



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Insurance – application to transfer insurance business of general insurer to another general insurer. See *In the matter of Calliden Limited* (I, B)

Professional Indemnity – whether solicitor was negligent in the conduct of a number of proceedings involving commercial litigation for his clients – whether the solicitor was entitled to advocate's immunity – whether the clients exercised control over the litigation – damages – loss of commercial opportunity. See *Coshott v Barry* (I, B, C)

Copyright – employee emailed to her home address certain documents of her employer to which copyright attached – nominal damages of \$10 awarded against employee. See *Luxottica Retail Australia v Grant & Ors* (I, B, C)

Contract – determination of preliminary questions – joint venture agreement – interpretation of "Costs" in the Agreement – whether term should be implied – application for declarations dismissed and further questions to be determined at trial. See *Drake Australia v Platypus Communications* (I, B, C)

Conveyancing (Qld) – contract for sale of unit under community title – "Whitsunday Vista Resort" – purchasers terminated contract – resort's swimming pool encroached onto adjoining parcel of land – whether termination valid – held: No. See *Harris & Anor v Prigg* (B)

Succession (Qld) – applications by surviving wife and youngest son of deceased farmer for further provision from Will – where youngest son disinherited from property previously promised to him – whether applications brought in time – wife's application dismissed – youngest son's application successful. See *L & E Frey v L & L Frey (as personal representatives of the estate of H Frey) & R Frey* (B)



Benchmark

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Negligence – claim for damages for loss of property caused by fire – unauthorised changes to fire walls – bailment – whether bailor bound by exclusion clauses applying to bailee – misleading and deceptive conduct – valuation of property – where large collection of valuable antiques, paintings and other objects. See *Clambake v Tipperary Projects (No.3)* (I,B,C)

Practice & Procedure (WA) – defamation action – application to strike out parts of Statement of Claim – application partially successful. See *Hickey v West Australian Newspapers* (I)

Practice & Procedure (ACT) – whether defendant should pay plaintiff's costs of proceedings that were discontinued – where defendant a "model" litigant. See *Nelipa v Dr Robertson & Commonwealth of Australia* (I, B, C)



Wednesday 11 March 2009

Calliden Limited, in the matter of Calliden Limited [2009] FCA 186

Federal Court of Australia

Perram J

s17F *Insurance Act* 1973 (Cth) – transfer of insurance business of general insurer to another general insurer – transferring benefits & burdens of all outward reinsurance contracts - scheme confirmed.

[Calliden](#) (I, B)

Coshott v Barry [2009] NSWCA 34

Court of Appeal of New South Wales

Beazley, Ipp & Campbell JJA

Professional negligence – solicitors - for decision appealed from, see 'Benchmark' Insurance Friday 12 October 2007 & link below - whether respondent solicitor negligent in handling of clients' case - whether clients exercised control over conduct of proceedings - whether advocate's immunity applies - damages - loss of a commercial opportunity – appeal dismissed.

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

[Coshott](#)– decision 11 October 2007 - case law considered as to advocate's immunity - omission to advise - whether plaintiff would have taken advice if given - verdict for defendant solicitor.

Luxottica Retail Australia v Grant & Ors [2009] NSWSC 126

Supreme Court of New South Wales

White J

Copyright Act 1968 (Cth) – infringement of copyright – breach of contract of employment - emails & attachments - plaintiff carrying on retail optometry business - first defendant employee of plaintiff – first defendant emailed employer's documents to which copyright attached to her home email address - nominal damages of \$10 awarded against first defendant - no additional damages awarded under the Act.

[Luxottica Retail Australia](#) (I, B, C)

Drake Australia Pty Ltd v Platypus Telecommunications Pty Ltd [2009] VSC 67

Supreme Court of Victoria

Mandie J

Joint venture agreement – preliminary questions - definition of "costs" to be shared under the agreement - wireless communication – profit margin – overhead expenses - plaintiff seeking various declarations, two of them dismissed; other issues should be determined at trial.

[Drake Australia](#) (I, B, C)

**Harris & Anor v Prigg [2009] QCA 47**

Court of Appeal of Queensland

McMurdo P; Muir JA & Atkinson J

Standard form contract - applicants had agreed to purchase from respondent a unit under a community titles scheme - 'Whitsunday Vista Resort' - applicants purported to terminate agreement pursuant to its standard terms because resort's swimming pool & related structures encroached onto an adjoining parcel of land - whether an encroachment of a structure built mainly on common property and extending onto adjoining land can be described as "an encroachment by structures ... from a Lot" within the meaning of "Lot" in a contract for the sale of a lot in scheme - appeal dismissed.

[Harris](#) (B)**Jadewell Pty Ltd & Ors v Shelley & Ors [2009] QCA 39**

Court of Appeal of Queensland

Holmes JA

Application for stay of part of judgment - balance of convenience - order as to delivery of executed share transfer - stay granted to extent of order as to specific performance subject to undertakings.

[Jadewell](#) (B, C)

[Jadewell](#) - judgment 19 December 2008 (ie: not the 30.1.09 judgment referred to in decision above) - businesses involved in property development including Lighthouse Restaurant at Mackay Marina ; Shelley Sands at Airlie Beach.

Frey & Anor v Frey & Anor (as personal representatives of the estate of HE Frey, dec'd) & Anor [2009] QSC 43

Supreme Court of Queensland

Lyons J

Family provision - grazing properties in Inglewood area - family farming enterprise - fair allocation of water - applications by first applicant widow & second applicant, youngest son of testator, to extend time within which to apply for further and better provision out of estate - first applicant's applications for leave to proceed & her application for further and better provision out of the estate dismissed - application by second applicant allowed - additional to provision for second applicant as provided in the will, devise of rural property & allocation of one hundred megalitres of water - detailed consideration of principles & case law.

[Frey](#) (B)**Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 3] [2009] WASC 52**

Supreme Court of Western Australia

E M Heenan J

Negligence - nuisance - bailment - risk of fire - adequacy of fire protection system - insurance recommendations - action for damages for loss of property caused by fire at end of 2002 - fire started in roof of commercial property at Claremont - six separate tenancies - *Occupiers Liability Act 1985* (WA) -



misleading & deceptive conduct: s52 & s82 of the *Trade Practices Act* 1974 (Cth) - *Fair Trading Act* 1987 (WA) - silence as misleading & deceptive conduct - alleged obligation to disclose deficiencies in fire protection system in leased premises – whether tenant would have removed property from premises if informed of alleged inadequacies in fire protection system - valuation of property - large collection of valuable & historic antiques, furniture, carpets, paintings - methods of valuation of rare collection of watercolour paintings of Australian bird life - claim for unpaid rent & outgoings - cross-claim for breach of covenant to insure against risks for public liability & fire - extent of liability – GST – whether claim for interest a penalty – set-off – liability of guarantor – costs - legal costs – ability of bailee to sue in its own name for entire value of property owned by bailor – a very lengthy judgment with comprehensive review of case law from UK, Canada, New Zealand & Australia. (I, B, C)

[Clambake](#) – part one of judgment – paragraphs 1 – 105

[Clambake](#) – part two of judgment – paragraphs 106 – 266

[Clambake](#) – part three of judgment – paragraphs 267 – 403

[Clambake](#) – part four of judgment – paragraphs 404 – 534

[Clambake](#) – part five of judgment – paragraphs 535 – 674

[Clambake](#) – part six of judgment – paragraphs 676 – 792

Hickey v West Australian Newspapers Limited [2009] WASC 50

Supreme Court of Western Australia

Newnes J

Defamation - application to strike out parts of statement of claim – application successful in part.

[Hickey](#) (I)

Nelipa v Dr Robertson and Commonwealth of Australia [2008] ACTSC 16

Supreme Court of the Australian Capital Territory

Refshauge J

Costs – discontinuance – termination of employment – plaintiff had commenced action in negligence & contract – plaintiff alleging misfeasance in public office - whether defendant should pay discontinuing plaintiff's costs - model litigant obligations – freedom of information requests – a lengthy, interesting judgment with detailed consideration of case law.

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

Springrange Pty Limited v ACT & ACT Planning & Land Authority [2009] ACTSC 18

Supreme Court of the Australian Capital Territory

Master Harper

Crown Leases – claim by Crown lessee of block of land at Tuggeranong Town Centre for a declaration as to the meaning of provision in the Crown Lease – provision is of significance in assessment of a



change of use charge payable if plaintiff to proceed with its intention to redevelop site - restriction on gross floor area – whether applicable to each building on the land or to the floor area of all buildings – whether Court may have regard to Territory Plan - judgment for defendants.

[Springrange](#) (C)

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