



## Insurance Banking & Construction

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

#### Today's Cases

**Corporate insolvency** – litigation funding agreement – general principles. See *IMF (Australia) Limited v Meadow Springs Fairway Resort Limited (in liq)* (B)

**Administrative law** – appeal from Civil Aviation Authority to Administrative Appeals Tribunal. See *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (I, C)

**Building and construction** – whether union officer contravened s 43 of the *Building and Construction Industry Improvement Act 2005* (Cth). See *Cahill v Construction, Forestry, Mining and Energy Union (No 3)* (C)

**Corporations law** – dispute as to price at which shares in three companies should be purchased. See *Frauenstein v Farinha* (B)

**Unconscionable conduct** – alleged undue influence by husband where bank has loaned money on security. See *National Australia Bank v Satchithanantham* (B)

**Insurance** – duty of utmost good faith – scope of duty in a case of double insurance  
See *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pty Ltd* (I, C)

**Personal injury (ACT)** – substantial impairment of earning capacity. See *Musladin v Owen* (I)

**Personal injury (ACT)** – whether breaches of occupational health and safety regulations may be pleaded as particulars of negligence. See *Edwards v Woolworths Ltd* (I)



## Tuesday 10 February 2009

### **Cadbury Schweppes Pty Limited v Darrell Lea Chocolate Shops Pty Limited [2009] FCAFC 8**

Full Federal Court of Australia

Emmett, Greenwood & Besanko JJ (in Sydney, by videolink with Melbourne)

Apprehended bias – dispute as to use of colour purple in packaging of chocolate products - judgment overturned on appeal on a question of exclusion of certain evidence – proceeding remitted to & heard by same trial judge – same substantive verdict on retrial – appeal allowed.

[Cadbury Schweppes](#) (I)

### **IMF (Australia) Limited v Meadow Springs Fairway Resort Limited (in Liquidation) [2009] FCAFC 9**

Full Federal Court of Australia

North, Emmett & Rares JJ (in Sydney, via video link to Perth)

Corporate insolvency - winding up – litigation funding agreement – agreement providing that a proportion of any settlement or judgment received by company be paid to funder in addition to repaying it all moneys it had outlaid – competing claims & priorities to funds – competing equitable interests - appeal allowed.

[IMF \(Australia\)](#) (B)

### **Civil Aviation Safety Authority v Central Aviation Pty Ltd [2009] FCA 49**

Federal Court of Australia

Perram J (in Sydney)

Civil aviation – aircraft maintenance - the Authority had cancelled certificate of approval of respondent Central - certificate permitted Central to carry out certain aspects of aircraft maintenance - Central applied to Administrative Appeals Tribunal for a review of the Authority's decision – AAT had found in favour of Central & restored certificate of approval but imposed various conditions – Authority appealed contending AAT had made a number of legal errors - appeal allowed - tribunal's reasons not adequate – reasons set aside – “question of law”

[Civil Aviation Safety Authority](#) (I, C)

### **Cahill v Construction, Forestry, Mining and Energy Union (No 3) [2009] FCA 52**

Federal Court of Australia

Kenny J (in Melbourne)

*Building & Construction Industry Improvement Act 2005* (Cth) - meetings between Union officer & construction company in relation to construction project – Union officer told crane crew to shut down crane & leave the construction site – whether Union officer contravened s43 by making threats or taking action with intent to coerce construction company for a proscribed reason – contraventions



made out – Union contravened s43 by virtue of Union officer's actions - whether Union officer discouraged other crane companies from attending the construction site – whether Union officer threatened to organise, or organised, a picket line – alleged contraventions of ss38 & 43 not made out.

[Cahill](#) (C)

**Frauenstein v Farinha & Ors [2009] FCA 55**

Federal Court of Australia

Emmett J (in Sydney)

*Corporations Act* 2001 (Cth) - fourteen defendants - first plaintiff & first three defendants jointly involved in three businesses at Bondi Junction & World Square - one company subject to deed of company arrangement, a second subject to creditors' voluntary winding up & third being wound up by the Court - dispute as to determining price at which shares in the three companies should be purchased.

[Frauenstein](#) (B)

**Oakland Property Holdings Pty Ltd ACN 090 604 872 v J P Morgan Trust Australia Ltd ACN 050 052 as custodian of Trafalgar Opportunity Fund No 4 ARSN 107 416 348 [2008] NSWCA 360**

Court of Appeal of New South Wales

Giles JA

Corporations law - statutory demand - creditor's change of name - known to debtor - whether use of old name provided "some other reason" to set aside demand.

[Oakland Property Holdings](#) (B)

**Amour v National Trust of Australia (NSW) [2009] NSWSC 23**

Supreme Court of New South Wales

White J

Vintage cars - executors seeking determination of questions as to the proper construction of clauses in a will - gift to National Trust of "residue of my estate" subject to gift to beneficiary of personal right to use vintage cars - scope of right of "use."

[Amour](#) (B)

**National Australia Bank v Satchithanantham [2009] NSWSC 21**

Supreme Court of New South Wales

McCallum J

Defences to claim for possession of house at Westmead - undue influence by husband - second limb of Yerkey v Jones - whether unconscionable conduct on part of the bank - whether contract unjust - partial volunteer - inferences to be drawn in the absence of a witness - pure asset lending – order for possession made.

[National Australia Bank](#) (B)

**Lunn v The Commissioner for Public Employment [2009] NSWSC 19**

Supreme Court of New South Wales

Hislop J

Cross-vesting – proceedings commenced by statement of claim filed in NSW Supreme Court – plaintiff alleging employment in Northern Territory on a series of fixed term contracts over a period of nearly seven years – plaintiff seeking damages for breach of contract & breach of duty owed by an employer to its employees - aggravated & exemplary damages sought - application by defendant to transfer proceedings to Supreme Court of the Northern Territory refused.

[Lunn](#) (I)**Karalis & Anor v Archonstruct Pty Ltd & Ors [2008] SASC 368**

Supreme Court of South Australia

White, Layton &amp; Kourakis JJ

Building contract – negligence - *Trade Practices Act* 1974 (Cth) - what amounts to repudiation - allegations of negligence; false & misleading conduct - duty of care - professional persons - measure & remoteness of damages - costs - appellants had engaged second respondent to act as their architect for purposes of building new home – appellants had then contracted with first respondent, a construction company, on a 'cost plus' basis for the building of that home - third respondent the principal of both first & second respondents - primary judge had found first respondent entitled to \$242,828.00 for work performed but that appellants were entitled to set off against that amount cost of remediating building defects – primary judge had held appellants entitled to offset \$8,000 for disturbance & \$20,000 for diminution in value - second respondent's claim for fees was allowed – primary judge had otherwise dismissed claims made by appellants against first & second respondents – most grounds of appeal dismissed.

[Karalis](#) (I, C)**Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pty Ltd [2009] WASCA31**

Court of Appeal of Western Australia

Martin CJ, McLure JA &amp; Beech AJA

Insurance - duty of utmost good faith - scope of duty in a case of double insurance – for decision appealed from see link below - *Insurance Contracts Act* 1984 (Cth) - contribution between co-insurers of same risk – whether payment of contribution by one insurer to another insurer gives contributing co-insurer a right of subrogation to claims of the insured - whether precludes one insurer from claiming contribution from a co-insurer of the same risk on the basis that that might lead to claim for indemnity by co-insurer against insured - extensive consideration of UK & Australian case law.

[Speno Rail Maintenance Australia](#) –part one of judgment (I, C)[Speno Rail Maintenance Australia](#) –part two of judgment[Zurich Australian Insurance v Metals Minerals Insurance](#) –decision 16 March 2007



**I-Corp Pty Ltd v Coastal Hire Pty Ltd [2009] WASCA 36**

Court of Appeal of Western Australia

Wheeler, Buss &amp; Newnes JJA

Personal injury- damages - contribution proceedings - contractor on building site injured in fall from scaffolding due to defect caused by interference - interference with scaffolding on building sites known problem - builder appealing from primary judge's finding that owner of scaffolding not liable to builder in damages for breach of contract for amount for which builder liable to injured contractor – owner of scaffolding appealing against primary judge's finding it owed a duty of care to injured contractor &, alternatively, if such a duty was owed, that scaffolding owner was in breach of it ; also appealing against the apportionment of liability against it – appeal by builder dismissed – appeal by scaffolding owner allowed.

[I-Corp](#) (I, C)**Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd [2009] WASCA 33**

Court of Appeal of Western Australia

Pullin JA

Legal capacity – litigation regarding property at Churchlands - whether second appellant a person under a disability -whether next friend should be appointed - presumption that person is capable of managing own affairs – application by second appellant for stay of proceedings adjourned.

[Allregal Enterprises](#) (I)**Musladin v Owen [2009] ACTSC 2**

Supreme Court of the Australian Capital Territory

Master Harper

Damages – personal injury – motor vehicle collision – s13(1) *Security Industry Act* 2003 (ACT) - whiplash injury to neck – injury to C1-2 facet joint – substantial impairment of earning capacity – chronic neck pain – judgment for plaintiff for \$794,000.00 with defendant to have credit out of that sum for treatment expenses previously paid.

[Musladin](#) (I)**Edwards v Woolworths Ltd [2009] ACTSC 4**

Supreme Court of the Australian Capital Territory

Master Harper

Personal injuries – negligence – breach of statutory duty - application by defendant for order that a portion of the statement of claim be struck out as not disclosing a cause of action – whether count in breach of statutory duty under occupational health & safety legislation available – whether breaches of occupational health & safety regulations may be pleaded as particulars of negligence.

[Edwards](#) (I)**Key: (I) Insurance, (B) Banking, (C) Construction**