

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Windsor v Sydney Medical Service Co-operative Ltd (No. 2) - Application for summary judgment dismissed - agreement for provision of after hours medical services as a locum (B)

Australian Competition & Consumer Commission v Skins Compression Garments Pty Ltd - *Trade Practices Act 1974* (Cth) – contravention – penalty - advertising - resale price maintenance (B)

Oates v Consolidated Capital Services Ltd - *Corporations Act 2001* (Cth) - derivative action – business development – structured finance products in UK & elsewhere in Europe – statutory interpretation - ss236 & 237 – “proceedings” – “on behalf of” – “reflective loss” (B)

Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2) - Interlocutory injunction in proceedings brought by property owners against Council discharged - beach erosion (I, C)

Keswick Developments P/L v Kevroy P/L & Ors; Keswick Developments P/L v Keswick Island P/L & Ors - Crown leases on Keswick Island – breach of warranty – dealing in respect of land - put & call options – right of retention (C)

CGU Insurance Ltd & Anor v Pettit - Personal injuries – interpretation of insurance policy - motor accident – appellants liable to indemnify respondent (I)

Manolakis v Commonwealth Director of Public Prosecutions & Ors - Abuse of process - the Court’s supervisory role - inherent jurisdiction of the Court - access to justice (I)

Saleh v The Nominal Defendant (No. 2) - Personal injuries - funds management charges – claim for interest pursuant to s137 *Motor Accidents Compensation Act 1995* (NSW) – stay for twenty-eight days granted (I)



Chartbrook Ltd (resp.) v Persimmon Homes Ltd & Ors (apps.) - House of Lords - rule that pre-contractual negotiations inadmissible - rectification (C)

Westpac New Zealand Limited v Alan John Clark - Mortgages – *Land Transfer Act 1952* (NZ) - bank had initiated proceedings against solicitor claiming loss by reason of failure to register mortgage during period from advance of the monies till when forgery by an imposter came to light (I, B, C)



Summaries with links (5 minute read)

Wednesday 8 July 2009

Wednesday 8 July, 2009

Windsor v Sydney Medical Service Co-operative Ltd (No. 2) [2009] FCA 704

Federal Court of Australia

Edmonds J (in Sydney)

Application for summary judgment & other orders – agreement for provision of after hours medical services as a locum - filing of an amended statement of claim after strike-out of original statement of claim – whether proceeding should be dismissed under O20 r5 *Federal Court Rules* as an abuse of process - an order striking out a statement of claim is interlocutory – interlocutory orders do not found an issue estoppel - the filing of the amended statement of claim not abuse of process - amended statement of claim disclosed a reasonable cause of action for breach of contract – application dismissed – detailed consideration of case law.

[Windsor](#)

Australian Competition & Consumer Commission v Skins Compression Garments Pty Ltd [2009]

FCA 710

Federal Court of Australia

Besanko J (in Adelaide)

Trade Practices Act 1974 (Cth) – contravention – penalty - misleading or deceptive conduct, or conduct likely to mislead or deceive - advertising – advertorials – promotions - website endorsements - resale price maintenance – parties submitted draft consent orders & statement of agreed facts - public policy.

[Australian Competition & Consumer Commission](#)

Oates v Consolidated Capital Services Ltd [2009] NSWCA 183

Court of Appeal of New South Wales

Spigelman C; Allsop P; Campbell JA

Corporations Act 2001 (Cth) - derivative action – business development – structured finance products in UK & elsewhere in Europe – for decision appealed from, see ‘Benchmark’ B & IBC Friday 16 May 2008 & link below - statutory interpretation - ss236 & 237 – meaning of “proceedings on behalf of a company” – damages - reflective loss principle – whether principle applies to equitable remedies - employment law – whether property belonged to employer or employee - “proceedings” – “on behalf

of" – "reflective loss" – appeal dismissed – comprehensive review of legislation, text & case law from UK & Australia in judgment of Campbell JA.

[Oates](#)

[Oates](#) – decision 15 May 2008 reported at 218 FLR 73 - statutory derivative action - business ventures concerned with development and marketing of structured finance products - claim by former company director for leave under s237 to bring two proceedings on behalf of Australian company - leave refused – detailed consideration of case law from Australia, UK & Hong Kong: see links for [Waddington Ltd v Chan Chun Hoo Thomas](#) below.

Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2) [2009] NSWLEC 110

Land & Environment Court of New South Wales

Biscoe J

Interlocutory injunction - beach erosion - for decision 29 May 2009, see 'Benchmark' I, C & IBC & link below – interlocutory injunction in proceedings brought by property owners against Council discharged – costs reserved.

[Byron Shire Council](#)

[Byron Shire Council](#) - decision 29 May 2009 - s124 *Environmental Planning & Assessment Act* 1979 (NSW) - Council sought urgent interlocutory injunction restraining respondents from undertaking work on their own land & on Manfred Street road reserve & on Crown land adjoining the Manfred Street road reserve at Belongil Beach which fronts the Pacific Ocean – erosion of beach front of respondents' land - interim sandbag wall largely dismantled by storm surge – differing engineering views – balance of convenience - legal issues arising include whether any nuisance claim can arise in light of s177(8) *Conveyancing Act* 1919 (NSW) which abolishes claims for nuisance in relation to removal of support provided to supported land - injunctive order made.

Keswick Developments P/L v Kevroy P/L & Ors; Keswick Developments P/L v Keswick Island P/L & Ors [2009] QSC 176

Supreme Court of Queensland

McMurdo J

Contracts – Crown leases on Keswick Island – breach of warranty – dealing in respect of land - sublease not referred to in contract - put & call options – right of retention.

[Keswick Developments](#)

CGU Insurance Ltd & Anor v Pettit [2009] SASC 187

Supreme Court of South Australia

Doyle CJ

Personal injuries – interpretation of insurance policy - motor accident – primary judge had determined as preliminary issue that appellants liable to indemnify respondent in respect of District Court proceedings in respect of any liability that respondent had to plaintiff in those proceedings - appeal dismissed - "interlocutory judgment", "using your motor vehicle", "your motor vehicle."

[CGU Insurance](#)

[Martin](#) – District Court decision 12 March 2009

Manolakis v Commonwealth Director of Public Prosecutions & Ors [2009] SASC 193

Supreme Court of South Australia

Gray J

Abuse of process - the Court's supervisory role - inherent jurisdiction of the Court - access to justice – detailed consideration of case law from U.K. & Australia.

[Manolakis](#)

From the District Court of New South Wales...**Saleh v The Nominal Defendant (No. 2) [2009] NSWDC 165**

District Court of New South Wales

Levy SC DCJ

Damages – personal injuries - for decision 19 May 2009, see 'Benchmark' I & IBC & link below - funds management charges – claim for interest pursuant to s137 *Motor Accidents Compensation Act 1995* (NSW) – application for unconditional stay pending an appeal refused but a stay for twenty-eight days granted.

[Saleh](#)

[Saleh](#) - decision 19 May 2009 - plaintiff's car hit power pole then fence – whether accident caused by the driver of an unidentified motor vehicle – severe brain injury - plaintiff alleging contact with other car when other car changed lanes - whether plaintiff contributorily negligent – whether requirements of due search & inquiry had been satisfied – assessment of multiple heads of damage - Verdict for the Plaintiff in the sum of \$1,083,398 - entry of final judgment & any costs orders deferred pending assessment of damages for funds management charges.

From the United Kingdom...**Chartbrook Ltd (resp.) v Persimmon Homes Ltd & Ors (apps.) [2009] UKHL 38**

House of Lords

Lord Hope of Craighead, Lord Hoffmann, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond

Contracts – interpretation – disputed definition of “Additional Residential Payment” - rule that pre-contractual negotiations inadmissible - construction of mixed residential & commercial development – fall in housing market – rectification – appeal allowed – text & case law considered from UK, Australia [at para. 32 of Lord Hoffmann's judgment], New Zealand & Hong Kong.

[Chartbrook](#)

From New Zealand...

Westpac New Zealand Limited v Alan John Clark [2009] NZSC 73

Supreme Court of New Zealand

Elias CJ; Blanchard, Tipping & Wilson JJ

Mortgages – registration - causation – *Land Transfer Act 1952* (NZ) - appellant had been victim of fraud – imposter claiming to be registered proprietor of a property in Auckland – advance under home loan agreement in the name of the registered proprietor but signed by imposter – advance secured by mortgage – defendant solicitor had prepared documentation for loan & mortgage - bank had initiated proceedings against solicitor claiming loss by reason of failure to register mortgage during the period from advance of the monies before forgery came to light – bank sought summary judgment – consideration of Australian case law: Gibb v Registrar of Titles (Vic) (1940) 63 CLR 503 & Solak v Bank of Western Australia Ltd [2009] VSC 82 in judgment of Blanchard, Tipping & Wilson JJ, given by Blanchard J - appeal dismissed – at para. 52:

“It may be unfortunate for New Zealand banks & other financiers that the compensation provisions of the Act, unlike those in some at least of the Australian states, do not appear to enable them to claim against the Registrar in a situation such as the present after a void mortgage has been innocently registered. But that is not a good reason for giving Westpac’s documentation an interpretation that it simply cannot bear. The compensation provisions, along with the rest of the Act, are under review by the Law Commission, which will no doubt consider whether, and how, they should be modified.”

[Westpac New Zealand](#)

[Gibb](#) – High Court of Australia decision 25 July 1940

[Solak](#) – decision 17 March 2009 – see ‘Benchmark’ Thursday 19 March 2009 - *Transfer of Land Act 1958* (Vic) – indefeasibility of title - mortgage – registration of forged instrument – mortgagee innocent of fraud – whether indefeasibility extends to obligation contained in loan agreement – apportionment of liability between concurrent wrongdoers – whether apportionable claim – detailed consideration of case law.

From Hong Kong*...

Waddington Ltd v Chan Chun Hoo Thomas & Ors - [2006] HKCA 169

Court of Appeal of Hong Kong

Hon Rogers VP & Le Pichon JA

Derivative action against management of a public company – sale of shares on stock market – rights issue – at para. 25 of judgment of Hon Rogers VP:

“Whilst accepting as fundamental the principles of separate shareholder identity from that of the company and the inability of a shareholder to recover loss if it is wholly incurred by the company, it nevertheless appears to me that there are very strong arguments that a double derivative action is maintainable. Derivative actions are, after all, a procedural means devised by the courts to enable a minority shareholder to enforce the rights of a company in relation to wrongs inflicted by insiders.



The rules developed by the courts in respect of derivative actions have been complex and, as Mr Yu SC, who appeared on behalf of the plaintiff pointed out, are based on a concept of an exception to the general rule that only the party suffering the wrong can bring proceedings. The limits of those exceptions have often been difficult to discern and apply. It would also appear that the derivative action was one originally devised in the United States.”

[Waddington](#)

[Waddington](#) – whether intermediate subsidiaries should be joined into the action – answer ‘yes’ - at para. 4 of judgment of Hon Rogers VP:

“As far as is known, this is the first case in which a double derivative action is likely to go ahead to trial in Hong Kong. Quite what the ultimate outcome will be and whether it will be held that it is maintainable & the basis on which it would be held it is maintainable - remains to be seen and will not be decided for some time to come, unfortunately.”

[Waddington](#) - application for leave to appeal to the Court of Final Appeal from 30 May 2006 judgment – held that until facts found, it would be premature to grant leave for the case to be taken to the Court of Final Appeal.

*cited in NSWSC case of *Oates supra*.

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