



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Personal Injuries – slip & fall incident – defendant's appeal against findings of apportionment and Non-Economic Loss. See *Bon Appetit Family Restaurant v Mongey* (I)

Charitable Trusts – application for “cy pres” orders concerning appropriate distribution of Trust Funds where the events giving rise to the purpose of the Trust will no longer occur. See *Grant v Attorney-General of NSW* (B)

Bankruptcy – application by trustee in bankruptcy for possession of real estate dismissed. See *Robinson v Nishtom P/L & Anor* (B)

Suitors' Fund Act (NSW) – whether certificate available to a party aggrieved by a review of a decision of a Registrar. Held: Yes. See *Tisdale v Ballanday* (I)

Expert Evidence - whether report of expert valuer admissible as expert evidence – where expert had not acknowledged the Expert Code of Conduct. See *Tim Barr P/L v Narui Gold Coast P/L* (I, B, C)

Expert Evidence – whether 87 financial market analysis reports admissible in circumstances where not all of them had been put to previous expert witness whose evidence had already been given at trial. See *ASIC v Macdonald (No. 2)* (B)

Real Property (NSW) – appeal against decision of Valuer-General regarding whether real property ought be categorised as one or two parcels of land. See *Triguboff v Valuer-General* (B, C)

Judgments & Orders (Vic) – application to set aside Consent Judgment on ground it was procured by fraud or unconscionable conduct. See *Paolacci v Capital Finance Australia Limited* (I, B, C)

Practice & Procedure (Qld) – application by plaintiff to file Statement of Claim in action commenced in 2004. Defendants’ application to dismiss proceedings for want of prosecution. Held: proceedings dismissed. See *Althaus & Anor v Australia Meat Holdings P/L* (I, B, C)

Trusts – determination of repurchase value of units – validity of determinations of valuers – whether trustees in breach of trust. See *Wilden P/L v Green* (B)

From the USA:

Defamation – appeal by plaintiff alleging the sullyng of his reputation by reason of a chapter in a book published by the defendant entitled “*Freakonomics*”. See *Lott v Levitt* (I)



Wednesday 18 February 2009

Bon Appetit Family Restaurant Pty Ltd v Patricia Mongey [2009] NSWCA 14

Court of Appeal of New South Wales

Beazley, Tobias & Basten JJA

Personal injuries – respondent employed by Mount Pritchard & District Community Club Ltd as beverage attendant – she slipped and fell on greasy floor while carrying garbage bin – she was awarded damages in District Court – appeal on two grounds: apportionment of responsibility between plaintiff's employer & appellant Restaurant - second challenge to primary judge's assessment of the severity of plaintiff's injuries, for purposes of determining non-economic loss, at 30% of most extreme case - contractual arrangement between parties as to cleaning responsibilities – damages – reduction of damages recoverable from third party tortfeasor – s151Z(2) *Workers Compensation Act 1987* (NSW) – appeal dismissed – at paragraphs 2 & 3 of judgment of Tobias JA :

“..... In my view the appellant's challenges to the findings of the primary judge were untenable..... [3] Insurers should be put on notice that there is a real risk that these untenable appeals will be visited with an order for indemnity costs in favour of the successful respondent. Furthermore, I draw the attention of the legal advisers of insurers to the provisions of Division 10 of Part 3.2 of the *Legal Profession Act 2004* &, in particular, ss345 & 348. I note that s345(3) provides that the obligations under Division 10 are to apply to a legal practitioner despite any obligation that practitioner may have to act in accordance with the instructions or wishes of his or her client. That Division extends to legal services in connection with proceedings by way of appeal in this Court (see s344(1)).”

[Bon Appetit Family Restaurant](#) (I)

Grant v Attorney General of NSW [2009] NSWSC 51

Supreme Court of New South Wales

Bryson AJ

Charities -- trustees of Holroyd FESPIC Fund seeking order for cy prés scheme to be settled to administer capital & income of the Fund - Far East & South Pacific Games for the Disabled (FESPIC Games) - fund collected from Government Grants & public subscription for Holroyd FESPIC Games 1977 FESPIC Games no longer to be held – last held 2006 - activities have passed to Asian Paralympic committee - scheme proposed is to direct the trustees to distribute the remaining funds equally between the NSW Wheelchair Sporting Association Incorporated & the Blind Sporting Association NSW Incorporated - orders made adopting the scheme & requiring the trustees to report to the Court & Attorney General when they have carried out the scheme.

[Grant](#) (B)



Robinson v Nishtom Pty Limited & Anor [2009] NSWSC 36

Supreme Court of New South Wales

Hall J

Vendor finance - contract for sale of land at Salamander Bay – loan agreement - mortgage – plaintiff trustee of bankrupt estate - claim for order for possession dismissed.

[Robinson](#) (B)

Tisdale v Ballanday [2009] NSWSC 56

Supreme Court of New South Wales

Macready AsJ

Costs - review of Registrars' decisions - s6 *Suitors' Fund Act* 1951, - "appeal" - "decision of a court" - "question of law" – held that s6 does apply to a review of a Registrars' decisions – case law considered.

[Tisdale](#) (I)

[Burringbar Real Estate Centre](#)– decision considered in Tisdale case above.

Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2009] NSWSC 49

Supreme Court of New South Wales

Barrett J

Experts reports - admissibility – Uniform Civil Procedure Rules 2005 (NSW) - valuation of land at Kingscliff – report by registered valuer - not commissioned or obtained for use in proceedings - no Schedule 7 acknowledgment - not served as required by Rules - whether admissible under *Evidence Act* 1995 (NSW)– answer 'yes,' but need for order to promote purpose of Rules - pursuant to s136(a) *Evidence Act* 1995 (NSW), the use to be made of report to be limited to proof of state of mind of second plaintiff as to value of the land the subject of the report.

[Tim Barr](#) (I, B, C)

Australian Securities & Investments Commission v Macdonald (No 10) [2009] NSWSC 53

Supreme Court of New South Wales

Gzell J

Application to tender eighty seven financial market analysts' reports - reports not put to expert merchant banker called by ASIC who opined on sixty nine other reports & gave his evidence in October 2008 - tender rejected except for reports relevant to other issue with limitation of use to that issue under s136 *Evidence Act* 1995 (NSW.)

[Australian Securities and Investments Commission](#) (C)

**Triguboff v Valuer General [2009] NSWLEC 9**

Land & Environment Court of New South Wales

Biscoe J

Valuation of Land Act 1916 (NSW) – appeal - whether land on one title but formerly on two titles comprises & should be valued as one parcel or two - meaning of "parcel" - whether unity of title, physical unity & unity of use & occupation - appeal allowed - order that Valuer General's decisions be revoked – matter to be remitted to Valuer General for determination in accordance with Court's decision.

[Triguboff](#) (B, C)**Paolacci v Capital Finance Australia Limited [2009] VSC 31**

Supreme Court of Victoria

Forrest J

Application to set aside consent judgment on two grounds: that fresh evidence had emerged; that the consent judgment had been procured by fraud or unconscionable conduct - rental agreement for provision of photocopier – guarantee – held that neither ground made out - "consent" – consideration of authority as to setting aside a contract on basis of unilateral mistake — summons dismissed – an interesting review of case law.

[Paolacci](#) (I, B, C)**Althaus & Anor v Australia Meat Holdings Pty Ltd & Anor [2009] QSC 005**

Supreme Court of Queensland

Chesterman JA

Claim for misuse of confidential information – food processing – want of prosecution – plaintiffs seeking leave to file statement of claim in action commenced in 2004 & which had not progressed to point where Defence required - action dismissed – thorough examination of pleadings & analysis of case law as to what is required when pleading claim for misuse of confidential information.

[Althaus](#) (I, B, C)**Wilden Pty Ltd v Green [2009] WASCA 38**

Court of Appeal of Western Australia

McLure & Pullin JJA; Newnes AJA

Trusts - determination of repurchase value of units - appointment of independent valuers - Balga Bazaar Shopping Centre - whether valuers' repurchase determinations valid - if repurchase determinations invalid, whether trustees in breach of trust – discretion to delegate - options – duty of disclosure - appeal allowed – detailed consideration of case law from UK & Australia.

[Wilden](#)- part one of judgment (B)[Wilden](#)-part two of judgment



From the United States of America...

John R. Lott Jr v Steven D. Levitt

United States Court of Appeals for the Seventh Circuit

Ripple, Evans & Sykes, Circuit Judges

Defamation – appeal – primary judge had dismissed claim – appellant claiming his reputation sullied by respondent's book "Freakonomics" – paragraph in a chapter as to drop in crime rates in the 1990s – primary judge's decision affirmed.

[John R. Lott](#) (I)

Key: (I) Insurance, (B) Banking, (C) Construction