



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Mars Australia Pty Ltd v Sweet Rewards Pty Ltd - ss 52 & 53 *Trade Practices Act 1974* (Cth) - intellectual property whether ordinary consumer could be misled by respondent's product – application dismissed (I, B)

Brisconnections Management Company Limited, In the matter of Thames Blund Holdings Pty Ltd (in liq'n) - Legal principles governing exercise of casting vote - appointment of new liquidator (I, B, C)

Valuer-General v Commonwealth Custodial Services Ltd - *Valuation of Land Act 1916* (NSW) - heritage restricted – Commonwealth Bank building - appeal dismissed (I, B, C)

Yakmor v Hamdoush - Personal injuries - motor vehicle accident - primary judge had been correct in holding that breach of a duty of care had not been made out (I)

Michael Wilson & Partners Limited v Robert Colin Nicholls & Ors - Apprehended bias - no basis established for His Honour to disqualify himself (I, B, C)

Nemeth v Prynew Piling v Prynew - Costs – building & construction – negligence – subsidence of Edwardian house (I, C)

Landini v the State of New South Wales & Ors - Costs – torts – two causes of action based on tort of malicious prosecution (I)

Deputy Commissioner of Taxation v Soong - Service of documents - *Income Tax Assessment Act 1936* (Cth) – construction of s222AOG (B)

Leveraged Capital Pty Ltd v Modena Imports Pty Ltd - Order made that defendant company be wound up in insolvency & that liquidator be appointed (B)

Summaries with links (5 minute read)

Friday 12 June 2009

Mars Australia Pty Ltd v Sweet Rewards Pty Ltd [2009] FCA 606

Federal Court of Australia

Perram J (in Sydney)

ss52 & 53 *Trade Practices Act* 1974 (Cth) - intellectual property – allegations of passing off, misleading conduct, false representations & infringement of trademarks – Maltesers - whether ordinary consumer could be misled by respondent's product - application dismissed.

[Mars Australia](#) (I, B)

Brisconnections Management Company Limited, In the matter of Thames Blund Holdings Pty Ltd (in liq'n) [2009] FCA 626

Federal Court of Australia

Gordon J (in Melbourne)

Legal principles governing exercise of casting vote - Insolvency Practitioners Association of Australia's Code of Professional Practice for Insolvency Practitioners - *Corporations Act* 2001 (Cth) - an application under ss503 & 1321 by applicant seeking relief in respect of decision of first respondent not to exercise casting vote under reg 5.6.21(4) *Corporations Regulations* 2001 in favour of resolution put to meeting of creditors of Thames Blund Holdings (in liquidation) held on 8 May 2009 to remove first & second respondents as liquidators of the company &, in their place, to appoint two other liquidators – appointment of new liquidator – decision of first respondent reversed.

[Brisconnections Management Company](#) (I, B, C)

Valuer-General v Commonwealth Custodial Services Ltd [2009] NSWCA 143

Court of Appeal of New South Wales

McClellan CJ at CL; Hodgson & Tobias JJA

Valuation of Land Act 1916 (NSW) - heritage restricted – Commonwealth Bank building at 120 Pitt St, Sydney – for decision appealed from, see 'Benchmark' Tuesday 9 December 2008 & link below - valuation methodology - appeal dismissed.

[Valuer-General](#) (I, B, C)

[Commonwealth Custodial Services](#) – decision 28 November 2008 in Land & Environment Court of NSW - *Valuation of Land Act* 1916 (NSW) - merit appeals against valuations of heritage restricted land by Valuer General - applicant Commonwealth Custodial Services Ltd the owner of land on which Commonwealth Bank Building erected, corner of Martin Place & Pitt Street, Sydney "The Moneybox" - approach to land value for heritage restricted land to which s14G of the Act applies – rental differential adjustment – appeals allowed - case law considered in an interesting decision.

Yakmor v Hamdoush [2009] NSWCA 137

Court of Appeal of New South Wales

Giles, Ipp & Tobias JJA

Personal injuries - motor vehicle accident - primary judge had been correct in holding that breach of a duty of care had not been made out – appeal dismissed.

[Yakmor](#) (I)

Michael Wilson & Partners Limited v Robert Colin Nicholls & Ors [2009] NSWSC 505

Supreme Court of New South Wales

Einstein J

Apprehended bias – objection made by defendants - attributes of the "fair-minded lay observer" - comments by judges to be considered in context - danger of judge disqualifying himself/ herself too readily - case law as to test – the verb 'might' – no basis established for His Honour to disqualify himself.

[Michael Wilson & Partners](#) (I, B, C)

Nemeth v Prynew Piling v Prynew [2009] NSWSC 511

Supreme Court of New South Wales

Macready AsJ

Costs – building & construction – negligence – subsidence of Edwardian house at Darling Point - for judgment 26 February 2008, see 'Benchmark' I, C & IBC Thursday 28 February 2008 & link below – for decision 14 April 2008, see 'Benchmark' I, C & IBC Tuesday 15 April 2008 & link below - whether GST should be included in amounts for judgment for plaintiffs against first three defendants : answer 'yes' - cost consequences of offers of compromise served by first & second defendants – whether Bullock or Sanderson order should be made against plaintiffs in respect of cost order already made that first & second defendants pay cost of QBE of second cross claim - whether costs' orders against first & second defendant should be joint and several or should be apportioned – an interesting judgment.

[Nemeth](#) (I, C)

[Piling](#) – decision 26 February 2008 : note that plan view included so dimensions of page wider than usual - negligence – insurance – reasonable precautions – recklessness - building & construction - adoption of Referee's report - principles & case law considered – report as to causes & results of subsidence of support for Edwardian house resulting from excavation & faulty piling work next door - nature of duty of care under s177 *Conveyancing Act* 1919 (NSW) : whether it extended to support of adjoining buildings – answer 'yes' - whether it included omissions – answer 'no' - whether a statutory cause of action for breach of condition of development consent arose in respect of breach of a condition imposed under s78 & s78F Environmental Planning & Assessment Regulation 1994 – answer 'yes' - professional indemnity insurance – case law as to reasonable precautions considered;

[Piling](#) – decision 14 April 2008 – Referee's Report - negligence in respect of excavation – res ipsa loquitur - apportionment.

Landini v the State of New South Wales & Ors [2009] NSWSC 431

Supreme Court of New South Wales

Hall J

Costs – torts – two causes of action based on tort of malicious prosecution - set-off – interest rates.

[Landini \(I\)](#)

[Landini](#) - decision 17 December 2008 – torts – malicious prosecution – claims for deprivation of liberty, economic loss, aggravated & exemplary damages - judgment for plaintiff in relation to cause of action in malicious prosecution based upon the 1980 charge, where the only defendant was the first defendant - judgment in favour of first, second, third, fourth & fifth defendants in relation to cause of action in malicious prosecution based upon the 1982 charges – in relation to cause of action based on 1980 charge, damages to include: injury to person & restriction on liberty \$35,000; aggravated damages \$30,000; exemplary damages \$160,000.

Deputy Commissioner of Taxation v Soong [2009] NSWSC 495

Supreme Court of New South Wales

Schmidt AJ

Service of documents - *Income Tax Assessment Act 1936* (Cth) – statutory interpretation - construction of s222AOG – s28A & s29 *Acts Interpretation Act 1901* (Cth) - penalties – PAYG deductions - whether plaintiff had given defendant notices required to be served on date on which notices were posted or on date received – “give” - judgment for plaintiff – thorough consideration of legislation & case law.

[Deputy Commissioner of Taxation \(B\)](#)**Leveraged Capital Pty Ltd v Modena Imports Pty Ltd [2009] NSWSC 509**

Supreme Court of New South Wales

Brereton J

Winding up in insolvency – creditor – contingent creditor – whether plaintiff’s standing established - whether prima facie case of insolvency made out - whether plaintiff should be granted leave to apply for Modena to be wound up - plaintiff granted leave to proceed as contingent creditor - order made that company be wound up in insolvency & that liquidator be appointed.

[Leveraged Capital \(B\)](#)**‘Tread softly because you tread on my dreams’**

‘Had I the heavens’ embroidered cloths,
Enwrought with golden & silver light,
The blue and the dim & the dark cloths
Of night and light & the half-light,
I would spread the cloths under your feet:
But I, being poor, have only my dreams;
I have spread my dreams under your feet,
Tread softly because you tread on my dreams.’



William Butler Yeats

b. 13 June 1865 Sandymount, Co. Dublin – d. 28 January 1939 Roquebrune, France : initially buried there - in 1948, brought back to Ireland to rest, as he had wished, "under bare Ben Bulbin's head" in Drumcliff churchyard. On his tomb is engraved the epitaph he wrote for himself :

*'Cast a cold eye
On life, on death.
Horseman, pass by!'*

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

(See also 'Benchmark' Monday 29 September 2008 for W.H. Auden's poem on the death of W.B. Yeats)

[The Lake Isle of Innisfree / I will arise and go now and go to ...](#)

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