

Tuesday 27 November 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Vince (Trustee), in the matter of Sopikiotis (Bankrupt) v Sopikiotis (No 2)** - bankruptcy - application for possession of property (B)

**Perry v Lennox** - expert evidence - application to rely on additional reports (I)

**McLeary v Swift** - contract - agreement severing business interests - specific performance - indemnity - taxation liabilities - contract for benefit of third parties (B, C)

**Chen v Caldieraro** - negligence - motor accident - unregistered vehicle - findings of fact - road - open to or used by public - credit (I)

**Gigi Entertainment Pty Ltd v Schmidt** - damages - contract - termination of lease - amendment of pleadings - admissibility of expert evidence - adjournment (I, B, C, G)

**Orcher v Bowcliff Pty Ltd** - indemnity costs - offers of compromise - *Calderbank* offers - stay - conduct of litigant (I, B, C, G)



**Lombardo & Anor v Werbeloff & Anor** - appeal - summary dismissal - admissibility of evidence - futility - natural justice (I, B, C, G)

**Bentley v Chang Holdings Pty Ltd** - contract - lease - option to renew lease - possession of premises - liability of lessees for maintenance of demised premises - *fair wear and tear* exception (B)

**SDR Australia Pty Ltd v Leighton Contractors Pty Ltd** - contract - construction - existence of contract - estoppel - misleading and deceptive conduct (B, C)

## Summaries with links (5 minute read)

### **Vince (Trustee), in the matter of Sopikiotis (Bankrupt) v Sopikiotis (No 2) [2012] FCA 1298**

Federal Court of Australia

Bromberg J

Bankruptcy - possession of property - applicant sought orders for possession of property of which respondent was registered proprietor under s30 *Bankruptcy Act* 1996 (Cth) (**Act**) - respondent applied for adjournment based on application for review of sequestration order - *whether*: court had power to grant orders sought by trustee: ss30 & 77 of the Act, *Horne (as trustee of the Bankrupt Estate of Sekulovski) v Sekulovski* (2009) FCA 1164; applicant had right to possession of property; court had power to suspend operation of sequestration order: s37(2)(a) of the Act; court had power to suspend proceedings brought under the sequestration order: *Richmond v BMW Australia Finance Ltd (No 1)* (2009) FCAFC 24, s52(3) of the Act; respondent's application should be treated as application for stay of proceedings - court's discretion to grant stay - test for stay under s52(3) of the Act - balance of convenience - timing of respondent's application - explanation of delay - prospects of success - whether respondent complied with court orders or obligations under s54(1) of the Act.

[Vince \(Trustee\), in the matter of Sopikiotis \(Bankrupt\) \(B\)](#)

**Perry v Lennox [2012] NSWSC 1391**

Supreme Court of New South Wales

Harrison J

Evidence - expert evidence - claim for damages arising from epidural infusion of analgesia - application in part-heard proceedings - *whether*: court should grant leave to plaintiff and to hospital to rely on additional expert reports; exceptional circumstances within the meaning of r31.28(4)(a) *Uniform Civil Procedure Rules 2005 (NSW)*.

[Perry \(I\)](#)**McLeary v Swift [2012] NSWSC 1403**

Supreme Court of New South Wales

Windeyer AJ

Contracts - specific performance - plaintiff and defendant entered into agreement pursuant to which their business interests were severed - plaintiff sought order for specific performance of clause of agreement in relation to payment of taxation liability of company associated with parties - *whether*: defendant liable under clause of agreement to pay Australian Taxation Office (ATO) half of taxation liability of company associated with the parties (**company**); defendant must indemnify plaintiff for half amount payable to ATO by company - terms on which court may grant relief of specific performance: *R Meagher, D Heydon and M Leeming, Meagher, Gummow & Lehane's Equity Doctrines and Remedies (LexisNexis Butterworths, 4th ed, 2002)* - *whether*: plaintiff had fulfilled obligations under clause; defendant could be ordered to pay a third party in fulfilment of obligation under clause: *Coulls v Bagot's Executor and Trustee Co Ltd (1967) 119 CLR 460*; appropriate case for award of damages to be made.

[McLeary \(B, C\)](#)**Chen v Caldieraro [2012] NSWSC 1409**

Supreme Court of New South Wales

Price J

Negligence - motor accident - unregistered and uninsured vehicle - plaintiff suffered paraplegia when trapped under vehicle on farm - sued first defendant owner of farm and Nominal Defendant - *whether*: vehicle's handbrake, footbrake and tyres were defective; plaintiff applied handbrake before alighting; accident occurred on a road: s3 *Motor Accidents Compensation Act 1999 (NSW)*, s4 *Road Transport (Vehicle Registration) Act 1997 (NSW)* - meaning of *open to or used by public*: *Schubert v Lee (1946) 71 CLR 589*, *Ryan v The Nominal Defendant (2005) NSWCA 59* - whether first defendant



sold vehicle to scrap metal dealer so that it would be destroyed and thus not able to be tested - principles governing duty, causation and damages: s5 *Civil Liability Act* 2005 (NSW).

[Chen](#) (I)

## **Gigi Entertainment Pty Ltd v Schmidt [2012] NSWSC 1423**

Supreme Court of New South Wales

Schmidt J

Damages - lease - dispute in relation to termination of lease of hotel - plaintiff claimed damages from defendant for outstanding rent, costs of repair or replacement of plant and equipment, repair and maintenance of hotel, rent and other amounts due under lease - defendant cross-claimed for repayment of security deposit, conversion in relation to cash, stock and other property retained by plaintiff, and damages including for loss of business - referee appointed - resolution of notices of motion and remaining issues - refusal of pleading amendment: ss56, 58(2)(b) & 59 *Civil Procedure Act* 2005 (NSW), *Aon Risk Services Australia Ltd v Australian National University* (2009) HCA 27; (2009) 239 CLR 175 - admissibility of expert evidence: ss55 & 56 *Evidence Act* 1995 (NSW), *Dasreef Pty Ltd v Hawchar* (2011) HCA 21 - refusal of adjournment application.

[Gigi Entertainment](#) (I, B, C, G)

## **Orcher v Bowcliff Pty Ltd [2012] NSWSC 1429**

Supreme Court of New South Wales

Harrison J

Costs - offers of compromise - *Calderbank* offers - stay - application by plaintiff for costs on indemnity basis - application by first and third defendants for stay of orders pending appeals - defendants refused offers of compromise made by plaintiff - plaintiff obtained verdict against defendants more favourable than offers of compromise - *whether*: offers were valid offers: r20.26 *Uniform Civil Procedure Rules* 2005 (NSW), *Old v McInnes and Hodgkinson* (2011) NSWCA 410, *Vieira v O'Shea (No 2)* (2012) NSWCA 121; offers operated as *Calderbank* offers: *Collins v Sydney Ports Corporation* (2012) NSWSC 1316, *Pritchard v Trius Constructions Pty Ltd (No 2)* (2011) NSWSC 1114; to grant order for indemnity costs; disentitling conduct by plaintiff during litigation; to grant stay of judgment; defendants should be required to pay the amount of the judgment into trust account pending disposition of any appeal.

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



## Lombardo & Anor v Werbeloff & Anor [2012] VSC 544

Supreme Court of Victoria

McMillan J

Appeal - summary dismissal - contractual dispute between appellant purchasers and respondent vendors in respect of sale of a portion of respondents' land pursuant to ss9AA-9AF *Sale of Land Act* 1962 (Vic) - appeal from decision of Magistrates' Court pursuant to s109 *Magistrates' Court Act* 1989 (Vic) - respondents sought summary dismissal of appeal pursuant to s62 *Civil Procedure Act* 2010 (Vic) and r58.10(8) *Supreme Court (General Civil Procedure) Rules* 2005 (**Rules**) - appellants appealed from summary dismissal pursuant to r77.06 of the Rules - *whether*: primary judge correct in allowing respondents to bring application for summary dismissal; remitting matter to Magistrates' Court would be futile because appellants' defences to respondents' claims were hopeless; application based on inadmissible material, too late and misconceived with no proper basis; appellants were denied natural justice.

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

## Bentley v Chang Holdings Pty Ltd [2012] QSC 366

Supreme Court of Queensland

PD McMurdo J

Lease - renewal of lease - possession of premises - *fair wear and tear* - applicant lessees conducted hotel business in building (**premises**) leased from respondent lessor - applicants sought to exercise option to renew lease and claimed entitlement to premises for a term of five years - respondents claimed applicants breached provisions of lease and denied their entitlement to possession - respondent served notices on applicants pursuant to s124 *Property Law Act* 1974 (Qld) (**Act**) - alleged breaches occurred after exercise of option to renew but before expiry of lease - *whether*: respondent entitled to forfeit lease on basis of alleged breaches; valid exercise of option to renew lease; challenge to exercise of option could not succeed because respondent gave no notice in compliance with s128 of the Act; breach of lease fell outside operation of s128 of the Act; notices given by respondent under s124 of the Act were in bad form or ineffective because breaches did not occur; repair of breakdown of lift was applicants' responsibility under lease; breakdown of lift constituted *fair wear and tear*; lift was an *appurtenance*.

[Bentley](#) (B)



## **SDR Australia Pty Ltd v Leighton Contractors Pty Ltd [2012] WASC 434**

Supreme Court of Western Australia

Allanson J

Contract - estoppel - misleading and deceptive conduct - plaintiff and main contractor defendant entered contracts in relation to construction of steel silos - parties did not execute formal written contracts - plaintiff claimed payment for work calculated at reasonable prices and order that defendant give up bank guarantees provided by plaintiff in as security in lieu of cash retentions - 12 questions for determination including: whether the parties had entered into a contract - third category *Masters v Cameron* (1954) HCA 72; contract may be inferred *Lighting By Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd* (2008) WASC 23; representations; estoppel: *Thompson v Palmer* (1933) HCA 61, *Galaxidis v Galaxidis* (2004) NSWCA 111, *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551, 14,570; misleading and deceptive conduct.

[SDR Australia](#) (B, C)

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