

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Australian Securities & Investments Commission v Johnston - s1323(1) *Corporations Act* 2001 (Cth) - ASIC carrying out investigation as to whether contraventions of the Act occurred in relation to operations of groups of companies - whether interim orders should be made preventing the director from leaving Australia (B)

Doumit v Jabbs Excavations Pty Ltd - Personal injuries - workplace incident - whether bulldozer should be classed as "motor vehicle" within Motor Accidents *Compensation Act* 1999 (NSW) & *Road Transport (General) Act* 2005 (NSW) (I)

Ryan v Premachandran - Defamation - email sent to plaintiff & fourteen recipients - verdict for plaintiff in sum of \$82,543 (I, B)

Drillsearch Energy Ltd v Carling Capital Partners Pty Ltd - Winding up - application for order setting aside statutory demand granted (B)

J P Morgan Trust Australia Limited v Siahos (No 2) - Costs (B)

Redland City Council v Aldi Stores (A Limited Partnership) & Ors - Redlands Planning Scheme - identification of 'District Centre' (C)

St George Bank Limited v Wright & Ors (No 2) - Application for summary judgment on counter-claim (B)

Devenport v Wilson - Torts - assault - appeal against dismissal of action for assault allowed (I)

Miller v Miller - Personal injuries - respondent a passenger in stolen car - joint illegal enterprise - whether appellant driver owed duty of care to respondent - primary judge had found duty of care existed - appeal allowed (I)

Borchert v Terry - Personal injuries - statement of claim contending that at time of settlement, plaintiff did not have capacity to enter into binding agreement to settle her claim - application for summary judgment by defendants - statement of claim struck out with leave to replead (I)

Licciardo v Hudson (No 1) - ss60(1) & 62(1)(b) *Motor Accidents Compensation Act 1999* (NSW) - issue of plaintiff's whole person impairment referred to MAS Assessor for further assessment (I)

Summaries with links (5 minute read)

Tuesday 10 November 2009

Australian Securities & Investments Commission v Johnston [2009] FCA 1276

Federal Court of Australia

Siopis J (in Perth)

s1323(1) *Corporations Act 2001* (Cth) - ASIC carrying out investigation as to whether contraventions of the Act occurred in relation to operations of group of companies - Firepower group - director on a temporary visit to Australia - whether interim orders should be made preventing the director from leaving Australia - pending determination of application made by originating process, defendant prohibited from leaving Australia without Court's consent.

[Australian Securities and Investments Commission](#) (B)

Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360

Court of Appeal of New South Wales

Ipp & Young JJA; Handley AJA

Personal injuries - workplace incident - bulldozer reversed on worker - whether bulldozer should be classed as "motor vehicle" within *Motor Accidents Compensation Act 1999* (NSW) & *Road*

Transport (General) Act 2005 (NSW) - whether bulldozer a vehicle determined whether duty of care that of employer to employee or of driver to pedestrian - "vehicle" - at para. 104 of judgment of Young JA: bulldozer a motor vehicle; at para. 120 of judgment of Handley AJA: bulldozer not a motor vehicle; Ipp JA at para. 12 of judgement concurs with Handley AJA: bulldozer not a motor vehicle - appeal dismissed.

[Doumit](#) (I)

Ryan v Premachandran [2009] NSWSC 1186

Supreme Court of New South Wales

Nicholas J

Defamation - email sent to plaintiff & 14 recipients - defences - assessment of damages - whether justification - whether honest opinion - whether actuated by malice - qualified privilege at common law - plaintiff's claim for award of aggravated damages made out - verdict for plaintiff in sum of \$82,543 - detailed consideration of principles & United Kingdom & Australian case law.

[Ryan](#) (I, B)

Drillsearch Energy Ltd v Carling Capital Partners Pty Ltd [2009] NSWSC 1192

Supreme Court of New South Wales

Barrett J

Winding up - application for order setting aside statutory demand - whether genuine dispute as to existence of each of several debts referred to in the demand - two debts said to be "as per" letter alleged by defendant to have contractual force - whether letter in terms contractual - whether director of plaintiff had authority to commit to any such contract - plausible contentions in the negative on each matter - genuine dispute therefore established - where debt said to be due under earlier contract - question of construction of that contract regarding word "acquisition" used in context of takeover bid - genuine dispute established - statutory demand set aside.

[Drillsearch Energy](#) (B)

J P Morgan Trust Australia Limited v Siahos (No 2) [2009] NSWSC 1168

Supreme Court of New South Wales

Harrison J

Costs - successful appeal by defendants to NSW Court of Appeal - for Court of Appeal decision, see 'Benchmark' B & IBC Friday 6 March 2009 & link below - costs of hearing at first instance to be

determined by trial judge - plaintiff to pay the defendants' costs.

[J P Morgan Trust Australia](#) (B)

[Siahos & Anor](#) - Court of Appeal decision 5 March 2009 - *Powers of Attorney Act 2003* (NSW) - for decision appealed from, see 'Benchmark' B & IBC Wednesday 19 March, 2008 & link below - attorney authorised respondent to direct portion of loan monies to a bank to enable completion of a purchase by him - ambit of Attorney's authority - whether benefit conferred on Attorney - whether Attorney possessed ostensible authority to act on appellants' behalf - appeal allowed;

[J P Morgan Trust Australia](#) - decision 13 March, 2008 - mortgage - application for possession by mortgagee - mortgagors elderly with limited English - whether capable of understanding transaction - *Contracts Review Act 1980* - whether contract unjust - undue influence - unconscionable bargain - security document executed by co-owner pursuant to powers of attorney granted by other co-owners - whether valid or procured by fraud - unjust enrichment - restitution - order for possession granted.

Redland City Council v Aldi Stores (A Limited Partnership) & Ors [2009] QCA 346

Court of Appeal of Queensland

De Jersey CJ; Holmes & Muir JJA

Redlands Planning Scheme - Council had refused first respondent Aldi's application for a development permit for a material change of use to establish a supermarket on land at Alexandra Hills - identification of 'District Centre' - first respondent had successfully appealed against refusal to Planning & Environment Court - application for leave to appeal from Planning & Environment Court refused.

[ALDI Stores](#) (C)

St George Bank Limited v Wright & Ors (No 2) [2009] QSC 350

Supreme Court of Queensland

McMurdo J

Application for summary judgment on counter-claim - for decision 26 October 2009, see 'Benchmark' B & IBC Thursday 29 October 2009 & link below - judgment for plaintiff against defendants upon their counterclaim.

[St George Bank](#) (B)

[St George Bank](#) - decision 26 October 2009 - guarantee & indemnity - loan facility agreement - 'Miami One' development - *Australian Securities & Investments Commission Act 2001* - judgment for plaintiff in sum of \$47,763,997.46.

Devenport v Wilson [2009] SASC 336

Supreme Court of South Australia

Duggan J

Torts - assault - personal injuries - appeal against dismissal of action for assault - appellant's ribs broken when he fell on his back on water meter - whether magistrate erred in application of onus of proof as to self-defence - appeal allowed - order of dismissal of action set aside - judgment entered for appellant against respondent with damages to be assessed - an interesting decision with detailed examination of Australian case law.

[Devenport](#) (I)

Miller v Miller [2009] WASCA 199

Court of Appeal of Western Australia

McLure, Buss & Newnes JJA

Personal injuries - respondent a passenger in stolen car - joint illegal enterprise - whether appellant driver owed duty of care to respondent - primary judge had found duty of care existed - appeal allowed - detailed analysis of case law in an interesting decision.

[Miller](#) (I)

[Miller](#) - District Court decision 3 April 2008 on liability - plaintiff aged sixteen at time of accident - defendant driver a relation of plaintiff's mother - vulnerability - control.

Borchert v Terry [2009] WASC 322

Supreme Court of Western Australia

Kenneth Martin J

Personal injuries - plaintiff, then aged 12, had suffered severe injuries as passenger in motor vehicle in 1994 - settlement of her claim & Deed of Release in 2005 - *Guardianship & Administration Act 1990 (WA)* - *Limitation Act 1935 (WA)* - *Motor Vehicle (Third Party Insurance) Act 1943 (WA)* - statement of claim contending that at time of settlement, plaintiff did not have capacity to enter into a binding agreement to settle her claim - application for summary judgment by defendants - striking out application - statement of claim struck out with leave to replead - Australian case law considered.

[Borchert](#) (I)

From the District Court of New South Wales...

Licciardo v Hudson (No 1) [2009] NSWDC 289

District Court of New South Wales

Levy SC DCJ

Personal injuries - ss60(1) & 62(1)(b) *Motor Accidents Compensation Act 1999* (NSW) - issue of plaintiff's whole person impairment referred to MAS Assessor for further assessment.

[Licciardo \(I\)](#)

[Ragen](#) - decision referred to at para. 8 of above judgment - reported at 4 DCLR (NSW) 227

'Die Wende'

The Turning Point : Twenty Years Ago

Between the foundation of East Germany (Deutsche Demokratische Republik: DDR) in 1949 & mid-1961, two and a half million East Germans had left their country for the West. In the early hours of Sunday 13 August 1961, East German police, soldiers & workmen blocked streets at the eighty crossing points along the demarcation line between the two halves of Berlin. 50,000 armed troops were deployed. On 17 August, starting at the Potsdamer Platz, workers began erecting a 6 foot concrete wall topped with barbed wire. The final wall, begun in 1963, had a total border length around West Berlin of 96 miles / 155 km with 302 watch towers.

*On **Thursday 9 November 1989**, after several weeks of civil unrest, East Germans citizen breached the Wall & surged into West Germany. The Wall had divided the city for twenty-eight years, two months & twenty-seven days.*

"The Great Wall of China was finished off at its northern-most corner. From the south-east & the south-west it came up in two sections that finally converged there. This principle of piecemeal construction was also applied on a smaller scale by both of the great armies of labour, the eastern and the western. After all the wall was intended, as was universally proclaimed & known, to be a protection against the peoples of the north. Every fellow countryman was a brother for whom one was building a wall of protection Unity ! Unity! Shoulder to shoulder, a ring of

brothers, a current of blood no longer confined within the narrow circulation of one body, but sweetly rolling & yet ever returning throughout the endless leagues of China. There were many wild ideas in people's heads at the time perhaps simply because so many were trying to join forces as far as they could for the achievement of a single aim. Human nature, essentially changeable, unstable as the dust, can endure no restraint; if it binds itself it soon begins to tear madly at its bonds, until it rends everything asunder, the wall, the bonds & its very self

From 'The Great Wall of China,'

a short story in German by

Franz Kafka

(b. 1883 Prague - d. 1924 Kierling, Austria)

Kafka moved to Berlin in 1923 - his health deteriorated during the spring of 1924, & after a brief final stay in Prague, he died of tuberculosis in a clinic near Vienna. 'The Great Wall of China' was written in 1917, but not published till 1931.

"Like lovers' quarrels are the discords of the world. At the centre of dispute lies reconciliation, & everything divided will find itself again."

From the novel 'Hyperion,' first published in 1797 & 1799 by

Johann Christian Friedrich Holderlin

(b. 1770 Lauffen am Neckar - d. 1843 Tübingen, Germany)

"Wie der Zwist der Liebenden, sind die Dissonanzen der Welt. Versöhnung ist mitten im Streit & alles Getrennte findet sich wieder."

"Joy, thou beautiful divine spark,
Daughter of Elysium*,
Fervent with bliss, we enter
Your sanctuary, Divinity !
Your magic powers reunite
That which the Sword of Custom had divided;
Beggars become the brothers of Princes,
Where'er your soft wing rests"



from the 1785 poem 'Ode To Joy' by

Johann Christoph Friedrich von Schiller

(b. **10 November, 1759**, Marbach am Neckar, Württemberg - d. 9 May 1805, Weimar)

Beethoven incorporated & adapted the poem into his Ninth Symphony - he changed the second & third last lines in the verse above so that they were sung as : ".....Was die Mode streng geteilt;/Alle Menschen werden Brüder..." ("... what custom strictly divided;/ All men become brothers ...") On Christmas Day 1989, Leonard Bernstein conducted Symphony No. 9 in East Berlin's Schauspielhaus as part of a celebration of the fall of the Berlin Wall.

* in Greek mythology, the Elysian Fields were the final resting place of the souls of the heroic & virtuous.

"Live with your century; but do not be its creature."

(from Schiller's 'On the Aesthetic Education of Man' 1795)

Friedrich Schiller

[Berlin Wall - Wikipedia, the free encyclopedia](#)