



Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Koee Communications Pty Ltd v Primus Telecommunications Pty Ltd - s52 *Trade Practices Act* 1974 (Cth) - no *Anshun* estoppel - appeal allowed (B)

Velissaris v Fitzgerald - s482(1) *Corporations Act* 2001 (Cth) (B)

Sheikholeslami v Tolcher - Trusts - question of ownership of home unit in Kent Street - respondent trustee of bankrupt estate - required notice under s26A *Foreign Acquisitions & Takeovers Act* 1975 (Cth) (B)

Ayoub v AMP Bank Ltd - *Workplace Injury Management & Workers Compensation Act* 1998 (NSW) - retrenchment process - appeal from Acting Deputy President dismissed (I)

Midcoast County Council trading as Midcoast Water v Reed Constructions Australia Pty Ltd - *Building & Construction Industry Security of Payment Act* 1999 (NSW) - *Trade Practices Act* 1974 (Cth) - progress claim - appeal dismissed (C)

Clyde Bergemann v Varley Power - *Building & Construction Industry Security of Payment Act* 1999 (NSW) - challenge to adjudicator's determination unsuccessful (I, B, C)

Shepparton Projects Pty Ltd v Cave Investments Pty Ltd (No 2) - Loan agreements - calculation of principal sum & interest - compound interest - costs (I, B, C)



Platinum United II Pty Ltd & Anor v Secured Mortgage Management Ltd (in liq'n) - Costs (I, B)

Securities Exchange Guarantee Corporation Ltd v Samuel Holdings Pty Ltd - Securities Lending & Borrowing Agreement - appeal dismissed - cross-appeal as to interest allowed (I, B)

Tasmanian Contracting Services Pty Ltd v Young - *Workers Rehabilitation & Compensation Act 1988* (Tas) - "worker" - "employee" (I)

Shoobert v Baptist Community Services NSW & ACT Ltd - *Limitation Act 1985* (ACT) - personal injuries (I)

Johnson v MNG Investments Pty Ltd t/as Australian Temporary Fencing & Ors - Costs - personal injuries (I)

Lewis v Stojanovic & Anor - Contracts for sale of land - declaration that plaintiffs validly rescinded contract for sale (C)

LA Concrete Pty Ltd v Sywak - Loans - identity of lender - interest - costs (I)

Sir Robert Lloyd & Co Ltd. & Ors v Hoey - United Kingdom decision - limitation of actions - date of knowledge (I)

Summaries with links (5 minute read)

Tuesday 13 September 2011

Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd [2011] FCAFC 119

Full Court of the Federal Court of Australia

Gilmour, Jagot & Nicholas JJ

s52 *Trade Practices Act 1974* (Cth) - no *Anshun* estoppel - at par 138 of judgment: respondent had not established that appellant had engaged in any misleading & deceptive conduct or, if it did, that respondent had acted in reliance on that conduct - appeal allowed.

[Kooee Communications](#) (B)



[Primus Telecommunications](#) - decision 12 January 2011: see 'Benchmark' Tuesday 1 February 2011 - s51A(1)(a) *Trade Practices Act 1974* (Cth) - applicable rates of interest in respect of pre-judgment period to be included in a judgment - rates agreed upon by Discount & Interest Rate Harmonisation Committee established following a referral by Council of Chief Justices of Australia & New Zealand - misleading & deceptive conduct - reliance - loss & damage - judgment for applicant in sum of \$2,386,349;

[Port of Melbourne Authority](#) - decision High Court of Australia 1 September 1981

Velissaris v Fitzgerald [2011] FCAFC 120

Full Court of the Federal Court of Australia

Gilmour, Jagot & Nicholas JJ

s482(1) *Corporations Act 2001* (Cth) - appeal against primary judge's order dismissing application to terminate winding up of corporation dismissed.

[Velissaris](#) (B)

[Velissaris](#) - decision Federal Court 2 March 2011

Sheikholeslami v Tolcher [2011] FCA 1050

Federal Court of Australia

Yates J

Trusts - question of ownership of home unit in Kent Street - respondent the trustee of bankrupt estate - at the time of making of sequestration order, bankrupt the registered proprietor - respondent contending property formed part of bankrupt's divisible property - applicant contending she was beneficial owner of property pursuant to an express trust alternatively, that the property held at all times by bankrupt upon either a resulting trust or constructive trust for her - required notice under s26A *Foreign Acquisitions & Takeovers Act 1975* (Cth) not given - matter stood over for hearing of any argument on form of orders to be made.

[Sheikholeslami](#) (B)

Ayoub v AMP Bank Ltd [2011] NSWCA 263

Court of Appeal of New South Wales

Basten & Whealy JJA, Sackville AJA

Workplace Injury Management & Workers Compensation Act 1998 (NSW) - retrenchment process - arbitrator had concluded actions of employer unreasonable - on appeal, Acting Deputy President found retrenchment process reasonable, revoked the arbitrator's decision & an award was made in favour of employer - procedural fairness - appeal from ADP dismissed.

[Ayoub](#) (I)

[AMP Bank Limited](#) - decision of the Workers Compensation Commission of New South Wales -Presidential 14 April 2010



Midcoast County Council trading as Midcoast Water v Reed Constructions Australia Pty Ltd [2011] NSWCA 268

Court of Appeal of New South Wales

Beazley, Basten & Meagher JJA

Building & Construction Industry Security of Payment Act 1999 (NSW) - Trade Practices Act 1974 (Cth)
- progress claim - appellant contending primary judge's conclusion that there was no misleading or deceptive conduct in error - whether appellant had been misled in failing to serve in time a payment schedule under s14 - appeal dismissed.

[Midcoast County Council](#) (C)

[Reed Constructions Australia](#) - decision 29 October 2010: see 'Benchmark' Tuesday 2 November 2010 - defendants alleging misleading or deceptive conduct - plaintiff's claim succeeded - cross-claim dismissed.

Clyde Bergemann v Varley Power [2011] NSWSC 1039

Supreme Court of New South Wales

McDougall J

Building & Construction Industry Security of Payment Act 1999 (NSW) - plaintiff had contracted to design, build, operate & maintain a fly ash collection & disposal plant at Eraring Power Station - dispute had been referred to adjudication - second defendant adjudicator had determined, among other things, that first defendant was entitled to a progress payment of (in round figures) \$2.5 million - whether an adjudicator acts in excess of jurisdiction by determining that an applicant is entitled to a progress payment that exceeds the amount calculated in accordance with the terms of the contract - challenge to adjudicator's determination unsuccessful.

[Clyde Bergemann](#) (I, B, C)

Shepparton Projects Pty Ltd v Cave Investments Pty Ltd (No 2) [2011] VSC 384

Supreme Court of Victoria

Croft J

Loan agreements - calculation of principal sum & interest - basis of calculation of compound interest - costs - extensive consideration of United Kingdom & Australian case law.

[Shepparton Projects](#) (I, B, C)

[Shepparton Projects](#) - decision 10 December 2010: see 'Benchmark' B, C & IBC Monday 20 December 2010 - contract - Shepparton Projects borrowed money from Cave Investments under two loan agreements, and two deeds of variation of the first loan agreement - the first loan was for the purpose of purchasing certain land & then subdividing it, developing it, & selling the subdivided lots - the first loan agreement was ultimately superseded by the second loan agreement - the Court was called upon to decide the proper construction of the default provisions in the second loan



agreement - concerned the nature of the obligations in the case of default - held: the construction contended for by Cave Investments should be accepted - Cave Investments had been entitled to exercise its option to accelerate Shepparton Project's obligations - there should be judgment for Cave Investments for the sum outstanding plus interest.

Platinum United II Pty Ltd & Anor v Secured Mortgage Management Ltd (in liq'n) [2011] QCA 229

Court of Appeal of Queensland

Fraser & Chesterman JJA & Fryberg J

Costs - provisions of commercial loan facility agreement between first appellant & respondent - first appellant to pay respondent's costs of appeal assessed on indemnity basis - second appellant to pay respondent's costs of appeal assessed on standard basis.

[Platinum](#) (I, B)

[Platinum](#) - decision Court of Appeal 15 July 2011: see 'Benchmark' B & IBC Monday 18 July 2011 - banking & finance - loan facility agreement - first appellant borrower & SML lender - appellants appealing against orders made striking out paras of appellants' third further amended statement of claim & on 2 December 2010 refusing appellants' application for particulars of defence - detailed consideration of clauses in the agreement - principles concerning construction of commercial contracts considered - appeal dismissed.

[Platinum](#) - decision 6 December 2010: see 'Benchmark' B & IBC Wednesday 8 December 2010 - commercial loan facility agreement - *Australian Securities & Investments Commission Act 2001* (Cth) - *Trade Practices Act 1974* (Cth) - respondent seeking that certain parts of applicants' third further amended statement of claim be struck out (or summary judgment.)

Securities Exchange Guarantee Corporation Ltd v Samuel Holdings Pty Ltd [2011] QCA 228

Court of Appeal of Queensland

McMurdo P, Chesterman JA & Wilson AJA

Securities Lending & Borrowing Agreement - respondent had applied to Opes Prime Stockbroking Ltd to open "margin lending account" - appellant administers National Guarantee Fund, a statutory fund established to provide compensation for persons who suffer some kinds of loss as a result of dealing in a financial market with a dealer who becomes insolvent - appeal against declaration that SEGC should allow respondent's claim - appeal dismissed - cross-appeal as to interest allowed.

[Securities](#) (I, B)

[Samuel](#) - decision 6 December 2010 - *Corporations Act 2001* (Cth) - whether s1017E or s981H establishes a trust - *Corporations Regulations 2001* (Cth)



Tasmanian Contracting Services Pty Ltd v Young [2011] TASSC 49

Supreme Court of Tasmania

Evans J

Workers Rehabilitation & Compensation Act 1988 (Tas) - "worker" - "employee" - appeal from Workers Rehabilitation & Compensation Tribunal of Tasmania - appeal allowed & the order that had been made that respondent a worker within the meaning of that term in the Act who was employed at all material times by appellant set aside & in lieu order that respondent had not entered into or was not working under a contract of service with appellant.

[Tasmanian Contracting Services \(I\)](#)

Shoobert v Baptist Community Services NSW & ACT Ltd [2011] ACTSC 152

Supreme Court of the Australian Capital Territory

Master Harper

Limitation Act 1985 (ACT) - personal injuries - injury while working in nursing home - extension of limitation period granted.

[Shoobert \(I\)](#)

Johnson v MNG Investments Pty Ltd t/as Australian Temporary Fencing & Ors [2011] ACTSC 150

Supreme Court of the Australian Capital Territory

Master Harper

Costs - personal injuries - for decision 12 August 2011, see 'Benchmark' I & IBC Monday 22 August 2011 & link below.

[Johnson \(I\)](#)

[Johnson](#) - decision 12 August 2011: see 'Benchmark' I & IBC Monday 22 August 2011 - personal injuries - insurance - work accident - whether plaintiff employee or independent contractor - third defendant the Workers Compensation Default Insurance Fund Manager - four defendant Zurich Australia Insurance Ltd - whether insurer liable to indemnify defendant in respect of liability independently of *Workers Compensation Act 1951 (ACT)* - damages agreed at \$650,000.00 - first defendant admitted liability - judgment in plaintiff's favour against first defendant for that amount - plaintiff had not established existence of a duty of care owed to him by second defendant - no occasion for any declaratory relief against Default Insurance Fund - first defendant entitled to be indemnified by four defendant under the workers' compensation policy - first defendant also insured as registered owner of truck out of the use of which plaintiff's injuries arose by fifth third party, Insurance Australia Ltd - first defendant's liability should be borne equally by the two insurers - judgment for second defendant.



Lewis v Stojanovic & Anor [2011] ACTSC 155

Supreme Court of the Australian Capital Territory

Master Harper

Contracts for sale of land - first defendant owner of house at Casey - second defendant seller's agent & stakeholder of the deposit - plaintiff buyers seeking declaration that rescission was valid & a refund of the deposit - fence in place at the date of exchange an unapproved structure - declaration that plaintiffs validly rescinded contract for sale - order that second defendant refund to plaintiffs deposit of \$52,700 without deduction.

[Lewis \(C\)](#)

In the District Court of New South Wales ...

LA Concrete Pty Ltd v Sywak [2011] NSWDC 122

District Court of New South Wales

Johnstone DCJ

Loans - identity of lender - interest - costs - whether advances made to the defendant by first plaintiff or by second plaintiff personally - answer at par 49 of judgment: by first plaintiff - s51 *District Court Act 1973* (NSW); consent jurisdiction - first plaintiff entitled to judgment in amount claimed, even though it exceeds jurisdictional limit.

[LA Concrete Pty Ltd \(I\)](#)

From the United Kingdom ...

Sir Robert Lloyd & Co Ltd. & Ors v Hoey [2011] EWCA Civ 1060

Court of Appeal of England & Wales

Jackson, Tomlinson & McFarlane LJ

Limitation of actions - date of knowledge - cardio-respiratory disablement - appeal by employers in Employers Liability Disease case against finding that claim not statute barred - whether primary judge had erred in law in holding that claimant commenced proceedings within three years of date of knowledge under s11(4)(b) *Limitation Act 1980* (United Kingdom) - appeal dismissed.

[Sir Robert Lloyd \(I\)](#)

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