

Friday 13 June 2014

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

ABN AMRO Bank NV v Bathurst Regional Council (FCAFC) - corporations - financial products - misleading and deceptive conduct - negligent misstatement - contract - fiduciary duties - insurance - remoteness of damage (I B C G)

Mainteck Services Pty Ltd v Stein Heurtey SA (NSWCA) - contract - contractual construction - adoption of referee's reports - appeal dismissed (B C)

Parker v City of Bankstown RSL Community Club Ltd (NSWSC) - negligence - fall in club at dance concert - club and dance school not liable (I)

Michail v Australian Alliance Insurance Company Ltd (QCA) - motor vehicle insurance - insurer would not have insured car if driving history disclosed - appeal dismissed (I)

Yolla Holdings Pty Ltd v Aion Corporation Pty Ltd (QCA) - planning and development - lot was not *primary thoroughfare* - appeal allowed (C)

Edwards v Legalese P/L T/A Peter Scragg & Associates (SASCFC) - negligence - solicitors' duties - no breach of duty by solicitor - appeal dismissed (I B)



Ward v Metlife Insurance Ltd (WASCA) - insurance - insured no longer disabled within meaning of group income protection policy - appeal dismissed (I)

Summaries with links (5 minute read)

ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65

Full Court of the Federal Court of Australia

Jacobson, Gilmour & Gordon JJ

Corporations - financial products - misleading and deceptive conduct - negligence - breach of contract - breach of fiduciary duties - insurance - damages - claims arising from the rating, sale and purchase of a structured financial product - investment bank created product - S & P assigned rating to product to reflect likelihood that principal and interest would be paid in accordance with its terms - S&P assigned rating which it conceded was flawed - bank sold product to Local Government Financial Services Pty Ltd (LGFS) which sold them to Councils - Councils lost amounts invested - StateCover and Councils sued bank, S&P and LGFS for damages - judgment entered for Councils and liability apportioned - LGFS established entitlement to equitable contribution from bank and S&P including on account of LGFS's payment to StateCover to discharge its claims - ten appeals heard together - 12ED *Australian Securities and Investments Commission Act 2001* (Cth) - ss912A, 761D(1), 9, 924A, 925A *Corporations Act 2001* (Cth) *Corporations Act* - s48 *Insurance Contracts Act 1984* (Cth) - held: appeal dismissed - S&P's assignment of rating was misleading and deceptive, the bank was knowingly concerned that conduct and breached its contract with LGFS and LGFS engaged in misleading and deceptive conduct - findings in relation to damages, contributory negligence and apportionment upheld except that damages assessed under s1041E *Corporations Act* were not apportionable.

[ABN AMRO Bank NV](#) (I B C G)

Mainteck Services Pty Ltd v Stein Heurtey SA [2014] NSWCA 184

Court of Appeal of New South Wales

Ward, Emmett & Leeming JJA

Contract - steel maker and respondent entered contract for design, supply and installation of equipment at steel plant - respondent sub-contracted some of its obligations under contract - disputes as to whether subcontractor had performed obligations and supplied equipment beyond contract - subcontractor sued respondent for breach of contract, misrepresentation, damages for delay and disruption and for unreasonable variations - matter referred to referee who delivered reports - subcontractor challenged findings on construction of contract and order that reports be adopted - *turnkey* contract - *global claim* - held: no error in primary judge's findings on contractual construction - Court's task was not to review referee's reports - subcontractor was required to identify appellable error in primary judge's exercise of discretion to adopt, vary, or reject all or parts of referee's reports - no error in exercise of the discretion by the primary judge - contextual



approach to construction of commercial contracts - appeal dismissed.

[Mainteck Services Pty Ltd](#) (B C)

Parker v City of Bankstown RSL Community Club Ltd [2014] NSWSC 772

Supreme Court of New South Wales

Adamson J

Negligence - plaintiff fell whilst at club for dance concert in which her children were performing - and claimed damages from club and dance school - plaintiff claimed defendants negligently failed to illuminate or indicate the step from which she fell - accepted that defendants owed duty of care to plaintiff and that strip lighting should have been on - ss5A, 15 & 15B *Civil Liability Act 2002* (NSW) - gratuitous attendant care - damages for care of dependants - held: Court satisfied plaintiff tripped when she fell near the step but not that strip lighting was not illuminated - plaintiff fell because she was not taking reasonable care for her own safety - damages - judgment for defendants.

[Parker](#) (I)

Michail v Australian Alliance Insurance Company Ltd [2014] QCA 138

Court of Appeal of Queensland

M McMurdo P, Gotterson JA & Dalton J

Motor vehicle insurance - disclosure - appellant insured car with insurer's agent - vehicle damaged and was *total loss* under insurance contract - primary judge found appellant breached duty of disclosure in completing proposal for policy as he did not disclose driving history - whether agent would have refused to insure if appellant had made proper disclosure - whether primary judge assessed insurer's evidence in accordance with principles in *Blatch v Archer* - held: primary judge assessed all the evidence as to what insurer would have done had proper disclosure been made - risk of insuring appellant's car was unacceptable - no discretion to insure outside those guidelines - had proper disclosure been made insurer would not have accepted risk and would have had no liability under s28(3) *Insurance Contracts Act 1984* (Cth) appeal dismissed.

[Michail](#) (I)

Yolla Holdings Pty Ltd v Aion Corporation Pty Ltd [2014] QCA 137

Court of Appeal of New South Wales

P de Jersey CJ, Fraser & Gotterson JJA

Environment and planning - statutory construction - scheme for resort under *Integrated Resort Development Act 1987* (Qld) identified strip of land which encircled residential precinct as primary thoroughfare - land - intended by scheme plan to be transferred to body corporate was transferred to appellant - first respondent owned lots in residential precinct - second respondent was body corporate - appellant appealed from primary judge's declaration that its lot was primary thoroughfare - statutory construction - whether s33 of the Act imposed obligation on appellant to transfer lot to body corporate - held: primary judge erred in construction of s33 - obligation to transfer lot created by s33(1) did not arise unless lot was shown *on the plan as primary*

Benchmark

thoroughfare - neither initial nor subsequent plan designated subject land as primary thoroughfare and the designation of other land as primary thoroughfare also indicated that subject land was not - appeal allowed.

[Yolla Holdings Pty Ltd](#) (C)

Edwards v Legalese P/L T/A Peter Scragg & Associates [2014] SASCFC 58

Full Court of the Supreme Court of South Australia

Vanstone, Bampton & Parker JJ

Negligence - solicitors' duties - claim arising out of failure of manufacturing business in which appellant clients acquired shares - clients alleged solicitor gave negligent advice regarding bank's rights to act on breaches of loan agreement - clients appealed from dismissal of claim for damages for breach of duty and/or retainer - solicitor cross-appealed against refusal to certify costs for two counsel - principles relating to multiple counsel - held: evidence supported conclusion that alleged advice was not in fact given - even had alleged advice been given, clients failed to establish they could or would have done anything to save company - no error in assessment of damages - no basis to interfere with exercise of discretion as to costs - appeal dismissed.

[Edwards](#) (I B)

Ward v Metlife Insurance Ltd [2014] WASCA 119

Court of Appeal of Western Australia

McClure P; Pullin & Buss JJA

Insurance - income protection policy - appellant insured by group income protection policy - employment terminated by agreement in 2010 - insured had suffered depressive illness in 2009 - appellant subsequently worked part time and paid partial disability benefit - payments ceased after insurer determined appellant was no longer *disabled* - appellant appealed from dismissal of claim for breach of policy - whether accepted *disability* had ceased - construction of policy - held: trial judge did not err when he found insured's symptoms did not amount to an *illness*, that therefore there was no *disability* and no entitlement to payments under policy - appeal dismissed.

[Ward](#) (I)

Looks

By Peter Kirkpatrick

A photo album shows us half a life
ago, bliss kittens of the night, bowtied,
in drag, in tight jeans and tee-shirts - half a life

before we kissed and breakfasted: an age.



These are the slim acquaintances we were,
these leaner, lesser bodies that we led

through thumping pubs and on to garbled parties,
and in and out of other people's lives,
until they steadied in each other's gaze.

Tonight we're flirting with the past again,
and with each other, old and new. But which
is which? These recent, ageing beings or

those faded, younger frames, dressed in the past?
And should we even care? For as you turn
another page that shows the ways we've changed

I see no doubts, no hesitations, no
false steps in this long practised dance of ours,
only the Then and Now. The many stumbles

in between, when we were making do, making
it up, losing the plot, ignoring prompts
(unstaged scenarios as surely ours

as these more studied moves): those likenesses,
exposed to memory, lack this fixity,
or rest, unedited, beneath other beds.

Now as you pass the book and trade a glance
I try to catch a stranger in a kiss.
Only you're there before me, knowing the look.

Peter Kirkpatrick is a poet and academic, and teaches Australian Literature in the Department of English at the University of Sydney. He has published two collections, *Wish You Were Here* (Five Islands, 1996) and *Westering* (Puncher & Wattmann, 2006), and the chapbook *Australian Gothic and Other Poems* (Picaro, 2012).

[Click Here to access our Benchmark Search Engine](#)