



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Stay of Judgment - Pending hearing of application for Special Leave to Appeal to High Court – Personal injury – Stay granted with undertaking – See *Jandsen Pty Limited v Welsh* (I, C)

Personal injury – Delay – Prejudice – Limitation of actions – Application to join Third Parties as Defendants – Application refused – See *Palmer v Finnigan* (I, C)

OHS (SA) – Prosecutions – Limitation of actions – Extension of time limit refused – See *Gelzinis v T & R (Murray Bridge) Pty Limited* (I, C)

Workers' compensation (Qld) – Limitation of actions – Alternative rights against employer and/or third parties – Application to extend time dismissed – See *Handover v Consolidated Meat Group Pty Limited* (I)

Income Tax (Cth) – Carry forward of prior year losses – Same business test – Deductions allowed – See *Lilyvale Hotel Pty Limited v FCT* (B)

Trusts – Costs – Limitation of actions – Laches or acquiescence – Proceedings arose from trustee's failure to document terms of trust and make them apparent to executor – See *Chang v Tjong* (B)

Charges – Transaction documents – Issue as to effect of a charge which is claimed to be held over assets of company – See *Re Octaviar Limited; Re Octaviar Administration Pty Limited* (B)

From the District Court of New South Wales

Medical negligence – Duty of care – Failure to require pregnancy test before procedure –
See *MD v Sydney South West Area Health Service (No. 3) (I)*



Tuesday 10 March 2009

Lilyvale Hotel Pty Ltd v Commissioner of Taxation [2009] FCAFC 21

Full Federal Court of Australia

Edmonds, Graham & Perram JJ

ss165-13 & 165-210 *Income Tax Assessment Act* 1997 (Cth) - whether losses carried forward are deductible in later year of income - changes in the way in which a business was carried on did not necessarily render it a different business for purpose of the 'same business test' – held that the losses carried forward were deductible in the later year of income.

[Lilyvale Hotel](#) (B)

Jandsen Pty Ltd v Welsh [2009] NSWCA 33

Court of Appeal of New South Wales

McColl JA

Application for stay of judgment pending hearing of application for special leave to High Court – NSW Court of Appeal had dismissed appeal from primary judge's decision – primary judge had found applicant breached duty of care - respondent injured when she fell down two steps onto timbered area of floor in display home owned & occupied by applicant for commercial purposes: for Court of Appeal decision 3 December 2008 see 'Benchmark' Insurance, Construction & IBC & link below - stay granted with undertaking.

[Jandsen](#) (I, C)

[Jandsen](#) – 3 December, 2008 - personal injuries – duty of care - occupier of display home at Kellyville – respondent invitee injured after not noticing steps – primary judge had awarded respondent \$331,938 - foreseeability of injury - damages - whether redundancy payment to be credited against damages – by majority, Hammerschlag J: dissenting, appeal dismissed.

MacKinnon by his tutor Nantia MacKinnon v Bluescope Steel (AIS) Pty Limited & Ors [2009] NSWCA 38

Court of Appeal of New South Wales

Allsop J

Application to dismiss appeal for want of prosecution – appeal date 30 March 2009 - for decision of primary judge 20 July 2007 see 'Benchmark' Tuesday 24 July 2007 & link below – application refused.

[MacKinnon by his tutor Nantia MacKinnon](#) (I)

[Dr Angus MacKinnon v Bluescope Steel Limited](#) – decision 20 July 2007 - negligence - allegation by plaintiff medical practitioner employed by first defendant BHP of exposure to emotional stress resulting in psychiatric injury – plaintiff attended Leadership Course – nature of mental illness important to issue of causation - whether causative link between course & damage actually suffered established – detailed consideration of case law & legal principles in claim for psychiatric injury – held: plaintiff had failed to establish breach of duty of care & causal connection between alleged breach or breaches & his mental illness.



Vella v Australia and New Zealand Banking Group Ltd; Vella v Permanent Mortgages Pty Ltd; Mitchell Morgan Nominees Pty Ltd v Vella [2009] NSWSC 123

Supreme Court of New South Wales

Young CJ in Eq

Costs – negligence - for decision 28 May 2008, see ‘Benchmark’ Insurance, Banking & IBC Friday 30 May 2008 & link below - consolidated proceedings - multiple parties - overlapping issues - lender on mortgage sues mortgage originator – economic loss – no duty of care - rulings made on outstanding cross-claims & orders made for costs.

[Vella](#) (I, B)

[Vella](#) – decision 28 May 2008 - banking - joint venture to promote boxing event – mortgages over land at Leppington & Mangrove Mountain – forgery - loan agreements - apportionment – proportionality – six sets of proceedings consolidated & heard together – agency – solicitors – professional negligence - Powers of Attorney Act - *Australian Securities & Investments Commission Act 2001* (Cth) - *Cheques Act (1986)* (Cth) - *Consumer Credit (New South Wales) Act 1995* - *Contracts Review Act 1980* - *Fair Trading Act 1987* - s5 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - s9 *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) – comprehensive consideration of case law in a lengthy, interesting judgment - at par 124 of judgment:

“I should refer to what Johnson J wrote recently in the Judicial Officers Bulletin, Volume 20, No 2, p 10 when his Honour noted, with respect to the increased business in the Possession List in the NSW Supreme Court that lenders outside the authorised deposit-taking institutions (ADI) since 2001 have offered loans written with considerably less than the normally required documentation and checking. Further, there has been an increasing tendency for ADIs to offer loans which had originated from mortgage brokers & other third-party channels with assessments done by those who had referred the borrower to them without the ADIs themselves verifying the borrower information. It would seem to me that this tendency has reached a high point in the present case.”

Chang v Tjong & Ors [2009] NSWSC 122

Supreme Court of New South Wales

Palmer J

Trusts – costs – whether home unit at Burwood held on trust – whether breach of trust - *Limitation Act 1969* (NSW) – laches or acquiescence - proceedings arose from trustee’s failure to document terms of trust & make them apparent to executor – whether usual costs order should be made - judgment for defendants - plaintiff’s costs to be paid out of trustee’s estate.

[Chang](#) (B)

Guillot Enterprises (LE) Pty Ltd v Twin Disc (Pacific) Pty Ltd [2009] VSC 69

Supreme Court of Victoria

Byrne J

Special referee - damage to the transmission of a fishing vessel including its gearbox - damages sought for cost of further repairs to the engine & transmission and for loss of profit - reference to special referee – special referee an expert marine engineer – report adopted.

[Guillot Enterprises \(LE\)](#) (I, C)

**Re Octaviar Ltd; Re Octaviar Administration P/L [2009] QSC 37**

Supreme Court of Queensland

McMurdo J

Charges – “transaction documents” - proceedings brought by Public Trustee of Queensland for termination of two Deeds of Company Arrangement - issue as to effect of a charge which is claimed to be held over assets of Octaviar by Fortress Credit Corporation (Australia) II Pty Ltd.

[Re Octaviar](#) (B)**Palmer & Anor v Finnigan & Ors [2009] QSC 42**

Supreme Court of Queensland

Dutney J

Personal injuries – delay – prejudice – limitation of actions - first plaintiff employed to do carpet dyeing at premises on Isle of Capri, Queensland – in July 2001 first plaintiff fell when railing gave way on balcony - application by first & second plaintiffs to join the present first, second & third third parties as defendants to the action – first third party the owner of the property at the time – second third party the builder – proposed claim against third parties relates to original installation of the railings - application dismissed – an interesting decision.

[Palmer](#) (I, C)**Handover v Consolidated Meat Group P/L [2009] QSC 41**

Supreme Court of Queensland

Wilson J

Workers Compensation & Rehabilitation Act 2003 (Qld) – limitation of actions - alternative rights against employer &/or third parties - applicant’s failure to commence a proceeding claiming damages before expiration of the applicable limitation period – application dismissed.

[Handover](#) (I)**Gelzinis v T & R(Murray Bridge) Pty Ltd [2009] SASC 61**

Full Court of the Supreme Court of South Australia]

Gray, Sulan & David JJ

Occupational, Health, Safety & Welfare Act 1986 (SA) – prosecutions - limitation of actions - appeal from decision of Full Industrial Court - complaint laid against respondent alleging it had breached s19 of the Act in that it failed to ensure so far as was reasonably practicable that its employee was, while at work, safe from injury & risks to health - asserted by complainant appellant that Acting Director of Public Prosecutions had by written instrument extended two year time limit for laying of complaint to 20 July 2007 - appeal dismissed – at par 38 of judgment of Gray J :

“..... In my view the Director in these circumstances was constrained by the legislation to identify the precondition through which he asserted his power had been enlivened. In the present case the written instrument failed to identify the precondition said to exist.”

[Gelzinis](#) (I, C)



From the District Court of New South Wales...

MD v Sydney South West Area Health Service (3) [2009] NSWDC 24

District Court of New South Wales

Goldring DCJ

Medical negligence - duty of care - failure to require pregnancy test before procedure - vicarious liability - verdict for first defendant - verdict for plaintiff against second defendant medical practitioner in sum of \$110,120.

[MD](#) (I)

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