



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Friend v Brooker - High Court of Australia - equitable doctrine of contribution – distinctions between bases of recovery in an equity suit & in an action at common law - "common design", "community of interest", "co-ordinate liability", "equitable contribution" – appeal allowed (I, B, C)

Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Najem (No.2) - Application for stay of execution of judgments - applicant has applied for special leave to appeal to High Court – personal injuries (I)

Fifteenth Eestin Nominees Pty Ltd & Ors v Rosenberg & Anor - Trusts - equitable or promissory estoppel – appeal dismissed (B)

Re AWB Limited (No 3) - *Corporations Act* 2001 (Cth) – civil penalty proceedings – application to further amend amended statement of claim - application by ASIC for further non-party discovery from AWB. (B)

Partalo v Newtime Homes Pty Ltd - *Commercial Arbitration Act* 1985 (WA) – application to set aside arbitrator's interim award granted (C)

Van der Feltz v City of Stirling - Land use classification – appeal from State Administrative Tribunal - drive through take-away coffee outlet - appeal allowed (C)

Kenny v Ritter - *Law Reform (Contributory Negligence & Apportionment of Liability) Act* 2001 (SA) - personal injuries – motor vehicle accident apportionment of responsibility & damages - consideration given to scope of duty of a Judge to a litigant in person - appeal as to liability allowed - appeal as to assessment of quantum allowed (I)



Bell Taverns (Scotland) Ltd v The National Insurance & Guarantee Corporation

Ltd (Scotland) – hotel fire – construction of insurance policy - reinstatement – application of limit of liability clause (I)

Eric M., a minor(pl./appell) v Cajon Valley Union School District et al (USA) - personal injuries – negligence – alleged failure of supervision – statutory immunity - appellant through his tutor alleging injuries he received at the age of six from being hit by a car were proximately caused by district's failure to supervise adequately the process of his dismissal from school & anticipated school bus ride home - appeal upheld - summary adjudication ruling reversed (I)



Summaries with links (5 minute read)

Monday 1 June 2009

Friend v Brooker [2009] HCA 21

High Court of Australia

French CJ; Gummow, Hayne, Heydon & Bell JJ

Equitable doctrine of contribution – "co-ordinate liability" – distinctions between bases of recovery in an equity suit & in an action at common law - appellant & respondent company directors – respondent personally borrowed money which was on-lent to company – company ceased trading – respondent sought funds from appellant to repay personal loan – whether fiduciary relationship existed between the two – whether co-ordinate liability existed so as to require equitable contribution from appellant – "common design", "community of interest", "co-ordinate liability", "equitable contribution" – appeal allowed – primary judge had dismissed the suit – primary judge's orders restored.

[Friend](#)

Partalo v Newtime Homes Pty Ltd [2009] WASC 130

Supreme Court of Western Australia

Acting Master Chapman

Commercial Arbitration Act 1985 (WA) – application to set aside arbitrator's interim award - failure by arbitrator to determine all necessary issues in controversy between parties - reasons of arbitrator failed to expose reasoning process & therefore gave rise to material procedural unfairness – interim award set aside.

[Partalo](#)

Van der Feltz v City of Stirling [2009] WASC 142

Supreme Court of Western Australia

Murphy J

Land use classification – appeal from State Administrative Tribunal - development approval had been sought to use site as a drive through take-away coffee outlet - construction of planning instrument - use of expert evidence for purposes of construction - 'food' – held that use capable of approval under planning scheme – appeal allowed – matter remitted to Tribunal - extensive consideration of Australian case law.

[Van der Feltz](#)

Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Najem (No.2) [2009] NSWCA 130

Court of Appeal of New South Wales

Hodgson J

Application for stay of execution of judgments – for Court of Appeal decision 26 February 2009, see ‘Benchmark’ I & IBC Monday 2 March 2009 & link below – applicant has applied for special leave to appeal to High Court – onus on applicant to exclude appreciable risk that delay would cause applicant to be less able to meet the judgment - application granted subject to condition that that within fourteen days applicant provide security for the judgment debt & interest as agreed between the parties or as approved by the Registrar & if that condition not satisfied the stay to come to an end.

[Adeels Palace](#)

[Adeels Palace](#) – decision 26 February 2009 - personal injuries - conduct of restaurant/nightclub – New Year’s Eve function - on appeal, challenge to findings as to duty of care, breach & causation - duty of care owed by proprietor to patrons - can extend to taking reasonable care to guard against injury from intoxicated, unruly or violent behaviour of other patrons including criminal behaviour - depends on foreseeability of injury from the behaviour and control over it - on facts, duty of care was owed - desirability of discrimination in complaint of erroneous admission or rejection of evidence – appeals dismissed.

Fifteenth Eestin Nominees Pty Ltd & Ors v Rosenberg & Anor [2009] VSCA 112

Court of Appeal of Victoria

Maxwell P; Neave & Redlich JJA

Succession – trusts - equitable or promissory estoppel – proprietary estoppel -whether father estopped from removing trustee of discretionary trust & changing will because of alleged representations & promises to daughter & son-in-law – whether primary judge had erred in finding that no detriment was suffered in reliance on alleged representations or promises – father had died shortly before appeal was heard – son nominated as executor of will, but probate not yet granted – application for order that son be made respondent to appeal in substitution for father – appeal dismissed – thorough examination of case law.

[Fifteenth Eestin Nominees](#)

Re AWB Limited (No 3) [2009] VSC 209

Supreme Court of Victoria

Robson J

Corporations Act 2001 (Cth) – civil penalty proceedings – alleged breaches of ss180(1) & 181(1) - application to further amend amended statement of claim -application by ASIC for further non-party discovery from AWB.

[Re AWB](#)

Kenny v Ritter [2009] SASC 139

Full Court of the Supreme Court of South Australia

Gray, Anderson & Layton JJ

Law Reform (Contributory Negligence & Apportionment of Liability) 2001 (SA) - personal injuries – motor vehicle accident apportionment of responsibility & damages - appeal & cross-appeal from District Court - primary judge had concluded both parties negligent – primary judge had apportioned liability for collision 70% against defendant/appellant & 30% against plaintiff/respondent & cross-appellant - damages assessed in amount of \$237,125 - whether error in approach to apportionment of liability - whether primary judge had erred in assessment of damages – consideration given to scope of duty of a Judge to a litigant in person - appeal as to liability allowed - appeal as to assessment of quantum allowed – an interesting judgment.

[Kenny](#)

From Scotland...**Bell Taverns (Scotland) Ltd v The National Insurance & Guarantee Corporation Ltd [2009] ScotCS [2009] CSOH 69**

Scottish Court of Sessions

Lord Hodge

Hotel insurance policy – plaintiffs/("pursuers") owners of hotel in Perthshire – hotel fire - construction of policy – average clause - reinstatement – application of limit of liability clause – extensions to insurance cover in policy – demolition costs - cost of reinstatement of underground service pipes & cables - dispute with defendant/("defender") insurer as to amount to which pursuers entitled under policy - three questions for consideration.

[Bell Taverns](#)

From the United States of America...**Eric M., a minor(pl./appell.) v Cajon Valley Union School District et al., (defs/resps.) D053534**

Court of Appeal of California

Personal injuries – negligence – alleged failure of supervision – statutory immunity - appellant through his tutor alleging injuries he received at the age of six from being hit by a car were proximately caused by district's failure to supervise adequately the process of his dismissal from school & anticipated school bus ride home – school transportation safety plan - primary judge had ruled school had not undertaken to supervise children until they were safely in the arms of their parents – primary judge had concluded that s.44808 California Education Code provided District with immunity as a matter of law – s44808 provided: provides that school districts shall not be "responsible or in any way liable for the conduct or safety of any pupil of the public schools at any



time when such pupil is not on school property, unless such district . . . has undertaken to provide transportation for such pupil to and from the school premises . . . or has failed to exercise reasonable care under the circumstances. . . ." Also: "In the event of such a specific undertaking, the district . . . shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board." - Primary judge had granted respondents' application for summary judgment dismissing claim – held on appeal, primary judge had incorrectly determined District did not owe child a duty of reasonable care at the relevant times – appeal upheld - summary adjudication ruling reversed - triable material issues of fact remained regarding extent & manner of performance of that duty.

[Cajon Valley Union School District](#)

[California Education Code Section 44808](#)

Key: (I) Insurance, (B) Banking, (C) Construction