

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

### Executive Summary (1 minute read)

**Lindholm, in the matter of Munday Group Pty Limited (Administrators App'd) (Receivers & Managers App'd)** - *Corporations Act* 2001 (Cth) - application to extend convening period for calling of second meeting of creditors (B)

**Maher v Mulgowie Fresh Pty Ltd** - *Fair Work Act* 2009 (Cth) - applicant granted leave to amend application (I)

**Application of Saris; Elgammal v Saris** - Costs - *Legal Profession Act* 2004 (NSW) ss348 & 363 - costs relating to defendant's cross-claim against plaintiff (I)

**Kavourakis v Waverley Bowling & Recreation Club Ltd** - s440D *Corporations Act* 2001 (Cth) - voluntary administration - proceedings commenced against company before start of administration - plaintiff seeking leave to continue proceedings (B)

**Darin re Palamedia Ltd** - *Corporations Act* 2001 (Cth) - voluntary administration whether s447A order should be made to validate initiation of administration (B)

**State of Victoria & Ors v Richards** - Personal injuries - appeal against refusal to strike out cause of action - capsicum spray - appeal dismissed (I)

**Popovic v Rodevan Pty Ltd & Anor** - Personal injuries - industrial accident at Tullamarine Airport - contribution between defendants (I)

**Balanced Securities Ltd v Bianco & Ors** - *Transfer of Land Act* 1958 (Vic) - tenant in possession - whether tenancy protected by s42(2)(e) - mortgagee entitled to possession (C)

**Forza Finance Pty Ltd v Vergepoint Sales & Management Pty Ltd** - *Corporations Act 2001 (Cth)* - winding up - purchase of unit in development on Gold Coast - disclosure statement - deposit guarantee - statutory demand set aside (C)

**Office of Fair Trading (resps.) v Abbey National plc & others (apps.)** – United Kingdom decision - *Unfair Terms in Consumer Contracts Regulations 1999 (UK)* - bank charges (I, B)

## Summaries with links (5 minute read)

**Friday 14 May, 2010**

### **Maier v Mulgowie Fresh Pty Ltd [2010] FCA 439**

Federal Court of Australia

Collier J (in Brisbane)

*Fair Work Act 2009 (Cth)* - commencement of proceedings under incorrect provisions of the Act - application to amend substantive application - application for summary dismissal of substantive application - applicant forklift driver suffered from physical disability - termination of employment - whether Court should exercise discretion to grant leave to applicant to amend application - respondent's application for summary dismissal refused; applicant granted leave to amend application to allege a contravention of s351 of the Act.

[Maier](#) (I)

### **Application of Saris; Elgammal v Saris [2010] NSWSC 449**

Supreme Court of New South Wales

White J

Costs - application by defendant for leave to apply for costs against former solicitors under s348 *Legal Profession Act 2004 (NSW)* - costs relate to defendant's cross-claim against plaintiff - s348 not applicable - defendant may seek to have costs assessed; s363 considerations to which costs assessors to have regard.

[Application of Saris; Elgammal](#) (I)

**State of Victoria & Ors v Richards [2010] VSCA 113**

Court of Appeal of Victoria

Nettle & Redlich JJA; Hansen AJA

Personal injuries - police officer deploying capsicum spray to restrain offender - for decision appealed against, see link below - whether duty of care owed to bystander - appeal against refusal to strike out cause of action - appeal dismissed - detailed analysis of United Kingdom & Australian case law.

[State of Victoria & Ors \(I\)](#)

[Richards](#) - *Richards v State of Victoria & Ors* [2009] VCC 1349 - County Court decision Lacava J 29 October 2009 - striking out application dismissed.

**Popovic v Rodevan Pty Ltd & Anor [2010] VSC 191**

Supreme Court of Victoria

Williams J

Personal injuries - industrial accident - contribution between defendants - first defendant hired out services of plaintiff, Mr Popovic, as a freight handler, to second defendant ('AaE') - plaintiff injured his back whilst unloading a heavy item of freight at AaE's East Street site at Tullamarine Airport - plaintiff brought proceeding seeking damages from each of the defendants alleging negligence & breaches of their statutory duties under regs 12, 13, 14 & 15 *Occupational Health & Safety (Manual Handling) Regulations 1999* (Vic) - plaintiff has settled his claims with them - two defendants now claiming contribution from the other in relation to its liability under the settlement agreement under s24(2) *Wrongs Act 1958* (Vic) - AaE to contribute eighty five per cent & Rodevan fifteen per cent of plaintiff's damages.

[Popovic \(I\)](#)

**From the United Kingdom...****Office of Fair Trading v Abbey National plc & others [2009] UKSC 6**

Supreme Court of the United Kingdom

Lord Phillips (President), Lord Walker, Baroness Hale, Lord Mance, Lord Neuberger

*Unfair Terms in Consumer Contracts Regulations 1999* (UK) - for decision appealed from, see 'Benchmark B & IBC Friday 17 April 2009 & link below - whether as a matter of law the fairness of bank charges levied on personal current account customers in respect of unauthorised overdrafts (including unpaid item charges and other related charges as described below) can be challenged

by respondent the Office of Fair Trading as excessive in relation to the services supplied to the customers - whether the charges constituted the 'price & remuneration' as against 'the goods or services supplied in exchange' within the meaning of the Regulations - appeal by the banks allowed. (I, B)

[Office of Fair Trading \(OFT\)](#) (I, B)

[Office of Fair Trading](#) - press summary of Supreme Court decision above;

[Abbey National](#) - decision Court of Appeal of England & Wales 26 February 2009 - Sir Anthony Clarke MR, Lord Justice Waller V-P & Lord Justice Lloyd - bank charges - whether or not Office of Fair Trading entitled to assess fairness of certain charges made by banks under Unfair Terms in Consumer Contracts Regulations 1999 - whether, on the true construction of regulation 6(2)(b), an assessment of fairness of charges imposed was prohibited in the circumstances of this case - primary judge had held that it was not - for decision of primary judge 24 April 2008,, see 'Benchmark' B & IBC Wednesday 7 May, 2008 & link below - appeal dismissed;

[Office of Fair Trading](#) - decision 24 April 2008 Smith J - bank & customer - whether bank overdraft charges can be regulated by consumer credit legislation - charges made by banks to customers with personal current accounts when requested or instructed to make payments for which they do not hold necessary funds in the account & which are not covered by a facility arranged with the customer - 'plain intelligible language' - 'informed choice' - penalties;

[Rutherford](#) - decision Blair J 6 April 2009 High Court of Justice, Queen's Bench Division - bank charges - appeal by claimant from County Court decision given on 31 October 2008 - claimant in financial difficulties, facing eviction from his home - arrears of mortgage - test case above *Abbey National Plc & Ors v The Office of Fair Trading* referred to - claim is one of many thousands brought in the County Courts to recover bank charges which are said to have been unfair - test case above *Abbey National Plc & Ors v The Office of Fair Trading* [2009] EWCA Civ 116 -referred to - vast majority of County Court claims like the Rutherford claim have been stayed pending outcome of the Abbey test case - banks' appeal in Abbey test case to the Court of Appeal had failed - permission had been refused to appeal in the Abbey test case to the House of Lords - banks entitled to apply to House of Lords for permission to appeal in the Abbey test case - the Court in the Rutherford case of the view there was much to be said for present position in the county courts to remain as it is until House of Lords in has decided whether to grant permission to appeal in the Abbey case, and, if the House of Lords does grant permission to appeal, until the determination of that appeal. [note: the Supreme Court of the United Kingdom, which was officially opened by HM Queen Elizabeth II on Friday 16 October 2009, replaced the Appellate Committee of the House of Lords.]