

Wednesday 31 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)

**Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserves Reserve Trust v Thompson** - occupiers' liability - respondent injured descending stairs of rotunda in park - appeal on liability and damages (I)

**Jacques v Forte Enterprises Pty Ltd** - application to reopen case - costs (I, B, C, G)

**Dickson v Chaffey & Anor (No 4)** - damages - unlawful assault (I)

**AE Consulting Pty Ltd v Online Valuations Pty Ltd** - damages - heads of damage - negligent valuation - Australian Consumer Law - breach of contract (I, B, C, G)

**Paramount Lawyers Pty Ltd v Maneschi (No 2)** - costs and interest - reagitation of order re interest - indemnity costs - offer of compromise (I, B, C, G)

**Bendigo and Adelaide Bank Ltd v Crown Melbourne Ltd** - interrogatories - objections (I, B, C, G)



**Pathway Investments Pty Ltd v National Australia Bank Ltd (No 2)** - anti-suit injunction - foreign proceeding - oppressive and vexatious proceedings (I, B, C, G)

**Ryan v Urban Construct (SA) Pty Ltd (No 2) [2012] SASC 193** - corporations - winding up in insolvency - applications for stay of execution and to set aside statutory demand (B)

**Vizovitis v Ryan t/as Ryans Barristers & Solicitors** - apprehended bias - summary dismissal - security for costs (I, B, C, G)

## Summaries with links (5 minute read)

### **Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserves Reserve Trust v Thompson [2012] NSWCA 340**

Court of Appeal of New South Wales

Meagher & Hoeben JJA; Tobias AJA

Occupiers' liability - respondent injured when descending steps of rotunda in park - proceedings against appellant as trustee of occupier of rotunda - appellant appealed on liability and in respect of damages awarded for future loss of earning capacity - *whether*: erroneous finding as to who was occupier of the park; failure to apply provisions of s42 *Civil Liability Act* 2002 (NSW) (**Act**): *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263; failure to apply s5B of the Act; relevant risk was a risk appellant knew about or ought to have known about; evidence in relation to the occurrence of prior accidents was *neutral*; impermissible construction of meaning of photograph: *Short v Barrett* [1990] NSWCA 164; failure to give full effect to respondent's admissions; appellant's negligence was a cause of respondent's damage; failure to conform to requirements of s13 of the Act: *Husher v Husher* [1999] HCA 47.

[Bathurst Regional Council](#) (I)

### **Jacques v Forte Enterprises Pty Ltd (No 2) [2012] NSWSC 1314**

Supreme Court of New South Wales

Rein J

Damages - costs - arithmetical error in amount of judgment; application to reopen and make further submissions concerning damages; whether in interests of justice to allow further



submissions; application for order that defendants pay plaintiff's costs; whether basis to reduce amount of plaintiff's costs because he did not obtain as much as he claimed; whether open to court to reduce amount of costs: *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (No 3) (1998) 39 ASCR 20, *NRMA Ltd v Morgan* (No 3) [1999] NSWSC 768; whether r42.34 *Uniform Civil Procedure Rules* 2005 (NSW) applied to plaintiff; application for order that plaintiff's costs be limited to 50% of ordinary costs as agreed or assessed; application for stay pending appeal based on plaintiff's impecuniosity. [Jacques](#) (I, B, C, G)

**Dickson v Chaffey & Anor (No 4) [2012] NSWSC 1277**

Supreme Court of New South Wales

Beech-Jones J

Damages - determination of quantum of damages for unlawful assault without any defence under s52 *Civil Liability Act* 2002 (NSW) - general damages - economic loss - care.

[Dickson](#) (I)

**AE Consulting Pty Ltd v Online Valuations Pty Ltd [2012] NSWSC 1300**

Supreme Court of New South Wales

Davies J

Damages - negligent valuation - applications for default judgment for unliquidated damages pursuant to r16.7 *Uniform Civil Procedure Rules* 2005 (NSW) and for damages to be assessed - plaintiff sued valuers for negligent valuation - plaintiff claimed damages for breach of s18 *Australian Consumer Law* and breach of contract - *whether*: judgment should be given to plaintiff for damages to be assessed; contractual interest recoverable: *State Bank of NSW Ltd v Yee* (1994) 33 NSWLR 618; unpaid rates and the legal costs associated with obtaining possession against the defaulting borrower arose from independent acts of the borrower: *Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd* (2010) 29 VR 503 - appropriate heads of damage: *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514, *Kenny Pty Ltd and Good v MGICA* (1992) Ltd (1999) 199 CLR 413.

[AE Consulting](#) (I, B, C, G)



## **Paramount Lawyers Pty Ltd v Maneschi (No 2) [2012] NSWSC 1303**

Supreme Court of New South Wales

Rothman J

Costs and interest - defendant submitted plaintiff should pay its costs on indemnity basis due to effect of offer of compromise and/or *Calderbank* letter - defendant also sought to reagitate court's order in relation to interest and sought payment of interest at prescribed rate rather than Reserve Bank cash rate - principles applicable to alteration of judgment once entered; r36.11 *Uniform Civil Procedure Rules* 2005 (NSW) (**Rules**), *Postiglione v R* [1997] HCA 26, *Autodesk inc v Dyason (No 2)* [1993] HCA 6; *slip rule*, power to amend when intention of court not manifest, capacity to allow altering of orders made in chambers - court's jurisdiction to include interest or order for interest in orders concluding proceedings: s100 *Civil Procedure Act* NSW (2005) - nature of court's discretion to order interest up to judgment - interest at rate provided in Rules or otherwise - whether to vary order in relation to interest - *whether*: r42.15 of the Rules applied to offer of compromise; Rules entitled defendant to indemnity costs.

[Paramount Lawyers](#) (I, B, C, G)

## **Bendigo and Adelaide Bank Ltd v Crown Melbourne Ltd [2012] VSC 493**

Supreme Court of Victoria

Mukhtar AsJ

Interrogatories - knowing receipt of trust property, first limb in *Barnes v Addy* (1874) Ch App 244 - dispute between plaintiff bank and defendant casino concerning defendant's answers to interrogatories and sustainability of objections about defendant's state of knowledge about gambler's circumstances - *whether*: plaintiff had properly (ie not oppressively) interrogated to gain admissions according to pleaded facts or used interrogation as a form of general inquisition; interrogatories were objectionable as requiring legal opinion - disallowance of interrogatories that were inquisitorial, fishing or overreaching in nature - necessity for interrogatories to be composed, with precision, to seek admissions on alleged objective facts pleaded to constitute actual or constructive knowledge.

[Bendigo and Adelaide Bank](#) (I, B, C, G)



## **Pathway Investments Pty Ltd v National Australia Bank Ltd (No 2) [2012] VSC 495**

Supreme Court of Victoria

Pagone J

Anti-suit injunction - application by defendant for injunction restraining taking of evidence in proceeding in New York - *whether*: court's jurisdiction to make order sought should be exercised; institution of New York proceeding interfered with due process in a way that was vexatious or oppressive; taking evidence by deposition in New York proceedings would have impermissible tendency to interfere with Supreme Court proceedings - potential uses of deposition transcripts in Australian action: ss87(1)(b) & 44 *Evidence Act* 2008 (Cth), r30.11 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) - *whether*: oppressive interference: *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 4)* (1996) 64 FCR 61; futile to make order sought: *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

[Pathway Investments](#) (I, B, C, G)

## **Ryan v Urban Construct (SA) Pty Ltd (No 2) [2012] SASC 193**

Supreme Court of South Australia

Nicholson J

Corporations - winding up in insolvency - action for damages for breach of contract for sale of real property - application by appellant for stay of execution of order that respondent entitled to recover damages pending determination of appeal pursuant to *Supreme Court Rules (Rules)* 6R 300, s17 *Enforcements of Judgments Act* 1991 (SA) and court's inherent jurisdiction and for order to set aside statutory demand - application by respondent for security for costs of appeal - court's power to grant stay of execution: Rules 6R 295(2) - principles relevant to application: Rules 6R 300(1) - court's fundamental task to do what is just in circumstances of the case - factual basis of appellant's application for stay - *whether*: appeal would be stultified and rendered nugatory: *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* [1997] HCA 24; good arguable case on appeal - considerations of convenience - principles applicable to application to set aside statutory demand: s459J *Corporations Act* 2001 (Cth), *Tatlers.com.au Pty Ltd v Davis* [2006] NSWSC 1055, *Midas v Equator* [2007] NSWSC 759.

[Ryan](#) (B)



## Vizovitis v Ryan t/as Ryans Barristers & Solicitors [2012] ACTSC 155

Supreme Court of the Australian Capital Territory

Master Harper

Apprehended bias - summary dismissal - security for costs - application for declaratory relief in respect of costs agreements signed in personal injury proceedings - applications for disqualification of trial judge after 16 days of hearing, for summary dismissal of proceeding and security for costs during trial - test for apprehended bias: *Barakat v Goritsas (No.2)* (2012) NSWCA 36 - extension of principle not just to observer but also parties: *Livesey v NSW Bar Association* (1983) 151 CLR 288 - two-step process required to be applied in determining application for disqualification of a judge for apprehended bias: *Ebner v Official Trustee in Bankruptcy* [2000] 205 CLR 337 - *whether*: to dismiss action on ground that likely cost and duration of proceedings out of all proportion to amount in issue; intervention to bring trial to halt midstream was warranted or in interests of justice - court's authority to order plaintiff to give appropriate security for defendant's costs: r1900 *Court Procedure Rules* 2006 (ACT) (**Rules**) - circumstances in which court may order security: r1901 of the Rules - matters to which court may have regard: r1902 of the Rules.

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

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