



## Insurance, Banking & Construction

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

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**Friday 6 June 2008**

**Duinker v St Vincent de Paul Society Aged & Special Services Limited (Lewisham Nursing Home)**  
**[2008] NSWCA 127**

Court of Appeal of New South Wales

Beazley, Hodgson & McColl JJA

Workers compensation – Arbitrator of Workers Compensation Commission had determined that respondent pay the appellant weekly compensation - respondent had appealed to Commission constituted by a Presidential member pursuant to s352 Workplace Injury Management & Workers Compensation Act 1998 (NSW) – decision of Arbitrator revoked & award made in favour of respondent – appeal from Presidential member’s decision - whether Presidential member bound to apply principle in Abalos’ case – whether error of law by Presidential member shown – appeal dismissed.

[Duinker](#) (I)

**Sleboda v Sleboda** [2008] NSWCA 122

Court of Appeal of New South Wales

Campbell & Bell JJA; Handley AJA

Equity – appeal against factual finding based in part on demeanour - Fox v Percy [2003] HCA 22 – appellant son of respondent - father conveyed entire interest in real property to son – father’s claim for relief based on undue influence & unconscionable conduct - father sought declaration that property held on constructive trust for father & son as tenants in common in equal shares and order for son to carry out all necessary steps to transfer to father legal half interest in property – primary judge had found both grounds made out –primary judge had rejected evidence given by solicitor for son – whether reasons of primary judge inadequate – appeal dismissed.

[Sleboda](#) (I, B)

**Sellers v Siemianowski [2008] NSWSC 538**

Supreme Court of New South Wales

Barrett J

Resulting trust - presumption of advancement - plaintiff son claimed full beneficial ownership of house - defendant father claimed undivided interest in equity - conflicting presumptions of equity – Calverley v Green – property held upon trust for plaintiff alone.

[Sellers](#) (B, C)

**PJM Financial Services Pty Ltd v Citigroup Global Markets Australia Pty Ltd; PJKLM Holdings Pty Ltd v Citigroup Global Markets Australia Pty Ltd [2008] NSWSC 547**

Supreme Court of New South Wales

Barrett J

Corporations Act 2001 (Cth) s459G - winding up - statutory demand served on plaintiff by defendant – in each of these proceedings, application for order setting aside - accepted by the parties in each case that decision in Clawson Holdings Pty Ltd v Citigroup Global Markets Australia Pty Ltd [2008] NSWSC 537 would govern (see ‘Benchmark’ Banking Thursday 5 June 2008 & link below) - in each of 1521/08 & 1522/08 ordered that proceedings be dismissed with costs. (B)

[PJM Financial Services](#), and

[Clawson Holdings Pty Ltd v Citigroup Global Markets Australia Pty Ltd](#)

**Carpenter v Pioneer Park Pty Ltd [2008] NSWSC 551**

Supreme Court of New South Wales

Barrett J

Corporations Act 2001 (Cth) - winding up - company in liquidation - leave previously granted to plaintiff under Part 2F.1A of the Act & court's inherent jurisdiction to bring proceedings on behalf of company against Australia & New Zealand Banking Group Limited - termination of defendant's accounts with the Bank -in those proceedings, judgment against company – plaintiff seeking to pursue appeal on behalf of company - whether existing leave extends to appeal - whether new grant of leave should be made - supervening Court of Appeal decision that Part 2F.1A not available where company in liquidation - application for new grant of leave pursued on basis of inherent jurisdiction only - relevant criteria discussed – detailed consideration of case law from UK & Australia - criteria not met - leave refused.

[Carpenter](#) (B)

**Australian Executor Trustees Limited v Lanmar Pty Ltd & Ors [2008] NSWSC 549**

Supreme Court of New South Wales

Adams J

Application to set aside default judgment – credit agreement – guarantee -Contracts Review Act 1980 (NSW) - defendant's evidence of arguable defence – detailed consideration of case law - default judgment set aside – leave granted to file defence & cross-claim.

[Australian Executor Trustees](#) (I, B)

**QBE Underwriting Limited v New Cap Reinsurance Corporation Limited [2008] NSWSC 526**

Supreme Court of New South Wales

Windeyer J

Corporations Act 2001 (Cth) s500(2) - plaintiff (the Syndicate) seeking leave to commence proceedings against New Cap Reinsurance Corporation Limited (in Liquidation) & its liquidator – leave to proceed given.

[QBE Underwriting](#) (I)

**Stolfa v Owners Strata Plan 4366 & Ors (No 2) [2008] NSWSC 531**

Supreme Court of New South Wales

Brereton J

Expert evidence – engineer's report - proceedings seeking to restrain building works by defendants in strata title building - application for leave to adduce evidence of a second expert where parties' single expert appointed - leave to adduce evidence of second expert refused.

[Stolfa](#) (C)

**Livingspring Pty Ltd v Kliger Partners [2008] VSCA 93**

Court of Appeal of Victoria

Maxwell P & Buchanan JA

Security for costs - applicant property developer had engaged respondent to act as solicitors in connection with two apartment projects – applicant sued respondent for breach of fiduciary duty & negligence, alleged to have resulted in misappropriation of approximately \$2.5 million by former architect & project manager for the developments - collateral litigation over security for costs – order had been made that appellant give security for respondent's costs of proceedings, up to commencement of trial, in sum of \$118 471.50 –appellant sought leave to appeal – whether existence of professional indemnity insurance a relevant factor – whether failure to supply up to date financial information a relevant factor – whether expenditure on legal costs properly considered an asset - company accounts – statutory presumption of admissibility – Corporations Act 2001 (Cth) s 1305 - appeal dismissed.

[Livingspring](#) (I, C)

**Mango Boulevard Pty Ltd v Spencer & Ors [2008] QSC 117**

Supreme Court of Queensland

Chesterman J

Procedure – pleadings - corporate finance - shareholders deed - Kinsella carries on business of developing land at Mango Hill on northern outskirts of Brisbane - deed provided that in certain circumstances plaintiff would have right to acquire defendants' shares in Kinsella at a price fixed by valuation - plaintiff commenced this action alleging those circumstances had arisen & that it was entitled to acquire defendants' shares in accordance with a clause in deed - default judgment - res judicata - discovery – detailed consideration of case law.

[Mango Boulevard](#) (B, C)

## From the United States of America...

**TAG 380, LLC,(respondent) v ComMet 380, Inc., (appellant); ComMet 380, Inc.,(third party plaintiff) v GMAC Commercial Mortgage Corporation,(third party defendant)**

Court of Appeals of New York

Kaye CJ, Ciparick, Graffeo, Read, Smith, Pigott & Jones JJ

Insurance – commercial building on Madison Avenue - whether tenant had breached its lease by procuring insurance that specifically excluded “terrorism” when lease specifically required this to be not excluded – held that tenant had breached lease – case law considered as to interpreting an insurance clause.

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

**Caso v Nimrod Productions - B198347**

Court of Appeal of California, Second Appellate District, Division Seven

Perluss PJ, Woods & Zelon JJ

Negligence – employment relationship - loan out corporations - professional stuntman suffered severe head injuries while performing a stunt for a television show called “M.D.’s “ – wife alleging loss of consortium – question as to who was in control of the stunt – case law considered – primary court had ruled claims were barred by workers’ compensation exclusivity – this decision affirmed.

[Caso](#) (I)



## From Singapore...

### Tan Kah Hock & Another v Chou Li Chen & Others - [2008] SGHC 82

High Court of Singapore

Lee Seiu Kin J

Conflict of laws – proceedings in Singapore & Western Australia - appeal against order that plaintiffs were to elect by 3 January 2008 to either amend Australian proceedings Federal Court No WAD 180 of 2007 or amend Singapore proceedings in Suit No 267 of 2007 to remove all references to Shareholders' Agreement, including but not limited to any breach of clause 9 of Shareholders' Agreement - plaintiffs & defendants shareholders in company incorporated in Western Samoa - company registered in Australia as a foreign company under Corporations Act 2001 (Cth) & owns office building in Perth WA – plaintiffs' claim relates to alleged agreement in which first defendant, on behalf of himself & second & third defendants, agreed to sell their entire shareholdings in the company to first & second plaintiffs - Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd [1989] 3 All ER 65 distinguished – appeal allowed – order set aside.

[Tan Kah Hock](#) (B)

## And in the news...

Green Paper June, 2008 - Financial Services & Credit Reform

Improving, Simplifying & Standardising Financial Services & Credit Regulation – the Treasury

[Green Paper on Financial Services and Credit Reform](#) (B)

**Monday 9 June 2008 being a public holiday, the next edition of 'Benchmark' will appear on Tuesday 10 June 2008**

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