



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Building & Construction Industry Security of Payment Act 1999 (NSW) – Construction Risks Insurance Policy – Proper approach to construction of an insurance policy – Whether policy contained a construction contract – Held: contract did not – Appeal dismissed – See *Thiess Pty Limited v Zurich Specialties London Limited* (I, C)

Torts – Trespass – Allegation of deprivation of water source – Held: no trespass – Appeal dismissed – See *Weller v Bennett* (I)

Building & Construction Industry Security of Payment Act 1999 (NSW) – Claim that adjudicator's determination was invalid – Issue as to service of notice of adjudicator's acceptance – Defendant had benefit of statutory presumption of delivery which Plaintiff had not displaced – Adjudication valid – See *Randhuva v Serrato* (I, B)

Traffic law – Speed camera – Prosecution only obliged to prove that Defendant had exceeded speed limit at particular place – Held: Magistrate erred in holding that prosecution must prove offence occurred in a school zone or on a school day – Matter remitted for Magistrate's further consideration *RTA of NSW v Lian* (I)

Supreme Court Civil Rules 2006 (SA) – Withdrawal of offer of settlement – Notice of withdrawal of offer of settlement becomes effective when Notice filed in Court – Failure to serve Notice of Withdrawal of offer amounts to a procedural irregularity but does not of itself make the Notice ineffective – See *Rule Chambers Pty Limited v Badge Constructions (SA) Pty Limited* (I, B)

Trade Practices Act 1974 (Cth) – Representations about clearing approvals – Causation – Expert evidence – Extensive consideration of case law – See *Grainger v Williams* (I)



Application to transfer proceedings – Opes Prime collapse – similar proceedings in Victoria
– Proceedings transferred – See *Mortimer v Opes Prime Stockbroking Limited* (B)

Security Industry Act 1997 (NSW) – Refusal of application for security licence – Access to confidential material – Appeal allowed – Extensive consideration of text and case law – See *Commissioner of Police NSW v Gray* (I, B, C)



Wednesday 18 March 2009

Mortimer v Opes Prime Stockbroking Limited (Administrators Appointed) (in Liquidation) [2009] FCA 227

Federal Court of Australia

McKerracher J (in Perth)

Application to transfer proceedings - proceedings arising from collapse of Opes Prime Group Companies - similar proceedings in Victoria District Registry - whether proceedings should be transferred from Western Australia District Registry to Victoria District Registry - answer 'yes.'

[Mortimer](#)

Thiess Pty Ltd & Anor v Zurich Specialties London Ltd & Anor [2009] NSWCA 47

Court of Appeal of New South Wales

Allsop P; Macfarlan JA; Sackville AJA

Building & Construction Industry Security of Payment Act 1999 (NSW) - Construction Risks Insurance Policy - proper approach to construction of an insurance policy - for decision appealed from, see 'Benchmark' Monday 29 September 2008 & link below - whether policy issued by respondents & others to appellants in relation to construction of Lane Cove Tunnel contained a "construction contract" within the meaning of *Building & Construction Industry Security of Payment Act 1999* (NSW) - primary judge had rejected appellants' submission that policy contained a construction contract - whether obligation to take "reasonable precautions" simply a condition precedent to insurer's liability or whether it also gave rise to an enforceable promise to take those precautions - appeal dismissed.

[Thiess](#)

[Zurich](#) - decision 25 September 2008 - collapse of portion of Lane Cove Tunnel in 2005 - provision in insurance policy requiring insured to take reasonable precautions to safeguard subject matter insured from loss or damage - "recognised financial institutions" - held that reasonable precautions clause not a construction contract between plaintiffs & defendants; the Act did not apply to the policy.

Weller v Bennett [2009] NSWCA 52

Court of Appeal of New South Wales

Beazley & Ipp JJA; Sackville AJA

Torts - trespass - appellants' action in District Court for trespass & nuisance had failed - work on dam - allegation of deprivation of water source - whether findings of trial Judge that there was no trespass should be set aside - appeal dismissed.

[Weller](#)

**Commissioner of Police New South Wales v Gray [2009] NSWCA 49**

Court of Appeal of New South Wales

Giles, Tobias & McColl JJA

Particulars - s29(3) *Security Industry Act* 1997 (NSW) - refusal of application for security licence – confidential material – for decision 9 May 2008 see 'Benchmark' Wednesday 14 May 2008 & link below – challenge to dismissal of appeal from decision of Administrative Decisions Tribunal that appellant provide respondent with particulars as to why application for security licence refused – appeal allowed – extensive consideration of text & case law.

[Commissioner of Police New South Wales](#)

[Commissioner of Police New South Wales](#)– decision 9 May 2008 - particulars – disclosure of confidential information - application for grant of security license had been refused on grounds first defendant not fit & proper person & that grant of licence would be contrary to public interest - *Security Industry Act* 1997 (NSW) - *Security Industry Amendment Act* 2002 (NSW) - *Security Industry Amendment Act* 2005 (NSW) - statutory construction – held that plaintiff had failed to discharge onus borne by it to demonstrate a relevant & material error that justified disturbing decision of Judicial Member of Administrative Decisions Tribunal – Judicial Member had ordered particulars be given of any alleged conduct that Commissioner said supported contention first defendant not a fit and proper person to hold security licence.

Patrick John Ford by his tutor Beatrice Ann Watkinson v Perpetual Trustees Victoria Limited [2009] NSWCA 43

Court of Appeal of New South Wales

Allsop P; Young CJ in Equity; Sackville AJA

Application by respondent to an appeal to file cross-appeal out of time – doctrine of non est factum - leave granted to file cross appeal.

[Patrick John Ford](#)

[Perpetual Trustees Victoria](#)– decision 1 February 2008 - mortgage – claim for possession of land – mortgagor illiterate & intellectually disabled – whether capable of understanding transaction – non est factum – *Contracts Review Act* 1980 (NSW) – whether contract unjust – unconscionable bargain – agency – whether mortgage broker agent of mortgagee – unjust enrichment – judgment for plaintiff - restitution ordered.

Kittu Randhawa v Monica Benavides Serrato [2009] NSWSC 90

Supreme Court of New South Wales

Hammerschlag J

Building & Construction Industry Security of Payment Act 1999 (NSW) – claim that adjudicator's determination invalid – issue as to service of notice of adjudicator's acceptance - distinction between non-delivery & not coming to attention of recipient – defendant has benefit of statutory presumption of delivery which plaintiff had not displaced – adjudication valid.

[Kittu Randhawa](#)

**The Roads and Traffic Authority of NSW v Lian [2009] NSWSC 146**

Supreme Court of New South Wales

Price J

Traffic law – speed camera - what must be established by the prosecution when it alleges that an offence of speeding was committed whilst the driver was in a school zone – driver had testified it was his belief it was a school holiday - held that magistrate had erred in determining prosecution was required to prove that the offence occurred in a school zone or on a school day - prosecution was obliged to prove simply that defendant had exceeded speed limit that applied to the particular length of road where the offence was allegedly committed - appeal allowed - whether the offence was committed under mistake of fact was a matter for magistrate's further consideration.

[The Roads and Traffic Authority of NSW](#)**Demlakian Engineers Pty Ltd v Priority Plus Capital Pty Ltd [2009] NSWSC 155**

Supreme Court of New South Wales

Barrett J

ss459G & 459H(1)(a) *Corporations Act* 2001 (Cth), - statutory demand - application for order setting aside - whether genuine dispute as to existence of debt – statutory demand set aside.

[Demlakian](#)**Donglyn trading P/L & Ors v Mannerling Ltd [2009] QSC 52**

Supreme Court of Queensland

Douglas J

Application to terminate administration - conduct of administrator – use of proxies at creditors' meeting – alleged delay in pursuing administration – alleged failure to investigate actions of former directors & dealings in associated company – application dismissed.

[Donglyn](#)**Rule Chambers Pty Ltd v Badge Constructions (SA) Pty Ltd [2009] SASC 70**

Full Court of the Supreme Court of South Australia

Duggan, Bleby & White JJ

Appeal from decision of a Master that a notice of withdrawal of an offer of settlement filed pursuant to r187 of the Supreme Court Civil Rules 2006 does not become effective until served on the opposing party - whether notice of withdrawal of offer of settlement effective at the time that it is filed in Court or at the time it is served on an opposing party – whether, in the circumstances of this case, the party who filed, but omitted to serve, a notice of withdrawal of offer should be estopped from relying on the notice – held that a notice of withdrawal of offer of settlement becomes effective at the time the notice is filed in Court - failure to serve such a notice amounts to a procedural irregularity, but does not of itself make the notice ineffective – in the circumstances of the case, insufficient grounds existed to found an estoppel – appeal allowed – order of the Master set aside.

[Rule Chambers](#)

**Grainger v Williams [2009] WASCA 60**

Court of Appeal of Western Australia

Martin CJ; Wheeler & McLure JJA

Trade Practices Act 1974 (Cth) – contract for sale & lease of farming land - representations about clearing approvals - *Soil & Conservation Act 1945 (WA)* - whether multiple statements about an issue form a single representation - causation – legal advice – expert evidence – quantum of damages – appeal allowed in part – extensive consideration of case law.

[Grainger](#) – part one of judgment[Grainger](#) – part 2 of judgment[Wesfarmers Dalgety](#)– decision 23 December 2005**From the District Court of Queensland...****The Architects (Aus) Pty Ltd Architects Australia v Bethany Brisbane International Church Inc [2009] QDC 56**

District Court of Queensland

Searles DCJ

Agreement for payment of architect fees - expert evidence as to calculation of amount owed - judgment for plaintiff for \$71,500 plus interest of \$11,812, a total of \$83,312 – defendant to pay plaintiff's costs on an indemnity basis from commencement of proceedings to judgment.

[The Architects](#)**Brought to mind by the very recent gathering of Royal Australian Navy ships in Sydney Harbour**

Some stirring lines about an old warship being retired - in this case an English warship, but perhaps the sentiments expressed are of more universal application. This was a ship which played a distinguished role in Nelson's defeat over the forces of Napoleon at the Battle of Trafalgar in 1805; a ship that remained in service until 1838 when it was towed to East London to be broken up for scrap.

The poem, by Sir Henry Newbolt (1862-1938), barrister & poet, was first published in his collection 'Admirals All & Other Verses' in 1897. J.M.W. Turner's famous painting was first exhibited in 1839.

From 'The Fighting Téméraire'

..... There's a far bell ringing
At the setting of the sun,
And a phantom voice is singing
Of the great days done.



There's a far bell ringing,
And a phantom voice is singing
Of renown for ever clinging
To the great days done.

*Now the sunset breezes shiver,
Téméraire! Téméraire!
And she's fading down the river,
Téméraire! Téméraire!
Now the sunset's breezes shiver,
And she's fading down the river,
But in England's song for ever
She's the Fighting Téméraire.*

[Poetry X » Poetry Archives » Henry Newbolt » "The Fighting Temeraire"](#)

[The Fighting Téméraire](#) – the painting

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