



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Allphones Retail Pty Ltd v Weimann - Application for leave to appeal from interlocutory decision to Full Court on whether a 'matter' has arisen for representative proceedings – application granted (B)

Loti Tuqiri & Anor v Australian Rugby Union Limited & Anor - Applications for access to court file – non-party media applicants - principles of open justice - public interest (I, B, C)

Michael Wilson & Partners Limited v Robert Colin Nicholls & Ors - Application to strike out misrepresentation defence & unclean hands defence - defence struck out (I, B, C)

BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industrierwerke GmbH; Protec Pacific Pty Ltd v Steuler Industrierwerke GmbH - *Trade Practices Act 1974* (Cth) – negligence - Olympic Dam mine in South Australia - misleading or deceptive conduct – causation – loss & damage – representation by supplier that a particular lining material was suitable for use as a long term containment membrane for concrete solvent extraction tanks at the project (I, B, C)

Bloomer Constructions (Qld) Pty Ltd v O'Sullivan & Anor - *Building & Construction Industry Payments Act 2004* (Qld) – applicant seeking to quash adjudication decision – application dismissed (C)

Sampson & Ors v Gluche - Motor vehicle accident personal injury claims – delivery up of legal papers to new solicitor – previous solicitor's lien - irrevocable authority & direction (I)

Inco Ships Pty Ltd v Barber - *Occupational Health & Safety (Maritime Industry) Act 1993* (Cth) – prosecution – interpretation of s4B(3) *Crimes Act 1914* (Cth) as to pecuniary penalties (I)



Clyde Group Incorporated v Minister for Primary Industries & Water (No 2) - Discovery of documents - s28 Water Management Act 1999 (Tas) - Lakes Sorell & Crescent Water Management Plan & Clyde River Water Management Plan (C)

From the District Court of New South Wales:

Nicholson Petroleum Pty Ltd v NSW Pastoral Investments Pty Ltd - District Court of NSW decision - guarantee & indemnity - plaintiff seeking to recover money from second defendant, a former director of the first defendant company now in liquidation - words ambiguous & sufficiently uncertain as to be incapable of constituting a personal guarantee (B)

Summaries with links (5 minute read)

Wednesday 12 August 2009

Allphones Retail Pty Ltd v Weimann [2009] FCA 849

Federal Court of Australia

McKerracher J (in Perth)

Application for leave to appeal from interlocutory decision to Full Court on whether a 'matter' has arisen for representative proceedings – novel & important point – suitable to depart from usual practice of single judge determining leave question - application for leave to appeal be heard by a Full Court.

[Allphones Retail](#) (B)

Loti Tuqiri & Anor v Australian Rugby Union Limited & Anor [2009] NSWSC 781

Supreme Court of New South Wales

Einstein J

Applications for access to court file – non-party media applicants seeking access to Commercial List Statement or Commercial List Summons – *Commercial List & Technology & Construction List Practice Note* SC Eq 3 - principles of open justice - public interest - Commercial List Summons & Commercial List statement, excepting one paragraph which is to be redacted, to be made available to those who seek to have access to the materials – an interesting decision with extensive consideration of principles & case law from UK & Australia.

[Loti Tuqiri](#) (I, B, C)

Michael Wilson & Partners Limited v Robert Colin Nicholls & Ors [2009] NSWSC 721

Supreme Court of New South Wales

Einstein J

Application to strike out misrepresentation defence & unclean hands defence – where concealment of a fact pleaded – misrepresentation pleading unsustainable & discloses no defence - recognised principles applying to equitable defence of a lack of clean hands, namely that the lack of clean hands must have an immediate & necessary relation to the equity sued for - defence struck out – an interesting decision with UK & Australian case law considered.

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

[Michael Wilson & Partners](#) - decision 14 July 2009 – see 'Benchmark' Thursday 16 July 2009

BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industrierwerke GmbH; Protec Pacific Pty Ltd v Steuler Industrierwerke GmbH [2009] VSC 322

Supreme Court of Victoria

Habersberger J

Trade Practices Act 1974 (Cth) – negligence - Olympic Dam mine in South Australia - misleading or deceptive conduct – causation – loss & damage – engineering evidence - pursuant to court order, an Experts' Conference had held in late January early February 2006 - representation by supplier that a particular lining material was suitable for use as a long term containment membrane for concrete solvent extraction tanks at the project – other representations about the lining – reliance - which company entered into contract bearing name of one entity & ACN of another - each plaintiff entitled to succeed in respect of their misleading or deceptive representation claim under *Trade Practices Act 1974* (Cth) – as to alternative common law claims, findings of negligence in making of representations – issues of quantum still outstanding - extensive consideration of UK & Australian case law.

[BHP Billiton \(Olympic Dam\) Corporation](#) (I, B, C)

Bloomer Constructions (Old) Pty Ltd v O'Sullivan & Anor [2009] QSC 220

Supreme Court of Queensland

White J

Building & Construction Industry Payments Act 2004 (Qld) – applicant seeking to quash adjudication decision – applicant had entered into contract with second respondent for second respondent to undertake design, installation & certification of perimeter & internal piling on a site at Newstead – second respondent issued payment claim under the Act - first respondent adjudicator was appointed under the Act & adjudicated in favour of second respondent – second respondent held a conditional contractor's licence – whether second respondent was precluded from entering into building contract, issuing a payment claim & applying for adjudication under the Act – effect of the 2007 amendments to *Judicial Review Act 1991* (Qld) – no jurisdictional error - application dismissed – detailed consideration of case law from Queensland & New South Wales including [Greg Beer t/as G & L Beer Covercreting v J M Kelly \(Project Builders\) Pty Ltd \[2008\] QCA 35](#).

[Bloomer Constructions](#) (C)

[Greg Beer](#) - decision 29 February 2008 – see 'Benchmark' C & IBC Wednesday 16 April 2008 - *Queensland Building Services Authority Act 1991* (Qld) - appellant carried out works for respondent under licence class "Painting & Decorating" – a condition restricted the licence to "residential spray on painting" – whether "licence of the appropriate class" can be read subject to any work-restrictive condition on a licence – whether the Act authorised creation of a class of licence of "painting & decorating restricted to residential spray on painting" – whether, alternatively *Mutual Recognition (Queensland) Act 1992* (QLD) allowed creation of specific class of "painting & decorating restricted to residential spray on painting" – appeal allowed.

Sampson & Ors v Gluche [2009] SASC 222

Supreme Court of South Australia

Withers J, a Master of the Supreme Court

Motor vehicle accident personal injury claims – delivery up of legal papers to new solicitor – previous

solicitor's lien – previous solicitor's professional costs & disbursements - seven plaintiffs applied for order pursuant to s39 *Legal Practitioners Act* 1981 (SA) that defendant, who was their former solicitor, deliver up to their new solicitor documents he held in relation to their various claims for damages – supporting affidavit filed on behalf of plaintiffs by their new solicitor which exhibited authorities that he had received from each of plaintiffs authorising him to assume conduct of their claim from defendant - defendant forwarded an irrevocable authority & direction which he required to be executed by each plaintiff & by the new solicitor before he would release the papers – at para. 25 of judgment :

“These particular cases are all motor vehicle accident personal injury claims. They are all cases where the first practitioner should have been well able to assess the prospects of success of the various plaintiffs and the likelihood therefore of the provision of monies through settlement or otherwise from which the practitioner's fees and disbursements could be paid. In such matters, in my view, it is not appropriate to insist upon agreement by the former client of the quantum of the first practitioner's professional fees, nor of the quantum of the first practitioner's disbursements. Nor is it appropriate to insist upon payment by the new solicitor to the former solicitor of the disbursements personally expended by the former solicitor in support of the client's case or that the new solicitor undertake to pay disbursements incurred by the former solicitor in any event.”

[Sampson](#) (I)

Inco Ships Pty Ltd v Barber [2009] TASSC 55

Supreme Court of Tasmania

Blow J

Occupational Health & Safety (Maritime Industry) Act 1993 (Cth) – prosecution – interpretation of s4B(3) *Crimes Act* 1914 (Cth) as to pecuniary penalties - applicant company operator of an Australian-registered container vessel named the ANL Bass Trader - accident with falling wire rope caused injury to an employee whose arm had to be amputated – charges laid under the Act – three offences involving same breach of duty – safety of three individuals put at risk - magistrate had fined applicant company \$100,000 – whether fine excessive - application to review magistrate's decision dismissed.

[Inco Ships](#) (I)

Clyde Group Incorporated v Minister for Primary Industries & Water (No 2) [2009] TASSC 58

Supreme Court of Tasmania

Blow J

Discovery of documents - application under *Judicial Review Act* 2000 (Tas) in relation to decision by Minister to adopt two water management plans in purported pursuance of s28 *Water Management Act* 1999 (Tas) - Lakes Sorell & Crescent Water Management Plan & Clyde River Water Management Plan – applicants not entitled to discovery as of right, but discretionary power exists to order discovery under *Supreme Court Rules* 2000, r386 – discovery orders made.

[Clyde Group](#) (C)

From the District Court of New South Wales...

Nicholson Petroleum Pty Ltd v NSW Pastoral Investments Pty Ltd [2009] NSWDC 90

District Court of New South Wales

Goldring DCJ

Guarantee & indemnity - plaintiff seeking to recover money from second defendant, a former director of the first defendant company now in liquidation – first defendant had incurred significant debt to plaintiff & the money was still owing - nature & effect of document signed by second defendant - words “personally guarantee or come to some agreement to pay the outstanding amount” ambiguous & sufficiently uncertain as to be incapable of constituting a personal guarantee – unclear as to whether document addressed to plaintiff, as opposed to bank - verdict for second defendant.

[Nicholson Petroleum](#) (B)

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