



Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Sharbutt v Supatech Holdings Pty Ltd - Application for summary judgment against first respondent granted – convertible notes – applicant, a resident of Texas, had invested in first respondent (B)

Commissioner of Taxation v Edgewater Estates Ltd - Court's power to make freezing orders – applicant alleging respondent incorporated outside of Australia & deriving income from share trading activities conducted in Australia (B)

Coles Supermarkets Australia Pty Ltd v Tormey - Personal injuries - duty of care - customer injured on a Saturday at appellant's premises at Gladesville by two other customers' unruly behaviour with a trolley – appeal upheld – verdict for appellant (I)

Zaetta v Nationwide News Pty Ltd - Defamation - application by plaintiff for order that defendant answer certain interrogatories, & that it give better answer to other interrogatories (I)

Conway v Critchley & Ors - Torts – trover & detinue – application for summary judgment - sale of winery at Mudgee – plaintiff claiming entitlement to possession of wine, plant & equipment held that this was a proper case in which to grant summary judgment (I)

Marlov Pty Ltd v Murat Col - Employment contracts – restraint of trade – real estate business (I, C)

Frances Madge Johnson by her tutor Karen Elisabeth Smith v Andrew Robert Stuart Johnson - Capacity – plea of non est factum - cheques signed by elderly woman - principles of undue influence applied in this case (B)

R v H Waterhouse & Son Pty Ltd - *Occupational Health & Safety Act 1985 (Vic)* – prosecution – jury determination - documents produced to WorkSafe inspector - privilege against self-incrimination – application for leave to appeal against conviction dismissed (I, C)

Astbury v Wood & Anor - Costs – statutory interpretation - *County Court Act 1958 (Vic)* – personal injuries - whether primary judge empowered to fix witness expenses – answer ‘yes’ (I)

Re S & D International Pty Ltd (in liq) (Rec. & M’gr app’t’d) - Mortgagee’s power of sale – whether surplus monies on land sold by mortgagee held on trust for subsequent equitable mortgagees & chargees - “salvage” costs & expenses - liquidator claiming lien (B)

Scope Machinery Pty Ltd v Ross - Personal injuries – apportionment – evidentiary burden – claim by first respondent against employer & appellant, the manufacturer of machine upon which first respondent working at time of injury - appeal & cross-appeal dismissed (I)

ING USA Annuity & Life Insurance Co. v J P Morgan Securities Inc - Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters – letters from a U.S. court requesting assistance – privilege against self-incrimination – power to compel answers (I, B)

ING USA Annuity & Life Insurance Co. v J P Morgan Securities Inc - Issue of subpoena (I, B)

From the District Court of New South Wales:

Stephanie Young v Insight Vacations Pty Ltd - Personal injuries – action for damages in contract & tort - plaintiff fell & injured herself in coach while it was travelling on motorway in Slovakia - verdict & judgment for plaintiff in sum of \$22,371 (I)

From the United Kingdom:

Derrick Barr & ors v Biffa Waste Services Ltd (def.); QBE Insurance (Europe) Ltd, (intervening insurers) - UK decision - whether insurance policy disclosable document – answer ‘yes’ (I, B, C)



Summaries with links (5 minute read)

Thursday 11 June 2009

Sharbutt v Supatech Holdings Pty Ltd [2009] FCA 612

Federal Court of Australia

Gordon J (in Melbourne)

Application for summary judgment against first respondent – convertible notes – applicant, a resident of Texas, had invested in first respondent - application granted.

[Sharbutt](#) (B)

Commissioner of Taxation v Edgewater Estates Ltd [2009] FCA 611

Federal Court of Australia

Barker J (in Perth)

Court's power to make freezing orders – applicant alleging respondent incorporated outside of Australia & deriving income from share trading activities conducted in Australia - assets not likely to be prejudiced by making of freezing orders.

[Commissioner of Taxation](#) (B)

Coles Supermarkets Australia Pty Ltd v Tormey [2009] NSWCA 135

Court of Appeal of New South Wales

Giles, Ipp & McColl JJA

Personal injuries - duty of care - duty to protect against acts of third parties - respondent customer injured on a Saturday at appellant's premises at Gladesville by two other customers' unruly behaviour with a trolley – respondent had a policy relating to “Unruly Behaviour & Undesirables” – Jones v Dunkel - appeal upheld – verdict for appellant – unnecessary therefore to determine issues on cross-appeal, but issues raised on cross-appeal considered as to primary judge's refusal to award respondent an amount for future domestic assistance – primary judge's decision delivered prior to Harrison v Melham - cross-appeal dismissed.

[Coles Supermarkets Australia](#) (I)

Zaetta v Nationwide News Pty Ltd [2009] NSWSC 508

Supreme Court of New South Wales

Nicholas J

Defamation - application by plaintiff for order that defendant answer certain interrogatories, & that it give better answer to other interrogatories – orders made that some interrogatories be answered, some not.

[Zaetta](#) (I)

Conway v Critchley & Ors [2009] NSWSC 499

Supreme Court of New South Wales

Debelle AJ

Torts – trover & detinue – application for summary judgment - sale of winery at Mudgee – plaintiff claiming entitlement to possession of wine, plant & equipment – late claim for costs of repairs: defendants granted leave to file cross-claim for cost of repairs – case law considered as to the demanding requirement, on an application for summary judgment, that the party making the application establish the defendants have no defence - order that defendants deliver up plant & equipment – held that this was a proper case in which to grant summary judgment.

[Conway](#) (I)**Marlov Pty Ltd v Murat Col [2009] NSWSC 501**

Supreme Court of New South Wales

Debelle AJ

Employment contracts – restraint of trade – real estate business - plaintiff formerly employed first defendant – first defendant now employed by second defendant – whether defendant had solicited customers of plaintiff in breach of contractual restraint – validity of restraint against employment – held first defendant did not solicit plaintiff’s customers & restraint void to extent that it geographically limited first defendant’s employment.

[Marlov](#) (I, C)**Frances Madge Johnson by her tutor Karen Elisabeth Smith v Andrew Robert Stuart Johnson [2009] NSWSC 503**

Supreme Court of New South Wales

Forster J

Capacity – plea of non est factum - cheques signed by elderly woman - "catching bargains" - unconscionability - principles of undue influence applied in this case - UK & Australian case law considered in an interesting judgment.

[Frances Madge Johnson](#) (B)**R v H Waterhouse & Son Pty Ltd [2009] VSCA 121**

Court of Appeal of Victoria

Warren CJ; Vincent & Nettle JJA

Occupational Health & Safety Act 1985 (Vic) – prosecution – appeal against conviction – jury determination – duty of employer to provide safe working environment - primary judge’s directions as to practicability - welding two tanks together – risk of toxic chemicals in tanks – documents produced to WorkSafe inspector - privilege against self-incrimination – application for leave to appeal against conviction dismissed - “employer,” “practicable,” “person” – an interesting judgment.

[H Waterhouse & Son](#) (I, C)

**Astbury v Wood & Anor [2009] VSCA 126**

Court of Appeal of Victoria

Ashley & Redlich JJA

Costs – statutory interpretation - *County Court Act* 1958 (Vic) – personal injury claim by first respondent, a shearer of llama/alpaca - proceedings in County Court settled after seven days of hearing - appellant the employer - whether primary judge empowered to fix witness expenses – answer ‘yes’ - whether exercise of discretion to fix witness expenses miscarried - appeal dismissed.

[Astbury](#) (I)**Re S & D International Pty Ltd (in liq) (Rec. & M’gr app’t’d) [2009] VSC 225**

Supreme Court of Victoria

Robson J

Mortgagee’s power of sale – whether surplus monies on land sold by mortgagee held on trust for subsequent equitable mortgagees & chargees - “salvage” costs & expenses - liquidator claiming lien - thorough analysis & synthesis of principles derived from text & case law in Australia & New Zealand in an interesting, lengthy decision.

[Re S & D International](#) (B)**Scope Machinery Pty Ltd v Ross [2009] WASCA 100**

Court of Appeal of Western Australia

Martin CJ; Buss & Miller JJA

Personal injuries – apportionment – evidentiary burden – causation - first respondent injured while employed by second respondent – claim by first respondent against employer & appellant, the manufacturer of machine upon which first respondent working at time of injury – machine for producing various shapes of plastic products such as containers, lids & biscuit trays – inadvertent operation of manual override switch; no guard; warning sign – operating manual - primary judge had concluded first respondent had established liability of each of employer & manufacturer, and had entered judgment in terms that employer & manufacturer pay first respondent \$695,373 – primary judge had ordered manufacturer contribute 60% towards damages & employer 40% - manufacturer appealing - employer cross-appealing, but conditional upon, & only to the extent of success of some of the grounds advanced by manufacturer - Browne v Dunn - use of Australian Standard AS 1219-1994 - appeal & cross-appeal dismissed.

[Scope Machinery](#) (I)**ING USA Annuity & Life Insurance Co. v J P Morgan Securities Inc [2009] WASC 157**

Supreme Court of Western Australia

McKechnie J

Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters – letters from a US court requesting assistance – privilege against self-incrimination – power to compel answers. [ING USA Annuity & Life Insurance Co.](#) (I, B)



ING USA Annuity & Life Insurance Co. v J P Morgan Securities Inc [2009] WASC 157 (S)

Supreme Court of Western Australia

McKechnie J

Issue of subpoena - letter of request - action in USA arising out of plaintiffs' purchase of \$32 million in debt securities in January 2002 issued by Sons of Gwalia Ltd that were marked by defendants.

[ING USA Annuity & Life Insurance Co.](#) (I, B)

From the District Court of New South Wales...

Stephanie Young v Insight Vacations Pty Ltd [2009] NSWDC 122

District Court of New South Wales

Rolfe DCJ

Personal injuries – action for damages in contract & tort - proper law of contract the law of New South Wales – plaintiff on coach tour of Europe – plaintiff fell & injured herself in coach while it was travelling on motorway in Slovakia - effect of implied warranty under s74(1) *Trade Practices Act 1974* (Cth) - exclusion of implied warranty if services rendered were recreational services - s5N *Civil Liability Act 2002* (NSW) - non-economic loss - damages for disappointment resulting from defendant's breach of contract in amount of \$8,000 - verdict & judgment for plaintiff in sum of \$22,371.

[Stephanie Young](#) (I)

From the United Kingdom...

Derrick Barr & ors v Biffa Waste Services Ltd (def.); QBE Insurance (Europe) Ltd, (intervening insurers) [2009] EWHC 1033 (TCC)

High Court of Justice, Queen's Bench Division, Technology & Construction Court

Coulson J (15 May 2009)

Disclosure – claimants' After The Event ("ATE") insurance policy - claims in private nuisance/negligence arising out of alleged odour omissions from defendant's Westmill Landfill Site – whether insurance policy disclosable document – answer 'yes:' relevant & not privileged.

[Barr & Ors](#) (I, B, C)

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