



## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Executive Summary (1 minute read)

**Commissioner of Taxation v Grimaldi (No. 4)** - Application for stay & continuation of interlocutory freezing orders dismissed (B)

**Michael Wilson & Partners Limited v Robert Colin Nicholls & Ors** - Case management - commercial litigation - compulsory mediation ordered - indemnity costs (I, B, C)

**Perpetual Trustees Victoria v Longobardi** - *Contracts Review Act 1980* (NSW) – loan agreement & mortgage – ss12CB & 12CC *Australian Securities & Investments Commission Act 2001* (Cth) - held that plaintiff entitled to relief sought - defendant's cross-claim dismissed (B)

**Lai See Law by her Tutor the Protective Commissioner of New South Wales v Yan Mo** - Presumption of undue influence not rebutted – transfer of property to defendant set aside (B)

**The University of Sydney v Cadence Australia Pty Limited & Anor** - *Building & Construction Industry Security of Payment Act 1999* (NSW) – adjudication determination – issue estoppel (I, C)

**Southern Cross Constructions (NSW) Pty Limited v Salfa Pty Limited (in liq'n) (receivers & managers app'd)** - *s7D Home Building Act 1989* (NSW) - declaration made that plaintiff had equitable mortgage (C)

**Chiotelis v Coate** - *Coroners Act 1985* (Vic) – refusal by Coroner to hold inquest – application to Supreme Court to order inquest refused (I)

**ACN 099 735 476 Limited (in liq) & Anor v Didasko Learning Institute Pty Ltd & Ors** - Sale of businesses – liability for tax debts - claim of statutory right of subrogation under s52

*Supreme Court Act 1986 (Vic) – ‘trading liabilities’ (I, B)*

**Munzer (resp.) v Johnston (1<sup>st</sup> app.) & RACQ Insurance Ltd (2<sup>nd</sup> app.)** - Personal injuries – respondent injured in motor vehicle collision with first appellant – first appellant admitted liability but quantum of damages was determined at trial – appeal dismissed (I)

**Barkworth Olives Management Ltd v Deputy Commissioner of Taxation** - *Income Tax Assessment Act 1936 (Cth)* - application for stay of judgment dismissed (B)

**Dick v Alan Powell Holdings & Ors** - *s232 Corporations Act 2001 (Cth)* – whether conduct oppressive to, unfairly prejudicial to, or unfairly discriminatory (B)

**From the United Kingdom:**

**Green v Sunset & Vine Productions Ltd & Ors** - personal injuries – hearing on liability – claimant injured while driving a 1948 Maserati 4 CLT 1492cc during the 2005 Goodwood Trophy race – claim dismissed (I)



## Summaries with links (5 minute read)

### Thursday 16 July 2009

#### **Commissioner of Taxation v Grimaldi (No. 4) [2009] FCA 748**

Federal Court of Australia

Graham J (in Sydney)

Application made 9 July 2009 *ore tenus* (verbally/orally) for stay & for continuation of interlocutory freezing orders against third & fifth respondents, foreign corporations incorporated in Vanuatu, dismissed.

[Commissioner of Taxation](#) (B)

[Commissioner of Taxation](#) – decision 9 July 2009 – see ‘Benchmark’ B & IBC Monday 13 July 2009 - injunctions – alleged tax liabilities – Australian & ex-Australian assets - freezing orders – interesting review of case law including [In Re Hallett’s Estate: Knatchbull v Hallett](#) (1880) 13 Ch D 696.

#### **Michael Wilson & Partners Limited v Robert Colin Nicholls & Ors [2009] NSWSC 669**

Supreme Court of New South Wales

Einstein J

Case management - commercial litigation - responsibility of parties, through their legal representatives, to assist Court to further overriding purpose to facilitate just, quick & cheap resolution of real issues in dispute & to participate in processes of the Court to that end – “trolley load litigation” - compulsory mediation ordered - defendants costs of & occasioned by time to be taken in absorbing the latest tranche of eighteen or thereabouts folders to be paid by plaintiff on an indemnity basis.

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

#### **Perpetual Trustees Victoria v Longobardi [2009] NSWSC 654**

Supreme Court of New South Wales

McDougall J

*Contracts Review Act* 1980 (NSW) – loan agreement & mortgage – business indebtedness – home indebtedness – defendants did not buy business; they bought issued shares in company operating & conducting the business - loan secured by mortgage over defendants’ home at Beacon Hill – order for possession sought - whether loan agreement & mortgage contracts “entered into in the course of or for the purposes of a... business ... carried on by” defendants, with consequence that *Contracts Review Act* 1980 (NSW) did not apply - on the basis that making the loan constituted supply of financial services in trade or commerce for purposes of ss12CB & 12CC *Australian Securities & Investments Commission Act* 2001 (Cth), whether conduct of plaintiff & those for whom it was responsible

“unconscionable” - held that plaintiff entitled to relief sought by its statement of claim – defendant’s cross-claim dismissed – detailed analysis of legislation – case law considered including case law as to concept of ‘asset lending.’

[Perpetual Trustees Victoria](#) (B)

**Lai See Law by her Tutor the Protective Commissioner of New South Wales v Yan Mo [2009] NSWSC 639**

Supreme Court of New South Wales

Bergin CJ in Eq.

Undue influence - whether there was undue influence over plaintiff at time of the transfer of property at Killarney Heights – presumption of undue influence not rebutted – transfer of property to defendant set aside - judgment for defendant/cross-claimant on cross-claim in sum of \$154,000; cross-claim otherwise dismissed.

[Lai See](#) (B)

**The University of Sydney v Cadence Australia Pty Limited & Anor [2009] NSWSC 635**

Supreme Court of New South Wales

Hammerschlag J

*Building & Construction Industry Security of Payment Act 1999* (NSW) – payment claim – adjudication determination – first defendant seeking to re-agitate same claim as part of an expanded one - issue estoppel - orders made restraining first defendant from seeking adjudication of its payment claim 31 May 2009 - Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69 and Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Constructions Systems [2009] NSWSC 416 considered.

[The University of Sydney](#) (I, C)

[Dualcorp](#) - decision 15 April 2009 – see ‘Benchmark’ Wednesday 22 April 2009 - *Building & Construction Industry Security of Payment Act 1999* (NSW) - subcontract between respondent as contractor & applicant as sub-contractor for excavation & piling work at building site at Five Dock – adjudicator’s determination - primary judge in District Court had declined to enter summary judgment for appellant - progress payments – finality: principles & case law – previous valuations - issue estoppel - appeal dismissed.

[Perform](#) – decision 5 May 2009 – see ‘Benchmark’ C & IBC Thursday 21 May 2009 - *Building & Construction Industry Security of Payment Act 1999* (NSW) – plaintiff a formwork contractor on two buildings jobs, Sydney Airport car park & the other City North Substation – plaintiff hired formwork materials from defendant company - issue estoppel - second payment claim for items the subject of a previous claim – second claim precluded by principles of estoppel & provisions of the Act – appropriate for the Court to intervene prior to an adjudication determination to prevent such a claim from proceeding - defendant permanently restrained from taking any steps to prosecute any adjudication of second payment claim.



**Southern Cross Constructions (NSW) Pty Limited v Salfa Pty Limited (in liq'n) (receivers & managers app'd) [2009] NSWSC 634**

Supreme Court of New South Wales

Hammerschlag J

s7D *Home Building Act* 1989 (NSW) - whether terms of Deed between plaintiff & defendants conferred on plaintiff an equitable mortgage in respect of certain parcels of land or whether s7D prevented such an interest – declaration made that plaintiff had equitable mortgage.

[Southern Cross Constructions](#) (C)

**Chiotelis v Coate [2009] VSC 256**

Supreme Court of Victoria

Robson J

*Coroners Act* 1985 (Vic) – request to Coroner for inquest – fatal motor accident - refusal by Coroner to hold inquest – application to Supreme Court to order inquest – discretion of Coroner – new information not seen by Coroner – application refused – detailed consideration of legislation & case law.

[Chiotelis](#) (I)

**ACN 099 735 476 Limited (in liq) & Anor v Didasko Learning Institute Pty Ltd & Ors [2009] VSC 252**

Supreme Court of Victoria

Davies J

Contracts – sale of businesses – construction of contract – whether purchasers had joint & several liability for all tax debts - *Income Tax Assessment Act* 1936 (Cth) - *Corporations Act* 2001 (Cth) – PAYG - claim of statutory right of subrogation under s52 *Supreme Court Act* 1986 (Vic): buyers were not “persons” within the terms of s52(1) – defence & third party claim based on subrogation failed - “trading liabilities” – interesting review of case law.

[Didasko Learning Institute](#) (I, B)

**Munzer (resp.) v Johnston (1<sup>st</sup> app.) & RACQ Insurance Ltd (2<sup>nd</sup> app.) [2009] QCA 190**

Court of Appeal of Queensland

McMurdo P, Chesterman JA & Douglas J

Personal injuries – respondent, then aged forty-four, injured in motor vehicle collision with first appellant – first appellant admitted liability but quantum of damages was determined at trial – before the primary judge, respondent obtained judgment in sum of \$1,249,459.63 - whether primary judge had erred in assessment of damages - whether any error would justify appellate court's interference with damages award – appeal dismissed with costs to be assessed.

[Munzer](#) (I)

[Munzer](#) - decision 1 August 2008 - damages assessed under *Civil Liability Act* 2003 (Qld) – gratuitous care domestic assistance -home modifications

**Barkworth Olives Management Ltd v Deputy Commissioner of Taxation [2009] QCA 191**

Supreme Court of Queensland

Chesterman JA

*Income Tax Assessment Act 1936* (Cth) - application for stay of judgment - applicant was trustee of four trusts, beneficiaries of which were investors in olive tree plantations - appellant disputing liability for taxation debt – judgment entered against appellant for \$81,425,884.23 - whether recovery proceedings should be stayed in light of appeal – application dismissed.

[Barkworth Olives Management](#) (B)**Dick v Alan Powell Holdings & Ors [2009] QSC 184**

Supreme Court of Queensland

Philippides J

s232 *Corporations Act 2001* (Cth)– whether conduct oppressive to, unfairly prejudicial to, or unfairly discriminatory – whether contrary to interests of the members as a whole – winding up order made.

[Dick](#) (B)

## From the United Kingdom...

**Green v Sunset & Vine Productions Ltd & Ors [2009] EWHC 1610 (QB)**

High Court of Justice, Queen's Bench Division

Ouseley J

Personal injuries – hearing on liability – claimant, an experienced driver of historic motor-racing vehicles, was injured while driving a 1948 Maserati 4 CLT 1492cc during the 2005 Goodwood Trophy race – claimant contending Maserati's right hand side wheels hit kerb camera – allegation of negligence in placement of camera there, or in placing it there in an insecure manner – claim dismissed – at para. 218: claimant had made an error of judgment, & for a short while had driven below the standards to be expected of the reasonably careful driver in the context of motor-racing in historic cars on this circuit.

[Green](#) (I)**Key: (I) Insurance, (B) Banking, (C) Construction**