



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

McKerlie v Drillsearch Energy - s1041H(1) *Corporations Act* 2001 (Cth) – *Trade Practices Act* 1974 (Cth) - adjournment of general meetings – duties of chairman - duties of a director who occupies position of chairman of board of directors - "in relation to a financial product" - "in trade or commerce" – no effective postponement of general meeting. (I, B)

McKerlie v Drillsearch Energy - s659B(1) *Corporations Act* 2001 (Cth) - whether proceedings "in relation to a takeover bid" (B)

Australian Building & Technical Solutions Pty Limited v Boumelhem; Boral Australia Limited v Boumelhem; Boumelhem v Jones & Ors - Constructive trusts - resulting trusts – Baumgartner v Baumgartner - whether parties engaged in joint venture - proprietary estoppel (B, C)

Bondi Beach Astra Retirement Village Pty Ltd & C G Maloney Pty Ltd v GB & MJ Noon as Co-Executors of Estate of the late BR Noon [2009] - s66ZG *Conveyancing Act* 1919 (NSW) - *Retirement Villages Act* 1989 (NSW) - Mandatory Code of Practice – "buy back" provisions (B)

In the matter of Macquarie Communications Infrastructure Group [2009] NSWSC 487 - Application for order convening meeting & approving explanatory statement – triple-stapled securities (B)

QBE Insurance (Australia) Limited v Lumley General Insurance Limited [2009] VSCA 124 - Contribution between insurers – double insurance - *Insurance Contracts Act* 1984 (Cth) - appeal dismissed. (I, C)

Brown & Anor v Sandhurst Trustees Ltd [2009] VSC 212 - Application for revocation of probate granted – testamentary capacity (B)



Newman v Speigler & Anor - Defamation – appeal against jury's verdicts & awards - appeal against primary judge's indemnity costs order (I)

From the United Kingdom:

McLean or Toremar v CGU Bonus Ltd [2009] ScotCS CSOH 78 - Insurance – fire - held that insurers had established they were entitled to void policy. (I)

From the United States of America:

Lang v Holly Hill Motel Inc - Personal injuries – open & obvious doctrine - fall on stairs - Ohio Basic Building Code - court of appeals had affirmed judgment of the trial court where summary judgment had been entered for defendants – by majority, court of appeals judgment affirmed. (I)

Fultz v Delhaize America Inc - Personal injuries – customer at grocery store tripped over metal bar – held that circuit court had erred in determining that the issue whether she was reasonably distracted before injuring herself on an open & obvious hazard was appropriate for summary judgment (I)

Summaries with links (5 minute read)

Tuesday 9 June 2009

McKerlie v Drillsearch Energy Ltd [2009] NSWSC 488

Supreme Court of New South Wales

Barrett J

s1041H(1) *Corporations Act* 2001 (Cth) – *Trade Practices Act* 1974 (Cth) - adjournment of general meetings – duties of chairman - duties of a director who occupies position of chairman of board of directors - good faith & proper purpose - plaintiffs seeking declaration that purported “resolution” of directors was invalid - three of six directors purported to “postpone” meeting - whether “postponement” effective - whether notice to stock exchange misleading or deceptive - whether “in relation to a financial product” - whether “in trade or commerce” – no effective postponement of general meeting – an interesting decision with detailed consideration of Australian & UK case law.

[McKerlie](#)

McKerlie v Drillsearch Energy Ltd [2009] NSWSC 497

Supreme Court of New South Wales

Barrett J

s659B(1) *Corporations Act* 2001 (Cth) - Takeovers Panel - Beach Petroleum Ltd, as well as being shareholder of Drillsearch, is the bidder under takeover bid for Drillsearch under Chapter 6 *Corporations Act* 2001 (Cth) - whether proceedings “in relation to a takeover bid” - leave to Beach Petroleum to file its proposed originating process & interlocutory process refused - application by Beach Petroleum to be joined as party to proceeding refused.

[McKerlie](#)

Australian Building & Technical Solutions Pty Limited v Boumelhem; Boral Australia Limited v Boumelhem; Boumelhem v Jones & Ors [2009] NSWSC 460

Supreme Court of New South Wales

Ward J

Trusts - property at Dundas – bankruptcy - constructive trusts - resulting trusts – Baumgartner v Baumgartner - whether parties engaged in joint venture - proprietary estoppel: whether plaintiffs, in making contributions to property, acted in detrimental reliance upon assumptions induced by legal owner of property – whether constructive trust would grant plaintiffs unfair priority over third party creditors - contribution - resulting trust & equitable lien declared in favour of plaintiffs in 4401/08 ranking in priority to equitable charges of plaintiffs in 1648/08 & 4017/08 – comprehensive review of text & case law from UK & Australia.

[Australian Building & Technical Solutions](#)

Bondi Beach Astra Retirement Village Pty Ltd & C G Maloney Pty Ltd v GB & MJ Noon as Co-Executors of Estate of the late BR Noon [2009] NSWSC 461

Supreme Court of New South

Smart AJ

s66ZG *Conveyancing Act* 1919 (NSW) - *Retirement Villages Act* 1989 (NSW) - *Retirement Villages Act* 1999 (NSW) - Mandatory Code of Practice – sale of unit in 1996 – contract contained “buy back” provisions which plaintiffs seeking to enforce - Disclosure Statements -whether buy back arrangement amounted to option within s66ZG – order for specific performance.

[Bondi Beach Astra Retirement Village](#)

In the matter of Macquarie Communications Infrastructure Group [2009] NSWSC 487

Supreme Court of New South Wales

Brereton J

Application for order convening meeting & approving explanatory statement – triple-stapled securities – concurrent corporation, trust & foreign schemes – deemed warranty – necessity for effect to be spelt out in explanatory statement - application for judicial advice in respect of proposed trust scheme - order made convening scheme meeting & approving explanatory statement, subject to minor amendments - advice that trustee would be justified in convening meeting & circulating explanatory statement, & that proposed amendment to trust constitution within power.

[Macquarie Communications Infrastructure Group](#)

QBE Insurance (Australia) Limited v Lumley General Insurance Limited [2009] VSCA 124

Court of Appeal of Victoria

Neave & Dodds-Streeton JJA; Kyrou AJA

Contribution between insurers – double insurance - *Insurance Contracts Act* 1984 (Cth) - primary judge had ordered appellant to make contribution to respondent, in respect of a payment made by Lumley under its insurance policy for a liability that was also insured by QBE – for decision appealed from, see ‘Benchmark’ I, C & IBC Thursday 26 June 2008 & link below – appeal dismissed.

[QBE Insurance](#)

[Lumley General Insurance](#) – decision 24 June 2008 - contribution between insurers – contractual liability – whether authorisation or ratification necessary for liability of co-insurers – plaintiff claiming \$268,055.75 by way of contribution from defendant plus interest - fit-out works at premises to be occupied by firm of solicitors - flush sprinkler head in ceiling of a meeting room on level 50 accidentally dislodged & activated for about fifty minutes discharging water causing significant damage to fit-out works & contents on levels 48, 49 & 50 of premises – double insurance – case law considered - [John Collyear v CGU Insurance Ltd \[2008\] NSWCA 92](#) distinguished: see ‘Benchmark’ Tues. 29 January, 2008 & link below - defendant ordered to pay to plaintiff \$268,055.75 with interest from 6 June 2006.

[John Collyear](#) – reported at (2007) 14 ANZ Insurance Cases 61-729 - decision McDougall J - 27 April 2007 - double insurance - contribution between insurers – plaintiff John Collyear acting on behalf of Euclidian Underwriting Ltd & Lloyds Syndicates 1173, 1229, 861, 1209, 588, 1242, 727, 114, 780, 994 and 190 - whether same risk insured by both underwriters - whether obligation to contribute rateably to loss.

**Brown & Anor v Sandhurst Trustees Ltd [2009] VSC 212**

Supreme Court of Victoria

Mandie J

Application for revocation of probate – whether testator lacked testamentary capacity – grant of probate revoked.

[Brown](#)

Newman v Speigler & Anor [2009] QCA 155

Court of Appeal of Queensland

McMurdo P; Keane & Muir JJA

Defamation – appeal against jury's verdicts that applicants had made defamatory statements – appeal against jury's awards of \$7,000 damages against first applicant & \$3,000 damages against second applicant – appeal against primary judge's indemnity costs order - appeal allowed - matter remitted to District Court for retrial.

[Newman](#)

From the United Kingdom...

McLean or Toremar v CGU Bonus Ltd [2009] ScotCS CSOH_78

Scottish Court of Sessions

Lord Brodie

Insurance – fire damage to a hotel trading as a public house – insurer voided policy by reason of allegation that fire had been deliberately lit either by or on behalf of insureds – held that defenders had established they were entitled to void policy.

[McLean](#)

From the United States of America...

Lang v Holly Hill Motel, Inc. Slip Opinion No. 2009-Ohio-2495.]

Supreme Court of Ohio

Lundberg Stratton, O'Donnell, & Cupp JJ concurring ; O'Connor & Lanzinger JJ concurring in judgment only; Pfeifer J dissenting

Personal injuries – open & obvious doctrine : where a danger is open & obvious, a landowner owes no duty of care to individuals lawfully on the premises - elderly man fell on steps in hotel & died three months later – negligence suit brought by widow – allegation that step on which her late husband tripped exceeded the height limitations in Ohio Basic Building Code & that this violation created a dangerous condition, exacerbated by absence of handrails, which were also required under Building Code - widow argued summary judgment inapplicable, when dangerous condition at issue



violated Building Code - court of appeals held that a Building Code violation did not negate application of the open-and-obvious doctrine – court of appeals had affirmed judgment of the trial court where summary judgment had been entered for defendants – by majority, court of appeals judgment affirmed.

[Lang](#)

Fultz v Delhaize America, Inc., 080782

Supreme Court of Virginia

present : all the Justices, opinion by Justice Lawrence L. Koontz

Personal injuries – open & obvious hazard - customer at grocery store with her three year old grandson tripped over metal bar attached to floor while at its ATM when child suddenly moved – circuit court had found bars constituted open & obvious hazard, that she had been contributorily negligent – circuit court had granted defendants’ application for summary judgment – held that circuit court had erred in determining that the issue whether she was reasonably distracted before injuring herself on an open & obvious hazard was appropriate for summary judgment – judgment of circuit court reversed.

[Fultz](#)

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