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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)

Donnellan v Woodland - professional negligence - advocates' immunity – loss of a chance (I, B, C, G)

Hargraves Secured Investments Limited v Sharpe - application to set aside writ of possession - - duty of candour (B)

Amaca Pty Limited (under NSW administered winding up) & Ors v Messrs A G McGrath & C J Honey (as liquidators of the HIH Group of Companies) & Anor - corporations - winding up in insolvency - proceeds of contract of reinsurance - *just and equitable* criterion (B)

McVey v G J & L J Smith Pty Ltd & Anor - workers' compensation - second claim in respect of injuries arising out of same event - mental incapacity (I)

Emu (Aus) Pty Ltd v Victorian WorkCover Authority - workers compensation - calculation of premiums - predominant activities (I)



Premier Capital (China) Ltd v Sandhurst Trustees Ltd & Ors - legal practitioners - restraint - whether administration of justice required plaintiff to be deprived of choice of lawyer (I, B, C, G)

Norman South Pty Ltd & Anor v da Silva (No 2) - costs – application for indemnity costs against opposing party's- solicitors - rules of professional conduct (I, B, C, G)

Burns v Minister for Health - limitation of actions - extension of time - retrospective operation of statutes (I, B, C, G)

Perdaman Chemicals & Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd [No 8] - legal professional privilege - confidential documents - waiver (I, B, C, G)

Summaries with links (5 minute read)

Donnellan v Woodland [2012] NSWCA 433

Court of Appeal of New South Wales

Beazley, Basten, Barrett & Hoeben JJA; Sackville AJA

Professional negligence - advocates' immunity - - - duty to assist client to make an informed decision about settlement - *whether*: appellant solicitor breached duty of care to respondent; appellant was negligent in advice he gave to respondent as to likelihood court would grant application pursuant to s88K *Conveyancing Act 1919* (NSW) for grant of drainage easement and potential costs consequences of unsuccessful application; negligent conduct in respect of advice about settlement and offers of compromise; negligent failure to advise respondent to make counter offer to offer made by council; erroneous findings on causation - advocates immunity extends to conduct out of court which affects the conduct of the case in court : *D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12* - damages should be assessed on basis of loss of a chance: *Maels v J C Hutton [1990] HCA 20*

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

Hargraves Secured Investments Limited v Sharpe [2012] NSWSC 1519

Supreme Court of New South Wales

Harrison J

Setting aside judgments and orders - deed of settlement - writ of possession - defendant sought to set aside writ of possession pursuant to r36.16(2)(b) *Uniform Civil Procedure Rules 2005* (NSW) and declarations that deed of settlement was valid and enforceable - alternatively defendant sought



order that any action to enforce consent judgment be stayed - *whether*: clause of deed had not been complied with rendering plaintiff's actions invalid; plaintiff failed to meet obligation to pay defendant's solicitor *upfront* with consequence that it could not enforce provisions of the deed; issue of writs of possession invalid due to failure to draw attention to fact that consent judgment was affected by operation of deed; breach of duty of candour requiring disclosure of material that would mislead court if not disclosed: *Kavia Holdings Pty Ltd v Werncog Pty Ltd* [1999] NSWSC 839; defendant committed act of default; proper reading of deed and consent judgment produced no basis for defendant to oppose sale of properties and steps to recover possession.

[Hargraves Secured Investments](#) (B)

Amaca Pty Limited (under NSW administered winding up) & Ors v Messrs A G McGrath & C J Honey (as liquidators of the HIH Group of Companies) & Anor [2012] NSWSC 1523

Supreme Court of New South Wales

Black J

Corporations - winding up in insolvency - proceeds of contract of reinsurance - plaintiffs sought order under s562A(4) *Corporations Act 2001* (Cth) (**Act**) that ss562A(2)-(3) of the Act did not apply to receipt of specified monies and that those monies should be paid to plaintiffs by defendants - application of s562A of the Act - *relevant contract of insurance* under s562A(1) of the Act includes contract of reinsurance: *AssetInsure Pty Ltd v New Cap Reinsurance Corporation Ltd (in liq)* [2006] HCA 13 - circumstances in which operation of ss562A(2)-(3) can be varied - court's power to make order for different allocation of reinsurance proceeds: s562A(4) of the Act - *just and equitable* criterion: s562A(4), *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273 - matters which court may take into account in considering whether to make order: s562A(5) of the Act, *Re HIH Casualty & General Insurance Ltd* [2005] NSWSC 240 - *whether*: plaintiffs would be *severely prejudiced* if ss562A(2)-(3) of the Act applied; just and equitable to make orders sought.

[Amaca](#) (B)

McVey v G J & L J Smith Pty Ltd & Anor [2012] VSCA 312

Court of Appeal of Victoria

Maxwell P, Tate JA & Davies AJA

Workers compensation - appeal under s52(1) *Accident Compensation Act 1985* (Vic) (**Act**) from dismissal of proceeding on ground that it involved second claim under s98C of the Act in respect of injuries arising out of same event - *whether*: there were questions of law raised during the proceedings; a prior claim could be disregarded if, at time of lodging that claim, claimant was



suffering from a mental incapacity; court bound to find appellant lacked mental capacity to bring first claim: *Dalle-Molle v Manos* [2004] SASC 102; grounds of appeal which contended that trial judge was bound to reach particular conclusion were within scope of s52(1) of the Act: *Green v VWA* [1997] 1 VR 364; s104B(5AA) of the Act prevented lodgment of second claim under s98C of the Act if claimant was proved to have been suffering from relevant mental incapacity at time of lodging claim under s 98C of the Act; uncontested evidence of effect of appellant's psychiatric disorder established he was suffering from relevant mental incapacity; psychiatric injury the subject of second claim should be assessed pursuant to ss104B & 98C of the Act for purpose of payment of compensation.

[McVey v G J & L J Smith](#) (I)

Emu (Aus) Pty Ltd v Victorian WorkCover Authority [2012] VSC 610

Supreme Court of Victoria

Pagone J

Workers compensation insurance premiums - - appeal from decision of Victorian WorkCover Authority (**Authority**) in relation to calculation of insurance premium brought pursuant to s36J *Accident Compensation (WorkCover Insurance) Act 1993 (Vic) (Act)* - appeal was a hearing *de novo*: *United Petroleum Pty Ltd v Victorian WorkCover Authority* [2011] VSC 570 - Authority determined that plaintiff's predominant activities at workplace caused it to fall into a certain Group Class and calculated plaintiff's premiums according to that classification - plaintiff contended that it fell into a different Group Class - - factual inquiry required by *WorkCover Insurance Premiums Order* - necessity to identify relevant goods and services, value of goods and services and causal link between the activities of the employer and value of goods and services - *whether*: classification of adopted by Authority corresponded or most closely corresponded to the predominant activity of the plaintiff at the workplace..

[Emu \(Aus\)](#) (I)

Premier Capital (China) Ltd v Sandhurst Trustees Ltd & Ors [2012] VSC 611

Supreme Court of Victoria

Pagone J

Legal practitioners - application by defendants to restrain solicitor from acting for plaintiff in proceedings in relation to put-and-call option agreement - nature of court's jurisdiction to restrain solicitor from acting in particular case: *Grimwade v Meagher & Ors* [1995] VicRp 28 (*Grimwade*), *Kallinicos v Hunt* [2005] NSWSC 1181 - consideration against exercise of jurisdiction that litigant should not be deprived of his or her choice of lawyer without good cause: *Bowen v Stott* [2004]



WASC 94 - test to be applied in exercise of jurisdiction: *Grimwade - whether*: administration of justice required that party should be deprived of his or her choice of lawyer; solicitor who drafted agreement was witness to a material contested issue of fact; contested fact was of a kind that warranted conclusion that lawyer will be the subject of adverse criticism concerning their professional conduct in the preparation and execution of the agreement or gave personal interest to lawyer or law firm which conflicted with interests of plaintiff; matters pleaded in defendants' counterclaim made allegations of a kind comparable to those in *Clay v Karlson* (1997) 17 WAR 493 in which propriety of conduct of practitioners was in issue – distinction between whether it was prudent not to continue to act and whether interests of justice required they should be prevented.

[Premier Capital \(China\)](#) (I, B, C, G)

Norman South Pty Ltd & Anor v da Silva (No 2) [2012] VSC 622

Supreme Court of Victoria

Beach J

Costs – overarching case management obligations- plaintiffs sought order that defendant's solicitors pay plaintiffs' costs of the proceeding on indemnity basis - relief sought pursuant to s29 *Civil Procedure Act 2010 (Act)* for breach of overarching obligations - plaintiffs relied upon rr13.1, 16.1 & 16.2 *Professional Conduct and Practice Rules 2005 (Vic)* - whether overarching obligations under the *Civil Procedure Act 2010 (Vic)* required defendant's legal practitioners to abandon defendant's denial of loan agreement (and allegation that emails had been altered) at the start of the trial, or on either of its first two days.

[Norman South](#) (I, B, C, G)

Burns v Minister for Health [2012] WASCA 267

Court of Appeal of Western Australia

Martin CJ; Pullin & Newnes JJA

Limitation of actions - extension of time – infant appellant sought leave to appeal from refusal of leave to commence proceedings claiming damages for injuries sustained at time of her birth - application was made pursuant to ss39, 41 & 42 *Limitation Act 2005 (WA) (Act)* - *whether*: to allow extension of time for commencement of proceedings; Commissioner erred by dismissing application without considering merits of application; s7 of the Act applied to all causes of action accruing before commencement day which could be subject of application brought in accordance with Pt3 of the Act; s7 applied only to actions commenced in accordance with s47A *Limitation Act 1935 (WA)*; s7 applied to all causes of action which had not become finally barred by the lapse of



time as at the commencement day – retrospective operation of statutes whether procedural or substantive limitation provision- use of extrinsic materials in statutory interpretation.

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

Perdaman Chemicals & Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd [No 8] [2012] WASC 494

Supreme Court of Western Australia

Martin CJ

Legal professional privilege - application by defendants for inspection of confidential documents discovered by plaintiff - *whether*: documents were privileged from inspection by reason of legal professional privilege; waiver of privilege by plaintiffs - legal principle to be applied where case relies on confidential communication: *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384 - rulings on documents inspected by court.

[Perdaman Chemicals & Fertilisers](#) (I, B, C, G)

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