



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

ACCC v Black and White Cabs Pty Ltd - trade practices - third line forcing contravention admitted - parties agreed on penalty - agreed penalty is within the permissible range (B)

Structural Systems (Constructions) v Hansen Yuncken Pty Ltd - interlocutory injunctions (I, C)

Galea v Bagtrans Pty Ltd - negligence - rule in *Jones v Dunkel* - non-delegable duty of employer - appeal allowed (I)

Orion Lynch by his tutor Elizabeth Lynch v Sydney Ferries - costs - proceedings compromised - plaintiff who had accepted an offer for a lump sum plus costs as agreed or assessed precluded from applying for indemnity costs - r42.14 of the *Uniform Civil Procedure Rules* (I)

Shepparton Projects Pty Ltd v Cave Investments Pty Ltd - contract - construction of contract (B, C)

Dunworth v Mirvac Qld Pty Ltd - real property - trade practices - failure to establish that the alleged representations (I, B, C)

R & D Building Pty Ltd v Bank of Queensland Ltd - civil procedure - application for trial of preliminary issues - application dismissed (I, B, C)



Summaries with links (5 minute read)

Monday 20 December 2010

ACCC v Black and White Cabs Pty Ltd [2010] FCA 1399

Federal Court of Australia

Finkelstein J (in Melbourne)

Trade practices - Black and White Cabs Pty Ltd admitted it had engaged in third line forcing contrary to s47(1) of the *Trade Practices Act 1974* - it had supplied taxi network services, and the right to use taxi service licences held by Black and White Cabs taxi operators, to other taxi operators on the condition that they would acquire electronic payment services directly or indirectly from Cabcharge Australia Ltd, a company unrelated to Black and White Cabs - the question was what orders should be made - the parties suggested a pecuniary penalty of \$110,000 - the maximum penalty at the time of the contravention was \$10 million - held: when the parties agree on penalty the court's role is to determine whether the agreed penalty is within the permissible range - the Court was satisfied that \$110,000 was an appropriate penalty - further orders made to establish a training and compliance program.

[Black and White Cabs](#) (B)

Structural Systems (Constructions) v Hansen Yuncken Pty Ltd [2010] FCA 1358

Federal Court of Australia

Tracey J (in Melbourne)

Interlocutory injunctions - Hansen Yuncken, a principal contractor on a construction project, engaged Structural Systems as a sub-contractor - the contract provided that Structural Systems was to provide security for the performance of its obligations by way of two bank guarantees each in the sum of \$316,500 - after Structural Systems did its work, each party advised the other that it had claims against it under the contract - Hansen Yuncken called on the bank guarantees and was paid by the bank - Structural Systems sought urgent interlocutory relief in terms that Hansen Yuncken keep the amount in dispute in a nominated bank account - held: both parties were reputable participants in the building and construction industry, and both were in a financial position to meet their obligations to the other if necessary - the proper course was that Hansen Yuncken be required to give an undertaking of only half the amount at issue.

[Structural Systems](#) (I, C)



Galea v Bagtrans Pty Limited [2010] NSWCA 350

Court of Appeal of New South Wales

Allsop P; Hodgson, & Macfarlan JJA

Negligence - Galea was employed by a labour hire company (Adecco), and his services as a truck driver were hired out to Bagtrans - he alleged the driver's seat was faulty, and that this caused him injury when he drove over some potholes - Galea sued Bagtrans and Adecco in negligence - the trial judge gave judgment for both defendants - held: Bagtrans did breach its duty of care to Galea - the rule in *Jones v Dunkel* is one of commonsense reasoning, and its application should not be made unduly formal - an employer has a non-delegable duty to exercise reasonable care to provide employees with a safe place of work, a safe system of work, and safe plant and equipment - the employer is liable for any breach of this duty, no matter who the employer retains to perform it - liability should be apportioned 85% to Bagtrans and 15% to Adecco - appeal allowed.

[Galea \(I\)](#)

Orion Lynch by his tutor Elizabeth Lynch v Sydney Ferries [2010] NSWSC 1463

Supreme Court of New South Wales

Rein J

Costs - the plaintiff sued the defendant in tort - the plaintiff made an offer to compromise the proceedings - the defendant did not accept that offer within time, but later made the same offer to the plaintiff, which the plaintiff accepted - the plaintiff's solicitors were concerned that s338 of the *Legal Profession Act 2004* (NSW) would cap their costs at \$10,000 - they sought to avoid this by inviting the defendant to agree that capping would not apply, or, alternatively, by asking the Court to order that costs be paid on an indemnity basis - held: the plaintiff, having accepted an offer for a lump sum plus costs as agreed or assessed, was precluded from applying for indemnity costs - further: the words "obtains an order or judgment on the claim" in r42.14 of the *Uniform Civil Procedure Rules* mean an order or judgment after curial decision, not an order or judgment obtained by acceptance of an offer of compromise.

[Lynch \(I\)](#)



Shepparton Projects Pty Ltd v Cave Investments Pty Ltd [2010] VSC 504

Supreme Court of Victoria

Croft J

Contract - Shepparton Projects borrowed money from Cave Investments under two loan agreements, and two deeds of variation of the first loan agreement - the first loan was for the purpose of purchasing certain land and then subdividing it, developing it, and selling the subdivided lots - the first loan agreement was ultimately superseded by the second loan agreement - the Court was called upon to decide the proper construction of the default provisions in the second loan agreement - concerned the nature of the obligations in the case of default - held: the construction contended for by Cave Investments should be accepted - Cave Investments had been entitled to exercise its option to accelerate Shepparton Project's obligations - there should be judgment for Cave Investments for the sum outstanding plus interest.

[Shepparton Projects](#) (B, C)

Dunworth v Mirvac Old Pty Ltd [2010] QSC 472

Supreme Court of Queensland

Margaret Wilson J

Real property - trade practices - Mirvac was the developer of a staged residential complex in Brisbane - Dunworth contracted to buy an apartment in this development "off the plan" - in due course, Mirvac's solicitors notified Dunworth's solicitors that the community titles scheme had been established, and called for the completion of the contract - Dunworth refused to complete, and alleged Mirvac had engaged in misleading and deceptive conduct, concerning five alleged statements about the quality of the apartment, and particularly the height of the apartment off the ground - held: Dunworth had failed to establish that the alleged representations were made - further, the community titles scheme had been validly established - Dunworth's claim should be dismissed, and there should be an order for specific performance of the contract of sale.

[Dunworth](#) (I, B, C)

R & D Building Pty Ltd v Bank of Queensland Ltd [2010] WASC 371

Supreme Court of Western Australia

Beech J

Civil procedure - application for trial of preliminary issues - the parties were in dispute regarding the proceeds of the sale of real property - R & D Building contracted with the owner of the land to construct a house on the land - the Bank of Queensland was the registered mortgagee of the



property - the Bank exercised its power of sale over the property - R & D Building claimed that the mortgage was unenforceable to a certain extent by reason of the *Stamp Duty Act 1921 (WA)* - R & D Building applied for a trial of this issue as a preliminary issue - held: generally speaking, all issues of fact and law in an action should be determined at the one time - however, the fact that the resolution of a preliminary issue may determine the litigation is relevant - whether a separate trial of a preliminary issue will assist in leading to a settlement is also relevant - each application will turn upon the whole of the circumstances of the individual case - in this case, the trial of the entire action would not involve substantial factual issues, and would be quite short, and so there would be limited benefit to ordering a separate trial of a discrete issue - application dismissed.

[R & D Building](#) (I, B, C)

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