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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)

Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd; Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd - discovery and interrogatories - privilege - waiver - provision of privileged documents by mistake - confidentiality (I, B, C, G)

Azar v Kathirgamalingan - damages - motor accident - costs - offer of compromise - causation - incapable person (I)

Commissioner of Police v Industrial Relations Commission of New South Wales - judicial review - reinstatement of police officer (I, G)

Nigro v EVS Group Pty Ltd - security of payments legislation - issue estoppel - degree of finality - compulsion of law (I, C)

Sahin & Anor v National Australia Bank Ltd & Anor - stay - *res judicata* - *Anshun* estoppel - issue estoppel (I, B, C, G)



Wodonga City Council v Braunack - workers' compensation - serious injury - adequate reasons (I)

S J Sanders Pty Ltd v Schmidt - negligence - work injury - employers' duties - safe system of work - obligation to provide safe and proper plant and equipment (I)

Byrt v Aero Sth Pacific Pty Ltd - guarantee and sub-lease - application for amendment on first day of trial - adjournment - pleadings (I, B, C, G)

Fairwater Pty Ltd v QBE Insurance (Australia) Ltd - contract - recovery from insurer of amount payable to de-registered company under insurance contract - causation (I)

Summaries with links (5 minute read)

Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd; Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd [2012] NSWCA 430

Court of Appeal of New South Wales

Campbell & Macfarlan JJA; Sackville AJA

Discovery - privilege - waiver - electronic discovery of documents - request for return of privileged documents produced by mistake - application for leave to appeal orders restraining use of documents - interaction of law relating to privilege attaching to legal advice, confidential information and discovery - relationship of client legal privilege and legal professional privilege - whether privileged documents provided on discovery by mistake should be returned or whether any restriction should be placed on use of them - basis of principle in law re use of confidential information - *whether*: injunctions restraining use of documents should have been granted; circumstances in which documents were communicated to or obtained by applicants imposed obligation of conscience on applicants - test whether reasonable solicitor would have realised that documents had been disclosed by mistake: *Pizzey v Ford Motor Company Ltd* (Court of Appeal of England and Wales, 26 February 1993, unreported) - loss of privilege by waiver: s122 *Evidence Act 1995* (NSW).

[Armstrong Strategic Management and Marketing](#) (I, B, C, G)



Azar v Kathirgamalingan [2012] NSWCA 429

Court of Appeal of New South Wales

McColl, Basten & Campbell JJA

Motor accident - assessment of damages - causation - offer of compromise - appellant suffering a psychological condition sued the respondent through a tutor - respondent served offer of compromise in an amount greater than the amount of the judgment - *whether*: psychiatric condition from which appellant suffered was caused by accident; provisions of the *Uniform Civil Procedure Rules 2005* (NSW) (**Rules**) relating to offers of compromise applied to situation where a plaintiff was an incapable person who sued through a tutor: Pt20, Div4 of the Rules, s76 *Civil Procedure Act 2005* (NSW); trial judge's discretion concerning costs miscarried; erroneous finding as to credibility of appellant: *Nominal Defendant v Rooskov* (2012) NSWCA 43; application of wrong test for causation: s5D *Civil Liability Act 2002* (NSW); erroneous reliance upon matters not the subject of cross-examination or flagged to appellant prior to judgment: *Adamson v Ede* (2009) NSWCA 379; erroneous reliance on evidence of practitioners; *Jones v Dunkel* inference should be drawn against respondent: *Jones v Dunkel* (1959) 101 CLR 289.

[Azar](#) (I)

Commissioner of Police v Industrial Relations Commission of New South Wales

[2012] NSWCA 439

Court of Appeal of New South Wales

Beazley & Hoeben JJA; Tobias AJA

Administrative law - industrial relations - statutory construction - application for judicial review of decision of Full Bench of the Industrial Relations Commission of New South Wales (**IRC**) confirming orders for reinstatement of a police officer in the New South Wales Police Force - *whether*: IRC had power to order reinstatement; jurisdictional error; pursuant to s89 *Industrial Relations Act 1996* (NSW) (**Act**) IRC had power to order reinstatement of police officer permanently unfit for work; Act prevented a finding of practicability; *collateral purpose error* in conclusion that reinstatement order could be made for a reason or purpose other than to enable a return to work, being entitlement to workers compensation - construction of provisions of the Act and the *Police Act 1990* (NSW).

[Commissioner of Police](#) (I, G)



Nigro v EVS Group Pty Ltd [2012] NSWSC 1545

Supreme Court of New South Wales

Hislop J

Security of payments legislation - construction contract - issue estoppel - compulsion of law - application for leave to appeal from decision of Local Court pursuant to s40(2) *Local Court Act 2007* (NSW) - adjudication certificate obtained and filed as judgment pursuant to s25(1) *Building and Construction Industry (Security of Payments) Act 1999* (NSW) (**Act**) - defendant issued of garnishee order to plaintiff - plaintiff sought restitution of money together with interest and costs - *whether*: primary judge erred in permitting estoppel issue to be agitated by defendant when it had not been pleaded; adjudicator's decision gave rise to an estoppel: s22 of the Act, *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) NSWCA 69 (**Dualcorp**); adjudicator had determined issue that plaintiff was a party to construction contract and liable as such; issue before magistrate was the same as issue before adjudicator; sufficient degree of finality to give rise to issue estoppel for all purposes: *Dualcorp*; s32 of the Act permitted revisiting of adjudicator's determination; plaintiff entitled to recover funds from defendant on a claim for moneys had and received by defendant under compulsion of law: *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394.

[Nigro](#) (I, C)

Sahin & Anor v National Australia Bank Ltd & Anor [2012] VSCA 317

Court of Appeal of Victoria

Warren CJ; Neave JA & Ferguson AJA

Stay - appeal from judgment granting stay of proceeding on basis that claim of deceit was *res judicata* and that there was both an issue estoppel and *Anshun* estoppel: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) HCA 45 - *whether*: claim for deceit was substantially the same as cause of action already determined; respondents had waived right to bring application for stay: s18 *Civil Procedure Act 2010* (Vic); same facts supported both misleading and deceptive conduct claim and the deceit claim which appellants wished to pursue; issue estoppel in respect of damages; findings made in respect of allegations of fraud were conclusive and necessary to support judgment; there was issue estoppel when appellants were successful in earlier proceeding and had no ability to appeal from findings in respect of fraud; *Anshun* estoppel applied; appellants' lack of legal representation was on its own a sufficient reason for permitting appellants to prosecute counterclaim.

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



Wodonga City Council v Braunack [2012] VSCA 320

Court of Appeal of Victoria

Nettle & Redlich JJA; Davies AJA

Workers' compensation - *serious injury* application - *whether*: causal connection between employment and claimed injury; reasons of trial judge explained finding that injury was a result of work duties with appellant; reasons substantively inadequate and constituted error of law - respondent's onus to establish compensable injury including establishment of causal connection: s134AB(2) *Accident Compensation Act 1985* (Vic), *Church v Echuca Regional Health* (2008) VSCA 153 - task of appellate court in disposing of appeal in which ground is sustained complaining as to the adequacy of the reasons of the trial judge: *Church v Echuca Regional Health* (2008) VSCA 153.

[Wodonga](#) (I)

S J Sanders Pty Ltd v Schmidt [2012] QCA 358

Court of Appeal of Queensland

MA McMurdo P; Gotterson JA & Boddice J

Negligence - work injury - employers' duties - *whether*: finding of negligent failure to implement safe system of work was supported by evidence; basis for conclusion that appellant was negligent in failing to implement increased slip resistance on tread of step; findings contrary to expert evidence and not reasonably open on the evidence - employer's duty of care to establish, maintain and enforce safe system of work: *McLean v Tedman* (1984) 155 CLR 306 - employer's obligation to provide safe and proper plant and equipment discharged where employer purchases appropriate equipment from reputable manufacturer or supplier and makes any inspection which a reasonable employer would make: *Davie v New Merton Board Mills Ltd* (1959) AC 604.

[S J Sanders](#) (I)

**Byrt v Aero Sth Pacific Pty Ltd [2012] QCA 359**

Court of Appeal of Queensland

Holmes & Fraser JJA; Henry J

Contract - guarantee and sub-lease - appeal from judgment in favour of respondent for amounts payable under guarantee of aircraft lease and sub-lease entered by company owned by appellant - application to amend on first day of trial - *whether*: erroneous refusal to adjourn trial; prejudice inherent in loss of trial date could be mended with costs order; refusal of leave to amend defence and counter-claim was proper exercise of discretion; erroneous findings in respect of repudiation of lease: *Shevill v Builders' Licensing Board* (1982) 149 CLR 620; loss of bargain damages should have been reduced.

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

Fairwater Pty Ltd v QBE Insurance (Australia) Ltd [2012] WASCA 270

Court of Appeal of Western Australia

Pullin, Newnes & Murphy JJA

Contract - breach - causation - action pursuant to s601AG *Corporations Act 2001* (Cth) (**Act**) to recover amount payable to a de-registered company under an insurance contract - new cause of action created by s601AG of the Act: *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* (2005) NSWCA 19 - appellant entered into agreement with builder to supply security services on site of builder's display village - appellant entered into contract with de-registered security company - unknown persons set fire to one of the builder's display houses causing loss to builder - *whether*: de-registered security company's breach of its general law duty and implied term of contract with appellant caused appellant to come under liability to pay damages to builder; insurance contract covered de-registered security company's liability to appellant; appellant entitled to judgment against respondent in sum corresponding to liability to builder.

[Fairwater](#) (I)



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By Emily Dickinson

From *Complete Poems* 1924

Part One: Life

HOPE is the thing with feathers
That perches in the soul,
And sings the tune without the words,
And never stops at all,

And sweetest in the gale is heard; 5
And sore must be the storm
That could abash the little bird
That kept so many warm.

I've heard it in the chillest land,
And on the strangest sea; 10
Yet, never, in extremity,
It asked a crumb of me.

<http://www.poetryfoundation.org/bio/emily-dickinson>

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