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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)

Montevento Holdings Pty Ltd v Scaffidi - trusts and trustees - construction of trust deed governing appointment of trustees - whether appointment of corporation as sole trustee invalid for breach of trust deed (I, B, C, G)

Valuer-General v New South Wales Golf Club - valuation of Crown lease restricted land (B, G)

Australia and New Zealand Banking Group Ltd v Mishra - mortgages - mortgagor threatened cross-claim against loan facilities and mortgage - whether mortgagee justified in requiring extra money to secure its costs (B)

Commonwealth Bank of Australia Ltd v Chamos - enforceability of guarantees - representation concerning presale contracts - whether misleading or deceptive conduct (B)

Sharp v Maritime Super Pty Ltd - construction of superannuation trust deed - total and permanent disablement benefit (I, B)



IPG Finance Aust Pty Ltd & Ors v Crouch and Lyndon & Anor - partnership - solicitors misleading and deceptive conduct - deceit - fraud - duty of care - wrongful acts - whether firm of solicitors liable for conduct of partner (I, B, C, G)

Summaries with links (5 minute read)

Montevento Holdings Pty Ltd v Scaffidi [2012] HCA 48

High Court of Australia

French CJ; Hayne, Crennan, Bell & Gageler JJ

Trusts and trustees - construction of trust deed concerning appointment of trustees - distinction between individuals and corporations - family dispute over control of discretionary trust designed to regulate the acquisition, management and disposal of family's assets - *whether*: appointment of appellant corporation as sole trustee of trust was invalid because it breached trust deed; there should be appointment of a new trustee under s77 *Trustees Act* 1962 (WA) - meaning of *appointed as a Trustee* in trust deed - whether the words *as a* were used in clause to distinguish between control over the exercise of the trustee's powers, and appointment to the office of trustee, with the consequence that the class of persons excluded from appointment extended to any corporate person whose powers, directions or duties as trustee would be exclusively exercised by the individual appointor - ordinary weight and meaning of clause - whether the words *as a* bore weight which first respondent sought to place on them - necessity for clause to be read in context of whole document which repeatedly distinguished between an *individual* (in the sense of a natural person) and a corporation.

[Montevento Holdings](#) (I, B, C, G)

Valuer-General v New South Wales Golf Club [2012] NSWCA 355

Court of Appeal of New South Wales

Hoeben JA, Preston CJ of LEC & Ward J

Valuation of Crown lease restricted land - appeal on question of law from Land and Environment Court of NSW under s57(1) *Land and Environment Court Act* 1979 (NSW) - *whether*: erroneous construction of s14I *Valuation of Land Act* 1916 (NSW) (**Act**); erroneous holding that cl90 of lease was *a restriction on the disposition* within meaning of s14I of the Act; erroneous holding that lessee had discharged onus under s40(2) of the Act to establish lessee's appeal against the valuation of the appellant in circumstances in which there was no evidence of risk of Minister exercising power



under s136 of the *Crown Lands Act* 1989 (NSW) and cl90 of lease to withdraw any land from the lease, which would cause the land value to be nil; if appeal were successful, matter should be remitted to Land and Environment Court for determination in accordance with Court of Appeal's decision.

[Valuer-General](#) (B, G)

Australia and New Zealand Banking Group Ltd v Mishra [2012] NSWSC 1333

Supreme Court of New South Wales

Davies J

Mortgages - mortgagee sought possession of defendants' properties of as a result of alleged defaults under facility arrangements - defendant mortgagor threatened cross-claim to challenge loan facilities and mortgage - plaintiff relied on mortgage to justify right to seek amount securing its costs in the event that defendants proceeded with threatened claim - *whether*: plaintiff entitled to require payment of extra money as security for costs of any claim by defendants: *Perpetual Trustees Australia Ltd v Barker* (2004) SASC 58; dispute could be reasonably anticipated; relief sought in such a dispute would be likely to involve challenge to rights of plaintiff to enforce mortgage; clauses in mortgage were wide enough to cover the charging of contemplated costs if plaintiff otherwise had the right to do so: *Liberty Funding Pty Limited v Steele-Smith* (2004) NSWSC 1100; continued threat of cross-claim or proceedings sufficient to justify plaintiff's approach: *Liberty Funding Pty Limited v Steele-Smith* (2004) NSWSC 1100; plaintiff acted unreasonably in refusing to agree to payout figure which did not include a provision for the costs of defending claim; if plaintiff did not require payment or security for probable costs of any contest it would lose right to raise the matter later by asserting that tender was insufficient to cover those costs.

[Australia and New Zealand Banking Group](#) (B)



Commonwealth Bank of Australia Ltd v Chamos [2012] NSWSC 1345

Supreme Court of New South Wales

Stevenson J

Guarantees - misleading or deceptive conduct - plaintiff was successor in law of Bank of Western Australia (**BWA**) - plaintiff brought proceedings under guarantees given by defendants to BWA in relation to indebtedness to BWA of corporation in liquidation - plaintiff sought to recover corporation's indebtedness to BWA - *whether*: BWA engaged in misleading or deceptive conduct within meaning of s12DA *Australian Securities and Investments Commission Act* 2001 (Cth) (**Act**) and as a consequence defendants were entitled to an order under s12GM of the Act discharging them from liability under guarantees, or, alternatively, to declarations that guarantees were not enforceable; representations in relation to pre-sale contracts were misleading or deceptive because pre-sale contracts did not comply with s212 *Body Corporate and Community Management Act* 1997 (Qld) - necessity to consider *effect or likely effect [of the representation] on the person to whom it is directed* when assessing whether conduct misleading or deceptive: *Heydon v NRMA Ltd* (2000) NSWCA 374 - where representation directed to individual necessity to consider *effect or likely effect* in context of ultimate question whether representation was misleading or deceptive or likely to mislead or deceive.

[Commonwealth Bank of Australia](#) (B)

Sharp v Maritime Super Pty Ltd [2012] NSWSC 1350

Supreme Court of New South Wales

Ward J

Trust deed - construction of superannuation trust deed - dispute between plaintiff member of superannuation scheme (**scheme**) and trustee of scheme in relation to plaintiff's claim for payment of total and permanent disablement benefit (**benefit**) - *whether*: plaintiff entitled to benefit under deed; trustee failed to make requisite determination under deed; plaintiff's employment terminated solely by reason of event or events demonstrating permanent incapacity to perform duties satisfactorily and/or exhibiting symptoms of a psychiatric condition demonstrating him to be a danger to others in the workplace; trustee's decisions wrong in law and fact; trustee constructively declined request for reconsideration of claim; trustee breached duty owed pursuant to s14 *Superannuation (Resolution of Complaints) Act* 1993 (Cth); failure to consider matters required under deed - proper construction of deed - whether unanimous medical opinions provided to trustee were decisive of entitlement to benefit.

[Sharp](#) (I, B)



IPG Finance Aust Pty Ltd & Ors v Crouch and Lyndon & Anor [2012] QSC 312

Supreme Court of Queensland

Boddice J

Partnership - professional negligence - plaintiff commercial lender obtained services from first defendant firm of solicitors (**firm**) through second defendant partner of firm - plaintiffs claimed loss and damage suffered as consequence of second defendant's conduct in provision of services in relation to commercial lending transactions - second defendant pleaded guilty to fraud and forgery including creation of sham loan transactions - *whether*: second defendant's conduct constituted wrongful acts undertaken in ordinary course of business of first defendant; first defendant owed duty to plaintiffs to exercise reasonable care, skill and diligence while undertaking services on plaintiffs' behalf; second defendant's conduct deceitful, misleading and deceptive under s52 *Trade Practices Act* 1974 (Cth), in breach of warranty, and/or in breach of first defendant's duty of care to plaintiffs; first defendant liable for second defendant's conduct pursuant to ss13 & 14 *Partnership Act* 1891 (Qld); conduct not authorised by partnership; conduct involved illegal conduct engaged in by second defendant in criminal frolic of his own - meaning of *ordinary course of business*: *Walker v European Electronics Pty Ltd (in liq)* (1990) 23 NSWLR 1, *JJ Coughlan Ltd v Ruparelia* (2003) EWCA Civ 1057.

[IPG Finance Aust](#) (I, B, C, G)



The Tyger

by William Blake

Tyger Tyger, burning bright,
In the forests of the night;
What immortal hand or eye,
Could frame thy fearful symmetry?

In what distant deeps or skies.
Burnt the fire of thine eyes?
On what wings dare he aspire?
What the hand, dare seize the fire?

And what shoulder, & what art,
Could twist the sinews of thy heart?
And when thy heart began to beat,
What dread hand? & what dread feet?

What the hammer? what the chain,
In what furnace was thy brain?
What the anvil? what dread grasp,
Dare its deadly terrors clasp!

When the stars threw down their spears
And water'd heaven with their tears:
Did he smile his work to see?
Did he who made the Lamb make thee?

Tyger Tyger burning bright,
In the forests of the night:
What immortal hand or eye,
Dare frame thy fearful symmetry?

<http://www.poetryfoundation.org/bio/william-blake>

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