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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)

Returned & Services League of Australia (Queensland Branch) Sarina Sub Branch Inc v Returned & Services League of Australia (Queensland Branch) - application for interlocutory injunction preserving option to purchase interest in land and buildings (I, B, C, G)

Brisbane Broncos Leagues Club Ltd v Alleasing Finance Australia Pty Ltd (No 2) - representative proceedings - application for approval of proposed settlement (I, B, C, G)

Bryant v Telstra Corporation Ltd - leave to appeal - whether: appeal from findings of fact; reasonable prospects of success (I, B)

Daya v CX Reinsurance Company Ltd - security for costs - evidence of non-compellable witnesses - plaintiff and witnesses outside jurisdiction (I, B, C, G)

BM & JA Holdings Pty Ltd v Clarence Street Developments Pty Ltd - landlord and tenant - cross-claim for rent and damages - mitigation of loss - set-offs - abatement of rent (I, B)



Clear Wealth Pty Ltd v Kwong (No 2) - intellectual property - confidential information - restraints of trade - non-solicitation clause (I, B)

Markisic v The State of New South Wales & Ors - disqualification application - whether actual or apprehended bias (I, B, C, G)

Australian Football League & Ors v Hard On Sports & Ors - *Anton Piller* order - requirement of disclosure on *ex parte* application - tort of inducing breach of contract - intention (I)

Summaries with links (5 minute read)

Returned & Services League of Australia (Queensland Branch) Sarina Sub Branch Inc v Returned & Services League of Australia (Queensland Branch) [2012] FCA 1105

Federal Court of Australia

Collier J

Interlocutory injunction - applicant claimed respondents engaged in unconscionable conduct in contravention of ss20 and/or 21 *Australian Consumer Law* and/or *Trade Practices Act 1974 (Cth)* in respect of heads of agreement for operation and occupation of club premises - applicant sought interlocutory injunction preventing expiry of option to repurchase interest in land and buildings - principles relevant to exercise of court's discretion to grant interlocutory injunction: *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 - *whether*: serious question to be tried; applicant likely to suffer injuries for which damages will not be an adequate remedy; balance of convenience in favour of interlocutory relief preserving the *status quo* pending outcome of substantive proceedings.

[Returned & Services League of Australia](#) (I, B, C, G)

Brisbane Broncos Leagues Club Ltd v Alleasing Finance Australia Pty Ltd (No 2) [2012] FCA 1112

Federal Court of Australia

Perram J

Representative proceedings - application for approval of proposed settlement - clubs suffered loss and damage as a result of involvement with system under which plasma screens would be leased



to them and on which advertising would be shown - parties reached accommodation - representative proceeding may not be settled or discontinued without the approval of the court: s33V(1) *Federal Court of Australia Act 1976 (Cth)* - *whether*: settlement in the best interests of the group members as a whole and not merely in interests of applicant and respondent: *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* (1996) 71 FCR 250; settlement a fair and reasonable compromise of claims made: *Kirby v Centro Properties Ltd (No. 6)* [2012] FCA 650; in all circumstances settlement a reasonable one.

[Brisbane Broncos Leagues Club](#) (I, B, C, G)

Bryant v Telstra Corporation Ltd [2012] NSWCA 330

Court of Appeal of New South Wales

Barrett JA & Tobias AJA

Application for leave to appeal - applicant entered into contract with respondent for provision of mobile telephone service - applicant sought to appeal against decision that respondent did not breach a warranty implied by s74(1) *Trade Practices Act 1974 (Cth)* into the contract as to the fitness for purpose of the handset supplied - calls not transmitted from competitor network - no finding of fact would be challenged on appeal rendering applicant's prospects of success negligible.

[Bryant](#) (I, B)

Daya v CX Reinsurance Company Ltd [2012] NSWSC 1213

Supreme Court of New South Wales

Brereton J

Security for costs - plaintiff resident outside jurisdiction - evidence of non-compellable witnesses - defendant sought alternative orders for obtaining evidence of witnesses (former employees) located outside jurisdiction and order pursuant to r42.21 *Uniform Civil Procedure Rules 2005 (NSW)* that plaintiff give security for defendants' costs - whether evidence should be taken on commission - court's chief discretionary considerations in application for security for costs: *Equity Access Limited v Westpac Banking Corporation* (1989) ATPR 40-972 - plaintiff's prospects of success - magnitude of risk that plaintiff could not satisfy an adverse costs order - *whether*: use of power to order security would be oppressive or stultify plaintiff's claim; plaintiff's impecuniosity arose from conduct of defendant in respect of which relief was sought in proceedings; public interest considerations; discretionary matters particular to case which weighed one way or another - distinction between litigation funder who funds plaintiff on commercial basis for the purpose of profiting from its participation in litigation, and a person with an extant interest in the plaintiff's



success in litigation: *Green v CGU Insurance Limited* [2008] 67 ACSR 105 - whether application brought sufficiently promptly - relevance of plaintiff's residence outside jurisdiction: *Jalfox Pty Ltd v Motel Association of New Zealand Inc* (1984) 2 NZLR 647 - whether Canadian court would recognise and enforce Australian costs judgment - security limited to cost of enforcing costs order in Canada.

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

BM & JA Holdings Pty Ltd v Clarence Street Developments Pty Ltd [2012] NSWSC 1236

Supreme Court of New South Wales

Macready AsJ

Landlord and tenant - tenancy terminated - cross-claim for rent and damages by defendant head lessor against former lessee - liability on lessee for rent for period of possession of premises - interest on late payment of rent - entitlement of lessor to damages and/or rent from time lessee left possession of premises - mitigation of loss by lessor taking steps to release premises: *Derbury Pty Ltd v ACI Australia Limited* (NSWSC, 8 August 1991, Giles J, unreported) - whether set-offs for lessee for alleged detention of goods or entitlement to abatement of rent due to alleged flooding: s84 *Conveyancing Act* 1919 (Cth).

[BM & JA Holdings](#) (I, B)

Clear Wealth Pty Ltd v Kwong (No 2) [2012] NSWSC 1233

Supreme Court of New South Wales

Rein J

Intellectual property - confidential information - restraint of trade - first defendant's employment with plaintiff financial planning business was terminated - first defendant set up second defendant company - majority of second defendant's clients were former clients of plaintiff - *whether*: first defendant in breach of contractual obligations when he downloaded client lists from plaintiff's computer shortly before he left plaintiff's employment; first defendant used client lists to approach clients of plaintiff; clause prohibiting work performed by first defendant for former clients of plaintiff was a valid restraint - confidentiality of customer lists at common law: *Forkserve Pty Ltd v Pacchiarotta* (2000) 50 IPR 74 - principles relevant to non-solicitation clause and relationship to *Restraints of Trade Act* 1976 (NSW): *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9 - method of assessment of damages for breach of confidentiality and breach of restraints - amount to be awarded to plaintiff - discount for factors outside first defendant's actions.

[Clear Wealth](#) (I, B)



Markisic v The State of New South Wales & Ors [2012] NSWSC 1237

Supreme Court of New South Wales

Price J

Disqualification application - bias - plaintiff made applications that trial judge should disqualify himself on grounds of actual bias or reasonable apprehension of bias - objective test for apprehension of bias: *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48 - two-step application of test: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48 - conceptual difference between actual and apprehended bias: *Spencer v Bamber* [2012] NSWCA 274 - whether plaintiff had established actual or apprehended bias.

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

Australian Football League & Ors v Hard On Sports & Ors [2012] VSC 475

Supreme Court of Victoria

Vickery J

Anton Piller order - tort of inducing breach of contract - application by defendants to set aside or discharge *Anton Piller* order - application by plaintiffs for interlocutory injunctions pending trial and administrative orders in relation to execution of *Anton Piller* order - principles on which *Anton Piller* order may be granted: *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, *Microsoft Corp v Goodview Electronics Pty Ltd* (1999) AIPC 91 - evidence in support of application for *Anton Piller* order - *whether*: copyright infringement; trademark infringement; inducing breach of contract - gravamen of tort of inducing breach of contract is *intention*: *Hospitality Group v Australian Rugby* [2001] FCA 1040; misleading conduct in breach of s18 and/or 29(1)(g) *Australian Consumer Law* as set out in Sch2 *Competition and Consumer Act 2010* (Cth); passing off - requirement of disclosure to court when *Anton Piller* order sought: par19 *Practice Note No 6 of 2010* (2010) 26 VR 712, *Liberty Financial Pty Ltd v Scott* [2002] FCA 345, *Milcap v Coranto* (1995) 32 IPR 34 - whether material non-disclosure - balance of convenience - discharge of *Anton Piller* order in part.

[Australian Football League](#) (I)

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