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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)

Director General, Department Of Services, Technology & Administration v Veall (No. 6) - trade and commerce - misleading and deceptive conduct - unconscionable conduct - remedies (B, G)

Petrov v Do - defamation - default judgment - assessment of damages (I)

Smith v Gould (No 2) - *Calderbank* offer - failure to foreshadow application for indemnity costs (I, B, C, G)

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors - security of payments legislation - latent condition claim - termination costs - jurisdictional error (I, C)

Fletcher and Ors v Fortress Credit Corporation (Australia) II Pty Ltd and Ors - corporations - cross-vesting - transfer of proceedings under the Corporations Act (I, B, C, G)

Ierino v Gutta - equity of exoneration - use by one party of joint debt - intention of parties - (B)

Carey v Korda - evidence - legal professional privilege - waiver - receivership (I, B, C, G)



Augusto v Augusto Homes Pty Ltd (In Liquidation) and Anor - appeal - unrepresented appellant
- application for dismissal of appeal for incompetence (I, B, C, G)

Summaries with links (5 minute read)

Director General, Department Of Services, Technology & Administration v Veall (No. 6) [2012] NSWSC 1118

Supreme Court of New South Wales

Davies J

Trade and commerce - misleading and deceptive conduct - unconscionable conduct - knowing concern - remedies for contraventions of ss52, 51AB & 75B *Trade Practices Act* 1974 (Cth) and ss42, 43 & 61 *Fair Trading Act* 1987 (NSW) (FTA) - Director General sought injunctions preventing defendants from being involved in any activities in the introductory agency industry affecting New South Wales or, alternatively, a requirement by them to provide pre-contractual disclosure with 28 day cooling-off period, together with declarations and restitutionary/compensatory orders - *whether*: appropriate to order permanent injunction: *Holloway v Witham* (1990) 21 NSWLR 70, *Director-General of the Department of Fair Trading v Monaghan* (2003) NSWSC 1099; to exercise discretion to make declarations in the circumstances - considerations influencing whether or not to make declaration: *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (No 2) (1993) 41 FCR 89 - function of a declaration: *Australian Competition and Consumer Commission v Star Promotions Club Pty Ltd* (2010) FCA 139 - whether to grant orders for compensation pursuant to ss72(2) & 72(5) of the FTA.

[Director General, Department of Services, Technology & Administration](#) (B, G)

Petrov v Do [2012] NSWSC 1382

Supreme Court of New South Wales

Simpson J

Defamation - default judgment - assessment of damages - plaintiff claimed damages for defamation by publication of material in Macedonian language newspaper - plaintiff sued publisher of newspaper and source of material - defendants neither appeared nor filed defence - whether article conveyed defamatory imputations - consideration of manner in which they were damaging to plaintiff - assessment of damages.

[Petrov](#) (I)

**Smith v Gould (No 2) [2012] VSC 541**

Supreme Court of Victoria

Dixon J

Costs - plaintiff obtained order adjusting property interests of parties under PtIX *Property Law Act* 1958 (Vic) (**Act**) - *whether*: appropriate occasion to deprive apparently successful party of costs; default position in claims under PtIX of the Act was that costs of proceedings lie as they fall; plaintiff unreasonably refused settlement offers in the form of *Calderbank* letters - court's jurisdiction to award costs: s24 *Supreme Court Act* 1986 (Vic), O63 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) - factors relevant to whether to deprive successful party of costs: ss28(2) & 29 *Civil Procedure Act* 2010 (Vic) - factors relevant to assessing whether rejection of *Calderbank* offer unreasonable: *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2.)* (2005) VSCA 298 - effect of failure foreshadow application for indemnity costs in *Calderbank* offer.

[Smith](#) (I, B, C, G)**BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2012] QSC 346**

Supreme Court of Queensland

Applegarth J

Security of payments legislation - applicant terminated contract with first respondent for construction of dam - applicant sought declaration that adjudicator's decision on first respondent's payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) (**Act**) was void - *whether*: decision affected by jurisdictional error regarding the amount awarded in respect of a latent condition claim, in finding latent condition claim was substantiated, and in including claimed termination costs which could not have arisen before relevant reference date - explanation of scheme of the Act: *Northbuild Construction Pty Ltd v Central Interior Lining Pty Ltd* (2012) 1 Qd R 525 - categories of jurisdictional error: *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* (2012) QCA 276 - whether reasons of adjudicator disclosed source of any entitlement to recover costs claimed before reference date: *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd* (2009) NSWSC 320

[BM Alliance Coal Operations](#) (I, C)

**Fletcher and Ors v Fortress Credit Corporation (Australia) II Pty Ltd and Ors [2012] QSC 359**

Supreme Court of Queensland

Fryberg J

Corporations - cross-vesting - two separate but related pleadings involving claims under the *Corporations Act* 2001 (Cth) (Act) pending in Supreme Court of Queensland - application by liquidators for proceedings to be transferred to New South Wales pursuant to s1337H of the Act - exercise of federal jurisdiction for resolution of all controversies in proceedings: s1337B(2) of the Act - whether applicants had established it was more appropriate for proceedings to be determined in the Supreme Court of New South Wales than in the Supreme Court of Queensland - interests of justice: *Acton Engineering Pty Ltd v Campbell* (1991) FCA 469 - evaluation of factors relevant to appropriateness - cost and convenience - related proceedings - natural forum for the proceedings - *natural* jurisdiction - location and wishes of unsecured creditors.

[Fletcher](#) (I, B, C, G)**Ierino v Gutta [2012] WASCA 222**

Court of Appeal of Western Australia

Pullin & Newnes JJA; Edelman J

Equity of exoneration - appellant knowingly involved in forgery of transfer of title regarding jointly owned property into his sole name - primary judge awarded respondent half the net proceeds from sale of property - *whether*: respondent should be exonerated for amount representing part of joint debt, secured by the property, which appellant used for own benefit - nature of equity of exoneration: *Farrugia v Official Receiver in Bankruptcy* (1982) 43 ALR 700 - basis for equity of exoneration is notion that effect should be given to intention of the parties that, as between them, it is intended that burden of debt should be borne by one, and the other should be exonerated - time for assessment of equity of exoneration for debt was when debt was incurred - *presumption* of exoneration - evidence concerning use of and security for borrowed funds.

[Ierino](#) (B)

Carey v Korda [2012] WASCA 228

Court of Appeal of Western Australia

Martin CJ; Newnes & Murphy JJA

Evidence - legal professional privilege - waiver - receivership - first appellant sought orders for production and inspection of documents in respect of receivers' fees and solicitors' bills of costs - *whether*: documents were subject to legal professional privilege; receivers could claim privilege; claim for privilege had been established on the evidence; privilege had been waived; privilege abrogated pursuant to ss232 & 234 *Legal Practice Act* 2003 (WA) and ss253(1)(c) & 295 *Legal Profession Act* 2008 (WA) - essential elements of the law of modern receivership: *Australian Mutual Provident Society v Geo Myers & Co Ltd (in liq)* (1931) HCA 31 - purpose of legal professional privilege: *Mann v Carnell* (1999) HCA 66, *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) HCA 67 - scope and nature of protected communications: *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325 - waiver - statutory waiver.

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

Augusto v Augusto Homes Pty Ltd (In Liquidation) and Anor [2012] NTCA 8

Court of Appeal of the Northern Territory

Southwood J

Appeal - unrepresented litigant - application for order dismissing appeal for incompetence under r84.16 *Supreme Court Rules* 2008 (NT) (**The Rules**) - appellant sought leave to appeal against summary judgment - *whether*: appeal document complied with Form 85B of the Rules: r85.09 of the Rules; appeal document was filed within 28 days of the material date on which judgment took effect: r59.02 of the Rules; appellant applied for extension of time to appeal: r85.12(2) of the Rules; explanation of delay in filing appeal; identification of grounds of appeal - appellant not entitled to indulgence of court simply because she was unrepresented.

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

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