



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Australian Competition & Consumer Commission v PRK Corporation Pty Ltd; Patrick Stevedores Holdings Pty Ltd & Ors - *Trade Practices Act 1974* (Cth) – arrangements substantially lessening competition - determination of pecuniary penalty under s76 – parties jointly proposing to Court amount of penalty (B, C)

Singleton, in the matter of Allcommercial Finance Australia Pty Limited - *Corporations Act 2001* (Cth) – application for an order under s477(2B) for Court's approval for liquidators to enter into two agreements on company's behalf – power of attorney – deed of acknowledgement (B)

BlueFreeway Limited, in the matter of BlueFreeway Limited (No 2) - s411(4) *Corporations Act 2001* (Cth) – approval of scheme of arrangement (B)

Cape Australia Holdings Pty Ltd v Iannello - Application for preliminary discovery refused - respondent former employee of second applicant (I, B, C)

United Group Rail Services Limited v Rail Corporation New South Wales - Commercial dispute resolution clause – certainty of terms - genuine & good faith negotiations - severance (I, B, C)

Allianz Australia Insurance Ltd v Elias (No 2) - Personal injuries – damages – calculation of future economic loss - discount for vicissitudes (I)

Bojko v ICM Property Service Pty Ltd & Ors - *Workplace Injury Management & Workers Compensation Act 1998* (NSW) - binding medical assessment – Appeal Panel – conduct of review – reasons of Panel – appeal dismissed (I)

Kekatos v Sanson & Anor - Professional negligence – solicitor's duties – appellant had acted



on purchase of investment unit - appeal allowed (I)

Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority - s57 *Land & Environment Court Act 1979* (NSW) – land acquisition compensation - remitter - two interlocutory orders – appeal dismissed (C)

Maurice Tarabay v Fifty Property Investments Pty Ltd & Ors - Building contract – ss51AA(1) & 82 *Trade Practices Act 1974* (Cth)– unconscionable conduct alleged – damages - torts – plaintiff builder’s claim dismissed (I, B, C)

Quintano v B W Rose Pty Ltd & Anor - Costs – personal injuries - funds management - Sanderson order made (I)



Summaries with links (5 minute read)

Tuesday 7 July 2009

Australian Competition & Consumer Commission v PRK Corporation Pty Ltd; Patrick Stevedores Holdings Pty Ltd & Ors [2009] FCA 715

Federal Court of Australia

Jacobson J (in Sydney)

Trade Practices Act 1974 (Cth) – access to automotive terminal services at ports of Brisbane, Sydney & Melbourne – arrangements substantially lessening competition - claims of contravention of s45(2) - determination of pecuniary penalty under s76 – parties jointly proposing to Court amount of penalty – deterrence – public interest factors which underlie the non-litigious resolution of enforcement proceedings – Court will have regard to views of regulators – whether proposed penalty fell within “permissible range” – pecuniary penalty ordered in terms agreed.

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

Singleton, in the matter of Allcommercial Finance Australia Pty Limited [2009] FCA 714

Federal Court of Australia

Jacobson J (in Sydney)

Corporations Act 2001 (Cth) – application for an order under s477(2B) for Court’s approval for liquidators to enter into two agreements on company’s behalf – power of attorney – deed of acknowledgement – at para 8 of judgment:

“The principles which govern the exercise of the Court’s power under s477(2B) have been considered in a number of authorities. In Re GA Listing & Maintenance Pty Ltd (1994) 15 ACSR 308 at 310, Young J said that:

“The whole purpose of liquidation is, to borrow a metaphor used by Sir Laurence Street some years ago, to lead the horse back into the stable. ... Any activity which marks a substantial deviation from the activity of “leading the horse back to the stable” is, generally speaking, outside the power of the liquidator. However, human activity is so diverse that there will be situations where the liquidator cannot lead the horse back to the stable by the direct route. He may have to pause along the way because the path is blocked by some litigation or other impediment.”

[Singleton](#) (B)

BlueFreeway Limited, in the matter of BlueFreeway Limited (No 2) [2009] FCA 708

Federal Court of Australia

Lindgren J (in Sydney)

s411(4) *Corporations Act 2001 (Cth)* – scheme of arrangement – for judgment 22 May 2009 see

'Benchmark' B & IBC Thursday 28 May 2009 & link below – scheme approved.

[BlueFreeway](#) (B)

[BlueFreeway](#) - *Corporations Act* 2001 (Cth) - plaintiff had sought an order under s411(1) for convening of a meeting of its ordinary shareholders other than IPMG Administration Pty Ltd - consideration of proposed scheme of arrangement – order made for plaintiff to convene meeting.

Cape Australia Holdings Pty Ltd v Iannello [2009] FCA 709

Federal Court of Australia

Siopis J (in Perth)

Application for preliminary discovery - under Order 15A r3 & Order 15A r6 *Federal Court Rules* – emails - two applicants provide industrial services to companies operating in oil, gas & resources industries - first applicant parent & controlling entity of second applicant – respondent former employee of second applicant – application dismissed.

[Cape Australia Holdings](#) (I, B, C)

United Group Rail Services Limited v Rail Corporation New South Wales [2009] NSWCA 177

Court of Appeal of New South Wales

Allsop P; Ipp & Macfarlan JJA

Commercial dispute resolution clause – content & operation - two contracts - design & building of new rolling stock for Railcorp - relevant provisions identical – for decision appealed from, see 'Benchmark' Monday 22 December 2008 & link below - certainty of terms - genuine & good faith negotiations - severance - appeal dismissed – comprehensive analysis of legislation, text & case law from UK, Australia, Canada & New Zealand by Allsop P in an interesting judgment.

[United Group Rail Services](#) (I, B, C)

[United Group Rail Services](#) – decision 17 December 2008 - whether contractual dispute resolution clause void for uncertainty - whether requirement to negotiate building dispute "in good faith" void for uncertainty - whether provision/s void for uncertainty are severable from contract – extensive consideration of UK & Australian case law.

Allianz Australia Insurance Ltd v Elias (No 2) [2009] NSWCA 166

Court of Appeal of New South Wales

Beazley, Macfarlan & Young JJA

Personal injuries – damages – calculation of future economic loss - discount for vicissitudes – for Court of Appeal decision 29 May 2009, see 'Benchmark' I & IBC 2 June 2009 & link below - judgment for respondent in sum of \$275,899.60.

[Allianz Australia Insurance](#) (I)

[Allianz Australia Insurance](#) – decision Court of Appeal 29 May 2009 - motor accident cases – assessment of damages – appellant's challenge to primary judge's findings as to respondent's disabilities caused by the accident failed - challenge to awards made to respondent for past & future economic loss succeeded – reassessment of economic loss claims.

Bojko v ICM Property Service Pty Ltd & Ors[2009] NSWCA 175

Court of Appeal of New South Wales

Allsop P; Giles JA & Handley AJA

Workplace Injury Management & Workers Compensation Act 1998 (NSW) – for decision appealed from, see ‘Benchmark’ I & IBC Tuesday 16 September 2008 & link below - binding medical assessment – Appeal Panel – conduct of review – reasons of Panel – appeal dismissed.

[Bojko](#) (I)

[Bojko](#) – decision 11 September 2008 - *Workplace Injury Management Act 1998* (NSW) – referral of assessment of whole person impairment to approved medical specialist - appeal to Appeal Panel – whether failure to accord procedural fairness – whether error of law – plaintiff failed to make out his challenge to Panel’s decision – application dismissed.

Kekatos v Sanson & Ano [2009] NSWCA 171

Court of Appeal of New South Wales

Tobias & McColl JJA; Handley AJA

Professional negligence – solicitor’s duties – appellant had acted for respondent purchasers on purchase of investment unit - exercise of reasonable care – no duty to ensure particular result – appeal allowed - judgment of District Court set aside, & in lieu thereof substitute judgment for first defendant in the action.

[Kekatos](#) (I)

Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2009] NSWCA 178

Court of Appeal of New South Wales

Beazley, Basten & Young JJA

s57 Land & Environment Court Act 1979 (NSW) – valuation of land situated at Ballast Point on Sydney Harbour – land acquisition compensation - appeal from two interlocutory orders - remittal following appeal - scope of remitter - "or", "matter", "rehearing", "remitter", "reopening" – appeal dismissed.

[Walker Corporation](#) (C)

[Walker Corporation](#) – decision 3 October 2008 Land & Environment Court

[Walker Corporation](#) – decision Land & Environment Court 29 August 2008 reported at (2008) 161 LGERA 86 – see ‘Benchmark’ Wednesday 3 September 2008 - client legal privilege – legal advice – parties engaged in long running litigation under *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) over market value of land at Ballast Point compulsorily acquired by S.H.F.A. in September 2002 - Walker’s application for access to documents produced on subpoena by Department of Planning - documents created prior to litigation - claim for client legal privilege by Department of Planning over some of the documents produced – S.H.F.A also claiming client legal privilege over subset of same documents - whether claim for client legal privilege proved - implied waiver – issue waiver – joint privilege – case law considered.

Maurice Tarabay v Fifty Property Investments Pty Ltd & Ors. [2009] NSWSC 617

Supreme Court of New South Wales

Hammerschlag J

Building contract – ss51AA(1) & 82 *Trade Practices Act 1974* (Cth)– unconscionable conduct alleged –



damages - torts – construction of units at Strathfield – issue as to who where parties to contract – held that claim for inducing breach of contract failed as third defendant had not induced any breach of building contract, the third defendant had not intended to induce any breach of contract & even if third defendant had intentionally induced breach of contract, plaintiff had not suffered any loss as a result of defendant's conduct – plaintiff builder's claim dismissed.

[Maurice Tarabay](#) (I, B, C)

Quintano v B W Rose Pty Ltd & Anor [2009] NSWSC 626

Supreme Court of New South Wales

Brereton J

Costs – personal injuries - funds management - for decision 26 May 2009, see 'Benchmark' I & IBC Friday 29 May 2009 & link below - action against several defendants – plaintiff only succeeded against first defendant – conditions for Bullock or Sanderson order satisfied – case law considered as to which was the appropriate order – where first defendant is or is likely to be insolvent – Sanderson order made; first defendant to pay second defendant's costs.

[Quintano](#) (I)

[Quintano](#) – decision 26 May 2009 - Personal injuries – causation – assessment of damages - plaintiff shot in course of brawl on nightclub premises – extremely severe traumatic brain injury - breach of duty established against first defendant nightclub operator : see para. 198 of judgment – breach of duty not established against second defendant company, contracted by nightclub operator to provide security services: see para. 199 of judgment – cost of home modifications – gratuitous care – interest on past lost earnings - interest on past loss of superannuation contributions – damages assessed at \$6,610,385 plus costs of funds management - fifty percent contributory negligence, so plaintiff entitled to judgment against first defendant for half that sum

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