

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

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Executive Summary (1 minute read)

Keller v LED Technologies Pty Ltd - s65C *Trade Practices Act* 1974 (Cth) - torts - infringement of designs - secondary liability of directors as joint tortfeasors

Strbac v QBE Insurance (Australia) Ltd - *Workplace Injury Management & Workers Compensation Act* 1998 (NSW) - fall on way home from work - assessment of impairment

Beechwood Homes (NSW) Pty Ltd v Camenzuli - Injunctions - statements on internet - s42 *Fair Trading Act* 1987

Crawley, Re the Estate of - *Succession Act* 2006 (NSW) - application under s18 that a statutory will be made

Hirst Estate - *Atkinson & Anor v Royal Alexandra Hospital for Children & Ors* - Wills - charitable trusts - cy-pres scheme

A J Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2) - Costs - Australian Taxation Office - Goods and Services Tax Ruling GSTR 2001/4 - Goods and Services Tax: GST consequences of court orders and out-of-court settlements (12 November 2008)

Blackman & Ors v Gant & Anor (No 2) - Costs

Roads Corporation v Love - *Land Acquisition & Compensation Act 1986* (Vic) - Hume Highway Craigieburn Bypass - determination of separate questions

Howard v ACE Radio Broadcasters Pty Ltd & Anor - *Planning & Environment Act 1987* (Vic) - Moyne Planning Scheme - permit conditions of telecommunications facility

Miller v Evans - Restrictive covenants - defendants had wrongfully deprived plaintiff of her views - mandatory injunction ordered

Federal Deposit Insurance Corporation, as Receiver of Connecticut Bank of Commerce v Great American Insurance Company – United States of America case - fidelity bonds - district court decision affirmed

Summaries with links (5 minute read)

Friday 11 June 2010

Keller v LED Technologies Pty Ltd [2010] FCAFC 55

Full Court of the Federal Court of Australia

Emmett, Besanko & Jessup JJ (in Melbourne)

s65C *Trade Practices Act 1974* (Cth) - torts - infringement of designs - secondary liability of directors as joint tortfeasors - rear combination LED lights - two appeals, two cross-appeals & two notices of contention - quantum of damages under s82 - *Designs Act 2003* (Cth) - *Motor Vehicle Standards Act 1989* (Cth) - costs - comprehensive consideration of text & case law from the United Kingdom, Canada & Australia.

[Keller](#)

[LED Technologies](#) - decision 24 February 2009

Strbac v OBE Insurance (Australia) Ltd [2010] NSWSC 602 S

Supreme Court of New South Wales

Harrison AsJ

Workplace Injury Management & Workers Compensation Act 1998 (NSW) - fall on way home from work - assessment of impairment – appeal against decision of Registrar, approved medical specialist & Medical Appeal Panel - no error on face of record - no jurisdictional error.

[Strbac](#)

Beechwood Homes (NSW) Pty Ltd v Camenzuli [2010] NSWSC 521

Supreme Court of New South Wales

Harrison J

Injunctions - statements on internet - s42 *Fair Trading Act* 1987 - injurious falsehood - whether defendant's conduct in trade or commerce - malice - whether serious question to be tried - whether plaintiff is likely to suffer injury for which damages are inadequate remedy - balance of convenience - order defendant be restrained until a final hearing, in terms in or to the effect of the regime currently in place.

[Beechwood Homes \(NSW\)](#)

Crawley, Re the Estate of [2010] NSWSC 618

Supreme Court of New South Wales

Palmer J

Succession Act 2006 (NSW) - application under s18 that a statutory will be made - loss of testamentary capacity - whether reasonably likely that incapacitated person would have intended estate to vest in Crown as *bona vacantia*.

[Crawley, Re the Estate of](#)

Hirst Estate - Atkinson & Anor v Royal Alexandra Hospital for Children & Ors [2010] NSWSC 613

Supreme Court of New South Wales

Palmer J

Wills - charitable trusts - cy-pres scheme - construction of clause in a will - gifts to two hospitals declared valid; cy-pres scheme ordered.

[Hirst Estate - Atkinson & Anor](#)

A J Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2) [2010] VSCA 128

Court of Appeal of Victoria

Redlich JA & Beach AJA

Costs - for decision Court of Appeal, see 'Benchmark' B, C & IBC Tuesday 22 December 2009 & link below - design & construction of certain facilities at Minerva Gas Field near Port Campbell - Offer of compromise - uncertainty of offer - uncertain goods & service tax clause in offer of

compromise - whether judgment or offer more favourable - see link below to ATO GST Ruling 12 November 2008.

[A J Lucas Drilling](#)

[GSTR 2001/4 - Goods and Services Tax: GST consequences of court](#) - Australian Taxation Office - Goods and Services Tax Ruling GSTR 2001/4 - Goods and Services Tax: GST consequences of court orders and out-of-court settlements (12 November 2008)

[A J Lucas Drilling](#) - decision 18 December 2009 Court of Appeal of Victoria: Redlich & Dodds-Streeton JJA & Beach AJA - building contracts - see 'Benchmark' B, C & IBC Wednesday 3 September 2008 for decision on liability, quantum & loss of profits appealed from, plus links below - valuation - appeal dismissed - cross-appeal allowed;

[A J Lucas Drilling](#) - decision 29 August 2008 Supreme Court of Victoria - Minerva Gas - entitlement of Lucas Drilling to payment for loss of profit upon unperformed work following termination of contract - nature of profit - whether includes allowance for risk - whether costs should be apportioned between parties by reference to success on issues - questions determined in two trials - whether failure by plaintiff on many issues at first trial warrants an adverse order for costs of that trial - order for costs of the proceeding as a whole in favour of Lucas Drilling;

[A J Lucas Drilling](#) - decision 1 August, 2008 Supreme Court - quantification of claims - assessment of pro-rata completion of contract works - assessment of extra work as a consequence of variation - drilling - geological risks;

[A J Lucas Drilling](#) - decision 7 December, 2007 Supreme Court - horizontal drilling & installation of two cased crossings from onshore plant to point on the seabed some 1500 metres from shore.

Blackman & Ors v Gant & Anor (No 2) [2010] VSC 246

Supreme Court of Victoria

Vickery J

Costs - for decision 1 June 2010, see 'Benchmark' I & IBC Friday 4 June 2010 & link below - differences between a Calderbank letter & an offer of compromise made under Order 26 - *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd (No.2)* not followed in part: see link below.

[Blackman & Ors](#)

[Tenth Vandy](#) - decision Croft J 12 March 2010: see 'Benchmark' I, B & IBC Friday 19 March 2010 - costs - dispute as to lease for retail premises - Offer of compromise - Calderbank offer - effect of unaccepted offer - whether wholly successful defendant entitled to costs on an indemnity basis - costs against a non-party - case law considered;

[Blackman & Ors](#) - decision 1 June 2010 - injunctions - art works found to be forgeries - *Fair Trading Act 1999* (Vic) - representations as to authenticity of art works through valuations given - representation as to authenticity of art work by sale of work - representations misleading & deceptive in trade or commerce - statutory negative injunction restraining sale of the forged art works - plaintiffs not parties to initial representation - standing to seek injunction - s80(1) *Trade Practices Act 1974* compared - scope & meaning of "any person"- whether sufficient nexus between conduct & injunction sought to confer jurisdiction on the Court - injunction refused as found unnecessary due to alternative relief granted - statutory mandatory injunction for delivery up & destruction of forged art works.

Roads Corporation v Love [2010] VSC 238

Supreme Court of Victoria

Vickery J

Land Acquisition & Compensation Act 1986 (Vic) - disputed claim as to compulsory acquisition of part of respondent's land - proposal for construction of a freeway - Hume Highway Craigieburn Bypass - determination of separate questions - admission alleged to have been made by Council - estoppel.

[Roads Corporation](#)

Howard v ACE Radio Broadcasters Pty Ltd & Anor [2010] VSC 248

Supreme Court of Victoria

Osborn J

Planning & Environment Act 1987 (Vic) - Moyne Planning Scheme - leave sought to appeal on questions of law - permit conditions of telecommunications facility - whether underground radials formed 'part of the structure' - meaning of 'minimal impact' in terms of amenity effects - noise criteria - relevance of alternative locations - relevance of cost considerations to community infrastructure - imposition of conditions to avoid material impact upon amenity of area.

[Howard](#)

Miller v Evans [2010] WASC 127

Supreme Court of Western Australia

Hall J

Restrictive covenants - plaintiff & defendants neighbours - both properties burdened by a restrictive covenant limiting what could be built near rear boundaries of the properties - defendants built retaining walls, an above ground spa & surrounding fences on their rear boundary adjacent to plaintiff's land - whether defendants had wrongfully deprived plaintiff of her views (of the Swan River) - meaning of 'building' - dividing fence a building within the terms of the restrictive covenant - defences - delay - acquiescence - disproportion - unclean hands - oppressive or vindictive conduct - whether damages in lieu a proper remedy held that defendant had breached restrictive covenant - mandatory injunction to be ordered requiring defendants to lower the structures to the maximum levels allowed by the restrictive covenant - detailed consideration of United Kingdom & Australian case law in an interesting decision.

[Miller](#)

From the United States of America...

Federal Deposit Insurance Corporation, as Receiver of Connecticut Bank of Commerce v Great American Insurance Company, 09-1052-cv

United States Court of Appeals for the Second Circuit

Pooler & Wesley, Circuit Judges & Keenan, District Judge

Fidelity bonds - Connecticut Bank had entered a purchase & assumption agreement to acquire a New York bank - district court had granted summary judgment to defendant, finding that defendant Great American Insurance entitled to rescind Lloyd's fidelity bond on basis of material misrepresentations contained in Connecticut Bank of Commerce's application for insurance - district court decision affirmed.

[Federal Deposit Insurance Corporation](#)

William Butler Yeats

(b. 13 June 1865 Sandymount, Co. Dublin - d. 28 January 1939 Roquebrune, France)

Who will go drive with Fergus now,
And pierce the deep wood's woven shade,
And dance upon the level shore ?
Young man, lift up your russet brow,
And lift your tender eyelids, maid,
And brood on hopes & fear no more.

And no more turn aside & brood
Upon love's bitter mystery;
For Fergus rules the brazen cars,
And rules the shadows of the wood,
And the white breast of the dim sea,
And all dishevelled wandering stars.

"Who Goes with Fergus ?" from *'The Rose'* collection (1893) - Fergus was a king in Irish legend who gave up his throne to become a wandering poet.

From Yeats' *"Fergus & the Druid"*

" ... What would you, Fergus?

Fergus. Be no more a king



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But learn the dreaming wisdom that is yours ..."

That is no country for old men. The young
In one another's arms, birds in the trees
- Those dying generations - at their song,
The salmon-falls, the mackerel-crowded seas,
Fish, flesh, or fowl, commend all summer long
Whatever is begotten, born, and dies.
Caught in that sensual music all neglect
Monuments of unageing intellect ...

From "Sailing to Byzantium" in "The Tower" collection (1928)

[Sailing to Byzantium - Wikipedia, the free encyclopedia](#)
[William Butler Yeats - Wikipedia, the free encyclopedia](#)

Because of the Long Weekend, the next edition of 'Benchmark' will be dated Tuesday 15 June
2010

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