

Friday 7 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)

**Papaconstuntinos v Holmes a Court** - defamation - qualified privilege - personal interests - *reasonable necessity* (I, G)

**Westfield Management Ltd v AMP Capital Property Nominees Ltd** - corporations law - managed investment scheme - winding up - voting rights - construction of unitholders' agreement (B, G)

**Commissioner of Taxation v Consolidated Media Holdings Ltd** - income tax - proceeds of share buy-back - dividend or capital gain (B, G)

**Citigroup Pty Ltd v National Australia Bank Ltd** - restitution - mistaken payments by banks due to fraudulent conduct of unknown person/s - *change of position* defence - estoppel (B)

**Aboddy v Ryan** - transfer of property - unconscionable conduct - special disadvantage (B)



**Re The President's Club Ltd; Coeur De Lion Investments Pty Ltd v Kelly & Ors** - corporations - statutory derivative action - application by member of unlisted public company limited by shares to bring proceedings against directors on its behalf - good faith - serious question to be tried - best interests (I, B)

**Robsyn Pty Ltd (in liquidation) v O'Brien (No 2)** - costs - indemnity costs - liquidator's liability for costs (I, B, C, G)

**BOQ Ltd v Chartis Aust Insurance Ltd** - professional liability insurance - whether policy responded to claim for indemnity against liability to third party and costs of defending claim (I)

**Bond v Johnson** - work injury damages - contribution and indemnity (I)

## Summaries with links (5 minute read)

### **Papaconstuntinos v Holmes a Court [2012] HCA 53**

High Court of Australia

French CJ; Heydon, Crennan, Kiefel & Bell JJ

Defamation - qualified privilege - appeal from Supreme Court of New South Wales that respondent's letter contained defamatory imputations concerning appellant director of football club and that letter had not been published on occasion of qualified privilege - requirements of defence of qualified privilege: *Toogood v Spyring* (1834) 1 Cr M & R 183 (149 ER 1044), *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 (**Bashford**) - *whether*: present case involved question of duty or interest of the kind dealt with in *Bashford*; respondent's own interest sufficient to ground the privilege; authorities supported a principle of *reasonable necessity*; respondent not only had to prove an interest in the matters but also to justify publication of the letter by reference to a *pressing need* to protect his interests.

[Papaconstuntinos](#) (I, G)

**Westfield Management Ltd v AMP Capital Property Nominees Ltd [2012] HCA 54**

High Court of Australia

French CJ; Heydon, Crennan, Kiefel & Bell JJ

Corporations law - winding up of managed investment scheme - appeal from Supreme Court of New South Wales - trust was registered as a managed investment scheme (**scheme**) under Ch5C *Corporations Act* 2001 (Cth) (**Act**) - appellant holder of majority of units sought to vote that scheme be wound up - respondent sought and obtained injunction to prevent breach of unitholders agreement - terms of agreements entered into by initial unitholders and responsible entity of scheme and trustee of trust - history of Ch5C of the Act - whether agreement operated to prevent first respondent voting in favour of winding up of scheme under s601NB of the Act at a meeting called to consider a resolution to that effect - s601NB of the Act and unenforceability - construction of agreement.

[Westfield Management](#) (B, G)

**Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55**

High Court of Australia

French CJ; Hayne, Crennan, Bell & Gageler JJ

Taxation - share buy-back - dividend or capital gain - appeal from Full Court of Federal Court of Australia concerning characterisation for income tax purposes of consideration received by respondent for shares sold in an off-market buy-back to Crown Melbourne Ltd - *whether*: amount received under buy-back agreement was *debited against amounts standing to the credit of (Crown's) share capital account* within the meaning of s159GZZP(1) *Income Tax Assessment Act* 1936 (Cth) - legislative history - statutory construction.

[Commissioner of Taxation](#) (B, G)

**Citigroup Pty Ltd v National Australia Bank Ltd [2012] NSWCA 381**

Court of Appeal of New South Wales

Bathurst CJ; Allsop P; Meagher, Macfarlan & Barrett JJA

Restitution - which of two banks must bear loss occasioned by fraudulent conduct by an unknown person that caused both banks to transfer money from the accounts held by customers - *whether*: a *change of position* defence was available to respondent in response to appellant's claim to recover money paid - recipient must prove it acted in *detrimental reliance in good faith* to displace primary right of recovery *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) HCA 17; factors to consider to determine causal connection - *whether* respondent had paid



over as agent funds received from appellant or was a mere intermediary or conduit; appellant ought to have been estopped from asserting right of recovery against respondent; approach to determining *reliance*: *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) NSWCA 84; *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350.

[Citigroup](#) (B)

## **Aboody v Ryan [2012] NSWCA 395**

Court of Appeal of New South Wales

Bathurst CJ; Allsop P & Campbell JA

Transfer of property - unconscionable conduct - appeal from judgment setting aside respondent's gift of interest in land - special disadvantage - unconscionable advantage - whether transaction was not improvident but fair and reasonable in the circumstances - governing general principles of relief against unconscionable dealings: *Blomley v Ryan* (1956) HCA 81, *Commercial Bank of Australia Ltd v Amadio* (1983) HCA 14 - equity's public normative role in the protection of the weak from the strong in appropriate circumstances: *J Story, Commentaries on Equity Jurisprudence* (Boston, 1836).

[Aboody](#) (B)

## **Re The President's Club Ltd; Coeur De Lion Investments Pty Ltd v Kelly & Ors [2012] QSC 364**

Supreme Court of Queensland

Mullins J

Corporations - statutory derivative action - unlisted public company limited by shares - application pursuant to s237(1) *Corporations Act* 2001 (Cth) (**Act**) by member for leave to bring proceeding in company's name against its directors - applicant alleged that company unlawfully paid consultancy fees to directors - applicant sought compensation under s1317 of the Act, equitable compensation or an account of profits for breach of fiduciary duties, or a claim for moneys had and received - requirements of s237(2) of the Act - serious question to be tried: *Hannon v Doyle* (2011) 82 ACSR 259, *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313 (*Swannson*) - whether applicant was acting in good faith: *Swannson, Chahwan v Euphoric Pty Ltd* (2008) 65 ACSR 661; in best interests of company to grant leave to applicant: *Swannson, MG Corrosion Consultants Pty Ltd v Vinciguerra* (2011) 82 ACSR 367.

[The President's Club](#) (I, B)



**Robsyn Pty Ltd (in liquidation) v O'Brien (No 2) [2012] QSC 367**

Supreme Court of Queensland

Daubney J

Costs - bulk of applicant's application unsuccessful, succeeded on a limited basis not in contention at the hearing - respondent sought indemnity costs on basis that applicant's pursuit of legal costs was bound to fail and that claim for liquidator's remuneration was unsubstantiated - *whether*: costs should be paid on indemnity basis; liquidator of applicant ought also to be liable for costs - circumstances in which it may be appropriate to make order for indemnity costs: *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 - conduct of applicant in pursuit of claims for costs - liquidator's personal interest in issues advanced in application by applicant - unlikelihood of respondent recovering on costs order made only against company.

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

**BOQ Ltd v Chartis Aust Insurance Ltd [2012] QSC 319**

Supreme Court of Queensland

Jackson J

Insurance - professional liability policy - claims made policy - *whether*: policy responded to a claim for indemnity against liability to a third party and defence costs; declarations to that effect should be granted before determination of the insured's liability to the third party - identification of subject matter in dispute - construction of policy.

[BOQ](#) (I)

**Bond v Johnson [2012] TASSC 81**

Supreme Court of Tasmania

Blow J

Work injury damages - consequences of statutory restrictions on rights of workers to sue for damages at common law when they have not suffered a prescribed degree of physical impairment - retrospective amendments - contribution and indemnity s3(1)(c) *Wrongs Act* 1954 (Tas) (**Act**) - labour hire company had made substantial payments of workers' compensation to its worker - respondent was supervising worker at time of injury - appeal from decision granting respondent leave to file and serve third party notice and grant of extension for time - *whether*: if worker's injury caused by negligence of appellant, labour hire company which employed worker could have recovered an indemnity from appellant pursuant to the s134(1) of the Act and respondent had viable claim for contribution or indemnity against appellant under s3(1)(c) of the Act - construction of the Act - hypothetical liability of appellant - equitable liability for contribution - effect of retrospective amendments to the *Workers' Rehabilitation and Compensation Act* 1988 (TAS) in 2007.

[Bond](#) (I)**At the Zoo**

by William Makepeace Thackeray

First I saw the white bear, then I saw the black;  
Then I saw the camel with a hump upon his back;  
Then I saw the grey wolf, with mutton in his maw;  
Then I saw the wombat waddle in the straw;  
Then I saw the elephant a-waving of his trunk;  
Then I saw the monkeys—mercy, how unpleasantly they smelt!

<http://www.poetryfoundation.org/bio/william-makepeace-thackeray>**[Click Here to access our Benchmark Search Engine](#)**