



## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Today's Cases

**Costs** – *Bullock* order – *Sanderson* order – Whether reasonable & proper for Plaintiff to have sued successful Defendant – Joinder of successful Defendant by Plaintiff at a time when the Defendant was already a Cross-Defendant – See *ACQ v Cook (No. 2)*; *Aircair Moree v Cook (No. 2)*; *Cook v Country Energy (No. 2)*; *Country Energy v Cook (No. 2)* (I, C)

**Personal injury** – Failure of balcony structure - Application by Defendant for separate hearing on quantum after determination of all other issues – Related proceedings by Plaintiff's children for psychological injuries – See *Ford v Greer* (I, C)

**Personal injuries** – Motor vehicle accident – Contributory negligence – Liability apportioned 10% to First Defendant and 90% to Plaintiff – See *Clark v Bellert & Allianz Australia Insurance Limited* (I)

**Tracing** – Winding up unregistered managed investment scheme – Right to interest following discharge of mortgage – Whether interest should be calculated at rate actually accrued on deposit or at rate specified in mortgage – See *ASIC, in the matter of GDK Financial Solutions (in liq) v GDK Financial Solutions (in liq)* (B, C)

**Farm Debt Mediation Act 1994 (NSW)** – *Contracts Review Act 1980* (NSW) – Possession and mortgagee sale – Detailed consideration of the *Farm Debt Mediation Act* and applicable case law – See *Lawloan Mortgages Pty Ltd v Young* (B)

**Application to set aside statutory demand** – Misdescription of name of creditor – Proceedings dismissed – Thorough consideration of case law – See *Oakland v J P Morgan* (B)

**Qualification and removal of liquidators** – Whether administrators lack[ed] independence – detail[ed] consideration of text & case law – See *Flynn v Theobald* (B, C)



**Property Agents & Motor Dealers Act 2000 (Qld)** - Estoppel in *pais* – Matters against which estoppel will not prevail – Statutory provisions – *Sultana Investments v Cellcom* (C)

... & from New Zealand

**Statutory insurance scheme** – Statutory construction – Whether damaged access way not ‘residential land’ for the purpose of the scheme – See *Earthquake Commission v Winch* (I)

## Wednesday 19 November 2008

### Macquarie Media Holdings Ltd v Australian Communications and Media Authority [2008] FCA 1711

Federal Court of Australia

Moore J (in Sydney)

*Broadcasting Services Act* 1992 (Cth) - interests in two television licences held by entities associated with Macquarie Group Ltd - broadcasting industry regulator Australian Communications & Media Authority took view provisions of the *Act* did not allow these interests to be held as they presently are – challenge to that view by applicants in these proceedings brought under s39B *Judiciary Act* 1903 (Cth) – ‘upstream controllers,’ ‘upstream holders’ - construction of s78A *Broadcasting Services Act* 1992 (Cth) advanced by respondent accepted; construction advanced by applicants rejected - application dismissed. (B)

[Macquarie Media Holdings](#)

### Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) (No 5) [2008] FCA 1700

Federal Court of Australia

Finkelstein J (in Melbourne)

Discharge of mortgage prior to tender of principal amount – amount due retained in separate bank account – the right to trace - winding up unregistered managed investment scheme known as Mews Retirement Village – principal asset of scheme land in Perth - right to interest following discharge of mortgage – whether interest should be calculated at rate actually accrued on deposit or at rate specified in mortgage. (B, C)

[Australian Securities and Investments Commission](#)



**ACQ v Cook (No 2); Aircair Moree v Cook (No 2); Cook v Country Energy (No 2); Country Energy v Cook (No 2) [2008] NSWCA 306**

Court of Appeal of New South Wales

Beazley, Giles and Campbell JJA

Costs – Bullock order – Sanderson order – personal injuries – for Court of Appeal decision 16 July 2008 & District Court decision 14 May 2007, see ‘Benchmark’ I,C & IBC Friday 18 July, 2008 & links below – whether reasonable & proper for plaintiff to have sued successful defendant – joinder of successful defendant by plaintiff occurred at a time when it was already joined to the proceedings by way of cross-claim by parties against whom costs order being sought – where those parties denied liability – where those parties were sued under statute while successful defendant was sued in tort. (I, C) [ACQ](#)

&  
[ACQ v Cook; Aircair Moree v Cook; Cook v Country Energy; Country Energy v Cook \[2008\] NSWCA 161](#) - decision 16 July, 2008 - *Damage by Aircraft Act* – Second Reading Speech - linesman employed by power company injured by electric shock from power line dislodged from supporting pole when struck by aircraft – whether duty of care owed by employer – whether duty of care owed by pilot of aircraft – construction of expression “caused by” in s10(1)(d) of DAA – whether voluntary assumption of risk available as defence to action for damages under s11 DAA - whether contributory negligence available as complete defence or defence to action for damages under s11 – whether circumstances falling within s10(1) of *Act* amount to a “wrong” within s8(a) *Law Reform (Miscellaneous Provisions) Act 1965* – whether s5A, s5R, s5S *Civil Liability Act 2002* (NSW) applicable to proceedings - whether owner & operator of aircraft can recover contribution from employer of linesman towards their liability to pay damages – s5(1)(c) *Law Reform (Miscellaneous Provisions) Act 1946* – whether provisions as to contributory negligence under State legislation applicable by State court exercising federal jurisdiction – comprehensive consideration of legislation & case law in judgment of Campbell JA.

&  
[Cook v Aircair Moree Pty Ltd \[2007\] NSWDC 164](#) – District Court – 14 May, 2007

&  
*Damage by Aircraft Act 1999 (Cth)* - ss. [3 10 11](#)

**Lawloan Mortgages Pty Ltd v Young [2008] NSWSC 1180**

Supreme Court of New South Wales

Rothman J

*Farm Debt Mediation Act 1994* (NSW) – *Contracts Review Act 1980* (NSW) – rural properties - possession obtained & mortgagee sale effected – residual issues for determination - *Farm Debt Mediation Act 1994* (NSW) did not apply to impose conditions precedent to enforcement of loan - terms of mortgage & circumstances of its making or circumstances of the contract did not render contract or any provision of it unfair – detailed consideration of *Farm Debt Mediation Act 1974* (NSW) & case law. (B)

[Lawloan Mortgages](#)

**Oakland v JP Morgan [2008] NSWSC 1079**

Supreme Court of New South Wales

Macready AsJ

Application to set aside statutory demand under s459G *Corporations Act 2001* (Cth) - amount of \$5,362,622.73 - misdescription of name of creditor in demand & affidavit verifying - proceedings dismissed – thorough consideration of case law. (B) [Oakland](#)



**Ford v Greer [2008] NSWSC 1181**

Supreme Court of New South Wales

Harrison AsJ

Personal injuries – building inspection report - application by defendant for order that quantification of any damages payable to plaintiff by defendant be determined separately from & after the determination of all the other questions in the proceedings - plaintiff permanent T4 paraplegic, after falling from balcony when balcony structure failed – related proceedings instituted by plaintiff's three children against defendant alleging psychological injuries – defendant's application dismissed – case law considered as to separate determination. (I, C)

[Ford](#)

**Sultana Investments P/L v Cellcom P/L [2008] QCA 357**

Court of Appeal of Queensland

McMurdo P, Holmes JA & White AJA

Estoppel – estoppel in pais – matters against which estoppel does not prevail – statutory provisions – appeal from District Court – 'The Mews' units built on land owned by appellant at Bowen Hill in Brisbane - respondent operated a Sydney based finance broking & planning business - respondent had brought claim to enforce payment of consultancy fees for successful introduction of buyers for appellant's apartment development – primary judge had dismissed appellant's counter-claim for monies already paid as consultancy fees to respondent – held that respondent successful in its construction of Agreement but caught by s140 *Property Agents & Motor Dealers Act 2000* (Qld), & could not raise an estoppel against appellant – appeal allowed - judgment in favour of respondent in District Court set aside and in lieu respondent's claim to be dismissed – judgment for appellant on its counterclaim – detailed consideration of case law from UK & Australia. (C)

[Sultana](#)

**Clark v Bellert & Allianz Australia Insurance Limited [2008] QSC 276**

Supreme Court of Queensland

Martin J

Personal injuries – motor accident – apportionment of negligence – plaintiff cyclist then aged twenty-five, pulled out from behind cane truck at intersection – first defendant driving in opposite direction - plaintiff in receipt of disability pension prior to accident – period of time for which past economic loss should be allowed - plaintiff was suffering epileptic seizures as a result of the accident – level of care & supervision required - liability for accident 10% to first defendant & 90% to plaintiff - judgment for plaintiff in sum of \$57,254.47. (I)

[Clark](#)



## **Flynn v Theobald [2008] WASC 263**

Supreme Court of Western Australia

Beech J

*Corporations Act* 2001 (Cth) Part 5.3A, s447A – administrators - qualification & removal of liquidators - company in business of designing & installing kitchens - company does not itself manufacture kitchens but orders materials, generally, from China – Australian Law Reform Commission General Insolvency Inquiry Report 1988 -“solvent” – whether administrators lack independence – whether administrators should be replaced - application dismissed - detailed consideration of text & case law including *Bell Group Ltd (in liq) v Westpac* (No 9) [2008] WASC 239 (see link below) in an interesting decision. (B, C)

[Flyn](#)

&

[The Bell Group Ltd \(In Liq\) v Westpac Banking Corporation \(No 9\) \[2008\] WASC 239 \(28 October 2008\)](#) - Bell Group v Westpac decision 28 October, 2008

## **...& from New Zealand**

### **Earthquake Commission v Winch [2008] NZHC 1704**

High Court of New Zealand

Heath J

Heavy rainfall causing landslip in 2007 – statutory construction - statutory insurance scheme – Earthquake Commission seeking declaration that it was not obliged to pay compensation to defendants for damage to right of way over their neighbours’ property - whether right of way part of land covered by statutory insurance scheme created by *Earthquake Commission Act* 1993 – Commission seeking declaration that damaged access way not ‘residential land’ for purposes of the *Act* – at para. 16 of judgment, reference to *Deredge Pty Ltd t/as Sunny Bank Plumbing Excavations v Sinclair* (1993) 30 NSWLR 174 (in [Deredge](#), the Court of Appeal – Kirby P, Meagher and Cripps JJA - examined provisions in relation to loss of sight in the *NSW Workers Compensation Act*) - held that defendants entitled to cover under the Act. (I)

[Earthquake Commission](#)

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