

Friday 22 February 2013

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd** - remedies - equity - corporations - breaches of duty - contravention of corporations law - assessment of statutory compensation - account of profits (I, B, C)

**Almario v Varipatis (No. 3)** - costs - application for variation of costs order - indemnity costs - offers of compromise - diffidence of plaintiff - whether reference to "costs" invalidates an offer of compromise - exceptional circumstances justifying order other than for indemnity costs (I, B, C)

**Howes v ACP Magazines Ltd & Ors** - defamation - application for jury of 12 persons - whether to depart from usual jury of 4 persons - public prominence of defendant (I)

**Hawkins v DHL Express (Australia) Pty Ltd** - accident compensation - *serious injury* application - appeals from dismissal of leave to bring proceedings - test for setting aside determination of trial judge (I)



**Duma v Mader International Pty Ltd** - tort - breach of statutory duty - manual handling - whether jury's verdict open on the evidence - whether error of law (I)

**State Trustees Ltd v Hassett** - trusts - deceased estate - whether legal owner of apartment held apartment on implied or resulting trust for his parents - evidence - interests of justice (B)

**Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd & Anor** - negligence - manufacturer's duty of care - pure economic loss - trade and commerce - consumer protection - supply of goods - cross-applications for summary judgment and for leave to amend pleadings (I, B, C)

## Summaries with links (5 minute read)

### **V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd [2013] FCAFC 16**

Full Court of the Federal Court of Australia

Emmett, Edmonds & Rares JJ

Remedies - equity - corporations - statutory compensation - account of profits - statutory interpretation - appeal concerning relief to be granted for established breaches of fiduciary and contractual duty and contraventions of *Corporations Act 2001* (Cth) (**Act**) by former director and employees of respondent (individual appellants) in connection with acquisition of business by company (first appellant) - trial judge made assessments in relation to possible alternative remedies: equitable compensation, account of profits, statutory compensation - respondent elected statutory compensation - *whether*: primary judge erred in assessment of statutory compensation under s1317H of the Act; wrong approach to determination of compensation; erroneous exclusions or omissions of expenses in calculation of profits of business; profit resulted from contraventions of the Act - assimilation by trial judge of statutory remedy of compensation with equitable remedy of account of profits - interpretation of s1317H of the Act - appeal upheld.

[V-Flow](#) (I, B, C, G)

**Almario v Varipatis (No. 3) [2013] NSWSC 93**

Supreme Court of New South Wales

Campbell J

Costs - offers of compromise - indemnity costs - plaintiff applied for variation of costs order - *whether*: plaintiff entitled to indemnity costs; r42.14 *Uniform Civil Procedure Rules 2005* (NSW) prima facie engaged; defendant had demonstrated exceptional circumstances justifying another order: *New South Wales Insurance Ministerial Corp. v Reeve* (1993) 42 NSWLR 100, *Morgan v Johnson* (1998) 44 NSWLR 578 - division of opinion as to meaning of r42.14 of the Rules: *Barakat v Bazdarova* [2012] NSWCA 140 - diffidence of plaintiff in respect of first offer's compliance with the Rules: *Vieira v O'Shea (No 2)* [2012] NSWCA 121 - *whether* reference to "costs" invalidates offer of compromise: *Old v McInnes & Anor* [2011] NSWCA 410 - *whether* defendant justified in letting plaintiff's offers lapse - held: plaintiff entitled to indemnity costs - special costs order made.

[Almario](#) (I, B, C, G)**Howes v ACP Magazines Ltd & Ors [2013] NSWSC 88**

Supreme Court of New South Wales

Nicholas J

Defamation - jury - plaintiff sued defendants for publication of article in *The Australian Women's Weekly* magazine - defendants sought order under s20(2) *Jury Act 1977* (NSW) that trial of proceedings be before a jury of 12 persons - principles applicable to application: *Robert (Robbie) Waterhouse v The Age Company* [2012] NSWSC 1349 - *whether*: public prominence of one of the defendants and his association with Australian Labor Party could arouse prejudice or antagonism against him in at least some jurors' minds with result that his evidence in support of defence of substantial truth would not be accepted; administration of justice warranted departure from normal procedure of trial with a jury of 4 persons; issues at trial would ventilate matters concerning public conduct of defendant; any issues of fact for jury to determine in relation to defences filed which would justify a jury of 12 - reality that jurors generally discharge duty fairly and with commonsense - application dismissed.

[Howes](#) (I)**Hawkins v DHL Express (Australia) Pty Ltd [2013] VSCA 26**

Court of Appeal of Victoria

Redlich &amp; Tate JJA

Accident compensation - serious injury - appeals against orders dismissing worker's application for leave under s134AB(16)(b) *Accident Compensation Act 1985* (Vic) to bring proceedings for





damages for pain and suffering in respect of injury caused by employment - leave refused on ground that injury was not a *serious injury* within the statutory definition - applicable test that judge's determination whether or not plaintiff had suffered serious injury *should be set aside only for specific error or if plainly wrong or wholly erroneous*: *Mobilio v Balliotis* [1998] 3 VR 833 - considerations relevant to determination of pain and suffering: *Sutton v Laminex Group Pty Ltd* [2011] VSCA 52 - held: worker unable to establish any specific error material to determination, or that determination plainly wrong or wholly erroneous - appeal dismissed.

[Hawkins](#) (I)

## **Duma v Mader International Pty Ltd [2013] VSCA 23**

Court of Appeal of Victoria

Neave & Tate JJA; Davies AJA

Torts - breach of statutory duty - manual handling - appellant sought orders setting aside jury's finding of no breach of statutory duties imposed by Regs 13, 14 & 15 *Occupational Health and Safety (Manual Handling) Regulations 1999* (Vic) - *whether*: jury's verdict open on the evidence; breach of regulations by failure to conduct risk assessment or provide alternative tools or system of work to eliminate or reduce risk that appellant would be injured while tightening bolts; error of law as to what appellant was required to establish in order to succeed in cause of action for breach of regulations - appeal dismissed.

[Duma](#) (I)

## **State Trustees Ltd v Hassett [2013] VSC 55**

Supreme Court of Victoria

Mukhtar AsJ

Trusts - implied or resulting trust - defendant son purchased apartment and was registered owner - son never lived in apartment - defendants' parents, now deceased, lived in apartment as their home - parents paid substantial part of purchase price, made mortgage repayments, paid for outgoings and improvements - *whether*: defendant, although he was legal owner, held apartment on resulting or implied trust for parents; unconscionable for defendant to assert legal title to prevail over intention that parents were the true owners - presumption of resulting or implied trust: *Heydon and Leeming, Jacobs Law of Trusts in Australia* 7th ed, *Calverley v Green* [1984] HCA 81 - held: plaintiff had proved case on grounds of objective evidence and justice.

[State Trustees](#) (B)



## **Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd & Anor [2013] QSC 16**

Supreme Court of Queensland

Jackson J

Negligence - duty of care - pure economic loss - trade and commerce - consumer protection - supply of goods - pleadings - cross-applications to amend statement of claim and for summary judgment on part of plaintiff's claim - core dispute as to quality of boat designed and built by manufacturer (second defendant), sold to dealer of boats built by manufacturer (first defendant), and later resold to dealer's customer (plaintiff) - *whether*: to grant leave to customer to amend pleadings to add claims for damages under s74 *Trade Practices Act 1974* (Cth) (TPA); to grant summary judgment to manufacturer against customer's claim for damages for negligence; prospects of success; causes of action based on TPA breached limitation provision in s74J TPA or arose out of substantially same facts as cause of action for which relief had been claimed; existence of duty of care in tort owed by manufacturer to purchaser of boat to guard against risk of damage to boat itself, as pure economic loss: *Caltex Oil, Minchillo v Ford Motor Company of Australia Ltd* [1995] VicRp 78, *Bryan v Maloney* [1995] HCA 17, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA16; appropriate to deal with difficult question of duty of care for purposes of summary judgment application - leave to amend granted - application for summary judgment dismissed.

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

### **Beginning My Studies**

By Walt Whitman

Beginning my studies the first step pleas'd me so much,  
The mere fact consciousness, these forms, the power of motion,  
The least insect or animal, the senses, eyesight, love,  
The first step I say awed me and pleas'd me so much,  
I have hardly gone and hardly wish'd to go any farther,  
But stop and loiter all the time to sing it in ecstatic songs.

<http://www.poetryfoundation.org/bio/walt-whitman>

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