Uniform Civil Procedure Rules* 2005 (NSW) - *whether*: reference to *Palace Films* adequately named first plaintiff; particulars capable of identifying first plaintiff; first plaintiff, as non-trading company, can sustain action for damages; *Palace Films Pty Ltd* nothing more than a shelf company with no business and no reputation.

[Palace Films](#) (I)

**Reid v Wright [2012] NSWSC 1149**

Supreme Court of New South Wales

McCallum J

Cross vesting - applications by defendants under s5(2) *Jurisdiction of Courts (Cross Vesting) Act 1987* (NSW) for proceedings commenced in Supreme Court of NSW to be transferred to Queensland in accordance with r44.5(b) *Uniform Civil Procedure Rules 2005* (NSW) - plaintiff suffered brain injury from complications during his birth - plaintiff claimed damages for negligence from medical practitioner and hospital - plaintiff's mother claimed damages for physical and psychological injuries suffered - principles applicable to applications: *British American Tobacco Australia Services Limited v Laurie* [2009] NSWSC 83 - determination whether *in the interests of justice* for proceedings to be transferred to Supreme Court of another State requires identification of the *more appropriate* forum: *James Hardie & Company Pty Limited v Barry* [2000] NSWCA 353 - inquiry alternatively characterised as identification of the *natural forum*: *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 230 - place of the alleged tort - residence of the parties - convenience to witnesses - procedural considerations - prejudice.

[Reid](#) (I, B, C, G)**Bluescope Steel Ltd v Allianz Australia Insurance Ltd [2012] NSWSC 1178**

Supreme Court of New South Wales

Stevenson J

Discontinuance - parallel proceedings in Supreme Court of NSW and Dust Diseases Tribunal - plaintiff sought leave to discontinue Supreme Court proceedings pursuant to r12.1 *Uniform Civil Procedure Rules 2005* (NSW) and an order for costs - defendant opposed discontinuance being granted and applied for extension of time to file cross-claim in proceedings - usual approach of court to grant leave to a plaintiff who wishes to discontinue proceedings - principles relevant to whether court will grant leave to discontinue: *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876 - practical consequence of granting or refusing leave to discontinue - whether allowing leave to discontinue would deprive defendant of an advantage - whether refusing leave may result in both Dust Diseases Tribunal and Supreme Court deciding the same issue between the same parties.

[Bluescope Steel](#) (I, B, C, G)

**OAMPS Gault Armstrong Pty Ltd & Anor v Andrew Glover & Anor [2012] NSWSC 1175**

Supreme Court of New South Wales

Nicholas J

Employment contracts - plaintiff employers sought interlocutory injunctions restraining former employee defendants from undertaking employment with competitor in breach of restraint provisions in employment contracts - whether balance of convenience favoured grant or refusal of relief sought - principles relevant to finding balance of convenience: *Kolback Securities v Epoch Mining NL* (1987) 8 NSWLR 533 - where negative covenant sought to be enforced, correct approach to grant injunction unless good reason to the contrary: *Cerilian Pty Ltd v Graham Fraser* [2008] NSWSC 1016 - employer's protectable interest in staff connection: *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717 - analysis of concept of goodwill: *Commissioner of Taxation v Murry* [1998] HCA 42 - *whether*: plaintiffs demonstrated reasonable prospects of success at final hearing; in interests of justice to make restraining orders.

[OAMPS Gault Armstrong](#) (I, B)

Fitness First Australia Pty Ltd v McNicol [2012] QSC 296

Supreme Court of Queensland

PD McMurdo J

Contract - dispute over termination of respondent's membership of health club operated by applicant - parties agreed to settle by deed of settlement and letter of acknowledgement (**letter**) - applicant sought permanent injunction to restrain breach of deed by respondent - deed of settlement prohibited respondent from discussing applicant, staff, members or premises - deed made no reference to letter - *whether*: publication of letter precluded by deed of settlement; agreement between parties that letter would be distributed to applicant's customers and staff; oral term of agreement required applicant to publish letter; letter formed part of contract; breach of contract by non-publication of letter; applicant made collateral promise to publish letter which was enforceable as promissory estoppel - respondent's conduct - terms of injunction.

[Fitness First Australia](#) (I, B)



Hughes as Administrator of Westgem Investments Pty Ltd (Receivers and Managers Appointed) v The Receivers and Managers of Westgem Investments Pty Ltd (Receivers and Managers Appointed) (Administrator Appointed) [No 3] [2012] WASC 360

Supreme Court of Western Australia

Corboy J

Corporations - external administration - plaintiff administrator sought directions under s447D Corporations Act 2001 (Cth) (Act) or alternatively an order under s447A to vary operation of pt5.3A of the Act so a special purpose administrator might be appointed to defendant company - court's power to appoint special purpose administrator: s447A of the Act, *Honest Remark Pty Ltd v Allstate Explorations NL* [2006] NSWSC 735 - appropriateness of order where conflict of interest: *Re Obie Pty Ltd (in liq) (No 4)* (1984) 8 ACLR 967 - not necessary to establish administrator had actual conflict but *realistic possibility* of conflict: *Re Club Superstores Australia Pty Ltd (in liq)* (1993) 10 ACSR 730 - impartiality and independence of administrator must be manifest: *Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24.

[Hughes](#) (B)

My Star

By [Robert Browning](#) 1812–1889

All that I know
Of a certain star,
Is, it can throw
(Like the angled spar)
Now a dart of red,
Now a dart of blue,
Till my friends have said
They would fain see, too,

My star that dartles the red and the blue!



Then it stops like a bird; like a flower, hangs furled:
They must solace themselves with the Saturn above it.
What matter to me if their star is a world?
Mine has opened its soul to me; therefore I love it.

Robert Browning - [Wikipedia, the free encyclopedia](#)

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