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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)

Deputy Commissioner of Taxation v Seabrooke - freezing orders - prospective cause of action - dissipation of assets - service out of jurisdiction - substituted service (I, B, C, G)

Engineered Thermal Systems Pty Ltd v Salmon, In the Matter of Salmon & Speck Pty Ltd (In Liq) - corporations - application for default judgment - court's discretion - service of process (I, B, C, G)

Trust Co. Fiduciary Services Ltd v Hassarati (No. 3) - real property - possession - amendment of statement of claim - joinder - rights of third parties - limitation of actions (I, B, C, G)

Li v Deng (No 2) - torts - malicious prosecution - abuse of process - proprietary estoppel - credibility evidence (I, B)

Eastmark Holdings Pty Ltd v Kabraji (No 2) - costs - court's discretion - whether costs should be payable forthwith (I, B, C, G)



Sevior v Morgan - corporations - termination of winding up - solvency - public interest - commercial morality - future creditors (B)

Grinham v Tabro Meats Pty Ltd & Anor; Victorian WorkCover Authority v Murray - Medical negligence - duty of care - third party proceeding - recovery of compensation (I, B)

Wilson v Orreal - application to set aside orders - proper service of material - fraud - court's residual discretion (I, B, C, G)

POA Enterprises Pty Ltd, Parcour Pty Ltd and Malcolm Richard Anderson trading as Stratford Village Pharmacy v Chemist Warehouse Cairns & Anor; Nash and Caris trading as Terry White Chemists Pacific Fair v Chemist Warehouse Southport & Ors - trade and commerce - misleading and deceptive conduct - advertised price list for generic medical product - non-disclosure - Pharmaceutical Benefits Scheme (I, B, G)

Summaries with links (5 minute read)

Deputy Commissioner of Taxation v Seabrooke [2012] FCA 1158

Federal Court of Australia

Siopis J

Freezing orders - application by Commissioner of Taxation for freezing order in respect of respondent's assets - whether good arguable case on prospective cause of action sufficient to support the making of orders - whether fact that time for payment for some of the tax and administrative penalties had not yet elapsed precluded making of orders: *Deputy Commissioner of Taxation v Sharp* (1988) 91 FLR 70 - necessity for court to be satisfied of danger that assets may be dissipated so that prospective judgment would be wholly or partly unsatisfied: r7.32(1) *Federal Court Rules* 2011 (Cth) (**Rules**) - *whether*: balance of convenience favoured making of freezing order; to grant leave to serve out of the jurisdiction: r10.43(2) of the Rules, *State of Western Australia v Vetter Trittler Pty Ltd (In liq) (Receiver and Manager Appointed)* (1991) 30 FCR 102; appropriate to make order for substituted service: r10.24 of the Rules, *Rohalo Pharmaceutical Pty Ltd v RP Scherer SpA* (1994) 15 ACSR 347.

[Deputy Commissioner of Taxation](#) (I, B, C, G)



Engineered Thermal Systems Pty Ltd v Salmon, In the Matter of Salmon & Speck Pty Ltd (In Liq)
[2012] FCA 1159

Federal Court of Australia

Foster J

Corporations - application for default judgment pursuant to rr5.23(2)(b) & (c) *Federal Court Rules* 2011 (Cth) (**Rules**) - *whether*: second defendant in default within meaning of r5.22 of the Rules; engagement of r5.23(2); cause of action relied upon by applicant was a statutory cause of action authorised by ss588G & 588M(3) *Corporations Act* 2001 (Cth) (**Act**); claim for debt or liquidated damages within meaning of r5.23(2)(b) of the Rules; claim in debt within meaning of s588M(3) of the Act; effective service of originating process, statement of claim and interlocutory process; part of claim debt paid to applicant - correct interpretation of r5.23(2)(c) of the Rules: *Speedo Holdings BV v Evans (No 2)* [2011] FCA 1227 - *whether*: inappropriate for court to exercise its discretion to enter judgment by default; applicant's remedies limited to summary judgment; granting relief would carry with it *findings* which may bind first defendant and hamper or prejudice defences.

[Engineered Thermal Systems](#) (I, B, C, G)

Trust Co. Fiduciary Services Ltd v Hassarati (No. 3) [2012] NSWSC 979

Supreme Court of New South Wales

Davies J

Real property - possession proceedings - rights of third parties - limitation of actions - application by plaintiffs for leave to file amended statement of claim - applications by non-parties to be joined as parties to proceedings and to file defence to current form of plaintiff's claim - *whether*: any reason to oppose amendment of statement of claim - court's power to permit amendment: s64 *Civil Procedure Act* 2005 (NSW), *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 - *whether*: adequate explanation of delay in making application statement of claim; cause of action based on breach of *Fair Trading Act* 1987 (NSW) could not be brought; cause of action may result where solicitor makes representation to another party: *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; solicitor acting for one party owes duty of care to another; claims statute-barred - court's power to add a person as a party: r6.24 *Uniform Civil Procedure Rules* 2005 (NSW) (**Rules**) - *whether*: any rights held by non-parties would prevail against registered mortgage of first plaintiff: ss42 & 43 *Real Property Act* 1900 (Cth); unconscionable conduct of plaintiffs resulted in rights of applicants being able to be enforced notwithstanding plaintiff's registered interest; standing under *Contracts Review Act* 1980 (NSW) to challenge contractual arrangements even though applicants not parties to contract.

[Trust Co. Fiduciary Services](#) (I, B, C, G)



Li v Deng (No 2) [2012] NSWSC 1245

Supreme Court of New South Wales

Ball J

Torts - malicious prosecution - abuse of process - credibility evidence - proprietary estoppel - plaintiff claimed interest in property (**first property**) on basis of proprietary estoppel, resulting trust, or constructive trust - plaintiff also claimed damages for malicious prosecution in relation to apprehended violence order (**AVO**) proceedings and sought declaration that first defendant held another property (**second property**) on trust for herself and plaintiff on the same terms as first property - credibility of witnesses - *whether*: lies of one party can corroborate evidence of another; plaintiff contributed money to purchase of first property; first defendant promised plaintiff an interest in first property; second and third defendants knew of plaintiff's claim on first property; court satisfied that conversation between first defendant and plaintiff relied upon for claim of proprietary estoppel occurred; plaintiff made out tort of malicious prosecution - elements of tort of malicious prosecution: *A v State of New South Wales* [2007] HCA 10 - whether plaintiff made out tort of abuse of process: *Hanrahan v Ainsworth* (1990) 22 NSWLR 73, *Williams v Spautz* (1992) 174 CLR 509.

[Li](#) (I, B)

Eastmark Holdings Pty Ltd v Kabraji (No 2) [2012] NSWSC 1255

Supreme Court of New South Wales

Hallen AsJ

Costs - application for costs of failed notices of motion for summary dismissal - defendants failed to discharge onus of demonstrating that plaintiff's claims were untenable - court's discretion to make order for costs: s98(1) *Civil Procedure Act* 2005 (NSW) - costs should follow event unless it appears to court that some other order should be made as to the whole or part of the costs: r42.1 *Uniform Civil Procedure Rules* 2005 (NSW) (**UCPR**) - purpose of a costs order: *Ohn v Walton* (1995) 36 NSWLR 77 - whether plaintiff's costs should be payable forthwith: r42.7 UCPR, *Fiduciary Ltd v Morningstar Research Pty Ltd* [2002] NSWSC 432 - discretion must depend on all the circumstances of the case: *Plaza West Pty Ltd v Simon's Holdings (NSW) Pty Ltd (No 2)* [2011] NSWSC 556.

[Eastmark Holdings](#) (I, B, C, G)



Sevior v Morgan [2012] VSC 480

Supreme Court of Victoria

Sifris J

Corporations - application under s482(1) *Corporations Act* 2001 (Cth) (**Act**) to terminate winding up of company in liquidation - factors to which court may and should have regard when applying s482 of the Act: *Gematech Pty Ltd v Bardi Investments Pty Ltd* [2008] NSWSC 196 - onus on applicants to demonstrate solvency of company by leading the *fullest and best* evidence of the company's financial position: *Commonwealth Bank of Australia v Begonia* (1993) 11 ACSR 609, *QBE Workers' Compensation Pty Ltd v P Russel Enterprises Pty Ltd* [2005] NSWSC 1127 - necessity for court to have regard to public interest, including whether granting order would be detrimental to commercial morality: *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 - concepts of commercial morality and public interest not narrow: *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22 - whether in company's best interest to stay liquidation - whether risk of danger to future creditors.

[Sevior](#) (B)

Grinham v Tabro Meats Pty Ltd & Anor; Victorian WorkCover Authority v Murray [2012] VSC 491

Supreme Court of Victoria

J Forrest J

Medical negligence - plaintiff sought damages from former employer as a result of illness contracted at work - claim settled - employer commenced third-party proceeding against plaintiff's general practitioner - Victorian WorkCover Authority (**Authority**) instituted proceedings under s138 *Accident Compensation Act* 1985 (Vic) (**Act**) seeking recovery of compensation payments from general practitioner - allegations of negligence against general practitioner identical in both sets of proceedings - whether general practitioner negligent in provision of advice as to seriousness of situation and failing to recall plaintiff to attend clinic or undergo requested pathology test - necessity for employer to establish liability of general practitioner under s23B(1) *Wrongs Act* 1958 (Vic) (**Wrongs Act**) - Authority's right of indemnity in relation to compensation payments under s138 of the Act dependent on establishment of *circumstances creating a liability in a third party to pay damages - whether*: general practitioner liable for injuries and loss sustained by plaintiff; general practitioner breached duty of care to plaintiff; risk of harm and risk foreseeable: s48(1) of the *Wrongs Act* - relevant considerations in relation to breach: ss48(2) & 49 of the *Wrongs Act* - *standard of care for professionals*: s59 of the *Wrongs Act* - defence of peer-professional opinion.

[Grinham](#) (I)



Wilson v Orreal [2012] QSC 315

Supreme Court of Queensland

McMeekin J

Setting aside orders - service - fraud - application pursuant to rr667(2)(a) & (b) *Uniform Civil Procedure Rules* 1999 (Qld) (**Rules**) for orders to be set aside on grounds that they were made in absence of the plaintiff and were obtained by fraud - applicants not physically present when orders made - application by respondent for appointment of costs assessor - *whether*: applicants were served with material on which trial judge acted; existence of fraud on basis that court was misled into thinking material had been served when it had not, and that solicitor for respondent knew the material had not been served; applicants were aware of proceedings but chose not to attend; to exercise court's residual discretion to set aside orders - silence of Rules on how discretion enlivened - matters relevant to exercise of discretion - *whether*: sole purpose of setting aside orders to saddle respondent with burden of costs; applicants brought application on false basis.

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

POA Enterprises Pty Ltd, Parcour Pty Ltd and Malcolm Richard Anderson trading as Stratford Village Pharmacy v Chemist Warehouse Cairns & Anor; Nash and Caris trading as Terry White Chemists Pacific Fair v Chemist Warehouse Southport & Ors [2012] QSC 316

Supreme Court of Queensland

PD McMurdo J

Trade and commerce - misleading and deceptive conduct - two sets of proceedings with identical issues - applicants and respondents operated competing pharmacies - *whether*: respondents engaged in conduct likely to mislead or deceive in contravention of s18 *Australian Consumer Law*; there should be an injunction to restrain further contravention; published price list misleading for failure to disclose that purchase of generic product would not count towards the potential availability of prescription drugs at concessional prices under the Pharmaceutical Benefits Scheme established under the *National Health Act* 1953 (Cth) - principles applicable to misleading or deceptive conduct by silence or non-disclosure: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357, *NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest), *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 - whether publications were likely to give impression that there was no difference between a purchase of named drug and one of the generic products, at the prices listed, apart from the differences in those prices.

[POA Enterprises](#) (I, B, G)



The Ship Starting

By Walt Whitman

Lo, the unbounded sea,

On its breast a ship starting, spreading all sails, carrying even
her moonsails.

The pennant is flying aloft as she speeds she speeds so stately —
below emulous waves press forward,

They surround the ship with shining curving motions and foam.

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

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