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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)

Tanious v The Public Guardian - administrative law - judicial review - guardianship (I, B, C, G)

Sibraa v Brown - occupier's liability - householder - foreseeability (I)

Little v Mackellar - negligence - night-time collision between bicycle and car - whether failure to take reasonable care by not keeping proper look-out (I)

Downer EDI Ltd v Gillies - employment law - entitlement to payment of sums under contract - fiduciary duties - serious misconduct (I, B)

The Ocean Marine Insurance Company Ltd v CSR Ltd - conflict of laws - conflict between Australian and English law - indicative or choice of law rules concerning assignment of choses in action (I, B, C, G)



Brightstars Holding Co Pty Ltd v Johnston; In the matter of Brightstars Freehold Pty Ltd - contract - settlement documents - variation - specific performance (B)

Egan v Mangarelli & Ors (No 2) - costs - offer of compromise - application for special costs order - conflicting decisions in court of appeal whether: compliance; exceptional circumstances; *Calderbank* offer (I, B, C, G)

Sharma v Victorian WorkCover Authority - accident compensation - bankrupt appellant - appeal from orders made before bankruptcy - whether stay of appeal - whether appeal in respect of personal injury to appellant (I, B, G)

Smith v Gould - de facto relationship - adjustment of property interests following separation - valuation - contributions by parties (B)

Summaries with links (5 minute read)

Tanious v The Public Guardian [2012] NSWCA 335

Court of Appeal of New South Wales

Meagher JA; Sackville & Tobias AJJA

Administrative law - judicial review - Guardianship Tribunal made order pursuant to the *Guardianship Act* 1987 (NSW) appointing Public Guardian as guardian of appellant's father - Public Guardian made decision in relation to place of residence of appellant's father - appellant applied for review under s46(4) *Supreme Court Act* 1970 (NSW) (**Act**) of dismissal of appeal from decision of Appeal Panel of the Administrative Decisions Tribunal - the application is not an appeal: s19(2) of the Act, r51.2 *Uniform Civil Procedure Rules* 2005 (NSW) - *whether*: appeal disclosed any cause of action - heavy burden on party seeking review under s46(4) of the Act to justify discharge of order of single judge - necessity to demonstrate that trial judge erred in principle or was plainly wrong: *Rinehart v Welker* [2011] NSWCA 403 - *whether* appellant discharged burden.

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

**Sibraa v Brown [2012] NSWCA 328**

Court of Appeal of New South Wales

Campbell & Hoeben JJA; Tobias AJA

Tort - occupier's liability - appeal against finding of negligence - *whether*: risk of injury foreseeable: s5B(1)(b) *Civil Liability Act* 2002 (NSW); breach of duty of care - previous cases regarding householders' reasonable care: *Neindorf v Junkovic* [2005] HCA 75, *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, *Jaenke v Hinton* [1995] QCA 484 - whether reasonable person in appellant's position would have taken precautions against a risk of harm and factors relevant to determination: ss5B(1)(c) & 5B(2) of the Act - evaluative task of weighing up relevant factors to conclude whether in the circumstances a reasonable person would have taken precautions against risk of harm.

[Sibraa \(I\)](#)

Little v Mackellar [2012] NSWCA 331

Court of Appeal of New South Wales

Basten, Campbell & Barrett JJA

Motor accident - negligence - cyclist suffered injuries in night-time collision with car - *whether*: failure to take reasonable care; factual finding that bicycle not fitted with reflectors was against weight of the evidence; failure to keep a proper look-out; respondent driving at excessive speed; error in opening description of judgment which undermined factual assessment of liability.

[Little \(I\)](#)

Downer EDI Ltd v Gillies [2012] NSWCA 333

Court of Appeal of New South Wales

Allsop P; Macfarlan & Meagher JJA

Corporations - employment law - contract - chief executive officer successfully sued employer for breach of contract of employment and for payment of sums due to him under contract: *whether*: phantom option scheme had been ratified and became binding and effective; respondent was employed when he made his election; respondent engaged in serious misconduct during his employment such that either by clause of employment contract or general law he had no right to amounts claimed under contract; respondent indebted to appellant for loan of a car - effect of circumstances of cessation of employment - legal framework for judgment of respondent's conduct: ss180, 181, 182 & Ch2E *Corporations Act* 2001 (Cth) - respondent's fiduciary duties in



equity - whether conduct of sufficient seriousness to warrant summary dismissal - weight to be given to subjective honesty of respondent - nature of impugned conduct - contractual consequences of findings of serious misconduct: *Shepherd v Felt and Textiles of Australia Ltd* [1931] HCA 21.

[Downer EDI](#) (I, B)

The Ocean Marine Insurance Company Ltd v CSR Ltd [2012] NSWSC 1229

Supreme Court of New South Wales

Stevenson J

Conflict of laws - choice of law - conflict between English law and Australian law - plaintiffs and defendant entered into a deed - High Court of England and Wales made orders (2004/2005 orders) pursuant to the *Financial Services and Markets Act 2000* (UK) (Act) which gave effect to scheme to transfer general insurance business of various insurers to plaintiffs - *whether*: plaintiffs entitled to sue defendant in respect of deed by operation of 2004/2005 orders; on proper construction of deed plaintiffs were entitled to indemnity from defendant for payments made; plaintiffs established entitlement to indemnity in the amount claimed - standing to bring proceedings - sanctioning of insurance business transfer schemes under the Act - nature of transfers - *lex situs* of chose in action - general rule that debt is situated where debtor resides: *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd* (2006) 225 CLR 331 - if debt due on a deed, its *situs* may be potentially where deed located: *Royal Trust Co v Attorney-General (Alberta)* [1930] AC 144 - whether assignment effective under *lex situs* - *indicative* or *choice of law* rules concerning assignment of choses in action - distinction between involuntary and voluntary assignments - identification of *lex causae* - whether *lex loci actus* English law - applicability of principles relevant to recognition of foreign judgments.

[Ocean Marine Insurance Company](#) (I, B, C, G)

Brightstars Holding Co Pty Ltd v Johnston; In the matter of Brightstars Freehold Pty Ltd [2012] NSWSC 1228

Supreme Court of New South Wales

Stevenson J

Contract - settlement documents - variation - deed of settlement and share sale deed to settle earlier proceedings - plaintiff sought enforcement of promise for payment of sum in deed of settlement and enforcement of warranties in share sale deed or alternatively sought specific performance of obligations under share sale deed - credit issues - whether agreement concerning payment of sum varied - nature of variation - admissibility of post-contractual conduct: *Brambles Holdings Limited v Bathurst City Council* [2001] NSWCA 61 - nature of agreement for payment of



sum - whether basis for relief for claim in relation to amounts due to Australian Taxation Office (ATO) and in respect of ATO proceedings - whether to make order of damages for sundry debts - arguments on behalf of defendants: *condition precedent*; *implied variation* of clause - *John Nich* - defendants' conduct and communication after settlement.

[Brightstars Holding](#) (B)

Egan v Mangarelli & Ors (No 2) [2012] NSWSC 1226

Supreme Court of New South Wales

Hoeben JA

Costs - offer of compromise - defendants served offer for payment of specified amount *plus costs as agreed or assessed* pursuant to r20.26 *Uniform Civil Procedure Rules* 2005 (NSW) (**Rules**) - offer not accepted by plaintiff - defendant sought special costs order - whether offer complied with r20.26 of the Rules - conflict between *Old v McInnes & Hodgkinson* [2011] NSWCA 410 and *Vieira v O'Shea (No 2)* [2012] NSWCA 121 - whether offer *exclusive of costs* - whether offer operated as a *Calderbank* offer: *Dean v Stockland Property Management Pty Ltd & Anor (No 2)* [2010] NSWCA 141 - whether to give effect to r42.15 of the Rules - conflict of opinion in Court of Appeal as to whether court can otherwise order for purpose of indemnity costs rule in the absence of *exceptional circumstances* - whether plaintiff's submission amounted to *exceptional circumstances*.

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

Sharma v Victorian WorkCover Authority [2012] VSCA 254

Court of Appeal of Victoria

Weinberg JA & Ferguson AJA

Bankruptcy - accident compensation - Victorian WorkCover Authority (**Authority**) made successful claim for reimbursement by appellant pursuant to s85(6) *Accident Compensation Act* 1985 (Vic) - appellant's counterclaim dismissed - appellant appealed before becoming bankrupt on his own petition - *whether*: appeal stayed pursuant to s60(2) *Bankruptcy Act* 1966 (Cth) (**Act**); bankrupt had standing to bring appeal; appeal was in respect of personal injury to the appellant: s60(4) of the Act; aspect of appeal relating to order for payment of money to Authority pursuant to s85(6) of the Act fell within the exception in s60(4); prohibition on appellant prosecuting appeal in respect of payment order affected his right to continue with appeal insofar as it concerned dismissal of his counterclaim: *Moss v Eaglestone* (2011) 285 ALR 656.

[Sharma](#) (I, B, G)



Smith v Gould [2012] VSC 461

Supreme Court of Victoria

Dixon J

De facto relationships - adjustment of interests - valuation - application for adjustment of property interests under PtIX *Property Law Act* 1958 (Vic) (**Act**) - preconditions for making orders: s280-282 of the Act - duties and obligations on court and enabling powers: ss278 & 291 of the Act - key operative provision: s285 of the Act - principles of adjustment: *Apostolidis v Kalenik* [2011] VSCA 307 - *whether*: plaintiff compromised claim by making enforceable agreement with defendant determining their entitlements to divisible property; court should adopt an *asset by asset* approach or a *global* approach to determination of financial and non-financial contributions; court should adopt date of separation or date of trial to best facilitate task of evaluating contributions - nature and value of divisible property - contributions made by parties to acquisition, conservation or improvement of divisible property and further issues related to those contributions.

[Smith](#) (B)

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