



## Insurance Banking & Construction

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

#### Today's Cases

**Winding Up** – application by liquidator for Court directions concerning settlement proceeds from litigation. See *Carson, in the matter of Trollope Property Holdings P/L (in liq)* (B, C)

**Hotelier's Liability** – consideration of the scope and content of a hotelier's duty of care to patrons – whether it includes a consideration of statutory responsibilities. See *Portelli v Tabriska P/L & Ors* (I)

**Family Provision Act (NSW)** – application by daughter to preserve assets allegedly distributed by deceased father prior to his death – whether assets part of notional estate – whether Court should order injunction against parties resident in Ireland where order cannot be enforced. Held: No. See *Murphy v Buckley* (B)

**Conveyancing** – where purchaser's ability to complete sale was hindered by vendor's refusal to allow valuer engaged by purchaser to inspect and provide Valuation. See *Ferrazza v Pandher* (B)

**Practice & Procedure** – plaintiff's application for security for costs – whether "defensive proceedings" – defendants' application for additional discovery allowed. See *Public Transport Ticketing Corporation v Integrated Transit Solutions Limited & Anor* (I, B, C)

**Contracts** – whether clause in Deed was unintelligible – whether appropriate to remove and replace clause to give effect to parties' initial intentions. See *Acacia Ridge Hotel Holdings P/L & Anor v Stratis & Ors* (B, C)

**Succession** – whether intention of testatrix to distribute part of her estate to relatives included nephews and nieces of half-blood siblings. See *Public Trustee v Loney & Ors* (B)



## Friday 20 February 2009

### **Carson, in the matter of Trollope Property Holdings Pty Ltd (In Liq.) [2009] FCA 118**

Federal Court of Australia

Gordon J (in Melbourne)

*Corporations Act* 2001 (Cth) s564 - application by liquidator of company seeking directions from Court as to the proper characterisation of an amount of funds received from settlement of proceedings involving the company & Australian Taxation Office, or alternatively, an order pursuant to s564 that some or all of the Agreed Amount be distributed to National Australia Bank - Agreed Amount would not have been recovered but for funding provided by NAB - sale of land at Mulgrave - fixed & floating charge - held that NAB should be given an advantage under s564 that sees it receive in priority to all other creditors 100% of the Agreed Amount after allowing for debt & claims payable under ss556(1)(a)-(df.)

[Carson](#) (B, C)

### **Portelli v Tabriska Pty Ltd & Ors [2009] NSWCA 17**

Court of Appeal of New South Wales

Allsop P; Hodgson & Macfarlan JJA

Personal injuries - respondents to appeal were the owner & occupier of hotel at Jindabyne, the licensee of the hotel & the provider of the security services - - altercation between patrons in hotel - scuffle over a pool game near closing time - subsequent altercation between those persons in the street - for decision appealed from, see 'Benchmark' I & IBC and link below - whether, in the circumstances, a duty was owed to appellant to exercise reasonable care in some relevant respect arising from the occupation of premises, the control involved in any such occupation, any statutory responsibilities in relation to the licence or in relation to the conduct of the establishment & any assumption of responsibility - appeal dismissed.

[Portelli](#) (I)

[Portelli](#) - decision 5 December 2007 - detailed review of case law as to duty of care - verdict for defendants.

### **Murphy v Buckley [2009] NSWSC 60**

Supreme Court of New South Wales

Young CJ in Eq

Family Provision - claim of daughter against notional estate - defendants in Ireland had innocently received assets from deceased before he died - injunction sought to preserve assets - equity will not make an order where no realistic chance of enforcement against person - injunction would not be enforceable in Ireland - no connection with jurisdiction.

[Murphy](#) (B)

**Ferrazza v Pandher [2009] NSWSC 66**

Supreme Court of New South Wales

Bryson AJA

Vendor & purchaser – time for completion – two closely connected contracts – plaintiffs purchasers – one for sale of Aquarius Motel at Long Jetty, the other for sale of the restaurant business conducted there – purchaser's mortgage broker repeatedly sought vendors' agreement to inspection by valuer – found that purchasers' inability to complete was caused by inability to obtain valuation in support of application for finance – judgment for plaintiffs against first & second defendants for \$321,600.00.

[Ferrazza](#) (B)**Public Transport Ticketing Corporation v Integrated Transit Solutions Ltd & Anor [2009] NSWSC 54**

Supreme Court of New South Wales

Einstein J

Security for costs – plaintiff seeking security for costs – claim for damages for breach of contract – project agreement – ticketing system for public transport – defendants filed cross-claims – examination of restructure of second defendant – whether restructure constituted a manipulative device designed to insulate second defendant from litigation risk exposure – whether defendants' cross-claims appropriately characterised as essentially 'defensive proceedings' – only one area in respect of which it would be appropriate to order security for costs against the defendants : as to additional issues raised by the cross claim – defendants' application for additional discovery allowed – extensive consideration of case law from UK & Australia.

[Public Transport Ticketing Corporation](#) (I, B, C)**The Acacia Ridge Hotel Holdings Pty Ltd & Anor v Stratis & Ors [2009] QSC 21**

Supreme Court of Queensland

Chesterman JA

Option to purchase land – put option period – construing clause in deed – sale of land – sale of business – land deed defining defendants as grantor & first plaintiff as grantee – business deed defining third & fourth defendants as grantor & second plaintiff as grantee – option to require plaintiffs to purchase property – declarations made that delivery of put option notices was ineffectual & did not give rise to contracts between plaintiffs & defendants to purchase the property – plaintiffs entitled to return of bank guarantees provided pursuant to those deeds – defendants' claim for rectification & defendants' counter-claim dismissed – detailed examination of case law as to construing deeds.

[The Acacia Ridge Hotel Holdings](#) (B, C)

**Accused A & Ors v Callanan & Ors [2009] QSC 012**

Supreme Court of Queensland

Applegarth J

Judicial review - *Crime & Misconduct Act* 2001 (Qld) – decisions to refer to Crime & Misconduct Commission - applicants seeking judicial review – ‘public interest’ – International Covenant on Civil & Political Rights - held that applicants had established each of the grounds of judicial review relied upon by them – decisions to refer to be set aside - detailed analysis of legislation, the powers of the Commission & case law in an interesting decision.

[Accused A](#) (I, B, C)**Public Trustee v Loney & Ors. [2009] SASC 17**

Supreme Court of South Australia

Sulan J

Wills – construction – ‘issue’ – distribution per stirpes (the equal distribution of an estate among branches or ‘stocks’ of beneficiaries )- testatrix left will which provided that her entire residual estate would pass to her husband in the event he survived her for at least one calendar month - testatrix's husband pre-deceased her - clause provided that in the event of husband pre-deceasing testatrix, one half of residual estate would pass to husband's children & the other half to the testatrix's mother, brother & sisters & nephews & nieces – held that textatrix had not intended to include siblings, nephews & nieces of the half blood in testamentary gifts.

[Public Trustee](#) B)**Re Pamela Hogan Magistrate of the Magistrates Court at Perth; ex parte West Australian Newspapers Ltd & anor [2009] WASC 31**

Supreme Court of Western Australia

EM Heenan J

Orders prohibiting publication of names – press access – open justice – young children - application by newspaper publisher & television broadcaster for review order dismissed.

[Pamela Hogan](#) (I)**Von Stalheim v Anti Discrimination Tribunal & KPMG; Von Stalheim v Anti Discrimination Tribunal, H M Wood & Statewide Independent Wholesalers [2009] TASSC 6**

Supreme Court of Tasmania

Porter J

Applications for extension of time to apply to Court for order for judicial review - application by one of respondents for dismissal of applicant's claim for judicial review – applications for extension of time granted, but a number of grounds for review struck out.

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