

Thursday 20 September 2012

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Taupau v HVAC Constructions (Queensland) Pty Ltd & Ors - personal injury - workers compensation - work injury damages appeal (I, C)

Hammond v JP Morgan Trust Australia Ltd - appeal from judgment for possession of property - joinder application by non-party to appeal (I, B)

Saffron v Cowley & Anor; Estate of Saffron - wills and estates - remuneration of executors from estate money - obligations of executors - beneficiaries of trust deed (B)

Kovarfi v BMT & Associates Pty Ltd - professional negligence - property development - assignment of choses in action - limitations (I, C)

Candibon Pty Ltd v Minister for Planning & Anor - costs - indemnity costs and liability for costs by non-party. (I, B, C, G)



Rigby v Secretary to Department of Sustainability and Environment - compulsory acquisition of land for public purposes - claims for compensation - hypothetical zoning (I, B, C, G)

Casama Group Pty Ltd v Four Sisters Pty Ltd - contracts - termination of wine distribution agreement - precondition to reliance on default (I, B)

Bowesco Pty Ltd v Read - subrogation claim - guarantee - application by defendant for summary judgment or alternatively for parts of statement of claim to be struck out (I, B, C)

Saraceni v Mentha [No 2] - contracts - construction of deed - whether valid appointment of receivers - rectification (I, B, C)

Summaries with links (5 minute read)

Taupau v HVAC Constructions (Queensland) Pty Ltd & Ors [2012] NSWCA 293

Court of Appeal of New South Wales

Beazley, Basten & Macfarlan JJA

Personal injury - workers compensation - appeal from dismissal of claim for damages for injuries sustained at work - adequacy of trial judge's reasons: *Fox v Percy* [2003] HCA 22 - whether trial judge erred in preferring second respondent's expert evidence to appellant's - whether unchallenged evidence sufficient for acceptance by trial judge - whether trial judge overlooked medical and lay evidence supporting finding of electric shock - whether continuing symptoms caused by electric shock - assessment of damages - assessment of non-economic loss involves *opinion, impression, speculation and estimation: Dell v Dalton* (1991) 23 NSWLR 528 - future economic loss and vicissitudes: s13 *Civil Liability Act* 2002 (NSW).

[Taupau](#) (I, C)

**Hammond v JP Morgan Trust Australia Ltd [2012] NSWCA 295**

Court of Appeal of New South Wales

Basten & Meagher JJA; Bergin CJ in Eq

Real property - mortgages - appeal from judgment for possession of property and application for review of judgment dismissing application for joinder - promissory estoppel - whether respondent mortgagee prevented from relying on non-compliance with default notice to bring proceedings for possession - estoppel available if reasonable to interpret the representation or promise in the way contended for and to act in reliance on interpretation: *Sullivan v Sullivan* [2006] NSWCA 312 - applicant claimed property held on resulting trust - whether applicant for joinder a necessary party to proceedings brought by appellant - whether judgment for possession *directly* affected applicant's rights or liabilities: *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19.

[Hammond](#) (I, B)

Saffron v Cowley & Anor; Estate of Saffron [2012] NSWSC 1108

Supreme Court of New South Wales

White J

Wills and estates - executors - claim for repayment of commissions paid by defendant executors to themselves out of estate money - first defendant also received remuneration for professional work performed as accountant for estate - defendants directors of trustee of trust to whom balance of estate paid - obligations of executors: *Re Craig* (1952) 52 SR (NSW) 265 - whether conflict between defendants' personal interests in receiving remuneration and duty to residual beneficiary - defendants claimed they were acting on legal advice - prompt steps taken by defendants to redress position following additional legal advice - question as to who were beneficiaries of the trust - whether definition of *appointed class* in trust deed too wide: *Re Baden's Trust Deeds; McPhail v Douulton* [1971] AC 424 - whether indemnity costs to be awarded to plaintiff - whether defendants' refusal to accept offer unreasonable.

[Saffron](#) (B)

Kovarfi v BMT & Associates Pty Ltd [2012] NSWSC 1101

Supreme Court of New South Wales

McCallum J

Professional negligence - commercial development of property - plaintiff sought to maintain claim as assignee of choses in action - application by defendant for dismissal of proceedings or to have



parts of statement of claim struck out - whether claim statute-barred - s14 *Limitation Act* 1969 (NSW) - whether claim disclosed no reasonable cause of action - whether choses in action were bare rights of action in tort - whether bare rights of action in tort not assignable or not validly assignable - whether necessary to consider defendant's application for security for costs.

[Kovarfi](#) (I, C)

Candibon Pty Ltd v Minister for Planning & Anor (No 2) [2012] VSC 424

Supreme Court of Victoria

Emerton J

Costs - applications for indemnity costs and for non-party to be jointly and severally liable for costs - whether exceptional circumstances to justify award of costs against non-party - court's power to determine by whom and to what extent costs to be paid: s24 *Supreme Court Act* 1986 (Vic) - court's jurisdiction to order non-parties to pay costs: *Knight v FP Special Assets Ltd* [1992] HCA 28 - offer of compromise by defendants - court's discretion to award costs on more generous basis than party-party basis from date offer served: *Mutual Community Ltd v Lorden Holdings Pty Ltd* (Unreported, Supreme Court of Victoria) - special costs order should not be made unless rejection of offer unreasonable: *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 - application for costs of non-party discovery - usual requirement for applicant party to pay reasonable costs of non-party order to make discovery: *Australian Competition and Consumer Commission v Boral Ltd* [1999] FCA 663 - whether set-off in relation to certain costs.

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

Rigby v Secretary to Department of Sustainability and Environment [2012] VSC 427

Supreme Court of Victoria

Emerton J

Compulsory land acquisition - hypothetical zoning - claims for compensation pursuant to *Land Acquisition and Compensation Act* 1986 (Vic) - land compulsorily acquired for public purposes - question of how land could have been developed had it not been ear-marked for acquisition - dispute as to whether land would have been re-zoned for industrial or building purposes as at date of acquisition - physical development of land and surrounds - preliminary questions - legal principles - planning history - flooding and ecological issues: *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (**Act**) - whether land could be rezoned as an urban development if development would be a *controlled action* under the Act - expert and secretary's



planning evidence - *orderly, economic and sustainable development* - State Planning Policy Framework - 1998 Planning Panel decision.

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

Casama Group Pty Ltd v Four Sisters Pty Ltd [2012] VSC 376

Supreme Court of Victoria

Judd J

Contracts - construction of contract - termination of distribution agreements by defendant wine producers - plaintiff claimed damages for wrongful termination - defendants counter-claimed for loss and damage for breach of good faith - whether defendant entitled to terminate - period of notice - termination for cause - default discovered after termination - exception to general right of reliance where preconditions not satisfied: *Carter JW, Carter on Contract, Butterworth, 2002* - whether plaintiff entitled to opportunity to persuade defendants not to terminate - whether defendants must consider and reject explanation before termination - operation of alternative termination provisions - whether repudiation - whether plaintiff breached duty of good faith - whether plaintiff breached *best endeavours* obligation - whether breach of agreement by selling competing products.

[Casama Group](#) (I, B)

Bowesco Pty Ltd v Read [2012] WASC 340

Supreme Court of Western Australia

Master Sanderson

Judgments and orders - application by defendant for summary judgment or alternatively for parts of statement of claim to be struck out with plaintiff having no right to re-plead - claim for subrogation in relation to guarantee - whether plaintiff's claim sustainable - whether subrogation only available when party has actually made payment - subrogation as it applies to guarantees: Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed) - basis in *natural justice* - subrogation of surety to rights of creditor: *Yonge v Reynell* (1852) 68 ER 744 - whether plaintiff as surety had incurred loss above and beyond what it had paid out under the guarantee.

[Bowesco](#) (I, B, C)



Saraceni v Mentha [No 2] [2012] WASC 336

Supreme Court of Western Australia

Corboy J

Contracts - plaintiff sought declarations under ss418A & 447B *Corporations Act* 2001 (Cth) (**Act**) - construction of deed - whether first defendant receivers validly appointed as receivers and managers of property pursuant to deed and mortgages - whether plaintiffs estopped from denying deed created fixed and floating charge over all assets and undertaking of party to deed - whether charge void against administrator pursuant to s266 of the Act - whether mortgages secured property pursuant to s441A of the Act - construction of instruments containing a *mistake* - principle that words may be supplied, omitted or corrected where clearly necessary to avoid absurdity or inconsistency: *Fitzgerald v Masters* (1956) 95 CLR 420 - whether deed should be rectified to include definition of *secured property* - whether chargee misled ASIC and Office of State Revenue concerning payment of stamp duty - whether unclean hands - whether defendants entitled to be subrogated to securities granted to another financier.

[Saraceni](#) (I, B, C)

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