



# Insurance Banking & Construction

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

### Today's Cases

**Trade Practices** – misleading and deceptive conduct – television broadcasters entered into a contract with operators of a business offering training to women for a fee in relation to property investment – broadcasters then aired two current affairs programs in which representations were made concerning the benefit of the training – whether representations were misleading and deceptive – whether statutory exemption from liability applied. Held: statutory exemption from liability did not apply. ACCC's appeal allowed. See *ACCC v Channel Seven Brisbane Limited & Ors* (B)

**Contract** – telecommunications – service providers entered into contract permitting the use by one of the other's network – whether telecommunications traffic information is confidential – whether such information can be used to prepare market share reports. Held: use of such information constituted a breach of contract. See *Optus v Telstra (No.2)* (B)

**Courts & Tribunals (NSW)** – jurisdiction of District Court of NSW – whether the Court has jurisdiction to make a freezing order restraining assets of a third party the effect of which guarantees the judgment debt entered by the Court. Held: District Court has jurisdiction to make a freezing order but has no power to order a third party to effectively become guarantor of a judgment debt in circumstances where the judgment debtor has entered into transactions for the benefit of the third party. Appeal allowed. District Court orders set aside. See *Tagget v Sexton* (B)

**Corporations** – family company deregistered 27 years ago under previous corporations legislation – application by children of deceased father who was the former director and shareholder of the company to reinstate registration of company – where company owned real property at time of deregistration – only property owned by company. Held: application upheld. See *Amalex Pty Ltd; Application of S M Shaw & Anor* (B)



**Professional Negligence (NSW)** – alleged negligent misrepresentations in registered mortgages in which security provided for lease agreements in respect of the hire purchase of trucking equipment – whether solicitor negligent – whether lender entitled to possession of property. Held: lender’s claim dismissed. Claim against solicitor upheld. See *Australian Regional Credit v Mula*; *Australian Regional Credit v Raphael* (I, B, C)

**Insolvency** – whether court has power to wind-up a company registered in the United States of America – whether company carries on business in Australia. Held: order that company be wound up. See *Re Starport Futures Trading Corporation* (B)

**Equitable Remedies** – large and complex commercial litigation involving banking industry – findings on liability handed down in October 2008 after 404 hearing days – orders made for equitable relief – declarations – monetary relief – compensatory interest – relief relating to transactions of non-parties. See *The Bell Group (in liq) v Westpac Banking Corporation & Ors* (I, B, C)

## From the USA:

**Insurance** – whether insurer liable to indemnify insured who settled claim for \$2.8M in respect of water damage – commercial general liability policy – whether damage caused by insured – whether damage caused by sub-contractor of insured – whether policy excluded such damage. Held: insurer successful in declining indemnity at first instance and on appeal. See *Westfield Insurance v Sheehan Construction* (I, C)

## From Canada:

**Insurance** – whether insurance broker obtained sufficient insurance cover for home owners who suffered damage to precious figurines – whether insurer issued insurance in accordance with insurance application – whether insurer owed duty of care to broker – whether insurer owed duty of care to insured - at first instance - broker and insurer each to contribute 50% towards plaintiffs’ verdict – insurer appealed. Held: no duty of care owed by insurer to broker – no duty of care owed by insurer to insured - judgment against insurer set aside. See *Saskatchewan Government Insurance v Sebastian* (I)



## Monday 4 May 2009

### **Australian Competition & Consumer Commission v Channel Seven Brisbane Pty Limited [2009] HCA 19**

High Court of Australia

French CJ; Gummow, Hayne, Heydon & Kiefel JJ

ss52 – s65A *Trade Practices Act* 1974 (Cth): Second Reading Speech considered – statutory exemption - prescribed information providers – two episodes of current affairs television program – business offering training for women in property investment - exception to exemption - exception relating to publication of matter pursuant to a contract, arrangement or understanding between party publishing the matter & a supplier of goods or services - "advertisement", "contract, arrangement or understanding", "goods or services of that kind" – Full Federal Court had held that, by reason of operation of s65A(1), s52 did not apply to conduct of respondents - appeal allowed.

[Australian Competition and Consumer Commission](#) (B)

### **Optus Networks Ltd v Telstra Corporation Ltd (No. 2) [2009] FCA 422**

Federal Court of Australia

Edmonds J (in Sydney)

Contract - Optus alleging breach of provisions of access agreement - whether telecommunications traffic information is confidential information – held that the uses to which the telecommunications traffic information & market share reports were put constituted breach of contract.

[Optus Networks](#) (B)

### **Australian Securities & Investments Commission v Fortescue Metals Group Ltd [No 2] [2009] FCA 424**

Federal Court of Australia

Gilmour J (in Perth)

*Australian Securities & Investment Commission Act* 2001 (Cth) – admissibility of transcripts of examinations under s19 *Australian Securities & Investment Commission Act* 2001 (Cth) – detailed analysis of legislation – “document.”

[Australian Securities and Investments Commission](#) (B, C)

### **Tagget v Sexton [2009] NSWCA 91**

Court of Appeal of New South Wales

Beazley & Young JJA; Sackville AJA

Jurisdiction of District Court - judgment for respondent in District Court for breach of contract & misleading and deceptive conduct - proceedings arose out of proposed purchase by respondent of property at Dorrigo - interlocutory relief - freezing order restraining assets of a third party – whether

District Court has jurisdiction to make such an order - whether the District Court has power to make orders effectively making a third party a guarantor of judgement debtor's debt - principles in Cardile v LED Builders Pty Ltd [1999] HCA 18 considered - costs - interlocutory proceedings - entitlement to appellate intervention where costs ordered at interlocutory stage - detailed consideration of case law - appeal allowed. [Tagget](#) (B)

**Amalex Pty Ltd; Application of S M Shaw & Anor [2009] NSWSC 343**

Supreme Court of New South Wales

Barrett J

Corporations - reinstatement of registration - company deregistered under s459(4) of the Companies (New South Wales) Code - application for order for reinstatement made well after expiration of fifteen years referred to in s459(6) of the Code - need for reinstatement to be under that legislation - need for extension of limitation period.

[Amalex](#) (B)

**Australian Regional Credit v Mula; Australian Regional Credit v Raphael [2009] NSWSC 325**

Supreme Court of New South Wales

McCallum J

Professional negligence - negligent misstatement - mortgage - lease agreements - agreements in respect of two prime movers & trailer to be used in trucking business - effect of registration of forged mortgage - two proceedings heard together - plaintiff seeking order for possession of property at Fairfield - proceedings by plaintiff against solicitor alleging breach of duty of care & of *Trade Practices Act* 1974 (Cth) - reliance on negligent misstatement - in relation to possession proceedings, plaintiff's claim dismissed, & two cross-claims dismissed - in relation to second proceedings, judgment for plaintiff.

[Australian Regional Credit](#) (I, B, C)

**Re Starport Futures Trading Corporation [2009] QSC 94**

Supreme Court of Queensland

Applegarth J

Winding up - whether investors should seek winding up of company in Delaware, United States of America - whether just & equitable to wind it up - company wound up & liquidator appointed.

[Starport Futures Trading Corporation](#) (B)

**The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 10] [2009] WASC 107**

Supreme Court of Western Australia

Owen J

Equitable relief - for decision 28 October 2008, see 'Benchmark' Thursday 30 October 2008 & link below - reasons as to precise form of relief parties should have - declarations - monetary relief - compensatory interest - relief relating to transactions of non-parties.

[The Bell Group](#) – part 1 of judgment (I, B, C)

[The Bell Group](#) – part 2 of judgment

[The Bell Group](#) - decision 28 October 2008 - corporate insolvency – directors' duties – conflict of interest – equitable fraud - refinancing - plaintiffs alleging banks knowingly assisted directors to breach their fiduciary duties - four hundred & four hearing days – twenty banks – whether Bell Group of companies insolvent as at 26 January 1990 – plaintiffs partially successful – whether banks ranked ahead of bondholders in receiving proceeds of disposal of assets - 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants (plaintiffs by counterclaim) partially successful – decision very lengthy – 404 hearing days.

## From the United States of America...

### Westfield Insurance Co. v Sheehan Construction Co, Inc, et al [def/apps], no. 08 - 3463

United States Court of Appeals for the Seventh Circuit

Easterbrook CJ; Wood & Williams, Circuit Judges

Commercial general liability insurance policy – scope of policy – water damage - Sheehans had been general contractor for a residential subdivision in Indianapolis – moisture found by owners due to defective work by subcontractors - settlement of claim for about \$2.8 million – Sheehan seeking its insurer indemnify that expense – district court found in insurer's favour – decision of district court affirmed.

[Westfield Insurance](#) (I, C)

## From Canada...

### Saskatchewan Government Insurance v Sebastian 2009 SKCA 44

Court of Appeal for Saskatchewan

Vancise, Lane & Hunter JJA

Negligence – breach of contract - home insurance policy - insurance broker's duty of care to the insured homeowners – homeowners wanted coverage to include coverage for a figurines collection - prior insurance policy had provided this cover, outside of what was usually provided for in the policy – in response to application submitted by broker, insurer issued standard "comprehensive perils" home coverage policy with a Fine Arts Rider for the collection, which contained an exclusion for accidental damage to & breakage of fragile items – homeowners' display case fell off wall & many of collectibles damages or destroyed – primary judge found broker & his employer were liable in negligence – as to third party claim, whether insurer was liable to indemnify broker & employer or contribute to amount of judgment payable to homeowners on the basis of negligence, contract, or pursuant to *Contributory Negligence Act* – primary judge had held that the third party insurer was liable for 50% of damages broker owed to homeowners – primary judge held insurer had a duty of care to insured when the application for insurance was submitted to it, by a broker, on behalf of the homeowner – on appeal, held no duty of care owed by insurer. [Saskatchewan Government Insurance](#) (I)

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