

Tuesday 22 May 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Hillam v Ample Source International Ltd (No 2)** - *Corporations Act 2001* (Cth) - winding up order - appeal dismissed (B)

**Smith v Comcare** - s7(4) *Safety, Rehabilitation & Compensation Act 1988* (Cth) - appeal dismissed (I)

**Hansen v Slattery Transport (NSW) Pty Ltd** - Property damage - accident between two semi-trailers - apportionment (I)

**Nominal Defendant v McLennan** - Personal injuries - s34 *Motor Accident Compensation Act 1999* (NSW) - appeal allowed (I)

**Smith v Zhang** - Personal injuries - principle in *Pennington v Norris* - appeal allowed (I)

**Dee-Tech Pty Ltd & Anor v Neddham Holdings Pty Ltd (No 2)** - s28A *Retail Leases Act 1994* (NSW) - ss133E, 133F & 133G *Conveyancing Act 1919* (NSW) (I, B)

**Westpac Banking Corporation v Munk** - Lease agreement - indemnity - counter indemnity - bill facility (B)



**Thomas v Powercor Australia Ltd (No 9)** - Settlement agreement - application for order for gross sum for costs (I, B, C, G)

**Sinnot v Higgins Trading Company Pty Ltd** - ss98C & 134AB *Accident Compensation Act 1985* (Vic) - preliminary question (I)

**Hogan v Transport Accident Commission** - *Transport Accident Act 1986* (Vic) - *Road Safety Act 1986* (Vic) - statutory interpretation (I)

**Perpetual Nominees Ltd v Rytelle Pty Ltd (recs & mgrs apptd) & Ors** - Pt 5C, ss601FS, 601FT & 601GA *Corporations Act 2001* (Cth) (I, B)

**McCracken v Phoenix Constructions (Qld) Pty Ltd** - ss182(1) & 1324(10) *Corporations Act 2001* (Cth) - appeal allowed (I, B, C, G)

**Seta v Baker** - Personal injuries - assessment of damages (I)

## Summaries with links (5 minute read)

### **Hillam v Ample Source International Ltd (No 2) [2012] FCAFC 73**

Full Court of the Federal Court of Australia

Emmett, Jacobson & Buchanan JJ

*Corporations Act 2001* (Cth) - winding up order appropriate exercise of primary judge's discretion - appeal dismissed.

[Hillam](#) (B)

### **Smith v Comcare [2012] FCA 502**

Federal Court of Australia

Perram J

S7(4) *Safety, Rehabilitation & Compensation Act 1988* (Cth) - Administrative Appeals Tribunal had concluded that applicant's osteoarthritis had not been contributed to in a material degree by his employment & had affirmed Comcare's earlier refusal of his claim - appeal dismissed.

[Smith](#) (I)



## **Hansen v Slattery Transport (NSW) Pty Ltd [2012] NSWCA 145**

Court of Appeal of New South Wales

Beazley, Basten & Macfarlan JJA

Property damage - accident between two semi-trailers - whether first appellant had been negligent - whether second respondent had been contributorily negligent - responsibility to be apportioned as to two-thirds against first appellant, and as to one-third against second respondent - appeal from District Court allowed.

[Hansen](#) (I)

## **Nominal Defendant v McLennan [2012] NSWCA 148**

Court of Appeal of New South Wales

Beazley, McColl & Macfarlan JJA

Personal injuries - s34 *Motor Accident Compensation Act 1999* (NSW) - whether there was evidence that enabled a finding that respondent had sustained injury as result of accident involving unidentified motor vehicle - appeal allowed - matter remitted to District Court for new trial.

[Nominal Defendant](#) (I)

[McLennan](#) - decision District Court of NSW 8 June 2010: see [Benchmark I](#) & [IBC](#) Tuesday 15 June 2010 - personal injuries - collision between unidentified motor vehicle & plaintiff pedestrian in railway car park - no witnesses - all issues contested by Nominal Defendant - credibility of testimony - consideration of expert medical evidence concerning genuineness of plaintiff's claim - assessment of damages pursuant to *Motor Accidents Compensation Act 1999* (NSW); domestic care & assistance pursuant to s128 - judgment for plaintiff in sum of \$643,607.

## **Smith v Zhang [2012] NSWCA 142**

Court of Appeal of New South Wales

Macfarlan &, Meagher JJA; Tobias AJA

Personal injuries - appellant pedestrian struck by car driven by respondent - whether primary judge had erred in reducing by 75% for contributory negligence damages recoverable by appellant - appellant's principal contention on appeal was that primary judge had failed to take into account the relative risk of harm in a car ... versus person collision & thereby failed to apply the principle said to have been established in *Pennington v Norris* (1956) 96 CLR 10 - appeal allowed - District Court verdict for appellant in sum of \$109,900.50 set aside - by majority, verdict for appellant in sum of \$175,840.80.

[Smith](#) (I)

[Pennington](#) - decision High Court of Australia 6 June 1956



## **Dee-Tech Pty Ltd & Anor v Neddham Holdings Pty Ltd (No 2) [2012] NSWSC 517**

Supreme Court of New South Wales

White J

S28A *Retail Leases Act* 1994 (NSW) - 2 proceedings heard together - ss133E, 133F & 133G *Conveyancing Act* 1919 (NSW) - failure to provide insurance policies & satisfactory evidence of currency of policy of business insurance - breaches that had been established, whether subject of notices under s133E or not, not of such seriousness as to warrant denial to plaintiff of option of renewal, provided amount due on the taking of the account was promptly paid.

[Dee-Tech](#) (I, B)

[Dee-Tech](#) - decision 22 March 2012

## **Westpac Banking Corporation v Munk [2012] NSWSC 504**

Supreme Court of New South Wales

Harrison AsJ

Lease agreement - indemnity - counter indemnity - bill facility - plaintiff seeking orders firstly, that first & second defendants give to plaintiff vacant possession of certain land – secondly, plaintiff seeking leave to issue a writ of possession in respect of the land - thirdly, plaintiff seeking judgment against first & second defendants in sum of \$2,513,183.62 - whether arguable defence of collateral contract &/or promissory estoppel - judgment for plaintiff against both defendants.

[Westpac Banking Corporation](#) (B)

## **Thomas v Powercor Australia Ltd (No 9) [2012] VSC 207**

Supreme Court of Victoria

Beach J

Settlement agreement - plaintiff seeking order that he be entitled to gross sum for costs, and an order that there be an increase, not exceeding 30%, in the solicitor's charges on taxation - *Supreme Court (General Civil Procedure) Rules* 2005 - at par 10 of judgment: settlement agreement not an agreement to pay costs otherwise than costs to be taxed.

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

[Thomas](#) - decision Supreme Court of Victoria 5 December 2011: see Benchmark I, C & ICBG Wednesday 7 December 2011 - application for approval of settlement of group proceeding - Black Saturday Horsham bushfire - proposed settlement fair & reasonable.



**Sinnot v Higgins Trading Company Pty Ltd [2012] VSC 208**

Supreme Court of Victoria

Beach J

Ss98C & 134AB *Accident Compensation Act* 1985 (Vic) - preliminary question - whether defendant estopped from asserting that plaintiff did not sustain compensable injury arising from employment with defendant.

[Sinnot](#) (I)

**Hogan v Transport Accident Commission [2012] VSC 206**

Supreme Court of Victoria

Croft J

*Transport Accident Act* 1986 (Vic) - *Road Safety Act* 1986 (Vic) - statutory interpretation - whether quad bike a motor vehicle - highway - road - road related area - rehabilitation service - orders of Victorian Civil & Administrative Tribunal set aside & appellant's application for review granted.

[Hogan](#) (I)

[Hogan](#) - decision 18 October 2011

**Perpetual Nominees Ltd v Rytelle Pty Ltd (recs & mgrs apptd) & Ors [2012] VSC 209**

Supreme Court of Victoria

Sifris J

Pt 5C, ss601FS, 601FT & 601GA *Corporations Act* 2001 (Cth) - Managed Investment Scheme - whether former Responsible Entity entitled to indemnity from fund - whether new Responsible Entity entitled to indemnity from fund - joinder application.

[Perpetual Nominees](#) (I, B)

**McCracken v Phoenix Constructions (Qld) Pty Ltd [2012] QCA 129**

Court of Appeal of Queensland

Fraser & White JJA, Applegarth J

*Corporations Act* 2001 (Cth) - whether primary judge's findings that appellant had contravened s182(1) should be set aside - whether s1324(10) empowered primary judge to award damages claimed to respondent - appeal allowed; judgment 15 June 2011 to be set aside, to be ordered instead that plaintiff Phoenix's claim against third defendant (appellant) is dismissed.

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



[Phoenix Constructions Queensland](#) - decision 15 June 2011: see Benchmark Friday 17 June 2011 - contracts - joint venture agreement - land development at Townsville - damages - delay - additional management fees - rate of interest - first defendant now in liquidation & second defendant bankrupt - the matter proceeded to trial against third defendant - claim against Director alleging breach of s182 *Corporations Act* 2001 (Cth), which provides that a director, secretary, other officer or employee of a corporation must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation - whether plaintiff entitled to damages under s1324(10) - whether injunction should be sought - *Chancery Amendment Act* 1858 (*Lord Cairns' Act*): *Barbagallo v Anor v J & F Catelan Pty Ltd & Ors* (1986) 1 Qd R 245 at pages 250-1 - judgment for plaintiff in sum of \$1,495,208.71 with interest calculated pursuant to contract between plaintiff & first defendant in sum of \$500,003.46.

## **Seta v Baker [2012] ACTSC 75**

Supreme Court of the Australian Capital Territory

Sidis AJ

Personal injuries - assessment of damages - causation - injury to lumbar spine - verdict for plaintiff in sum of \$179,409.

[Seta \(I\)](#)

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