

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Sydney Water Corporation v Turano - decision of High Court of Australia - personal injuries - reasonable foreseeability - liability of statutory authority - tree fell on passing vehicle during storm resulting in death of occupant (I, C)

Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd; Jeffery & Katauskas Pty Ltd v Rickard Constructions Pty Ltd - High Court decision - whether Supreme Court of New South Wales has power to order costs against a non-party which, for a contingency fee, has funded an impecunious corporate plaintiff without providing the plaintiff with an indemnity for adverse costs orders (I, B, C)

John Holland Pty Ltd v Victorian Workcover Authority - High Court decision - constitutional law - s109 Constitution - occupational health & safety prosecutions - "employer", "law", "non-Commonwealth licensee" (I, C)

John Holland Pty Ltd v Inspector Nathan Hamilton - High Court decision - occupational health & safety - New South Wales (I, C)

Bofinger v Kingsway Group Ltd - High Court decision - guarantee & indemnity - surety - "subrogation", "unconscientious", "unconscionable", "unjust enrichment" (I, B, C)

Chen v Marcolongo; Chen v Lym International Pty Ltd - Fiduciary obligations - s37A *Conveyancing Act* 1919 (NSW) - intent to defraud creditors (B, C)

Metrolink Victoria Pty Ltd v Inglis - Negligence - whether loss reasonably foreseeable - collision between tram owned by appellant & car - resulting delays - franchise agreement (I)

Summaries with links (5 minute read)

Thursday 15 October 2009

Sydney Water Corporation v Turano [2009] HCA 42

High Court of Australia

French CJ, Gummow, Hayne, Crennan & Bell JJ

Personal injuries - reasonable foreseeability – liability of statutory authority -installation of water main – approximately 20 years later tree fell on passing vehicle during storm resulting in death to occupant & injury to other occupants of vehicle - for NSW Court of Appeal decision 31 October 2008, see 'Benchmark' I, B & IBC Tuesday 4 November 2008 and link below – appeal allowed. (

[Sydney Water Corporation](#) (I, C)

[Council of the City of Liverpool](#) - decision 31 October 2008 reported at 164 LGERA - negligence – application of s42 *Civil Liability Act* 2002 (NSW) - foreseeability - roads & drainage – tree with defective root system caused by waterlogged soil fell onto car during a storm & killed motorist – primary judge had found Council was liable in negligence, but that Sydney Water was not - judicial obligation to give reasons extends to engagement with expert evidence - majority held Council did not owe a duty of care, McColl JA dissenting - on cross-appeal against Sydney Water: majority held Sydney Water liable in negligence with McColl JA dissenting – consideration of case law from United Kingdom & Australia.

Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd; Jeffery & Katauskas Pty Ltd v Rickard Constructions Pty Ltd [2009] HCA 43

High Court of Australia

French CJ, Gummow, Hayne, Heydon & Crennan JJ

Costs – whether Supreme Court of New South Wales has power to order costs against a non-party which, for a contingency fee, has funded an impecunious corporate plaintiff without providing the plaintiff with an indemnity for adverse costs orders - whether the Court has the power depends upon whether litigation funder has "committed ... an abuse of process of the Court", thus attracting application of r42.3(2)(c) *Uniform Civil Procedure Rules* 2005 (NSW) – for NSW Court of Appeal decision 19 December 2008, see 'Benchmark' Tuesday 3 February 2009 & link below - appeal dismissed - "abuse of process of the court", "occasioned by".

[Jeffery & Katauskas](#) (I, B, C)

[Rickard Constructions](#) – NSW Court of Appeal decision 19 December 2008 – costs orders against non-parties - whether non-party with commercial interest in litigation commits abuse of process by funding &/or controlling litigation brought by insolvent plaintiff without indemnifying plaintiff against adverse costs orders - whether non-party commits abuse of process by funding & assisting insolvent plaintiff to sue on ineffectively assigned causes of action - whether non-exposure of non-party to costs orders brings administration of justice into disrepute - whether security for



costs regime sufficient answer to abuse of process claims – all appeals dismissed – detailed consideration of case law from United Kingdom & Australia.

[Rickard Constructions](#) – NSW Court of Appeal judgment 15 December, 2006

[Rickard Constructions & Anor](#) – judgment 17 December, 2004

John Holland Pty Ltd v Victorian Workcover Authority [2009] HCA 45

High Court of Australia

French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ

s109 *Commonwealth Constitution* (Cth) – occupational health & safety prosecutions - "employer", "law", "non-Commonwealth licensee" – provisions of State Act empowered inspectors to bring proceedings for offence against State Act - several questions for determination, first one being: while plaintiff remained "non-Commonwealth licensee" for purposes of *Occupational Health & Safety Act* 1991 (Cth), the plaintiff was liable to conviction for offences against s21 & s23 *Occupational Health & Safety Act* 2004 (Vic) committed before plaintiff became a "non-Commonwealth licensee" – answer 'yes' - whether provisions of State Act authorising prosecution of such offences inconsistent with Commonwealth Act & thereby invalid by operation of s109 of the Constitution – answer 'no.'

[John Holland](#) (I, C)

John Holland Pty Ltd v Inspector Nathan Hamilton [2009] HCA 46

High Court of Australia

French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ

Occupational health & safety – New South Wales - charges not by reason of operation of Commonwealth Act & s109 *Commonwealth Constitution* (Cth) rendered invalid, null or void - not beyond jurisdiction of Industrial Court of New South Wales to hear & determine proceedings upon those charges.

[John Holland](#) (I, C)

Bofinger v Kingsway Group Ltd [2009] HCA 44

High Court of Australia

Gummow, Hayne, Heydon, Kiefel & Bell JJ

Guarantee & indemnity – surety - "subrogation", "unconscientious", "unconscionable", "unjust enrichment" – constructive trust – obligation to account – s3 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) as to entitlement of sureties to assignment of securities - appeal allowed – an interesting decision with detailed consideration of text & case law from U.K. & Australia.

[Bofinger](#) (I, B, C)

[Bofinger & Anor](#) – NSW Court of Appeal decision 3 December 2008: see 'Benchmark' Tuesday 9 December 2008 –



guarantee – subrogation- rule in *Otter v Vaux* - plaintiffs guarantors of loans to developer which were secured by first, second & third mortgages over development property at Enmore, supported by first, second & third mortgages over their home & a private investment property – s3 *Law Reform (Miscellaneous Provisions) Act 1965* – appeal dismissed;

[Bofinger](#) – decision Supreme Court NSW 15 October 2007

Chen v Marcolongo; Chen v Lym International Pty Ltd [2009] NSWCA 326

Court of Appeal of New South Wales

Allsop P, Giles & Young JJA

Fiduciary obligations - s37A *Conveyancing Act 1919* (NSW) - intent to defraud creditors – fiduciary used power of attorney to sell property to himself - two appeals, the “Lym appeal” (CA 40119/09 – appeal allowed in part) & “Marcolongo appeal” (CA 40118/09 - appeal allowed) – comprehensive consideration of legislation & case law from United Kingdom Canada, New Zealand & Australia.

[Chen](#) (B, C)

[Lym International](#) – decision 16 March 2009: see ‘Benchmark’ B, C & IBC Monday 23 March 2009 - fiduciary obligations – conflict of interest & duty – townhouse projects at Mona Vale - purchase by agent from principal of property – liability to retransfer property – whether allowance to agent for money expended on property should include allowance for agent’s work and skill in improving property;

[Lym International](#) - decision 18 March 2009;

[Lym International](#) - decision 2 March 2009: see ‘Benchmark’ B, C & IBC Monday 23 March 2009 – held that transaction was entered into in breach of fiduciary duty & of s37A *Conveyancing Act 1919* (NSW).

Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227

Court of Appeal of Victoria

Neave & Redlich JJA, Williams AJA

Negligence – whether loss reasonably foreseeable - collision between tram owned by appellant & car – resulting delays - remoteness of damage – characterisation of loss - whether loss incurred by appellant, as result of operation of certain provisions of franchise agreement with Director of Public Transport was too remote - for decision appealed from, see ‘Benchmark’ I & IBC Thursday 7 February 2008 & link below - by majority, Neave JA dissenting, appeal allowed – detailed consideration of case law from United Kingdom & Australia in an interesting decision.

[Metrolink Victoria](#) (I)

[Metrolink Victoria](#) – decision 5 February 2008 - appeal against decision in Magistrates’ Court dismissing claim for damages brought by Metrolink against respondent driver of car – driver had admitted his negligence caused collision but contested liability as to damages - economic loss – operational performance penalties payable by appellant to Director of Public Transport – remoteness of damages – appeal dismissed.