

Tuesday 30 October 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd** - trade practices - debt collection agency - misleading and deceptive conduct - unduly harassing or coercive (I, B)

**Coles Supermarkets Australia Pty Ltd v Haleluka** - negligence - damages (I)

**Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd (No 2)** - costs of trial and appeal - damages - *Calderbank* offer - reconstitution of court following retirement of judge (I, B, C, G)

**Lean v Clarence Property Corporation Ltd** - contract - construction of guarantee of obligation to pay rent - change in registered proprietor of premises (B)

**Pacific Resources International Pty Ltd v UTI (Aust) Pty Ltd; Brackley Industries Pty Ltd v UTI (Aust) Pty Ltd** - bailment - trade practices - misleading and deceptive conduct - concurrent wrongdoers - proportionate liability (I, B)



**Popovic v ACN 098 054 678 Pty Ltd & Anor** - negligence - breach of statutory duty - injury and subsequent aggravation to injury suffered in course of employment - damages (I)

**Peterson v Hottes** – equity - trusts and trustees - real property - appellant provided money to respondent for purchase of property - proportionate contribution - constructive trust (B)

**Town of Port Hedland v Reece William Hodder by next friend Elaine Georgina Hodder** - negligence - person with disability injured in diving accident at swimming pool - occupiers' liability - contributory negligence (I)

**McColley v Commonwealth of Australia** - torts - negligence - duties of public authorities - veterans affairs - application to strike out statement of claim (I, G)

## Summaries with links (5 minute read)

### **Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd [2012] FCA 1164**

Federal Court of Australia

Perram J

Trade practices - plaintiff applied for injunction against debt collection agency restraining misleading and deceptive conduct and unduly harassing or coercive conduct - plaintiff also sought declaratory relief - *whether*: conduct in breach of ss52 & 60 *Trade Practices Act* 1974 (Cth) (TPA) and ss12D(A)(1) & 12DJ *Australian Securities and Investment Commission Act* 2001 (Cth) (ASIC Act); claims under ASIC Act could be maintained; defendants covered by s12BAB(1)(g) of the ASIC Act; conduct connected to *financial services* within meaning of the ASIC Act - meaning of *use physical force or undue harassment or coercion* in s60 of the TPA in context of debt collection: *Australian Competition and Consumer Commission v McCaskey* [2000] FCA 1037, *Australian Competition and Consumer Commission v Maritime Union of Australia* [2001] FCA 1549.

[Australian Securities and Investments Commission](#) (I, B)



## **Coles Supermarkets Australia Pty Ltd v Haleluka [2012] NSWCA 343**

Court of Appeal of New South Wales

Allsop P; Campbell and Meagher JJA

Negligence - damages - respondent injured when hit by trolley in appellant's supermarket - appeal on quantum of damages - *whether*: erroneous assessment of non-economic loss of 30% of a most extreme case for purposes of s16 *Civil Liability Act* 2002 (NSW); erroneous assessment of future economic loss; there should have been no award of damages for past or future care; award of damages for future economic loss should be based on *buffer* approach.

[Coles Supermarkets Australia](#) (I)

## **Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd (No 2) [2012] NSWCA 347**

Court of Appeal of New South Wales

McCull & Basten JA; Young AJA

Costs - appeal from award of damages - judge retired shortly after handing down principal judgment - court reconstituted pursuant to s43 *Supreme Court Act* 1970 (NSW) with same members and retired judge in different capacity: *Orr v Holmes* [1948] HCA 16, *Cotogno v Lamb* (1985) 3 NSWLR 221 - allegation of *factual error* in principal judgment in respect of damages for lost opportunity of sale: *Hadley v Baxendale* (1854) 156 ER 145 - whether to reopen statement of supposedly erroneous *finding* in principal judgment - costs of correcting survey - interest on legal costs - *whether*: calculations by parties in relation to amount of judgment sought to achieve unjustifiable level of precision; appellant's offer of compromise made pursuant to r20.26 *Uniform Civil Procedure Rules* 2005 (NSW) could be disregarded for purposes of assessing costs of trial; *Calderbank* offer in relation to costs of appeal justified special order as to costs; appellants should receive costs of appeal; to have regard to *Calderbank* offer as guidepost for assessing success on appeal; unreasonable for respondent to reject *Calderbank* offer.

[Monaghan Surveyors](#) (I, B, C, G)

## **Lean v Clarence Property Corporation Ltd [2012] NSWSC 1267**

Supreme Court of New South Wales

Beech-Jones J

Contract - guarantee - respondent sued appellant for amount owing under guarantee of obligation to pay rent - appellant appealed pursuant to ss39(1), 40(1) & 41(1) *Local Court Act* 2007 (NSW) (**Act**) - construction of guarantee - *whether*: execution of lease; unregistered lease terminated by registration of title by subsequent proprietor; new registered proprietor bound by unregistered





lease: *Leros Pty Ltd v Terara Pty Ltd* [1992] HCA 22; 174 CLR 407; new registered proprietor a successor or assignee; new registered proprietor entitled to benefit of guarantee: *Broadwater Hospitality Management Pty Ltd v Primewest (Lot 4 Davidson Street Kalgoorlie) Pty Ltd* (No 2) [2010] WASCA 174; alterations to lease discharged guarantee: *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* [1987] HCA 15.

[Lean](#) (B)

**Pacific Resources International Pty Ltd v UTI (Aust) Pty Ltd; Brackley Industries Pty Ltd v UTI (Aust) Pty Ltd [2012] NSWSC 1274**

Supreme Court of New South Wales

Stevenson J

Bailment - trade and commerce - misleading and deceptive conduct - proportionate liability - concurrent wrongdoer - warehouse and contents destroyed by fire - plaintiff sought damages from defendant lessee for loss of goods including fish oil stored in warehouse - defendant's duty as bailee of goods to safeguard goods with reasonable care - *whether*: defendant discharged onus to show that duty discharged; fire caused by spontaneous combustion of fish oil spilled in warehouse and inadequate clean-up by defendant; fire caused by want of care of defendant; defendant's standard terms and conditions incorporated into bailment contract; standard terms and conditions, if incorporated, excluded defendant from liability; defendant made misleading or deceptive representations to plaintiff concerning storage of goods in breach of s52 *Trade Practices Act* 1974 (Cth); plaintiff detrimentally relied on the representations; defendant and its lessor were *concurrent wrongdoers* for the purpose of s34 *Civil Liability Act* 2002 (NSW) (**Act**), *Perpetual Trustee Company Ltd v CTC Group Pty Ltd* [2012] NSWCA 252; lessor owed duty of care to plaintiffs: *Jones v Bartlett* [2000] HCA 56; defendant had *proportionate liability* defence under s35 of the Act.

[Pacific Resources International](#) (I, B)

**Popovic v ACN 098 054 678 Pty Ltd & Anor [2012] VSC 498**

Supreme Court of Victoria

Kaye J

Negligence - plaintiff claimed damages for injuries sustained in two incidents during course of employment by first defendant labour hire company - in first incident plaintiff injured while hired to second defendant - in second incident plaintiff suffered aggravation of injury at office of first defendant - *whether*: negligence and breach of statutory duty by first and second defendants; contributory negligence; at time of sustaining injury plaintiff was performing tasks he had been instructed to perform - contribution of each of the two incidents to plaintiff's injury and ongoing



incapacity: *Dulieu v White & Sons* [1901] EWHC KB 1, *Watts v Rake* [1960] HCA 58 - extent of plaintiff's incapacity to perform restricted employment duties - relevance of pre-existing condition to assessment of damages: *Malec v J C Hutton Pty Ltd* [1990] HCA 20.

[Popovic](#) (I)

## **Peterson v Hottes [2012] QCA 292**

Court of Appeal of Queensland

Muir & Gotterson JJA; Henry J

Equity - trusts and trustees - real property - appellant provided money to respondent to assist in purchase of property - at the time money was provided the parties contemplated that appellant would live in property with respondent - relationship between parties broke down - appellant left property - appellant claimed beneficial interest in property - *whether*: failure to give adequate reasons for finding that appellant's intention was not to share a proportionate interest in property; failure to have due regard to evidence; error in not finding respondent held property on constructive trust in proportion to parties' contributions to purchase of property: *Baumgartner v Baumgartner* (1987) 164 CLR 137, *Muschinski v Dodds* (1985) 160 CLR 583; implicit finding that respondent made no statement to appellant that appellant would be owner of property when purchase and that parties did not discuss matter was erroneous, contrary to *incontrovertible facts*, *glaringly improbable* and not subject of adequate reasons; unconscionable for respondent to retain full title to and benefit of property; to apply constructive trust, charge, or equitable compensation.

[Peterson](#) (B)

## **Town of Port Hedland v Reece William Hodder by next friend Elaine Georgina Hodder [No 2] [2012] WASCA 212**

Court of Appeal of Western Australia

Martin CJ; McLure P & Murphy JA

Negligence - occupiers' liability - contributory negligence - first respondent suffering intellectual and physical disabilities was injured in diving accident at swimming pool owned by appellant and managed by second respondent - *whether*: appellant and/or second respondent liable in negligence; appellant and/or respondent were occupiers of the swimming pool; appellant's duty of reasonable care required it to remove diving blocks at the shallow end of the pool; failure by second respondent to supervise users of pool; engagement of second respondent discharged appellant's duty of care; appellant's duty as occupier was non-delegable; appellant liable to first respondent as a contractual entrant: *Watson v George* (1953) 89 CLR 409 - operation and effect of s6 *Occupiers Liability Act* 1985 (WA) - *whether*: second respondent liable to contribute to damages or



indemnify appellant in respect of damages pursuant to contract; erroneous assessment of contributory negligence on purely objective basis without regard to first respondent's disabilities: s5K *Civil Liability Act* 2002 (WA); first respondent failed to take adequate care for his own safety.

[Town of Port Hedland](#) (I)

## **McColley v Commonwealth of Australia [2012] ACTSC 154**

Supreme Court of the Australian Capital Territory

Burns J

Torts - negligence - duties of public authorities - plaintiff's husband took own life following investigation into payment of disability pension under *Veterans' Entitlement Act* 1986 (Cth) (Act) - plaintiff claimed damages in negligence from defendant and damages for beneficiaries and family members of deceased - application to strike out statement of claim pursuant to r425(1)(a) *Court Procedures Rules* 2006 (ACT) - *whether*: statement of claim disclosed reasonable cause of action - principles applicable to application to strike out statements of claim: *Galovac Pty Ltd v Australian Capital Territory* [2010] ACTSC 132 *whether*: Department of Veteran Affairs owed duty of care to deceased in investigation: *Tame v New South Wales and Wilson v State of New South Wales* (2001) 53 NSWLR 407; duty of care would be incompatible with duty to investigate; duty of care would be coherent with statutory scheme put in place by the Act: *State of New South Wales v Paige* (2002) 60 NSWLR 371; law had ever recognised a cause of action for damages for denial of procedural fairness in exercise of statutory or prerogative power: *Attorney-General (NSW) v Quin* (1990) 170 CLR.

[McColley](#) (I, G)

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