

Friday 28 September 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**SCCASP Holdings as trustee for the H&R Super Fund v Commissioner of Taxation** - objection against amended assessment by trustee of complying superannuation fund (B)

**Branson v Tucker** - recovery of costs - unpaid barrister's fees - appeal from decision dismissing application to strike out respondents' defence and cross-claim (I, B, C, G)

**Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd** - contract - application for stay of proceedings until dispute resolution procedure complied with (I, B, C)

**Lukac v Madsen (No 2)** - application by defendant for dismissal of proceedings or stay of proceedings self-represented plaintiff - non-compliance with court orders (I, B, C, G)

**Attorney-General for the State of South Australia v Kowalski (No 5)** - discovery - whether documents subject to legal professional privilege (I, B, C, G)



**Highfield Property Investments Pty Ltd v Commercial & Residential Developments (SA) Pty Ltd** - conveyancing - construction of contract for sale of property - requirement for service of vendor's statement (B, C)

## Summaries with links (5 minute read)

### **SCCASP Holdings as trustee for the H&R Super Fund v Commissioner of Taxation** **[2012] FCA 1052**

Federal Court of Australia

Logan J

Taxation - trusts - appeal from decision of Commissioner of Taxation disallowing objection against amended assessment - applicant trustee of complying superannuation fund - trust income applied to superannuation fund pursuant to trust instrument - applicant's onus to prove amended assessment excessive - whether distribution to applicant from trust gives rise to *special income* under s273 *Income Tax Assessment Act* 1936 (Cth) (**Act**) - concept of *income derived* in s273(6) of the Act - whether applicant's net capital gain was *income derived* - principle that statutory income including net capital gain forms part of assessable income: *Federal Commissioner of Taxation v Bamford* [2010] HCA 10.

[SCCASP Holdings](#) (B)

### **Branson v Tucker** [2012] NSWCA 310

Court of Appeal of New South Wales

Beazley, Campbell & Barrett JJA

Recovery of costs - unpaid barrister's fees - appeal from decision dismissing application that respondents' defence and cross-claim be struck out pursuant to r14.28 *Uniform Civil Procedure Rules* 2005 (NSW) (**Rules**) - applicant barrister sought unpaid fees from respondent solicitors - respondents sought but were refused assessment of memorandum of fees under the *Legal Profession Act* 2004 (NSW) (**Act**) due to expiry of time-limit under the Act - circumstances in which leave will be granted to argue previous Court of Appeal decision was wrongly decided: *Gett v Tabet* [2009] NSWCA 76 - circumstances and manner in which barristers entitled to sue for their fees - whether Div11 of the Act provided an exclusive regime for assessing reasonableness of costs - whether court had jurisdiction to determine reasonableness of disputed items in a bill of costs - principles for exercise of jurisdiction under r14.28 of the Rules.

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

**Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd [2012] QSC 290**

Supreme Court of Queensland

Martin J

Contract - operation agreement for maintenance of plant and equipment services -action for breach of agreement in relation to applicant's refusal to make any further payments for maintenance - applicant sought stay of proceedings until there had been compliance with dispute resolution procedure (DRP) contained in contract - court's power to stay proceedings - no basis in principle for treating DRP any differently from arbitration clause or expert determination clause: *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 - burden on parties to an application for stay of proceedings: *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 - whether DRP unenforceable to due uncertainty or futility - whether demonstration of pointlessness in continuing dispute resolution process.

[Downer EDI Mining](#) (I, B, C)**Lukac v Madsen (No 2) [2012] QSC 295**

Supreme Court of Queensland

North J

Procedure - self-represented plaintiff - defendant sought dismissal of proceedings under court's inherent jurisdiction or r658 *Uniform Civil Procedure Rules* 1999 (Qld) (**Rules**) or alternatively that proceedings be stayed - plaintiff commenced proceedings in Magistrates Court - matter transferred to Supreme Court on basis of public interest - plaintiff's claim struck out - plaintiff failed to comply with court orders - court's power to terminate proceedings for abuse of process: *von Risefer & Ors v Permanent Trustee Co Pty Ltd & Ors* [2005] QCA 109 - requirements of prompt and orderly progress of litigation: r5 of the Rules - public interest in expeditious resolution of litigation - whether to fix costs of proceedings commenced by plaintiff - court's power to fix costs: r687(2)(c) of the Rules - whether costs should be assessed in accordance with scale of costs and charges applicable in Magistrates Court.

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



**Attorney-General for the State of South Australia v Kowalski (No 5) [2012] SASC 169**

Supreme Court of South Australia

Blue J

Discovery - plaintiff sought declaration that defendant had persistently instituted vexatious proceedings pursuant to s39 *Supreme Court Act* 1935 (SA) - defendant sought production of documents by plaintiff pursuant to r215(1)(c) *Supreme Court Civil Rules* 2006 (SA) (**Rules**) - plaintiff resisted production on basis of legal profession privilege pursuant to r140(6) of the Rules - whether documents *prima facie* subject to legal professional privilege - principles applicable to communications between opposing parties and communications between solicitor and client - whether *prima facie* privilege abrogated due to creation for unlawful or improper purpose: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [1996] HCA 3.

[Attorney-General](#) (I, B, C, G)

**Highfield Property Investments Pty Ltd v Commercial & Residential Developments (SA) Pty Ltd [2012] SASC 165**

Supreme Court of South Australia

Blue J

Contract - conveyancing - contract between plaintiff and first defendant acting as agent for second defendant to sell property after first defendant exercised option - option agreement required plaintiff to serve vendor's statement pursuant to s7 *Land and Business (Sale and Conveyance) Act* 1994 (SA) - first defendant rescinded contract for misrepresentation because property contained asbestos - plaintiff terminated contract for breach and/or repudiation and claimed damages for loss of bargain - defendant counterclaimed for return of deposit - contractual construction - *whether*: term of contract that plaintiff serve accurate vendor's statement; statement required to disclose asbestos; term rendered void by s33 of the Act; obligation to settle postponed by s7 of the Act in absence of receipt of complying vendor's statement; breach of implied term requiring cooperation; unconscionable conduct by plaintiff; defendant ready willing and able to settle; plaintiff ready willing and able to comply with obligation to serve complying vendor's statement; plaintiff's breach precluded termination or claim for loss and damages; first defendant's conduct dispensed with further performance of vendor's statement obligation.

[Highfield Property Investments](#) (B, C)



## Ozymandias

By Percy Bysshe Shelley

I met a traveller from an antique land,  
Who said — “Two vast and trunkless legs of stone  
Stand in the desert. . . . Near them, on the sand,  
Half sunk a shattered visage lies, whose frown,  
And wrinkled lip, and sneer of cold command,  
Tell that its sculptor well those passions read  
Which yet survive, stamped on these lifeless things,  
The hand that mocked them, and the heart that fed;  
And on the pedestal, these words appear:  
My name is Ozymandias, King of Kings;  
Look on my Works, ye Mighty, and despair!  
Nothing beside remains. Round the decay  
Of that colossal Wreck, boundless and bare  
The lone and level sands stretch far away.”

<http://www.poetryfoundation.org/bio/percy-bysshe-shelley>

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