



## Insurance Banking & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Apostolou v VA Corporation of Aust Pty Ltd** - Insolvency - mortgagee sale - two appeals (I, B)

**CSBP Ltd v Construction, Forestry, Mining & Energy Union** - *Fair Work (Registered Organisations) Act 2009* (Cth) (C)

**Pritchard v Trius Constructions Pty Ltd & Ors** - Personal injuries - contracts - workplace injury - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - apportionment of liability - indemnity clauses (I)

**GIO General Ltd v Smith & Ors; Insurance Australia Ltd t/a NRMA Insurance v Smith & Ors** - *Motor Accidents Compensation Act 1999* (NSW) - Motor Accidents Authority Permanent Impairment Guidelines 1 October 2007 - apportionment of impairment (I)

**Oliver Markisic v Attorney General for New South Wales; Dragan Markisic v Attorney General for New South Wales** - Applications for summary dismissal (I)

**KF By Her Tutor RF v Sydney Children's Hospital Specialty Network (known as the Children's Hospital Westmead) & Anor** - Medical negligence claim - experts' conference (I)



**Colyer Fehr Tallow Pty Ltd v KNZ Australia Pty Ltd** - Contracts - fiduciary duties - agency (I, B)

**Thackray & Ors v Gunns Plantations Limited & Ors** - Receivers - remuneration - indemnity (B)

**Shaw v Menzies & Anor** - Personal injuries - motor accident - Transport Operations (Road Use Management - Road Rules) Regulation 1999 (Qld) (TORUM Regulation) - s59 *Civil Liability Act* 2003 (Qld) - apportionment of liability - damages for gratuitous services (I)

**Mooloolaba Slipways Pty Ltd & Anor v Cashlaw Pty Ltd & Ors** - Negligent misrepresentation - s82 *Trade Practices Act* 1974 (Cth) - mitigation of loss (I, C)

**DJE Building Services Pty Ltd v Insurance Australia Ltd** - s7(2)(b) *Home Building Act* 1989 (NSW) - progress claims - builder entitled to summary judgment - "arrangement" (I, C)

**Pastrovic & Co Pty Ltd v Farrington** - *Home Building Act* 1989 (NSW) - proportionate liability - apportionment provisions of *Civil Liability Act* 2002 (NSW) (I, C)

## Summaries with links (5 minute read)

### Wednesday 17 August 2011

#### **Apostolou v VA Corporation of Aust Pty Ltd [2011] FCAFC 103**

Full Court of the Federal Court of Australia

Perram, Nicholas & Yates JJ

Insolvency - mortgagee sale - two appeals - first appeal bought against six respondents - second appeal against six respondents, three of whom also respondents in the other appeal - Perpetual Trustee Company Ltd - Challenger Managed Investments trustee of Challenger Howard Mortgage Fund - in first appeal: appeal dismissed - in second appeal, leave to appeal refused.

[Apostolou](#) (I, B)

[Apostolou](#) - decision 11 February 2010: see 'Benchmark' I, B & IBC Monday 15 February 2010 - exercise of mortgagee's power of sale - claims against former mortgagee of a St. Kilda property which had been a trust asset & against former liquidators of VA Corporation - whether a breach of mortgagee's duties where a property properly marketed & auctioned but is sold for less than its market value - liquidators' authority to sell property - claims dismissed - detailed consideration of text & United Kingdom case law.



## **CSBP Ltd v Construction, Forestry, Mining & Energy Union [2011] FCA 917**

Federal Court of Australia

McKerracher J

*Fair Work (Registered Organisations) Act 2009* (Cth) - applicant manufactures & produces chemical products at a chemical plant in Kwinana - respondent contending it is legally entitled, by virtue of its Registered Rules to represent the industrial interests of all or some of applicant's process technicians - process technicians did not fall within ambit of Eligibility Rule; applicant entitled to declaratory relief it sought.

[CSBP Limited](#) (C)

## **Pritchard v Trius Constructions Pty Ltd & Ors [2011] NSWSC 749**

Supreme Court of New South Wales

Hoeben J

Personal injuries - contracts - workplace injury - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - apportionment of liability - indemnity clauses - second defendant Oceanic owned & operated coal preparation plant at Teralba - plaintiff employee of Trius, first defendant subcontractor, injured at colliery - plaintiff settled claim against Oceanic & discontinued proceedings against Trius - Oceanic's cross-claim against Trius - liability in tort apportioned sixty percent against first defendant & forty percent against second defendant Oceanic - Oceanic's claim in contract against Trius failed - extensive consideration of United Kingdom & Australian case law.

[Pritchard](#) (I)

## **GIO General Ltd v Smith & Ors; Insurance Australia Ltd t/a NRMA Insurance v Smith & Ors [2011] NSWSC 802**

Supreme Court of New South Wales

Hoeben J

*Motor Accidents Compensation Act 1999* (NSW) - Motor Accidents Authority Permanent Impairment Guidelines 1 October 2007 - apportionment of impairment - two successive motor accidents - claimant suffering permanent psychiatric impairment arising from both motor accidents - referral to Medical Assessor - Review Panel revoked certificates of Medical Assessor & issued its own certificates - error of law on the face of the record - orders sought by GIO & NRMA should be made.

[GIO](#) (I)



**Oliver Markisic v Attorney General for New South Wales; Dragan Markisic v Attorney General for New South Wales [2011] NSWSC 776**

Supreme Court of New South Wales

Hoeben J

Applications by Attorney-General for summary dismissal of summonses brought by litigants in person - refusal by Magistrate to sign Court Attendance Notices directed to Supreme Court Judges - no basis for exercise of prerogative relief disclosed - summonses dismissed on basis no prospects of success - Australian case law examined including as to certiorari & distinguishing jurisdictional & non-jurisdictional errors.

[Oliver \(I\)](#)

**KF By Her Tutor RF v Sydney Children's Hospital Specialty Network (known as the Children's Hospital Westmead) & Anor [2011] NSWSC 874**

Supreme Court of New South Wales

Johnson J

Medical negligence claim - reconvened breach of duty experts' conference to take place - application by plaintiff's legal representatives for leave to discuss breach issues with plaintiff's experts before reconvened meeting & provision of final joint breach experts' report - relevant discretionary factors - leave refused.

[KF By Her \(I\)](#)

[KF By Her](#) - decision 10 May 2011: see 'Benchmark' I & IBC Tuesday 24 May 2011 - plaintiff's application for appointment of facilitator to attend reconvened breach of duty experts' conference - application by plaintiff for leave to rely on a report from paediatric endocrinologist for purposes of issue of causation - applications granted;

[KF By Her](#) - decision 10 August 2010: see 'Benchmark' I & IBC Friday 13 August 2010 - application for medical examination of plaintiff - claim for damages against hospital & paediatrician - alleged negligence in failing to diagnose & treat hypoglycaemia & hyperinsulinism in infancy - second defendant seeking order that plaintiff undergo genetic testing - applicable principles on interlocutory application for medical examination - order for medical examination made.

**Colyer Fehr Tallow Pty Ltd v KNZ Australia Pty Ltd [2011] NSWSC 457**

Supreme Court of New South Wales

Ball J

Contracts - fiduciary duties - agency - plaintiff alleging wrongful repudiation of oral contract by which plaintiff agreed to buy tallow in Australia on behalf of defendant & to arrange for it to be delivered to storage facilities owned or leased by defendant - whether two weeks' notice of





termination by defendant reasonable - tort - conversion claim not established - claim & cross-claim dismissed - extensive consideration of United Kingdom & Australian text & case law.

[Colyer](#) (I, B)

## **Thackray & Ors v Gunns Plantations Limited & Ors [2011] VSC 380**

Supreme Court of Victoria

Davies J

Receivers - application by receivers to establish their entitlement to be indemnified out of scheme property of ten managed investment schemes, secured by equitable lien upon the lienable property, for their remuneration for work performed, & expenses reasonably incurred, in taking steps for the care, protection, preservation & realisation of the assets & property of the 1997 to 2006 schemes - "salvage" principle - equitable allowance principle in Re Berkeley Applegate (Investment Consultants) Ltd (No. 1) (1989) Ch. 32 applied - *prima facie* claim for an indemnity with respect to the remuneration, costs and expenses referable to each scheme established

[Thackray](#) (B)

[Re Universal](#) - decision High Court of Australia 14 February 1933

## **Shaw v Menzies & Anor [2011] QCA 197**

Court of Appeal of Queensland

White JA, Wilson AJA & Lyons J

Personal injuries - motor accident - Transport Operations (Road Use Management - Road Rules) Regulation 1999 (Qld) (TORUM Regulation) - s59 *Civil Liability Act* 2003 (Qld) - appeal on liability and quantum by plaintiff/motorcyclist injured in collision with semi-trailer driven by first respondent - apportionment of liability 75:25% - whether primary judge had erred in failing to award damages for gratuitous services - appeal allowed - judgment to be entered for appellant/plaintiff against respondent/second defendant in sum of \$704,418.04.

[Shaw](#) (I)

[Shaw](#) - decision 21 October 2010: see 'Benchmark' I & IBC Monday 25 October 2010 - apportionment of liability - first defendant was driving a truck that had a wide load & occupied two lanes when attempting left-hand turn - plaintiff motorcycle rider sought to overtake turning truck on left - whether plaintiff should have given way to first defendant - whether truck's indicator lights were visible - whether first defendant exercised sufficient care in making the turn - plaintiff's responsibility for accident assessed at seventy percent; first defendant thirty percent responsible - assessment of damages.



## Mooloolaba Slipways Pty Ltd & Anor v Cashlaw Pty Ltd & Ors [2011] QSC 236

Supreme Court of Queensland

Atkinson J

Negligence - plaintiffs claiming negligent misrepresentation causing economic loss - s82 *Trade Practices Act 1974* (Cth) - misleading & deceptive conduct - representations - slipway consisting of large industrial building with two jetties jutting out into Mooloolah river - first plaintiff entered into sublease with first defendant for slipway premises - defendants made representations that they would repair and make various improvements to the slipway premises - in reliance on those representations plaintiffs induced to enter into the lease, occupy the premises and commence business - plaintiffs incurred expenditure in performing capital works to site & sustained losses in operating slipway & engineering business - expert evidence - occupational health & safety standards - *Land Act 1994* (Qld) - s129 *Property Law Act 1974* (Qld) - in the judgment, reasons given for refusal to allow further amendment of Defence during trial - proportionate liability provisions of Part VIA *Trade Practices Act* & Chapter 2 Part 2 *Civil Liability Act 2003* (Qld) - plaintiffs entitled to recover their losses in pursuing their reasonable attempts to mitigate their loss - defendants alleging in their counterclaim that plaintiff had failed to remove certain of its fixtures, fittings and chattels or did so in a way that caused damage to the premises - defendants to pay first plaintiff the sum of \$704,656 less rent & outgoings owing to first defendant by first plaintiff, together with interest at five per cent per annum on net amount of \$637,406 less outstanding rent & outgoings - defendants to pay second plaintiff sum of \$1,081,264 - extensive consideration of Australian case law.

[Mooloolaba](#) (I, C)

## **In the District Court of New South Wales ...**

### DJE Building Services Pty Ltd v Insurance Australia Ltd [2011] NSWDC 95

District Court of New South Wales

Murrell SC DCJ

s7(2)(b) *Home Building Act 1989* (NSW) - statutory warranties - building services contracts - progress claims - fire at insured property damaged granny flat - insurer had accepted liability & arranged for preparation of a scope of works - builder entitled to summary judgment - "arrangement."

[DJE Building](#) (I, C)



**Pastrovic & Co Pty Ltd v Farrington [2011] NSWDC 94**

District Court of New South Wales

Johnstone DCJ

*Home Building Act 1989* (NSW) - proportionate liability - defendant the owner of house constructed by plaintiff builder - heavy rain - slumping of soil into rear of premises - appeal in relation to decision of Consumer Trader & Tenancy Tribunal in which Tribunal had found non-compliance with statutory warranties under Home Building Act & negligence in construction of retaining walls - Tribunal bound to consider builder's defence under apportionment provisions of *Civil Liability Act 2002* (NSW) - appeal partly allowed.

[Pastrovic](#) (I, C)

[Farrington](#) - decision Consumer Trader & Tenancy Tribunal 29 April 2010 - s35 *Civil Liability Act 2002* (NSW) - council, developer & possibly landscaper engaged by developer - no notification of concurrent wrongdoer pursuant to requirements of the Act.

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