

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Mbakwe v Sarkis - Negligent misrepresentation – financial adviser – duty of care in utterance (I,B,C)

Roads & Traffic Authority of NSW v Refrigerated Roadways Pty Ltd (No 2) - Costs – indemnity costs – power to vary costs orders (I)

Urban Traders v Paul Michael - *Building & Construction Industry Security of Payment Act 1999* (NSW) (I,B,C)

The Quadriplegic Centre Board of Management v McMurtrie - Personal injuries - failure to warn nursing assistant of incidents involving patient assaulting other staff – appeal allowed (I)

Gunns Limited v Alishah (No 2) - Privilege against self-incrimination - objection taken by defendants to answering interrogatories (I,B)

Schneider v State of New South Wales - Personal injuries - occupier's liability – workplace injury – damages - school cleaner fell into an open drainage pit left uncovered by vandals (I)

Centennial Coal Company Ltd v Xstrata Coal Pty Ltd - Contracts - sale of coal mining project – novation – “reasonable endeavours” – appeal dismissed (B,C)

BMD Major Projects Pty Ltd v Victorian Urban Development Authority - Contracts – excavation, filling & rehabilitation of quarry - “latent conditions” (C)

Phoenix International Group Pty Ltd v Resources Combined No. 2 Pty Ltd & Ors (No 2) - *Building & Construction Industry Security of Payment Act 2002* (Vic) [unamended form] - applications for summary judgment refused (C)



Summaries with links (5 minute read)

Tuesday 20 October 2009

Mbakwe v Sarkis [2009] NSWCA 330

Court of Appeal of New South Wales

Allsop P, Ipp JA & Handley AJA

Negligent misrepresentation – appellant was respondent’s financial adviser – for decision appealed from, see ‘Benchmark’ Friday 10 October 2008 & link below - duty of care in utterance – breach of duty – causation - need not be sole cause of respondent’s change of position - appeal dismissed.

[Mbakwe](#)

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[Sam George Sarkis](#) – decision 11 September 2008 - torts - negligent misstatement - defendant as financial adviser recommended plaintiff make loans to third party - plaintiff acted on advice & suffered loss - case law considered including *Esanda Finance Corporation Limited v Peat Marwick Hungerfords* (1995-1997) 188 CLR 241 – plaintiff awarded damages in sum of \$245,000 plus \$145,376 so judgment for plaintiff in sum of \$390,376 – plaintiff awarded indemnity costs from date after day on which defendant rejected second offer from plaintiff.

Roads & Traffic Authority of NSW v Refrigerated Roadways Pty Ltd (No 2) [2009] NSWCA 336

Court of Appeal of New South Wales

McCull, Campbell JJA & Sackville AJA

Costs – indemnity costs – power to vary costs orders - for Court of Appeal decision 22 September 2009, see ‘Benchmark’ I & IBC Thursday 24 September 2009 & link below – costs order in relation to trial varied.

[Roads and Traffic Authority of NSW](#)

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[Roads and Traffic Authority of NSW](#) – decision 22 September 2009 - negligence – whether breach of duty of care - fatal injury to F5 freeway user, an employee of respondent, from object dropped from an overbridge – liability of freeway authority – widow had not brought claim; respondent had made payments to widow pursuant to *Workers Compensation Act* 1987 (NSW) consisting of lump sum death benefit & continuing weekly payments - in District Court, respondent had sued RTA contending that death arose in circumstances that created a liability on part of RTA to pay damages to widow & children - in consequence, respondent contended, it was entitled, pursuant to s151Z(1)(d) *Workers Compensation Act*, to indemnity from RTA for payments of workers’ compensation made, plus interest on death benefit component of compensation – primary judge had found RTA was liable to indemnify respondent for the amount it claimed - whether duty of care of a roads authority extends to taking of reasonable care to prevent harm to motorists resulting from criminal conduct of others – s42 *Civil Liability Act* 2002 - “functions” – “general allocation” – “resources reasonably available to the authority” – s43A *Civil Liability Act* 2002 – “reasonableness” – “special statutory power” - appeal allowed – proceedings dismissed – comprehensive analysis of legislation, text & case law from Australia, U.K. & Canada.



Centennial Coal Company Ltd v Xstrata Coal Pty Ltd [2009] NSWCA 341

Court of Appeal of New South Wales

Hodgson, Tobias & Campbell JJA

Contracts - sale of coal mining project – novation – for decision appealed from, see ‘Benchmark’ B & IBC Thursday 13 August 2009 & link below - agreement that parties use reasonable endeavours to novate for benefit of purchaser rights in relation to coal loading facility – “reasonable endeavours” – appeal dismissed.

[Centennial Coal Company Ltd](#)

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[Centennial Coal Company Ltd](#) – decision 11 August 2009 - Anvil Hill Asset Sale Deed - obligation to use “all reasonable endeavours” to transfer shares & contractual rights to defendant – “best endeavours” – remedies – plaintiff seeking declaration that defendants precluded from bringing action against plaintiff for breach of provisions in deed because of limitations provisions contained in deed – inappropriate to grant negative declaration in respect of claims that have been formulated, if at all, only in general terms – plaintiff’s claim failed.

Urban Traders v Paul Michael [2009] NSWSC 1072

Supreme Court of New South Wales

McDougall J

Building & Construction Industry Security of Payment Act 1999 (NSW) – payment claim sought to reargue a number of items that had been dealt with by adjudicator in his determination of the dispute arising from earlier payment claim - whether attempt by defendant builder to engage mechanisms of the Act was an abuse of process, or otherwise liable to be restrained at suit of plaintiff owners – building at Bayview – issue estoppel - claim for loss of profits – claim for interest – claim for cost of repricing – detailed examination of legislation & Australian case law in an interesting decision.

[Urban Traders](#)



BMD Major Projects Pty Ltd v Victorian Urban Development Authority [2009] VSCA 221

Court of Appeal of Victoria

Buchanan, Nettle & Weinberg JJA

Contracts – excavation, filling & rehabilitation of quarry at Niddrie so that residential development could be built on reclaimed land – lump sum contract – Trade Practices Act 1974 (Cth) – disclaimers – for decision appealed from, see ‘Benchmark’ Tuesday 23 October 2007 & link below – estoppel – interest – costs – defendant to pay plaintiff sum of \$4,263,373.70 : paragraph 261 of judgment sets out how figure calculated.

[BMD Major Projects Pty Ltd](#)

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[BMD Major Projects Pty Ltd](#) - decision 19 October 2007 - *Trade Practices Act 1974* (Cth) – building & construction contract – claim by BMD against VicUrban” under “latent conditions” clause of a contract – also claim on grounds of unjust enrichment, breach of contractual warranties & breaches of *Trade Practices Act 1974* (Cth) & other claims – BMD’s main claim that it contracted to undertake extensive excavation, filling & rehabilitation works at former Niddrie Quarry upon expectation about physical conditions of site which differed materially from physical conditions encountered – VicUrban challenged any entitlement & maintained counterclaim for loss and damage said to arise from BMD’s failures which resulted in capping layer across site being lower than required – proceeding occupied total of thirty-six days with twenty-three witnesses – BMD maintained it encountered latent conditions which caused it to carry out additional works – requirements of notice – meaning of ‘forthwith’ – whether identification of precise location of latent condition necessary for notice – whether physical conditions differed materially from what contractor should reasonably have anticipated – objective standard – whether reasonable enquiries made – valuation for additional work at “reasonable rates” – breach of contractual warranties – allegations of misleading & deceptive conduct based in part on silence as to known inaccuracies & uncertainties to be properly raised on pleadings: see paras 136 -138 of judgment – defendant to pay to plaintiff the sum of \$2,549,850.89 on the claims under the contract plus interest.

Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd & Ors (No 2) [2009]

VSC 459

Supreme Court of Victoria

Vickery J

Building & Construction Industry Security of Payment Act 2002 (Vic) [unamended form] – Order 22 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) – three separate building projects – applications for summary judgment refused.

[Phoenix International Group Pty Ltd](#)



The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173

Court of Appeal of Western Australia

Pullin, Buss, Newnes JJA

Personal injuries - failure to warn nursing assistant of incidents involving patient assaulting other staff – for decision appealed from, see ‘Benchmark’ I & IBC Wednesday 3 December 2008 & link below - whether duty to warn - whether breach of duty - whether failure to warn caused injury – appeal allowed.

[The Quadriplegic Centre Board of Management](#)

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[2008] WADC 170 - decision 25 November 2008 - personal injuries – negligence & breach of contract alleged - liability - duty of care of employer – *Law Reform (Contributory Negligence & Tortfeasors Contribution) Act 1947* (WA) - nurse's assistant injured avoiding patient's arm movement - prior aggressive behaviour of patient - duty of employer to control resident - duty of employer to warn employee of prior aggressive behaviour of resident – causation – plaintiff's claim allowed, reduced by 20% for contributory negligence.

Gunns Limited v Alishah (No 2) [2009] TASSC 93

Supreme Court of Tasmania

Holt AsJ

Privilege against self-incrimination - objection taken by defendants to answering interrogatories - one of grounds to objection that answers might tend to incriminate them – penalty privilege – plaintiffs seeking order compelling answers to interrogatories - claim for damages due to disruption to plaintiffs' business – plaintiff alleging defendants entered plaintiffs' woodchip facility at Triabunna without permission - claim for exemplary damages – defendants' exposure to risk of prosecution for breach of *Workplace Health & Safety Act 1995* (Tas) – case law from UK & Australia considered in an interesting decision.

[Gunns Limited](#)

From the District Court of New South Wales...

Schneider v State of New South Wales [2009] NSWDC 108

District Court of New South Wales

Levy SC DCJ

Personal injuries - occupier's liability – workplace injury – school cleaner employed by contract cleaner engaged by defendant occupier – plaintiff required to walk through school playground in darkness in order to access workplace – plaintiff fell into an open drainage pit left uncovered by vandals - whether contributory negligence established – answer ‘no – damages assessed at \$1,204,371 ; after applying discount of thirty-five percent to findings made pursuant to s151Z(2) *Workers' Compensation Act 1987* (NSW) verdict for plaintiff in sum of \$782,841 – in absence of filing of memorandum of consent to unlimited jurisdiction of the Court under s51(2) *District Court Act 1973* (NSW), judgment for plaintiff entered in sum of \$750,000.

[Schneider](#)



*'And down by Kosciuszko, where the pine-clad ridges raise
Their torn & rugged battlements on high
Where the air is clear as crystal, & the white stars fairly blaze
At midnight in the cold & frosty sky'* *

On 7 July 1949, the *Snowy Mountains Hydro-Electric Power Act 1949* (Cth) was passed in Federal Parliament. On 17 October 1949, a ceremony to mark the beginning of work on the Snowy Mountains Scheme took place near the Eucumbene River. At the time, Australia's population was eight million. About 100,000 people were to work on the Scheme between 1949 & 1974, many from post-war Europe, arriving in Australia either as assisted migrants or from refugee camps in Europe.

The project involved the diversion of the waters of the Snowy River and its tributary the Eucumbene from their path to the sea by tunnels under the Great Dividing Range, thus providing electric power & additional waters for the Murray and the Murrumbidgee Rivers, the Snowy-Tumut Development diverting waters to the Murrumbidgee, and the Snowy Murray Development to the Murray.

One hundred and forty-five kilometres (90 miles) of trans-mountain tunnels were driven & eighty kilometres (50 miles) of aqueducts; sixteen major dams were constructed, and seven power stations – of these, Tumut 1 was built 366 m. below the surface, & Tumut 2 two hundred and forty-four metres underground.

[Snowy Mountains Scheme - Wikipedia, the free encyclopedia](#)

[The Snowy River](#)

**opening of the final verse of 'The Man from Snowy River' by A.B. Paterson (1890.)*