



Wednesday 27 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)

**Alstom Ltd v Liberty Mutual Insurance Company (No 2)** - marine insurance - excluded risks - claim for indemnity under marine insurance policy for loss and damage incurred to transformers during voyage (I)

**Marshall v Megna; Megna v Tory; Tory v Megna** - defamation - qualified privilege - relevance - malice - comment - limitations - appeal and cross-appeal from judgment concerning imputations contained in a series of publications (I)

**OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd** - contract - damages - appeal from dismissal of claim for loss and damage caused by wrongful refusal to accept cargoes of iron ore - construction of agreements (I, B, C)

**Vagg v McPhee** - professional negligence - solicitors' duties - wills and estates - whether solicitors owed a duty of care to beneficiaries of residual estate (I, B)



**Allianz Australia Insurance Ltd v Francica** - judicial review - motor accident compensation - whether error on the face of the record regarding medical certificate issued by medical assessor and decision issued by proper officer (I, G)

**Chen v Caldieraro (No 2)** - costs - motor accident compensation - indemnity costs - offer of compromise (I)

**Walshah Pty Ltd v Nando's Australia Pty Ltd** - costs - application for security for costs - jurisdictional condition - considerations relevant to exercise of discretion (I, B, C, G)

## Summaries with links (5 minute read)

### **Alstom Ltd v Liberty Mutual Insurance Company (No 2) [2013] FCA 116**

Federal Court of Australia

Siopis J

Marine insurance - excluded risks - applicant insured under marine project cargo insurance policy for transport of transformers - applicant sought declaration it was entitled to indemnity under the policy for loss and damage occasioned to transformers during voyage - construction of policy - *whether*: proximate cause of damage to transformers was an inherent vice in the transformers and therefore an excluded peril under the policy; absence of internal bracing comprised an *insufficiency or unsuitability of packing*; applicant could rely on deeming effect of unsuitability of packaging clause to obtain indemnity - nature and extent of losses recoverable under policy - disputed expenditure.

[Alstom](#) (I)

### **Marshall v Megna; Megna v Tory; Tory v Megna [2013] NSWCA 30**

Court of Appeal of New South Wales

Allsop P; Beazley & Hoeben JJA

Defamation - qualified privilege - relevance - malice - comment - limitations - appeal and cross-appeal from decision in favour of respondents and award of damages for imputations contained in a series of circulars published by appellants - *whether*: imputations the subject of the appeal were published on an occasion of qualified privilege and, if so, were relevant to the occasion of qualified privilege; imputations the subject of the cross-appeal were published on an occasion of



qualified privilege; appellants were motivated by malice; defences of qualified privilege and fair comment were made out in respect of imputations alleged in the cross-claim; claim based on first circular was statute-barred pursuant to *Limitation Act 1969* (NSW); damages awarded were excessive; erroneous order that appellants pay the whole of the respondents' costs - appeal dismissed in part - cross-appeal allowed - special costs order made.

[Marshall](#) (I)

## **OneSteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd [2013] NSWCA 27**

Court of Appeal of New South Wales

Allsop P; Macfarlan & Meagher JJA

Contract - damages - *BlueScope* (purchaser) and *Onesteel* (seller) entered into two related commercial agreements dealing with the sale of iron ore - *Onesteel* sued *BlueScope* for loss and damage caused by wrongful refusal to accept cargoes of iron ore - appeal from dismissal of claim - construction of agreements - *whether*: clause of principal agreement permitted *BlueScope* to refuse to take delivery of shipments and absolved it from paying damages; *Bluescope* breached contract by failing to accept shipments; *Onesteel* had proved its loss; *Onesteel* dispensed obligation to be ready and willing to perform; damages should be assessed on *prima facie* measure in s52(3) *Sale of Goods Act 1923* (NSW) (**Act**); use of market value under s52 of the Act inappropriate; lost margin under s52(3) of the Act inappropriate - determination of appropriate currency of damages - appeal allowed.

[OneSteel Manufacturing](#) (I, B, C)

## **Vagg v McPhee [2013] NSWCA 29**

Court of Appeal of New South Wales

Basten & Ward JJA; Tobias AJA

Professional negligence - solicitors' duties - wills and estates - appeal from dismissal of claim against law firm by five beneficiaries entitled to residuary estate in respect of advice concerning execution of testatrix's will and explanation of possibility of severance of joint tenancy - whether failure to establish a duty of care owed by solicitors to beneficiaries in the circumstances of the case; erroneous acceptance of evidence; failure to carefully scrutinise evidence; appellants failed on issue of causation - appeal dismissed.

[Vagg](#) (I, B)



**Allianz Australia Insurance Ltd v Francica [2012] NSWSC 1577**

Supreme Court of New South Wales

Hall J

Judicial review - motor accident compensation - plaintiff insurer sought declaratory relief in respect of certificate issued by medical assessor and decision issued by proper officer under *Motor Accidents Compensation Act 1999* (NSW) (**Act**) - *whether*: medical assessor provided adequate or proper reasons; medical assessor failed to properly apply principles of causation; error of law on face of the record - obligation to provide reasons: *Campbell City Council v Vegan* [2006] NSWCA 284 - adequacy of reasons: *Alchin v Daley* [2009] NSWCA 418 - whether decision of proper officer manifested error of law on face of the record for failure to be satisfied there was a reasonable cause to suspect medical assessment was incorrect in a material respect - judgment for plaintiff - declarations and orders made.

[Allianz Australia Insurance](#) (I, G)

**Chen v Caldieraro (No 2) [2013] NSWSC 5**

Supreme Court of New South Wales

Price J

Costs - motor accident compensation - indemnity costs - offer of compromise - judgment in proceedings awarded to defendant and nominal defendant - nominal defendant's cross-claim against first defendant dismissed - first defendant sought an order that plaintiff pay its costs of proceedings on ordinary basis and that nominal defendant pay costs of its defence of nominal defendant's cross-claim on ordinary basis - nominal defendant submitted there should be no order for costs of cross-claim and sought that plaintiff pay its costs partly on ordinary basis, and partly on indemnity basis pursuant to r42.15(2)(b)(i) *Uniform Civil Procedure Rules 2005* (NSW) in accordance with principles in *Calderbank v Calderbank* [1975] 3 All ER 333 - *whether*: offer of compromise real and genuine; to exercise discretion to award indemnity costs; rejection of offer unreasonable - held: plaintiff to pay defendants' costs on ordinary basis - no order for costs on nominal defendant's cross-claim.

[Chen](#) (I)



**Walshah Pty Ltd v Nando's Australia Pty Ltd [2013] NSWSC 112**

Supreme Court of New South Wales

Schmidt J

Costs - security for costs - plaintiff sought damages in relation to fast food franchise agreement and licence agreement with defendants - defendants sought security for costs under s1335(1) *Corporations Act 2001* (Cth) and r42.21 *Uniform Civil Procedure Rules 2005* (NSW) - *whether*: reason to believe plaintiff corporation would be unable to pay costs of defendant if successful - description of jurisdictional condition: *LivingSpring Pty Ltd v Kliger Partners* [2008] VCA 93; to exercise discretion to grant security for costs; likelihood of plaintiff succeeding on its claims; plaintiff's financial circumstances caused by defendants' conduct; making of order would stultify proceedings; shareholders might make funds available to meet costs order; in interest of justice to exercise discretion - held: security for costs granted in favour of defendants.

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

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