



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

McLaughlin v Dungowan Manly Pty Ltd (No 3) - s258B(2) *Corporations Act* 2001 (Cth) - share surrender agreements (I, B, C)

Paynter Dixon Constructions Pty Ltd v Fairfield City Council - Development applications - proposed development should be categorised as a 'motel' within the meaning of the LEP and was therefore a prohibited development (C)

Koller v Rice - s84(1) *Property Law Act* 1958 (VIC) - s60(2) *Planning & Environment Act* 1987 (VIC) - application to discharge or vary a restrictive covenant (B,C)

Scaffidi v Perpetual Trustees Victoria Ltd - Contracts - construction of settlement deed (I, B, C)

Lewis v Clifton & Ors - Personal injuries - plaintiff assaulted while patron at hotel by another patron - defendants make up a partnership that runs and operate hotel - award of \$296,247.73 (I)

Hanson v Tamworth Regional Council - s35, s35A *Civil Liability Act* 2002 (NSW) - application for vacation of hearing date (I, B, C)



Mory Pty Ltd v Alfred Medical Imaging Pty Ltd - Contracts - claim for damages for costs of contract works - cross-claim for cost of repairs to scanner & consequential losses - plaintiff builder's claim succeeded - cross-claim dismissed (I, C)

R. v Imperial Tobacco Canada Ltd - Canadian decision - negligence - duty of care - negligent misrepresentation - proximity & foreseeability - labelling (I)

Summaries with links (5 minute read)

Wednesday 3 August 2011

McLaughlin v Dungowan Manly Pty Ltd (No 3) [2011] NSWSC 717

Supreme Court of New South Wales

Pembroke J

s258B(2) *Corporations Act* 2001 (Cth) - share surrender agreements - statutory interpretation - aids to interpretation - finality of litigation - limited power to re-open - duty of Counsel.

[McLaughlin](#) (I, B, C)

[McLaughlin](#)- decision 10 May 2011: see 'Benchmark' Thursday 12 May 2011 - application to set aside judgment - power to re-open - appropriate to allow decision to be re-opened, but only so that the parties can put submissions as to what possible further declarations should be made, given conclusions of fact & law already reached;

[McLaughlin](#)- decision 25 March 2011: see 'Benchmark' Friday 6 May 2011 - contracts - principles of construction - share surrender agreements - series of individual agreements in identical form between first defendant & all but two of its shareholders - Australian text & case law considered;

[McLaughlin](#)- [McLaughlin v Dungowan Manly Pty Ltd \[2010\] NSWSC 187](#) - written reasons 16 March 2010 of Ward J for orders made on 26 February 2010, referred to at para. 2 of Pembroke J's judgment 25 March 2011 above - contracts - repair & redevelopment of home unit building in Manly - whether leave should be granted to commence derivative suit - oppression - leave granted to commence derivative suit for breach of statutory duties - assessment of damages.

Paynter Dixon Constructions Pty Ltd v Fairfield City Council [2011] NSWLEC 127

Land & Environment Court of New South Wales

Craig J

Development applications - Fairfield Local Environmental Plan 1994 - applicant was engaged by an RSL Club to prepare a development application for a new accommodation facility & elevated



car parking structure to be located on the site of the Club's present premises - Council opposes grant of development consent - whether the development is permissible under the provisions of Local Environmental Plan - whether, assuming the development is permissible, consent should be granted as a matter of merit - appeal dismissed - proposed development should be categorised as a 'motel' within the meaning of the LEP and was therefore a prohibited development.

[Paynter](#) (C)

Koller v Rice [2011] VSC 346

Supreme Court of Victoria

Dixon J

s84(1) *Property Law Act* 1958 (VIC) - s60(2) *Planning & Environment Act* 1987 (VIC) - application to discharge or vary a restrictive covenant - modification of the restrictive covenant would not substantially injure the persons entitled to the benefit of the restriction of one dwelling per lot.

[Koller](#) (B, C)

Scaffidi v Perpetual Trustees Victoria Ltd [2011] WASCA 159

Court of Appeal of Western Australia

Newnes & Murphy JJA & Mazza J

Contracts - construction of settlement deed - principles as to releases & covenants not to sue - whether deed of settlement validly terminated - accord & satisfaction - appeal from interlocutory decision dismissed.

[\[2011\] WASCA 159](#) (I, B, C)

[PERPETUAL](#) - decision 22 December 2010 - person under disability - settlement agreement approved by court - agreement not performed in part - whether one party able to terminate agreement - effect of Court approval - deed validly terminated.

From the District Court of New South Wales ...

Lewis v Clifton & Ors [2011] NSWDC 79

District Court of New South Wales

Elkaim SC DCJ

Personal injuries - duty of occupier to a lawful entrant - plaintiff assaulted while patron at hotel by another patron - first defendant the hotel licensee - defendants make up a partnership that runs and operates the hotel - *Civil Liability Act* 2002 (NSW) - attack unprovoked - whether hotel should have taken action against assailant after assailant had participated in an earlier fight - failure of



duty of care in not evicting assailant - liability established - assessment of damages - plaintiff a very competent amateur boxer who had at least the potential to turn professional though success not guaranteed - award of \$296,247.73.

[\[2011\] NSWDC 79](#) (I)

Hanson v Tamworth Regional Council [2011] NSWDC 72

District Court of New South Wales

Gibson DCJ

Building cases - case management - negligence claim - building subsidence - leaking storm water pipe - s35, s35A *Civil Liability Act* 2002 (NSW) - application for vacation of hearing date granted - articles relating to proportionate liability cited.

[\[2011\] NSWDC 72](#) (I, B, C)

Mory Pty Ltd v Alfred Medical Imaging Pty Ltd [2011] NSWDC 75

District Court of New South Wales

Levy SC DCJ

Contracts - claim for damages for costs of contract works - torts - parties had contracted for plaintiff to carry out building & internal fit-out works at defendant's premises where it was setting up a radiology practice in Five Dock - while plaintiff was in formal possession of premises, a CT scanner was delivered & stored there - scanner adversely affected by moisture from air-conditioning condensate that had accumulated due to low thermostat setting - cross-claim for cost of repairs to scanner & for compensation for consequential losses - plaintiff builder's claim succeeded - requirements of s5B *Civil Liability Act* 2001 (NSW) not satisfied - cross-claim dismissed.

[\[2011\] NSWDC 75](#) (I, C)

From Canada ...

R. v Imperial Tobacco Canada Ltd., 2011 SCC 42

Supreme Court of Canada

McLachlin CJ (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein & Cromwell JJ)

Negligence – duty of care – negligent misrepresentation – proximity & foreseeability – labeling – conflicting policy considerations – two cases before the Courts in British Columbia – the *Knight* case – the Costs Recovery case in which Government of British Columbia seeking to recover,



pursuant to British Columbia's *Tobacco Damages & Health Care Costs Recovery Act*, the cost of paying for medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial – in both cases, the tobacco companies had issued third-party notices to Government of Canada – at para. 5 of judgment: claims of Imperial & the other tobacco companies brought against Government of Canada bound to fail, & should be struck – appeals of Government of Canada allowed in both cases & cross-appeals dismissed.

[R. v Imperial \(I\)](#)

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