



Thursday 12 September 2013

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

#### Important Announcement



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#### Executive Summary (1 minute read)

**Chubb Insurance Company of Australia Ltd v Moore (No 2) (NSWCA)** - costs - defendants to pay proportion of insurers' costs of proceedings (I B C G)

**Sciacca v Langshaw Valuations Pty Ltd (NSWSC)** - insurance - claim against insurer of deregistered company - summary dismissal refused (I B)

**BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) (NSWSC)** - negligence - destruction of factory - lost opportunity - damages (I C)



**Tomasetti v Brailey** (NSWSC) - managed investment schemes - advice of accountant and financial planning business caused investor's loss - damages (I B)

**Jarrold v Isajul** (VSC) - sale of property purchased by seller in joint names with plaintiff - forgery allegation failed - plaintiff held interest on resulting trust for seller (B)

**KY Enterprises Pty Ltd v Darby** (VSC) - real property - adverse possession of disputed land established - claims in trespass failed (B)

**Applebee v Monash City Council** (VSC) - administrative law - *restricted breed dog* - real or significant argument that VCAT erred in law - leave to appeal granted (G)

*From the United States of America*

**Wiersum v. Harder** (Supreme Court of Alaska) - timber trespass - negligent misrepresentation - jury's award of restoration damages objectively unreasonable - new trial ordered on damages (I)

## Summaries with links (5 minute read)

### **Chubb Insurance Company of Australia Ltd v Moore (No 2) [2013] NSWCA 299**

Court of Appeal of New South Wales

Bathurst CJ, Beazley P, Macfarlan & Emmett JJA

Costs – stated case - judge in Equity posed a series of questions for Court of Appeal about application of s6(1) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - insurers sought order that defendants jointly and severally pay their costs of proceedings and a *Bullock* order with respect to other parties – defendants argued that proceedings should be treated as a test case with no order as to costs - held: no basis for departing from general rule that costs follow event - insurers succeeded for reasons other than advanced - defendants had measure of success in relation to some questions - defendants jointly and severally to pay 50% of insurers' costs of proceedings including proceedings in Court of Appeal – no *Bullock* order.

[Chubb Insurance Company of Australia Ltd](#) (I B C G)



## **Sciacca v Langshaw Valuations Pty Ltd [2013] NSWSC 1285**

Supreme Court of New South Wales

Adamson J

Insurance - registered proprietors of property granted second mortgage to plaintiffs to secure loan - plaintiffs suffered loss on sale of property and claimed damages from 14 defendants - defendant finance broker acted on transaction pursuant to which loan was made and mortgage granted - finance broker took out professional indemnity insurance with insurer - finance broker was deregistered - finance broker's insurer sought summary dismissal of plaintiffs' claim under s601AG *Corporations Act 2001* (Cth) - insurer accepted finance broker was liable to plaintiff for purposes of s601AG(a) of the Act - whether insurance contract *covered that liability immediately before deregistration* within meaning of s601AG(b) - held: court accepted interpretation of s601AG contained in *Tzaidas v Child* [2009] NSWSC 465 that section requires that liability fall within cover not that a claim must be made before deregistration - insured's risk was covered by policy - plaintiffs entitled to rely on s601AG - third defendant established it was entitled to sue insurer - insurer's application dismissed.

[Sciacca](#) (I B)

## **BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) [2013] NSWSC 1287**

Supreme Court of New South Wales

Stevenson J

Damages - negligence - explosion destroyed pet-food factory - hearing of remitter arising from judgment of Court of Appeal - question of loss of profits referred to referee by trial judge - Court of Appeal ordered adoption of referee's report subject to determination of extent to which plaintiff would have been able to supply pet-food to customers but for explosion - principles of assessment of damages for loss of a chance - two stage process - held: plaintiff established on balance of probabilities it lost a chance or opportunity of real value to derive profits from its relationships with entities in customer group - discount for vicissitudes of 45% - damages to be awarded for lost profits.

[BestCare Foods Ltd](#) (I C)

**Tomasetti v Brailey [2013] NSWSC 1282**

Supreme Court of New South Wales

R A Hulme J

Trade and commerce - consumer protection - plaintiffs entered agricultural investment schemes with advice and facilitation of first defendant accountant and fourth defendant financial planner - schemes went awry - plaintiffs brought proceedings against accountant and entities associated with him - proceedings dismissed - Court of Appeal found second plaintiff entitled to succeed on claim against accountants and financial planner under s42 *Fair Trading Act* (NSW) and in negligence - Court of Appeal remitted questions of causation in respect of accountants conduct and quantum - held: court satisfied accountant's conduct was causative of second plaintiff's loss - damages quantified - first and fourth defendants to pay damages and costs to second plaintiff.

[Tomasetti](#) (I B)**Jarrold v Isajul [2013] VSC 461**

Supreme Court of Victoria

McMillan J

Real property - evidence - trusts - negligence - sale of property purchased in joint names of plaintiff and fifth defendant, who were married but not close, with fifth defendant's money - plaintiff claimed she was entitled to half interest in property - plaintiff alleged fifth defendant sold property using forged power of attorney and that she did not authorise him to sell property or receive proceeds - fifth defendant claimed plaintiff signed power of attorney in his presence and that plaintiff held her interest in property on trust for him - plaintiff did not contribute to purchase or maintenance of property - expert handwriting evidence - standard of proof - *Briginshaw v Briginshaw* [1938] HCA 34 - held: court not satisfied, on balance of probabilities, plaintiff satisfied burden of proof on forgery allegation as that standard was applied in authorities and under s140 *Evidence Act 2008* (Vic) - fifth defendant rebutted presumption of advancement - plaintiff held legal interest in property on resulting trust for fifth defendant.

[Jarrold](#) (B)**KY Enterprises Pty Ltd v Darby [2013] VSC 484**

Supreme Court of Victoria

Lansdowne AsJ

Real property - adverse possession - proceedings concerning portion of vacant land between two shops - one shop erected on land owned by plaintiff, the other on land owned by defendant - portion of vacant land was on title of plaintiff - balance was on title of defendant - defendant's son



placed car and shipping container on portion of vacant land recorded on plaintiff's title - plaintiff sought damages for trespass and other relief - defendant sought declaration he had acquired title by possession to portion of plaintiff's land (disputed land) - principles applicable to competing claims of trespass and adverse possession - provisions of *Limitations Act 1958* (Vic) - requirements of vicarious liability in trespass - held: defendant went into possession of disputed land in 1971 - adverse possession continued uninterrupted until events in 2011 - title of plaintiff's predecessor in title to disputed land already extinguished by fifteen years continuous adverse possession by defendant prior to purchase of title by plaintiff - plaintiff failed to establish any trespass by defendant in respect of car or shipping container as they were wholly contained within disputed land and the defendant's land - parties to prepare orders in accordance with reasons.

[KY](#) (B)

### **Applebee v Monash City Council [2013] VSC 481**

Supreme Court of Victoria

Croucher J

Administrative law - appellant's dog was seized and impounded by Council - Council declared dog to be a *restricted breed dog* within meaning of s3(1) *Domestic Animals Act 1994* (Vic) - Associate Judge of Court refused application for leave to appeal against VCAT's decision to uphold Council's declaration - appellant appealed to Judge - nature of appeal - r77.06 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - *Standard for Restricted Breed Dogs in Victoria* - held: Associate Judge erred in determining there was no real or significant argument to be put that VCAT erred in law - appeal allowed against order of Associate Judge - order of Associate Judge set aside - leave granted to appeal against order of VCAT.

[Applebee](#) (G)

*From the United States of America*

### **Wiersum v. Harder --- P.3d ----, 2013 WL 4500328**

Supreme Court of Alaska

Fabe CJ; Carpeneti, Winfree, Stowers & Maassen JJ

Timber trespass - negligent misrepresentation - damages - plaintiff claimed restoration damages from defendants after they cleared trees from his property without his permission - defendants sought to apportion fault to plaintiff's sister on basis she negligently misrepresented she owned property where trees were cut when she gave defendants permission to remove trees from her property - held: Court affirmed grant of summary judgment and dismissal of claim against sister



on basis she owed no duty to plaintiff - Court affirmed denial of defendants' motion for directed verdict because plaintiff presented sufficient evidence for issue of restoration costs to be submitted to jury - Superior Court erred by denying defendants' motion for judgment notwithstanding verdict because jury's award of restoration damages was objectively unreasonable - damages award vacated - new trial ordered on damages.

[Wiersum \(I\)](#)

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