

Friday 22 June 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Clodumar v Nauru Land Committee** - appeal from Supreme Court of Nauru - High Court's original jurisdiction - not an appeal in the strict sense - fresh evidence allowed (I, B, C, G)

**Williams v Commonwealth of Australia** - constitutional law - executive power of the Commonwealth did not authorise the Schools Chaplaincy Program (I, B, C, G)

**King v The Queen** - dangerous driving - trial judge had not misdirected the jury, except in one minor respect - no miscarriage of justice (I)

**MTAA Superannuation Fund (R G Casey) Building Property Pty Ltd v Commissioner of Taxation** - goods and services tax - s13 *A New Tax System (Goods and Services Tax Transition) Act* 1999 (Cth) (B, G)

**Martinuzzi v Fair Work Ombudsman** - industrial law - different judges during the liability phase and penalty phase award applied only insurers, not brokers (I, C, G)



**Aldefeary v Secretary, Department of Education, Employment & Workplace Relations** - administrative law - AAT correct to refuse extension of time (B, G)

**Hannover Life Re of Australasia Ltd v Dargan** - appeal - notice of contention - respondent to appeal may depart from case below (I, B)

**New South Wales v NSW Nurses' Association** - industrial and administrative law - declarations by Industrial Court - error of law not jurisdictional error (G)

**Palavi v Queensland Newspapers Pty Ltd** - defamation - plaintiff destroyed evidence relevant to defamation case she was planning to bring - statement of claim struck out as an abuse of process (I)

**K James Corporation Pty Ltd** - creditor's statutory demand - clearly arguable dispute - statutory demand set aside (B)

**Copuss Pty Ltd v Nix** - contract - defendants not been entitled to terminate - damages for breach of contract and recovery in restitution (B)

**Rivercorp Pty Ltd** - costs - exception to general rule that no order for costs where proceedings are settled with no finding on the merits where one party has capitulated (I, B)

**Onefone Australia Pty Ltd v One.Tel Ltd (in Liq)** - company liquidation - remuneration of special purpose liquidator (B)

**Teppanyakki Pty Ltd** - vacation of hearing date - non-production of relevant documents (I, B)

**Campbell Street Theatre Pty Ltd (Receiver & Manager Appointed) (in liq) v Commercial Mortgage Trade Pty Ltd** - company insolvency - voidable transactions (B)

**Kevin Jacobsen Pty Ltd (Receivers & Managers Appointed) (in Liq)** - costs - claim of legal professional privilege decided by consent (B)

**NSW Trustee & Guardian as Executor of the Will of Michael Robert Walsh (Deceased) v Gregory** - appointment of trustees for the sale of property (B, C)



**Byrne v A J Byrne Pty Ltd** - oppression of minority shareholders - refusal to accommodate a minority shareholder extracting his money out by purchasing his shares not oppression (B)

**Hammond v Gerard Malouf & Partners and Anor** - professional negligence - default judgment against barrister - no valid service - default judgment set aside (I, B)

**Ange v Calogo Bloodstock AG t/as Coolmore Australia** - appeal from Local Court - actual authority to act as agent (B)

**Young v Kruger** - appeal from Local Court on costs - *Calderbank* offer (I, B)

**Calwell-Smith v Director-General, Department of Finance & Services** - associations law - appointment of administrator - review of decision - appointment of administrator set aside (B, G)

**Sapphire (SA) Pty Ltd (t/as River City Grain) v Barry Smith Grains Pty Ltd (in Liq)** - commercial arbitration - leave to appeal from an arbitration award - leave to appeal granted (B)

**In the matter of C & L Cameron Pty Ltd** - payment out of moneys held in court - another party had proceedings in the District Court to establish a claim to the money - applications dismissed (B)

**Starr-Diamond v Talus Diamond** - *Property (Relationships) Act 1984* (NSW) - adjustment of interests in property (B)

**Kocalidis (aka Kay) v Andrews** - contract - failed joint venture - contract was not void for uncertainty - small error by trial judge on damages, but appeal otherwise dismissed (B)

**Brakoulias v Karunaharan** - negligence - publication of reasons for jury instruction - s59 *Wrongs Act 1958* (Vic) (I)

**Knorr v Commonwealth Scientific & Industrial Research Organisation (No 2)** - pleadings - statement of claim struck out as manifestly defective - plaintiff given one further opportunity (I)

**Clarke v Great Southern Finance Pty Limited (Receivers & Managers Appointed)** - evidence - joint privilege - s124 *Evidence Act 2008* (Vic) - joint privilege lost (I, B)



**Rolls v Radford** - costs - offer not, in substance, a compromise - indemnity costs not ordered (I)

**Blackgrove v West** - trusts - dispute under will - costs (B)

**Marshall v Queensland Rehabilitation Services Pty Ltd** - negligence - special vulnerability - negligence not made out (I)

**Mio Art Pty Ltd v Macequest Pty Ltd** - interlocutory injunctions - equitable jurisdiction to grant relief against the breach of trust - balance of convenience (I, B)

**Rhodium Australia Pty Ltd v Stateway Pty Ltd** - costs - creditor's statutory demand set aside after default judgment set aside - no order as to costs (I)

**Alcoa of Australia Ltd v Apache Energy Ltd** - negligence - breach of statutory duty - pure economic loss - summary judgment (I, B, C)

**TBK Beef Pty Ltd v Ark Mangoes Pty Ltd** - company liquidation - proceedings under Supreme Court rules rather than Corporations Law Rules - no valid application (I, B)

## Summaries with links (5 minute read)

### **Clodumar v Nauru Land Committee [2012] HCA 22**

High Court of Australia

French CJ; Gummow, Hayne, Heydon, & Bell JJ

Appeal from Supreme Court of Nauru - original jurisdiction of the High Court - s5 *Nauru (High Court Appeals) Act 1976* (Cth) - former president of Nauru unsuccessful before Supreme Court - more than 9 years later, sought to appeal to High Court - sought to lead fresh evidence - held (by majority, Heydon J not deciding): extension of time should be granted - held (by majority, Heydon J dissenting): the fact that the *Nauru (High Court Appeals) Act* called the proceedings as an appeal did not mean that the restrictions applicable to the High Court's appellant jurisdiction apply - not an appeal in the strict sense - power to allow fresh evidence to be adduced - unnecessary to explore the limits of that power - fresh evidence adduced - appeal allowed and the matter remitted to Supreme Court of Nauru.

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



## **Williams v Commonwealth of Australia [2012] HCA 23**

High Court of Australia

French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel, & Bell JJ

Constitutional law - challenge to validity of agreements under the Schools Chaplaincy Program - Commonwealth contracted with private service provider - no act of Parliament authorised contracts or the expenditure of public money them- Commonwealth relied on the executive power of the Commonwealth - s61 of the Constitution - held (by majority, Heydon J dissenting): the executive power of the Commonwealth does not generally authorise entry into contracts or expenditure of public money on any matter with respect to which the Commonwealth Parliament has power to legislate - executive power of the Commonwealth did not authorise the Schools Chaplaincy Program - not prohibited by s116 of the Constitution, dealing with separation of church and state - agreements under the Schools Chaplaincy Program invalid.

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

## **King v The Queen [2012] HCA 24**

High Court of Australia

French CJ; Heydon, Crennan, Kiefel, & Bell JJ

Dangerous driving - appellant convicted of culpable driving causing death - alternative verdict would have been dangerous driving causing death - trial judge directed the jury as to the meaning of gross negligence in respect of the charge of culpable driving - negligence of such severity that the appellant deserved to be punished by the criminal law - consideration of the concept of negligence and its application in the criminal law - in respect of the alternative charge, the trial judge instructed the jury it was merely necessary that the accused drove in a way that significantly increased the risk of harming others - held (by majority, Heydon and Bell JJ dissenting): the trial judge had not misdirected the jury, except in one minor respect - no miscarriage of justice - appeal dismissed.

[King](#) (I)

## **MTAA Superannuation Fund (R G Casey) Building Property Pty Ltd v Commissioner of Taxation [2012] FCAFC 89**

Full Court of the Federal Court of Australia

Gilmour, Perram, & Jagot JJ

Goods and services tax - s13 *A New Tax System (Goods and Services Tax Transition) Act 1999* (Cth) - safe harbour rule under which certain supplies under certain agreements made before the GST system came into place are GST free - appellant owned a building which it leased to the Commonwealth and which was occupied by the Department of Foreign Affairs and Trade - did the safe harbour rule applied to payments that occurred after a rent review under the lease - held: the supplies made after rent review were not made for consideration satisfactorily identified in the lease - safe harbour did not apply to payments made after the rent review - no denial of procedural fairness by Administrative Appeals Tribunal - appeal dismissed with costs.

[MTAA Superannuation Fund](#) (B, G)



**Martinuzzi v Fair Work Ombudsman [2012] FCA 636**

Federal Court of Australia

Logan J

Industrial law - Federal Magistrate made declarations of contravention of the former *Workplace Relations Act 1996* (Cth) - different Federal Magistrate made penalty and repayment orders - held: permissible for the Federal Magistrates Court to be constituted by different judges during the liability phase and the penalty phase, although undesirable - relevant employees were employed in an insurance brokerage business - relevant award applied only to employers who provided insurance, not to brokers - award had no application - applicants had not committed any contraventions - declarations of contravention, and penalty orders set aside.

[Martinuzzi](#) (I, C, G)

**Aldefeary v Secretary, Department of Education, Employment & Workplace Relations [2012] FCA 633**

Federal Court of Australia

McKerracher J

Administrative law - applicant received Newstart Allowance - debt arising from overpayment - appeal to Social Security Appeals Tribunal (SSAT) rejected - 9 months later, extension of time sought for review of SSAT's decision by Administrative Appeals Tribunal (AAT) - extension of time refused - held: AAT had considered the correct principles, applied the correct law, and afforded the applicant procedural fairness - the AAT had considered all reasons provided by the applicant for his delay, and had given the applicant opportunity to comment on the merits of the SSAT's decision - no error in AAT's decision - no error in SSAT's decision - application dismissed with costs.

[Aldefeary](#) (B, G)

**Hannover Life Re of Australasia Ltd v Dargan [2012] NSWCA 185**

Court of Appeal of New South Wales

Barrett JA

Appeal - notice of contention - Mr Dargan totally and permanently disabled - sued his superannuation fund and the insurer under a policy associated with the fund - Mr Dargan successful - superannuation fund and insurer appealed - Mr Dargan filed a notice of contention, seeking to uphold trial judgment on a basis not argued at trial - construction of the insurance policy - ability to do part-time work would not prevent a finding of total and permanent disability - held: although an appellant generally cannot raise new matter on appeal, a respondent can - respondent is compelled to be a party to the appeal - respondent entitled to uphold the trial judgment on any good legal ground appearing on the evidence - application to strike out the notice of contention dismissed with costs.

[Hannover Life Re of Australasia](#) (I, B)

**New South Wales v NSW Nurses' Association [2012] NSWCA 179**

Court of Appeal of New South Wales

Bathurst CJ; Basten & Hoeben JJA

Industrial and administrative law - NSW made redundancy offers to nurses - 27 nurses accepted - NSW purported to withdraw the offer - Industrial Relations Court and the Full Bench of the Industrial Court made declarations that binding agreements existed - NSW sought certiorari and to quash the declarations - held: the declarations could only be quashed if jurisdictional error was established, and certiorari would not be granted for error of law on the face of the record: s179 *Industrial Relations Act* - power to make declarations was limited to declarations of existing rights - not a substitute for award making power or conciliation and arbitration powers - Full Bench had erred in its construction of the contract - on proper construction, retirement on a nominated date was a pre-condition to entitlement to redundancy payment - not jurisdictional error - application dismissed with costs.

[New South Wales](#) (G)

**Palavi v Queensland Newspapers Pty Ltd [2012] NSWCA 182**

Court of Appeal of New South Wales

Beazley; Basten & Tobias AJA

Defamation - trial judge ordered the defamation proceedings struck out as abuse of process - pleaded imputations that plaintiff had engaged in sexual impropriety - plaintiff destroyed a phone containing sexually explicit photographs of herself, and sexually explicit text messages, and deleted such material from another phone - trial judge found that she had in contemplation the possibility of instituting proceedings in which that material would be relevant - finding not challenged on appeal - held (by majority, Basten JA dissenting): the appellant's destruction of relevant material had a tendency to impair the Court's proper determination of the case - trial judge correct to strike out statement of claim as an abuse of process - appeal dismissed with costs.

[Palavi](#) (I)

**K James Corporation Pty Ltd [2012] NSWSC 602**

Supreme Court of New South Wales

Brereton J

Company liquidation - defendant served a creditor's statutory demand on K James Corporation - defendant alleged oral contract making advance of money a loan - held: arguable that the advance was a loan to the company, as its purpose was to assist a business was carried on by the company - also arguable that the loan had been to the natural person behind the company - clearly arguable dispute about whether the company was bound by the loan - creditor's statutory demand set aside with costs.

[K James Corporation](#) (B)

**Copuss Pty Ltd v Nix [2012] NSWCA 671**

Supreme Court of New South Wales

Ball J

Contract - Mr & Mrs Nix contracted with Copuss to develop their property - Mr & Mrs Nix served notice of termination - Copuss treated it as a wrongful repudiation and purported to accept it - Copuss sued - held: Mr & Mrs Nix had not been entitled to terminate the agreement - Copuss was entitled to recover the outstanding balance of various loan facilities and the builder's margin on the work it did - moneys also recoverable in restitution on the basis of total failure of consideration - Copuss must elect between damages for breach of contract and recovery in restitution.

[Copuss](#) (B)**Rivercorp Pty Ltd [2012] NSWSC 576**

Supreme Court of New South Wales

Brereton J

Costs – Offer of compromise - r42.15 *Uniform Civil Procedure Rules* 2005 (NSW) - Court entered consent judgment - plaintiff substantially succeeded and Commissioner of Taxation substantially failed - Commissioner argued his costs liability should cease on the date he indicated he would withdraw his defence to the plaintiff's claim - question of whether costs should be on an indemnity basis due to rejection of an offer of settlement - general rule, where proceedings are settled with no finding on the merits, there will be no order for costs - exception to general rule where it is clear one party has capitulated, or it is plain without further investigation that one party has achieved substantial success - held: Commissioner's self-imposed policies regarding litigation do not excuse the Commissioner from the costs consequences that are generally applicable - no rule that costs liability ceases when a party indicates it will not maintain its position - Commissioner ordered to pay the plaintiff's costs to the end of the proceedings, on an indemnity basis from the date of the offer of compromise.

[Rivercorp](#) (L, B)**Onefone Australia Pty Ltd v One.Tel Ltd (in Liq) [2012] NSWSC 589**

Supreme Court of New South Wales

Brereton J

Company liquidation - the special purpose liquidator (SPL) of One.Tel sought orders fixing his remuneration over certain periods - remuneration has been the subject of controversy, and some elements of his claim had not been allowed in the past - at the time of judgment there were proceedings pending for the SPL's removal (SPL subsequently removed - see yesterday's Benchmark) - Registrar's report making recommendations as to remuneration - held: prima facie, Court would be inclined to adopt Registrar's report - however, committee of inspection and general purpose liquidators should have an opportunity to be heard - also, it should be





ascertained whether the SPL prepared to undertake to repay any remuneration referable to the removal proceedings if it be found that he was not entitled to it.

[Onefone Australia](#) (B)

**Teppanyakki Pty Ltd [2012] NSWSC 672**

Supreme Court of New South Wales

Black J

Adjournment - plaintiff applied to vacate hearing date as relevant documents had not been produced - also the plaintiff would be absent in China for family reasons - held: the absence in China may or may not have warranted a vacation of the hearing date - the non-production of relevant documents certainly sufficed - production had been ordered by the Court - the plaintiff's solicitors had drawn the importance of compliance with court orders to the defendants' attention - further orders made requiring the second defendant (a director of the first defendant) to produce the relevant documents - court not satisfied an order for examination of the second defendant should be made.

[Teppanyakki](#) (I, B)

**Campbell Street Theatre Pty Ltd (Receiver & Manager Appointed) (in liq) v Commercial Mortgage Trade Pty Ltd [2012] NSWSC 669**

Supreme Court of New South Wales

Black J

Company insolvency - voidable transactions - plaintiff entered into a loan agreement, mandate agreement, and charge - plaintiff and its liquidators sought declaration that these agreements were void, and that the purported appointment of a receiver under the charge was invalid - held: execution of all documents was a single transaction - reasonable person in the company's circumstances would not have entered into the transaction - transaction therefore not a commercial transaction - the company became insolvent by entry into the transaction - insolvent transaction - voidable transaction - declarations made.

[Campbell Street Theatre](#) (B)

**Kevin Jacobsen Pty Ltd (Receivers & Managers Appointed) (in Liq) [2012] NSWSC 668**

Supreme Court of New South Wales

Black J

Costs - applicant produced documents under order for production - parties agreed to orders resolving claim of legal professional privilege - held: Court will make costs order, even where no hearing on the merits, where Court is confident that, although both parties have acted reasonably, one party was almost certain to have succeeded - no basis for costs order for the period prior to identification of the documents over which privilege was claimed - liquidator had no basis to assess the legitimacy of the claim at that time - costs order justified for the period after documents



had been identified - liquidator's opposition to the claim after that time was unsustainable - no basis for indemnity costs.

[Kevin Jacobsen](#) (B)

**NSW Trustee & Guardian as Executor of the Will of Michael Robert Walsh (Deceased) v Gregory [2012] NSWSC 681**

Supreme Court of New South Wales

Hallen AsJ

Application by executor for appointment of trustees for the sale of a property - s66G of the *Conveyancing Act* 1919 (NSW) - deceased and defendant were tenants in common - defendant absent - held: primary considerations in deciding whether to proceed *ex parte* concern urgency, irreparable damage, hardship, and whether the order can be set aside - no particular urgency, but the plaintiff could not administer the estate until the property was sold - no ground to adjourn trial - executor a co-owner because, on grant of probate, the deceased's property vested in him from date of death - order discretionary - no comprehensive description of the matters governing discretion - refusal generally requires some proprietary right, or contractual or fiduciary obligation, inconsistent with forced sale - personal views about hardship or unfairness irrelevant - no reason not to order sale - factors governing discretion as to identity of trustees - order for sale made - order for trustees to get vacant possession - stay for 21 days, for defendant to have a final opportunity to suggest alternative arrangements.

[NSW Trustee & Guardian](#) (B, C)

**Byrne v A J Byrne Pty Ltd [2012] NSWSC 667**

Supreme Court of New South Wales

Black J

Oppression of shareholders - minority shareholder sought orders requiring the majority to purchase his shares at market value - s232 and s233 of *Corporations Act* 2001 (Cth) concern commercial unfairness or departure from standards of fair dealing, by ordinary standards - objective test of unfairness as judged by a hypothetical commercial bystander - wrongful exclusion from participation in management, or breach of a shareholder's or services agreement, can be oppression - refusal to accommodate a minority shareholder extracting his money out by purchasing his shares does not usually amount to oppression - irreconcilable differences between shareholders does not establish oppression - held: conduct of the majority did not amount to excluding the minority shareholder from participating in management - no oppression or commercial unfairness, notwithstanding personal tensions - if oppression had been established, and purchase of shares ordered by the majority, there would generally not be a discount on the basis of minority status - the court would hear the parties on orders to be made.

[Byrne](#) (B)

**Hammond v Gerard Malouf & Partners and Anor [2012] NSWSC 664**

Supreme Court of New South Wales

Hislop J

Professional negligence - personal injuries - informal settlement conference, with plaintiff represented by solicitors and a barrister - settlement - notification from Centrelink that an amount was repayable to it - no allowance for this in the settlement sum - Ms Hammond sued solicitors and barrister for professional negligence - claim against solicitors settled - default judgment against barrister - barrister applied to have default judgment set aside - r36.15 and r36.16 *Uniform Civil Procedure Rules 2005 (NSW) (UCPR)* - claim that judgment was entered irregularly - claim that barrister did not have notice of the hearing - held: a person's own name is not a business name as defined in UCPR 10.9 - UCPR 10.9 had not authorised service on the barrister - no valid service - existence of arguable case - the plaintiff and the barrister each had an arguable case - possibility that the barrister actually received the originating process but did not act on it relevant, but of little weight - matter should be determined on the merits - default judgment set aside.

[Hammond](#) (I, B)

**Ange v Calogo Bloodstock AG t/as Coolmore Australia [2012] NSWSC 666**

Supreme Court of New South Wales

Harrison AsJ

Local Court Appeal - Coolmore sued Mr Ange in the Local Court to recover money purportedly owing under an Agistment and Stallion Agreement 2007 - Mr Ange cross-claimed to recover money paid under a default judgment since set aside - Local Court found in favour of Coolmore - appeal to Supreme Court - held: the person who had entered the agreement on behalf of Mr Ange had actual authority to do so - magistrate addressed the correct issues in relation to the agreement - appeal dismissed with costs.

[Ange](#) (B)

**Young v Kruger [2012] NSWSC 628**

Supreme Court of New South Wales

Harrison AsJ

Local Court Appeal - the plaintiffs were Kruger Specialist Services Pty Ltd (in Liq) and its liquidator - the defendant was sole director and a creditor of that company - plaintiffs sued to recover preference payments - plaintiffs successful in Local Court - plaintiff had served a *Calderbank* offer - each party ordered to pay their own costs - plaintiffs appealed to Supreme Court on costs - costs orders discretionary - principles in *House v The King* (1936) 55 CLR 499 at 504-505 - held: magistrate took the *Calderbank* offer into account, although not specifically referred to in his judgment - every matter addressed an argument on costs assumed to have been considered by the court below - judges disposing of costs issues should not be required to give elaborate reasons - no



error of principal - not sufficient doubt to warrant reconsideration - no reasonably clear injustice if costs orders not set aside - leave to appeal refused - plaintiff's to pay the defendant's costs.

[Young](#) (I, B)

**Calwell-Smith v Director-General, Department of Finance & Services [2012] NSWSC 413**

Supreme Court of New South Wales

Rothman J

Associations law - Director-General appointed administrator to incorporated association - chief executive officer of association sought injunctive relief against the administrator and a review of the decision to appoint the administrator - s104 *Associations Incorporation Act 2009* (NSW) - distinction between review and appeal - review not confined to judicial review, but includes a full merits review - Director-General had considered that the association had persistently failed to keep financial records as required by Act - new evidence not available to Director-General - held: Court was not satisfied that accounts were inadequate - no evidence of dishonesty or defalcation - appointment of administrator set aside.

[Calwell-Smith](#) (B, G)

**Sapphire (SA) Pty Ltd (t/as River City Grain) v Barry Smith Grains Pty Ltd (in Liq) [2011] NSWSC 1451**

Supreme Court of New South Wales

Ward J

Commercial arbitration - Sapphire sought leave to appeal from an arbitration award - s38 *Commercial Arbitration Act 1984* (NSW) - dispute regarding futures contracts for the sale of grain by Sapphire to Barry Smith Grains - identification of terms of the contract - held: manifest error on the face of the award - the determination substantially affected the rights of the parties - the construction of the clause at issue would have potential significance beyond the present case, and would be likely to substantially add to the certainty of commercial law - appropriate to exercise the discretion to grant leave to appeal - leave to appeal granted - defendants granted leave to raise matters by notice of contention.

[Sapphire](#) (B)

**In the matter of C & L Cameron Pty Ltd [2012] NSWSC 676**

Supreme Court of New South Wales

Ward J

Payment out of moneys held in court - applicants jointly owned property - mortgagee sale of property - after satisfaction of the debt owing to the mortgagee, there were surplus funds - funds paid into court - mortgagee commenced proceedings to determine how to distribute the surplus - held: applicants had established there were primarily entitled to the fund as co-owners of the property - they had a beneficial interest in the fund - however, another party had proceedings in the District Court to establish a claim to the money, based on an oral guarantee - Court could not



make a final determination in relation to that claim - applications dismissed, without prejudice to ability to make further applications after District Court proceedings determined.

[C & L Cameron](#) (B)

## **Starr-Diamond v Talus Diamond [2012] NSWSC 675**

Supreme Court of New South Wales

Slattery J

*Property (Relationships) Act 1984* (NSW) - adjustment of interests in property - defendant cross-claimed, asking for repayment of certain loans and the sale and division of proceeds from certain property - conflicting evidence as to the dates between which the domestic relationship existed - held: short separations do not necessarily end a domestic relationship - the relevance of a separation may be influenced by the presence of a third person during the separation period - findings made as to the length of the relationship - held: Court not required to undertake a reductionist process, examining every alleged contribution, putting a money value on each - parties brought substantially different assets to the relationship - discretion to adopt asset by asset approach or a global approach - held, no basis adjust property plaintiff's favour - strong basis to grant relief on the defendant's cross-claim - opportunity to be afforded to the parties to make submissions as to the final form of relief and costs.

[Starr-Diamond](#) (B)

## **Kocalidis (aka Kay) v Andrews [2012] VSCA 127**

Court of Appeal Victoria

Maxwell P, Mandie JA & Cavanough AJA

Contract - failed joint venture - agreement to purchase a residential property, demolish the existing house, and construct a new town house development - trial judge found an oral agreement - held: breaches of the joint venture agreement by Mr Andrews had not been made out - judge did not misapply the principles stated by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 619 - trial judge correctly decided joint venturers were entitled to repayment of their capital contributions - contract was not void for uncertainty - trial judge erred in allowing the insurance premium for builder's risk insurance contributions, paid by Mr Andrews, as part of his capital contribution - rather, it was part of his overhead as builder - subject to this correction, appeal dismissed.

[Kocalidis](#) (B)

## **Brakoulias v Karunaharan [2012] VSC 272**

Supreme Court of Victoria

Macaulay J

Negligence - publication of reasons for jury instruction - defendant doctor prescribed weight loss drug to plaintiff - plaintiff suffered cardiac arrest and consequential long term injuries - plaintiff alleged defendant was negligent in prescribing the drug - damages agreed but liability in issue -



trial by jury - jury instructed s59 of the *Wrongs Act 1958* (Vic) not an exclusive statement of the standard of care applicable to professionals - s59 provides a defence, as opposed to an opportunity to meet an evidentiary burden.

[Brakoulias](#) (I)

**Knorr v Commonwealth Scientific & Industrial Research Organisation (No 2) [2012] VSC 268**

Supreme Court of Victoria

Beach J

Pleadings - statement of claim struck out as manifestly defective - leave given to re-plead - application to strike amended statement of claim - held, the amended statement of claim should be struck as manifestly defective - plaintiff apparently wished to plead conspiracies, deceit, defamation, fraud, breaches of contract, and other allegations - certain defendants sought summary judgment as claims against them had no real prospect of success - held: pleading was so bad one could not conclude the plaintiff had no real prospect of success, although this might change in the event of another unsatisfactory statement of claim - other defendants sought summary judgment as the plaintiff had already been given sufficient opportunities - held: much to be said for this, however, the plaintiff should be given one further opportunity to plead an intelligible case.

[Knorr](#) (I)

**Clarke v Great Southern Finance Pty Ltd (Receivers & Managers Appointed) [2012] VSC 260**

Supreme Court of Victoria

Sifris J

Evidence - joint privilege - 16 separate group proceedings relating to Great Southern managed investment schemes - Great Southern Managers Australia Ltd (GSMAL) the responsible entity of each managed investment scheme - judge hearing the main proceedings referred claim of privilege to another judge - joint privilege between GSMAL and the plaintiffs - plaintiffs contended joint privilege had been lost - s124: *Evidence Act 2008* (Vic), has the effect that, where one joint privilege holder takes legal proceedings against another, joint privilege is lost.

[Clarke](#) (I, B)

**Rolls v Radford [2012] QSC 170**

Supreme Court of Queensland

Philippides J

Costs - plaintiff obtained a declaration he was entitled to deposit - plaintiff had made settlement offer - offer rejected - held: necessary to look at the substance of the offer to see whether it was in truth a compromise - \$100 discount on a claim of \$50,000 was not a compromise - indemnity costs not ordered - defendant argued that the plaintiff should not have a costs order in respect of one issue abandoned at trial - held: that issue was not of such significance as to require special treatment - costs ordered on the standard basis.

[Rolls](#) (I)

**Blackgrove v West [2012] QSC 169**

Supreme Court of Queensland

McMurdo J

Trusts - deceased's children were Betty, Keith, and Robert - will left \$100,000 to each, and the remainder to Robert - will assumed the deceased entitled to a share of real property in the name of Robert's wife - property purchased with the deceased's money - held: no attempt to disguise the ownership of the real property - no attempt to prejudice the interests of the deceased during her lifetime, or those who would take under her will - Betty and Keith commenced proceedings against Robert and his wife - held: no dispute that the deceased was entitled to a share of the real property - sufficient funds in the estate to pay to Betty and Keith the moneys left to them - as the remainder would belong to Robert, no utility in requiring him to account - Robert complained that the litigation had delayed the sale of the real property, and had caused a reduction in the price obtained - evidence of this was in the form of correspondence with real estate agents, rather than opinion evidence given by an appropriately qualified valuer - objection to this evidence upheld - no orders as to costs of the original application - Robert and his wife to pay Betty and Keith's costs of the application regarding the delayed sale of the real property.

[Blackgrove](#) (B)**Marshall v Queensland Rehabilitation Services Pty Ltd [2012] QSC 168**

Supreme Court of Queensland

Philippides J

Negligence - plaintiff employed as assistant in nursing at nursing home - claim of special vulnerability - plaintiff alleged she suffered injuries when moving a resident - defendant admitted duty of care but denied breach - defendant denied plaintiff had reported alleged special vulnerability - defendant denied that the plaintiff suffered injury as alleged - held: an employer owes a duty to each employee as an individual, and also must take into account any special weakness or particularity of the worker of which it knows - actual knowledge required - in general no duty to obtain such knowledge - negligence not made out - damages assessed as a matter of completeness - judgment for the defendant.

[Marshall](#) (I)**Mio Art Pty Ltd v Macequest Pty Ltd [2012] QSC 165**

Supreme Court of Queensland

Mullins J

Interlocutory injunctions - plaintiff a shareholder in company that owned land - land being developed by a joint venture pursuant to project management agreement (**PMA**) - defendant also party to PMA - plaintiff alleged breach of the PMA, breaches of trust, and oppression - plaintiff sought an interlocutory injunction - plaintiff sought, in effect, a mandatory injunction that a bank facility be repaid and securities associated with that facility be discharged - equitable jurisdiction



to grant relief against the breach of trust - held: plaintiff must address pleading deficiencies, but its case was not unarguable - status quo was that PMA would remain in operation - undertaking as to damages would have limited value - balance of convenience did not support granting interlocutory relief - application dismissed.

[Mio Art](#) (I, B)

## **Rhodium Australia Pty Ltd v Stateway Pty Ltd [2012] WASC 2005**

Supreme Court of Western Australia

Master Sanderson

Costs - creditor's statutory demand based on default judgment - default judgment set aside - defendant immediately conceded statutory demand should also be set aside - held: a party who resists setting aside a statutory demand, after the judgment underlying it is set aside, risks an order for indemnity costs - in this case, however, the defendant acted properly - until the judgment was set aside, it was entirely reasonable for the defendant to resist setting aside the statutory demand - no order as to costs.

[Rhodium Australia](#) (I)

## **Alcoa of Australia Ltd v Apache Energy Ltd [2012] WASC 209**

Supreme Court of Western Australia

Le Miere J

Negligence - breach of statutory duty - economic loss - Apache ceased to supply natural gas to Alcoa after explosion and - Apache applied for summary judgment - power to summarily terminate proceedings must be exercised with great care - requirement that the case cannot possibly succeed - defendant submitted that, as a general rule, there is no duty to take care to avoid reasonably foreseeable pure economic loss - defendant submitted vulnerability is necessary, but not sufficient, for the imposition of a such a duty - held: the law in this respect was not sufficiently certain for the court to give summary judgment - however, not arguable that breach of the relevant regulations conferred a private right of action - therefore, the claim for breach of statutory duty could not succeed and should be struck out.

[Alcoa of Australia](#) (I, B, C)

## **TBK Beef Pty Ltd v Ark Mangoes Pty Ltd [2012] NTSC 44**

Supreme Court of the Northern Territory

Master Luppino

Company liquidation - application to set aside statutory demand - proceedings commenced by originating motion under Supreme Court rules rather than originating process under *Corporations Law Rules* - power of Court to excuse technical defects under s467A of the *Corporations Act* and rule 1.7 of the *Corporations Law Rules* - held: power to excuse irregularities only arises if a valid application has been made - incorrect originating process potentially prejudiced the defendant, as





a date would not automatically allocated by the court - defect was jurisdictional, not merely procedural - no valid application - application dismissed.

[TBK Beef \(I, B\)](#)

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