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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)

Andrews v Australia and New Zealand Banking Group Ltd - banker and customer - bank fees might be void as penalties, even though they did not arise from breach of contract (I, B, C, G)

Commissioner of Taxation v Park - contract for sale - whether tax debt has priority over mortgagee's right to repayment (B)

Gippsreal Ltd v Hausfeld Johnson Pty Ltd - applications to amend defence and join respondents - misleading and deceptive conduct - concurrent wrongdoers - proportionate liability (I, B)

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union - industrial law - contempt - appropriate penalties (I, C)

Ion v Danutz - applications for extension of time and for leave to appeal from summary judgment (I, B, C, G)



Echin v Southern Tablelands Gliding Club Incorporated and Civil Aviation Safety Authority - application for dismissal of proceedings or for parts of pleadings to be struck out (I, G)

Barescape Pty Ltd as trustee for The V's Family Trust & Anor v Bacchus Holdings Pty Ltd as trustee for The Bacchus Holdings Trust & Anor (No 9) - termination of partnership agreement - valuation of interest - whether breach of fiduciary duties - assessment of damages (I, B)

Beerens v Bluescope Distribution Pty Ltd - guarantee and indemnity (I, B)

Great Southern Managers Australia Ltd (recs & mgrs apptd) (in liq) v Clarke & Ors - appeal from order declaring loss of joint privilege (I, B, C, G)

Geary v REJV Services Pty Ltd & Ors - evidence - functions of appellate courts (I)

Summaries with links (5 minute read)

Andrews v Australia and New Zealand Banking Group Ltd [2012] HCA 30

High Court of Australia

French CJ, Gummow, Crennan, Kiefel & Bell JJ

Banker and customer - representative proceedings in Federal Court - relief sought included declarations that certain bank fees were void as penalties - trial judge bound by Court of Appeal authority that rule against penalties only applies to payments arising from breach of contract - trial judge answered preliminary separate questions - most fees did not arise from customer's breach of contract - application for leave to appeal removed to High Court - held: rule against penalties is a rule of equity - rule has a wider application than to payments arising from breach of contract - trial judge's answer to separate questions replaced with a statement that the fees might be penalties, even though they did not arise from breach of contract - matter remitted for further disposal of the appeal by the Full Court, and further disposal of the proceedings by the trial judge.

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



Commissioner of Taxation v Park [2012] FCAFC 122

Full Court of the Federal Court of Australia

Siopis, Jessup & Katzmann JJ

Taxation - taxpayer entered into contract for sale of mortgaged land - applicant served garnishee notice on purchasers under s260-5 Sch 1 *Taxation Administration Act* 1953 (Cth) requiring payment of part of purchase price in discharge of respondent's tax debt - whether tax debt has priority over mortgagee's right to repayment - whether proceeds of sale due to respondent pursuant to contract for sale or money to which garnishee notice could attach - whether mortgagee held equitable charge over proceeds of sale: *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223.

[Commissioner of Taxation](#) (B)

Gippsreal Ltd v Hausfeld Johnson Pty Ltd [2012] FCA 956

Federal Court of Australia

Murphy J

Valuers - negligence - proportionate liability - misleading and deceptive conduct - claims against real estate valuers for misleading and deceptive conduct in relation to valuation reports - applications to amend defence to plead persons as concurrent wrongdoers under proportionate liability regimes and to join those persons as respondents - amended defence filed without seeking leave - essence of proportionate liability regimes: *Shrimp v Landmark Operations Ltd* [2007] FCA 1468 - whether breach of s601FD *Corporations Act* 2001 (Cth) - *apportionable claim* - whether public policy reasons for refusing application to amend - whether too late to allow joinder of parties - effect of joinder on trial date.

[Gippsreal](#) (I, B)

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2012] FCA 966

Federal Court of Australia

Buchanan J

Industrial law - contempt - respondents admitted breaches of court orders - *Building and Construction Industry Improvement Act* 2005 (Cth) (**Act**) - question of appropriate penalty ultimately a matter for the court: *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 - no barrier to court accepting figure jointly proposed by parties in appropriate case - whether proposed penalties recognise seriousness of conduct and need for reinforcement of statutory prohibition in s44 of the Act.

[Director of the Fair Work Building Industry Inspectorate](#) (I, C)

**Ion v Danutz [2012] NSWSC 941**

Supreme Court of New South Wales

Harrison AsJ

Appeal from Local Court - applications for leave to appeal summary judgment and for extension of time for leave to appeal - entitlement to appeal interlocutory judgment of Local Court with leave from Supreme Court: s40(2) *Local Court Act* 2007 (NSW) (Act) - provisions relevant to determination of appeal: s41 of the Act - whether extension of time should be granted - whether prejudice to defendant - whether prospects of success - principles in relation to decision whether to grant leave to appeal: *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164.

[Ion](#) (I, B, C, G)**Echin v Southern Tablelands Gliding Club Incorporated and Civil Aviation Safety Authority [2012] NSWSC 966**

Supreme Court of New South Wales

McCallum J

Statutory interpretation - practice and procedure - plaintiff claimed damages for injuries sustained in collision between glider and electricity wires - application for dismissal of proceedings pursuant to r 13.4(1)(b) *Uniform Civil Procedure Rules* 2005 (NSW) or for parts of pleadings to be struck out - whether pleadings disclose a reasonable cause of action against Civil Aviation Safety Authority (CASA) - functions of CASA: s9 *Civil Aviation Act* 1988 (Cth) - whether functions of CASA delegated *de facto* by operation of legislation instrument construction of s34AB(1)(c) of the *Acts Interpretation Act* 1901 (Cth) - whether existence of written instrument giving effect to delegation - whether existence of non-delegable duty.

[Echin](#) (I, G)**Barescape Pty Ltd as trustee for The V's Family Trust & Anor v Bacchus Holdings Pty Ltd as trustee for The Bacchus Holdings Trust & Anor (No 9) [2012] NSWSC 984**

Supreme Court of New South Wales

Black J

Contract - termination of partnership agreement - failure of mechanism for valuation of interest in partnership - whether expert valuations binding on parties - principles of interpretation of commercial contract: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36 - basis of calculation of amount payable on termination - court's jurisdiction as



to alternative valuation - whether breach of fiduciary duty - obligation of partners in fiduciary relationship - scope of duty - knowing assistance - *no profit rule* - *no conflict rule* - whether defences of informed consent, waiver or ratification - quantification of damages - mitigation of loss - equitable compensation - account of profits - entitlement to election between remedies.

[Barescape](#) (I, B)

Beerens v Bluescope Distribution Pty Ltd [2012] VSCA 209

Court of Appeal of Victoria

Nettle, Redlich & Tate JJA

Guarantee and indemnity - whether guarantee and indemnity obtained under illegitimate pressure amounting to economic duress: *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 - whether pressure analogous to knowing assistance in breach of fiduciary duty: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 - meaning of *debts and monetary liabilities which are or may become payable*: *Sunbird Plaza Pty Ltd v Maloney* [1988] HCA 11 - whether scope of guarantee and indemnity extended to damages claim - whether price payable calculated at time of delivery or time of order - whether trial judge failed to assess respondent's failure to mitigate its loss.

[Beerens](#) (I, B)

Great Southern Managers Australia Ltd (recs & mgrs apptd) (in liq) v Clarke & Ors [2012] VSCA 207

Court of Appeal of Victoria

Buchanan & Osborne JJA, Beach AJA

Evidence - appeal from order declaring loss of joint privilege pursuant to s124 *Evidence Act* 2008 (Vic) (**Act**) - where one party entitled to client legal privilege did not jointly retain lawyer - where parties to proceedings other than holders of joint client legal privilege - reformulation of terms of declaration - whether disclosure requirement in s131A of the Act engaged.

[Great Southern Managers Australia](#) (I, B, C, G)

Geary v REJV Services Pty Ltd & Ors [2012] QCA 238

Court of Appeal of Queensland

de Jersey CJ; Muir & White JJA

Personal injury - appellant injured in workplace - respondents admitted liability for negligence - whether pre-existing condition symptomatic at time of accident - alcohol use after incident -



whether factual conclusions sufficiently supported by evidence - witness credibility - functions of appellate court - assessment of damages.

[Geary \(I\)](#)

Bloom

By Elizabeth Allen

All day they have been drawing me back
to the kitchen table: a crossword question
I keep returning to, the answer just beyond

my tongue. I have been trying to find
their meaning: what they hold & signify,
what they expect & tell. What they can

know of me & what they can't. Only
now that evening is coming in have I
tired of this frenzy & decided to let them

be flowers: cream lilies, red carnations,
white daisies, purple orchids & others
I do not know the names for, so cannot

show you. An odd jarring of colour in
a basket, like seeing yourself reflected
from many angles at once; the constancy

of body temperature, dry humour, wit,
gathered in together like friendships;

some about to open & some, almost:

Elizabeth Allen is a contemporary Australian poet. Her book of poems *Body Language* is published by Vagabond Press (Sydney, 2012).

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