



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Collins v Repatriation Commission - *Veterans' Entitlements Act 1986* (Cth) – appeal dismissed (I)

Hill v Repatriation Commission - *Veterans' Entitlements Act 1986* (Cth) – widow's pension – determination of medical cause or causes of death of veteran – appeal dismissed (I)

Shaw v Minister for Families, Housing, Community Services & Indigenous Affairs - Interlocutory injunctions - compulsory acquisition Alice Springs town camps - *Northern Territory National Emergency Response Act 2007* (Cth) (I)

Uni-Span Height Safety Pty Ltd v Gold Coat Guardrail Pty Ltd - Pre-action discovery of documents – application dismissed (I, B, C)

Fernando (by his tutor, John Ley) v Minister for Immigration and Citizenship (No 9) - Costs – whether an order should be made excusing tutor for person under mental incapacity from personal liability in respect of any costs orders made against applicant in the damages proceedings (I)

Verge v Devere Holdings Pty Ltd 'Without prejudice' privilege claim - application for discovery & inspection of documentary communications directed to negotiating settlement of a separate proceeding (I, B, C)

Employment Services Australia Pty Ltd v Poniatowska - Application for stay of orders pending hearing & determination of appeal (I)

Challenger Group Holdings Ltd v Concept Equity Pty Ltd - Contracts - agreement for introduction of merger/acquisition opportunities - entitlement to fee - appeal allowed – declaration made that respondent not entitled to fee claimed (B)



Masterton Homes Pty Ltd v Palm Assets Pty Ltd - Contracts – residential strata title development at Parramatta - appeal allowed – matter remitted to Commercial List of the Equity Division for retrial – comprehensive review of text & case law from UK & Australia (B, C)

Council of the City of Wollongong v Vero Insurance Ltd - Insurance - "NES Hall" destroyed by fire - plaintiff's application posing a further question for separate determination dismissed (I)

From the United Kingdom:

Lexington Insurance Co v AGF Insurance Ltd - Reinsurance – whether consequences of damage to environment could be passed by a Massachusetts insurer Lexington to two London reinsurers Wasa & AGF – appeals by reinsurers allowed (I)

Summaries with links (5 minute read)

Monday 10 August 2009

Collins v Repatriation Commission [2009] FCAFC 90

Full Federal Court of Australia

Mansfield, Stone & Edmonds JJ (in Sydney)

Veterans' Entitlements Act 1986 (Cth) – decision of Administrative Appeals Tribunal that veteran's death was not "war-caused" – appeal dismissed by primary judge – Tribunal had found cause of death was pulmonary embolism – appeal dismissed.

[Collins](#) (I)

Hill v Repatriation Commission [2009] FCAFC 91

Full Federal Court of Australia

Mansfield, Stone & Edmonds JJ (in Adelaide - heard in Sydney)

Veterans' Entitlements Act 1986 (Cth) – widow's pension – determination of medical cause or causes of death of veteran – appeal, in effect, seeking to re-instate Administrative Appeals Tribunal's decision – "kind of death", "attributable to" – appeal dismissed.

[Hill](#) (I)

Shaw v Minister for Families, Housing, Community Services & Indigenous Affairs [2009] FCA 844

Federal Court of Australia

Goldberg J (in Melbourne)

Interlocutory injunctions - compulsory acquisition Alice Springs town camps - *Northern Territory National Emergency Response Act* 2007 (Cth) - tort of intimidation requires establishing an intention on the part of the alleged tortfeasor to cause economic harm – no evidence before His Honour of such intention on part of Minister – case law referred to – order made that until the hearing & determination of the trial of this proceeding or further order, respondent, servants or agents from giving to Northern Territory pursuant to s47(1) a notice specifying any part of land referred to in schedule to the order.

[Shaw](#) (I)

Uni-Span Height Safety Pty Ltd v Gold Coat Guardrail Pty Ltd [2009] FCA 819

Federal Court of Australia

Collier J (in Brisbane)

Pre-action discovery of documents – alleged misrepresentation of past turnover, predicted turnover & value of business prior to sale – requirements of Order 15A rule 6 Federal Court Rules not met –

application dismissed - no prima facie case established to support freezing order.

[Uni-Span Height Safety](#) (I, B, C)

Fernando (by his tutor, John Ley) v Minister for Immigration and Citizenship (No 9) [2009] FCA 833

Federal Court of Australia

Siopis J (in Perth)

Costs – tutor for person under mental incapacity - applicant under a mental incapacity seeking damages for false imprisonment & misfeasance in public office in relation to his immigration detention – applicant claiming his mental incapacity attributable to immigration detention – tutor for applicant acting pro bono – whether an order should be made excusing tutor from personal liability in respect of any costs orders made against applicant in the proceeding - Court has power to make an order prior to trial limiting personal liability of tutor for costs payable by person under disability – exercise of discretion - striking a balance between purpose of protecting interests of person under disability, as well as respondents being able to have recourse to a party capable of bearing costs – His Honour gave respondents a limited liberty to apply for a variation of the order protecting tutor from personal liability for costs - ground on which order may be varied pursuant to the exercise of that liberty, would be that tutor has, in the conduct of this proceeding, acted so unreasonably as to warrant varying that order.

[Fernando](#) (I)

Verge v Devere Holdings Pty Ltd [2009] FCA 832

Federal Court of Australia

McKerracher J (in Perth)

‘Without prejudice’ privilege claim - application for discovery & inspection of documentary communications directed to negotiating settlement of a separate proceeding – applicants trustees for two bankrupt estates – scope of privilege – public policy – whether privilege waived – whether ‘subject matter’ or parties the same – pleading into relevance - inspection & discovery should be ordered substantially in accordance with terms of application – detailed analysis of UK & Australian case law in an interesting decision.

[Verge](#) (I, B, C)

Employment Services Australia Pty Ltd v Poniatowska [2009] FCA 821

Federal Court of Australia

Mansfield J (in Adelaide)

Application for stay of orders pending hearing & determination of appeal - necessary for applicant/appellant to satisfy Court of likelihood that, if its appeal is successful, appeal would be rendered nugatory if no stay order is granted - order made subject to undertakings which applicant proffered granting stay provided that appellant pays to first respondent sum of \$50,000.

[Employment Services Australia](#) (I)

Challenger Group Holdings Ltd v Concept Equity Pty Ltd [2009] NSWCA 190

Court of Appeal of New South Wales

Allsop P; Hodgson & Macfarlan JJA

Contracts - agreement for introduction of merger/acquisition opportunities in financial services sector - entitlement to fee dependent on introduced opportunity being taken up - see 'Benchmark' B & IBC Friday 8 August, 2008 & link below for decision appealed from - implied terms - whether real estate agency cases as to "effective cause" implied term relevant to financial services sector agreement - *Property, Stock & Business Agents Acts 1941 & 2002 (NSW)* - transitional provisions - whether agent suing for a service performed as a business agent - appeal allowed - declaration made that respondent not entitled to fee claimed in a 2004 invoice - text & case law from UK & Australia considered.

[Challenger Group Holdings \(B\)](#)

[Challenger Group Holdings](#) - decision 7 August, 2008 - whether plaintiff liable to pay defendant commission - introduction agreement expressed two situations in which commission payable, only one of which expressly included an element of causation - merger/acquisition opportunities in financial services sector - "carrying on business" - "negotiate" - plaintiff's claim dismissed - verdict for defendant in sum of \$2,051,500 plus interest.

Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234

Court of Appeal of New South Wales

Allsop P; Basten & Campbell JJA

Contracts - residential strata title development at Parramatta - for decision appealed from, see 'Benchmark' B, C & IBC Thursday 3 April 2008 & link below - principles for determining whether a contract is wholly written, partly written and partly oral, or wholly oral - operation of parol evidence rule - construction of undertakings & court orders - circumstances when a judge can reject evidence not cross-examined - equitable remedies - specific performance - appeal allowed - matter remitted to Commercial List of the Equity Division for retrial - comprehensive review of text & case law from UK & Australia.

[Masterton Homes \(B, C\)](#)

[Masterton Homes](#) - decision 1 April 2008 - plaintiff engaged by defendants to construct development under written building contract - Deed of Mortgage & Assignment of Building Contract - equity - rectification - requirement of clear & convincing proof of a common intention inconsistent with the words deliberately employed - admissibility of post-contract communications - distinction between evidence admissible upon construction of contract as opposed to rectification - onus of proof - proceedings dismissed.

Council of the City of Wollongong v Vero Insurance Ltd [2009] NSWSC 771

Supreme Court of New South Wales

McDougall J

Industrial special risks insurance policy - in 2006 building known as "NES Hall" owned by plaintiff was destroyed by fire - for decision 12 May 2008, see 'Benchmark' I & IBC & link below - separate determination of questions - plaintiff's application posing a further question for separate determination dismissed. [Council of the City of Wollongong \(I\)](#)

[Council of the City of Wollongong](#) – decision 12 May 2009 - insurer accepted it was liable to indemnify council for the loss of the Hall but dispute as to basis on which Council should be indemnified - whether insurer obliged to indemnify the council for (i) the value of the Hall as stated in a record of the council, together with certain costs for demolition & securing the site; or (2) the full cost of reinstatement; or (3) the indemnity value of the Hall at the relevant time - determination of seven separate questions : see para. 5 of judgment, setting out fourteen questions, of which questions 1-6 & question 14 considered & answered at paras. 33 & 53 -56 - council is entitled to succeed in the sum of \$6,844 (\$37,568 minus \$31,900 plus \$1,176), presumably with some interest – matter was stood over for final orders till 26 May.

From the United Kingdom...

[Lexington Insurance Co v AGF Insurance Ltd](#) [2009] UKHL 40

House of Lords Appellate Committee

Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Collins of Mapesbury

Reinsurance – whether consequences of damage to environment could be passed by a Massachusetts insurer Lexington to two London reinsurers Wasa & AGF – “all risks of physical loss or damage between 1 July 1977 & 1 July 1980” – reinsurance subject to English law – American insurance policy – see para. 18 of Lord Mance’s judgment – see paras. 57 & 58 of judgment of Lord Collins – Supreme Court of Washington, in imposing liability on insurer, had applied law of Pennsylvania, a state which imposes joint & several liability for the whole of the clean-up costs in environmental claims on all insurers at risk during the period the pollution occurred provided that some pollution has occurred during the period covered in the relevant policy - at para. 4 of judgment of Lord Phillips: that principle of construction, adopted by the Washington Supreme Court, has its origin in the approach to insurance claims for the consequences of asbestos - appeals allowed - at para. 116 of judgment of Lord Collins:

“At the beginning & end of these appeals remains the question whether the provision for the policy period in the reinsurance is to be given the effect it has under English law, or whether the parties must be taken to have meant that the reinsurance was to respond to all claims irrespective of when the damage occurred & irrespective of the period to which the losses related. There is, in my judgment, no principled basis for a conclusion in the latter sense.”

[Lexington Insurance Co](#) (I)

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