

Thursday 8 March 2012

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Mercland Investment Group Pty Ltd v Duncalm Pty Ltd - *Trade Practices Act 1974 (Cth) - Fair Trading Act 1987 (NSW)* - claim of misleading or deceptive conduct - application dismissed (I, C)

Crisp, in the matter of ACN 069 895 585 Pty Ltd (in liq) v ACN 069 859 585 Pty Ltd (in liq) & Insurance Australia Ltd - Discovery of documents - privilege (I, B, C, G)

Ananda Marga Pracaraka Samgha Ltd v Tomar (No 3) - Costs (B)

Tsu v Nemeth & Anor - Costs - apportionment of costs (I, C)

Eaton v Industrial Relations Commission of New South Wales - Employment law - *Police Act 1990 (NSW) - Industrial Relations Act 1996 (NSW)* (I)

Donmez v Neissa & Anor - *Limitation of Actions Act 1958 (Vic)* - personal injuries (I)

MP Investments Nominees Pty Ltd & Anor v Bank of Western Australia Ltd - Contracts - promissory estoppel (B)



Mahoney v Salt - ss20, 30 & 35 *Personal Injuries Proceedings Act 2002* (NSW) - application for disclosure of documents - legal professional privilege (I)

King v King & Ors – s58 *Bankruptcy Act 1966* (Cth) - appeal allowed (B)

Summaries with links (5 minute read)

Mercland Investment Group Pty Ltd v Duncalm Pty Ltd [2012] FCA 183

Federal Court of Australia

Edmonds J

Trade Practices Act 1974 (Cth) - *Fair Trading Act 1987* (NSW) - applicant purchaser contracted with first respondent as vendor to purchase land on highway near Gundagai on which service centre built comprising petrol station, restaurant & other facilities - information memorandum in connection with purposed auction sale - applicant had been successful bidder at auction - claim of misleading or deceptive conduct concerning state of pavement at Service Centre - fitness for purpose - use by trucks, heavy vehicles & cars - application dismissed.

[Mercland Investment Group](#) (I, C)

Crisp, in the matter of ACN 069 895 585 Pty Ltd (in liq) v ACN 069 859 585 Pty Ltd (in liq) & Insurance Australia Ltd [2012] FCA 148

Federal Court of Australia

Jessup J

Discovery of documents - privilege - waiver - plaintiff liquidator of first defendant seeking order for remuneration - legal costs incurred - second defendant a creditor in the liquidation - detailed examination of Australian case law including *Commissioner of Taxation v Rio Tinto Ltd*.

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

[Commissioner of Taxation](#) - decision of Full Court of the Federal Court of Australia 2 June 2006 - legal professional privilege - test of waiver of privilege - appeal from interlocutory judgment dismissed;

[Rio Tinto](#) - decision Federal Court of Australia 22 September 2005 - applicant's application allowed - respondent's application dismissed.



Ananda Marga Pracaraka Samgha Ltd v Tomar (No 3) [2012] FCA 184

Federal Court of Australia

Dodds-Streeton J

Costs - application by second & third plaintiffs seeking various orders including that first plaintiff pay legal costs & disbursements incurred, or to be incurred, by second plaintiff, the third plaintiff, the first defendant & second defendant in the proceeding - second & third plaintiffs' application refused.

Ananda Marga Pracaraka Samgha (B)

Ananda Marga Pracaraka Samgha - decision Federal Court 3 December 2010: see Benchmark B & IBC Wednesday 8 December 2010 - ss181 & 183 *Corporations Act* 2001 (Cth) - plaintiffs seeking interlocutory injunction restraining defendants from certain activities & requiring a number of steps, including return of the company seal, sending of corrective letters, & the furnishing of affidavits & the company contact list - use of company funds in litigation - defendant seeking that first plaintiff be removed as a plaintiff in the proceedings - plaintiffs' application granted, defendant's refused - detailed consideration of case law.

Tsu v Nemeth & Anor [2012] NSWCA 29

Court of Appeal of New South Wales

Beazley & Whealy JJA; Handley AJA

Costs - concurrent tortfeasors - apportionment of costs - appeal, cross-appeal & cross-appeal by leave - *Calderbank* offers - s109Z *Environmental Planning & Assessment Act* 1979 (NSW) - primary judge's joint & several order for costs against all defendants appropriate - see orders made at par 77 of judgment of Handley AJA.

Tsu (I, C)

Nemeth - decision Supreme Court of NSW 10 June 2009: see Benchmark I, C & IBC Friday 12 June 2009 - building & construction - negligence - costs - subsidence of Edwardian house at Darling Point - whether GST should be included in amounts for judgment for plaintiffs against first three defendants: answer "yes" - cost consequences of offers of compromise served by first & second defendants - whether Bullock or Sanderson order should be made against plaintiffs in respect of cost order already made that first & second defendants pay cost of QBE of second cross claim - whether costs' orders against first & second defendant should be joint and several or should be apportioned;

Piling - decision Supreme Court of NSW 26 February 2008: see Benchmark I, C & IBC Thursday 28 February 2008 - negligence - insurance - reasonable precautions - recklessness - building & construction - adoption of Referee's report - principles & case law considered - report as to causes & results of subsidence of support for Edwardian house resulting from excavation & faulty piling work next door - nature of duty of care under s177 *Conveyancing Act* 1919 (NSW): whether it extended to support of adjoining buildings - answer "yes" - whether it included omissions - answer "no" - whether a statutory cause of action for breach of condition of development consent arose in respect of breach of a condition imposed under ss78 & 78F *Environmental Planning & Assessment Regulation* 1994 - answer "yes" - professional indemnity insurance - case law as to reasonable precautions considered;



[Piling](#) - decision Supreme Court of NSW 14 April 2008, see Benchmark I, C & IBC Tuesday 15 April 2008 - Referee's Report - negligence in respect of excavation - res ipsa loquitur - apportionment.

Eaton v Industrial Relations Commission of New South Wales [2012] NSWCA 30

Court of Appeal of New South Wales

Bathurst CJ; Handley & Tobias AJJA

Employment law - *Police Act* 1990 (NSW) - *Industrial Relations Act* 1996 (NSW) - unfair dismissal regime - statutory interpretation - Industrial Relations Commission of New South Wales - judicial review - certiorari - mandamus - orders of Full Bench quashed - matter remitted.

[Eaton](#) (I)

Donmez v Neissa & Anor [2012] VSC 73

Supreme Court of Victoria

Kaye J

Limitation of Actions Act 1958 (Vic) - personal injuries - at the relevant time, first defendant employed by second defendant at its dental clinic - defendants contending claim statute-barred - proceeding not barred by s27D.

[Donmez](#) (I)

MP Investments Nominees Pty Ltd & Anor v Bank of Western Australia Ltd [2012] VSC 43

Supreme Court of Victoria

Contracts - banker & customer - promissory estoppel - forbearance - application by plaintiffs for interlocutory injunction restraining defendant from exercising its powers as mortgagee of property at Lonsdale Street, Melbourne & another at Byron Bay in New South Wales, or to appoint receivers & managers - injunction sought by plaintiffs refused & proceeding dismissed.

[MP Investments Nominees](#) (B)

Mahoney v Salt [2012] QSC 43

Supreme Court of Queensland

Boddice J

Ss20, 30 & 35 *Personal Injuries Proceedings Act* 2002 (NSW) - application for disclosure of documents & for orders that compulsory conference be held to be attended by respondents in person - statements prepared by loss adjusters - respondents claiming legal professional privilege on documents & oppose any order for compulsory conference on ground application premature -



“investigation,” “investigation reports” - confidential communications - no waiver of privilege - documents not required to be disclosed - compulsory conference ordered.

[Mahoney \(I\)](#)

King v King & Ors [2012] QCA 39

Court of Appeal of Queensland

Chesterman & White JJA; Wilson AJA

S58 *Bankruptcy Act* 1966 (Cth) - applicant seeking leave to appeal order striking out his action - whether right of occupancy which applicant's proceedings seeking to protect was property, as defined, which passed to his trustees - applicant had arguable claim that right of occupation was a personal right or privilege, not a right of property; in that class of rights which do not pass pursuant to s58 to the trustees - leave to appeal granted - appeal allowed - an interesting review of UK & Australian case law.

[King \(B\)](#)



"To Autumn"

... Where are the songs of Spring? Ay, where are they ?
Think not of them, thou hast thy music too, —
While barred clouds bloom the soft-dying day,
And touch the stubble plains with rosy hue;
Then in a wailful choir the small gnats mourn
Among the river shallows, borne aloft
Or sinking as the light wind lives or dies;
And full-grown lambs loud bleat from hilly bourn;
Hedge-crickets sing; and now with treble soft
The red-breast whistles from a garden-croft;
And gathering swallows twitter in the skies.

The last stanza of " To Autumn" composed by John Keats (1795 - 1821) on Sunday 19 September, 1819 while at Winchester in Hampshire - Keats had moved to Winchester in August of that year - he and his friend Charles Brown had fixed on the Cathedral city as a place likely to have a good library for research - though this turned out not to be the case, Winchester had plenty of useful bookshops & Keats very much liked living there - he would usually walk for an hour before dinner, passing the west front of the Cathedral, the clergy buildings, "a country alley of gardens" until he reached the monastery of the Cross, set in lovely water-meadows. He wrote to his friend John Hamilton Reynolds on 21 September: "How beautiful the season is now - How fine the air... I never liked stubble fields so much as now - Aye better than the chilly gleam of the Spring. Somehow a stubble-plain looks warm - in the same way that some pictures look warm - this struck me so much on my sunday's walk that I composed upon it."

[To Autumn by John Keats, with original manuscript image](#)

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