

Tuesday 20 December 2011

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Mercedes Holdings Pty Ltd v Waters (No 5)** - *Corporations Act 2001* (Cth) - amendment of pleadings (B)

**BAE Systems Australia Ltd v Cubic Defence New Zealand Ltd** - Contracts – determination of separate question (B)

**Australian Building & Construction Commissioner v Professional Gyprock Solution Pty Ltd** - *Fair Work Act 2009* (Cth) - *Fair Work Regulations 2009* (Cth) (C)

**Laoulach v Ibrahim** - Personal injuries – duty of care - appeal against finding against appellant/plaintiff on liability in relation to second & fourth defendant dismissed (I)

**Cardinal Project Services Pty Ltd v Hanave Pty Ltd** - *s26 Building & Construction Industry Security of Payment Act 1999* (NSW) (C)

**Sahab Holdings Pty Ltd v Registrar-General** - *s32(6) Real Property Act 1900* (NSW) – construction of grant of right of way & attendant covenants (B, C)

**Padstow Corporation Pty Ltd v Fleming (No 2)** - Guarantee & indemnity – lease (B)



**Larkden Pty Ltd -v- Lloyd Energy Systems Pty Ltd** - *Corporations Act 2001 (Cth)* - s35(1)  
*Commercial Arbitration Act 2010 (NSW)* (B)

**Nabeth Taleb v National Australia Bank Ltd** - s43A *Real Property Act 1900 (NSW)* (B)

**Lake Burrendong State Park Trust v Thompson** - Costs (I, B, C, G)

**Holden Ltd v Rundle & Ors** - *Accident Compensation Act 1985 (Vic)* - industrial deafness (I)

**Victorian WorkCover Authority v Sharma** - s85(6) *Accident Compensation Act 1985 (Vic)* (I)

**RCL Kalynda Pty Ltd & Anor v Urbex Pty Ltd & Anor** - Contracts – land development (C)

**Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd & Anor** - Contracts - repudiation  
 – relief against forfeiture in equity – appeal dismissed (C)

**Doolan v Belgravia Health and Leisure Group Pty Ltd** - Personal injuries – occupier's liability -  
*Civil Law (Wrongs) Act 2002 (ACT)* (I)

**Foreshew v Imsies & Anor** - Personal injuries - *Motor Accidents Compensation Act 1999 (NSW)* -  
 assessment of damages (I)

## Summaries with links (5 minute read)

### **Mercedes Holdings Pty Ltd v Waters (No 5) [2011] FCA 1428**

Federal Court of Australia

Perram J

s601HG(3) *Corporations Act 2001 (Cth)* – pleadings - applicants applying for leave to file amended pleadings – respondents applying to have proceedings dismissed – class action relating to collapse of the former MFS Premium Income Fund - claim against auditors - allegation of breach of statutory duty – amendment of pleadings permitted subject to certain matters - respondents' applications for summary relief dismissed – extensive consideration of case law from UK & Australia.

[Mercedes Holdings](#) (B)

[Mercedes Holdings](#) – decision 14 May 2010: see Benchmark I, B & IBC Monday 24 May 2010 - *Corporations Act 2001 (Cth)* – managed investment scheme – plaintiffs applying for leave to file a further amended application & an amended statement of claim - negligence – causation - representative action - listed property trust formerly known as MFS Premium Income Fund – plaintiffs unit holders of the Fund between January 2007 & October 2008 – allegations



of breach of duty by responsible entity for the Fund – allegations of breach of duty by officers of responsible entity and by auditors of the Fund - whether Fund members may recover compensation under s 1325(2) of the Act from officers of the former responsibility entity for breaches of civil penalty provisions – whether plaintiffs have standing to sue – derivative actions – application dismissed – detailed consideration of legislation – extensive consideration of case law from Australia, UK & NZ.

[Mercedes Holdings](#) – decision 18 March 2011: see Benchmark B & IBC Friday 25 March 2011 - ss82 & 229 *Bankruptcy Act 1966* (Cth) - provable debts – property trust - whether persistence of claim against bankrupt for breach of fiduciary duty a claim for provable debt - application to discontinue – representative proceedings – application to amend – trusts – beneficiary - standing – trustee unwilling to sue – comprehensive consideration of case law from UK, Australia & NZ.

## **BAE Systems Australia Ltd v Cubic Defence New Zealand Ltd [2011] FCA 1434**

Federal Court of Australia

Besanko J

Contracts – whether respondent had validly terminated Contract for Provision of Supplies & Support Services - separate question answered “yes”.

[BAE Systems](#) (B)

## **Australian Building & Construction Commissioner v Professional Gyprock Solution Pty Ltd [2011] FCA 1393**

Federal Court of Australia

Barker J

*Fair Work Act 2009* (Cth) - *Fair Work Regulations 2009* (Cth) – contraventions - penalty hearing - appropriateness of agreed penalty - taken as a whole the penalties proportionate to the offending conduct.

[Australian Building and Construction Commissioner](#) (C)

## **Laoulach v Ibrahim [2011] NSWCA 402**

Court of Appeal of New South Wales

Giles & Macfarlan JJA & Tobias AJA

Personal injuries – duty of care - appellant had dived from sports cruiser moored in Botany Bay off Brighton-Le-Sands, striking his head on sandy bottom of the Bay - incomplete C4 tetraplegia – appeal against finding against appellant/plaintiff on liability in relation to second & fourth defendant in District Court proceedings – see par 76 of judgment: primary judge found no breach of duty but considered issue of dangerous recreational activity: primary judge had found that risk of serious injury to appellant arising from impact with the bottom of Bay upon diving into water



of uncertain depth would have been obvious to a reasonable person in his position within s5F(1) *Civil Liability Act* 2002 (NSW)– notice of contention - appeal dismissed – extensive consideration of Australian case law.

[Laoulach](#) (I)

[Laoulach](#) - decision 16 December 2010 – personal injuries - although the plaintiff did not succeed in his claim, consideration given to defendants' contention that any liability to plaintiff was limited by Limitation of Liability for *Maritime Claims Act* (Cth) & *the Convention on Limitation of Liability for Maritime Claims* 1976 - defendants not able to limit their liability for damages under the Act & the Convention.

### **Cardinal Project Services Pty Ltd v Hanave Pty Ltd [2011] NSWCA 399**

Court of Appeal of New South Wales

Basten & Macfarlan JJA & Tobias AJA

*Building & Construction Industry Security of Payment Act* 1999 (NSW) - whether for the purposes of s26 an adjudicator who issues only a purported but void determination fails to determine an adjudication application within time allowed by s21(3) - appeal dismissed – comprehensive consideration of Australian case law.

[Cardinal Project Services](#) (C)

[Cardinal Project Services](#) – decision 23 November 2010: see Benchmark C & IBC Wednesday 11 December 2010 - *Building & Construction Industry Security of Payment Act* 1999 (NSW) 26(1)(b) - whether plaintiff could make second adjudication application – whether second application made within time allowed by s 26(3) – "fails to determine the application within the time allowed by s.21(3)".

### **Sahab Holdings Pty Ltd v Registrar-General [2011] NSWCA 395**

Court of Appeal of New South Wales

McCull & Campbell JJA & Tobias AJA

s32(6) *Real Property Act* 1900 (NSW) – easements – construction of grant of right of way & attendant covenants to determine whether grant continued in operation – principle of indefeasibility of title - Court's power to order Registrar-General to amend folios of Register to reinstate right of way – comprehensive review of Australian case law.

[Sahab Holdings](#) (B, C)

[Sahab Holdings](#) – decision 26 October 2009 reported at 75 NSWLR 629: see Benchmark B & IBC Tuesday 3 November 2009 - Real property - restrictive covenants – parcels of land at Sailor's Bay Rd, Northbridge - proceedings to review decision Registrar-General's decision removing a right



of way from folio of register for servient tenement - reasons for decision of Registrar-General ordered to be provided pursuant to duty under s121 *Real Property Act* 1900 (NSW)

[Sahab Holdings](#) – decision 8 March 2010

[Sahab Holdings](#) - decision 5 May 2010

## **Padstow Corporation Pty Ltd v Fleming (No 2) [2011] NSWSC 1572**

Supreme Court of New South Wales

Gzell J

Guarantee & indemnity – lease - plaintiff entitled to damages on claim - first cross-claim succeeded - second cross-claim failed - third cross-claim discontinued on settlement - fourth cross-claim failed - damages to be assessed – extensive consideration of UK & Australian case law.

[Padstow Corporation](#) (B)

## **Larkden Pty Ltd -v- Lloyd Energy Systems Pty Ltd [2011] NSWSC 1567**

Supreme Court of New South Wales

Hammerschlag J

*Corporations Act* 2001 (Cth) - s35(1) *Commercial Arbitration Act* 2010 (NSW) - defendant company had gone into voluntary administration on 13 September 2011 - costs award was not a claim arising on or before 13 September 2011 within s444D(1) *Corporations Act* 2001 (Cth).

[Larkden](#) (B)

[Larkden](#) - decision 5 October 2011: see Benchmark B & IBC Friday 3 November 2011 - defendant company under voluntary administration - leave granted to plaintiff to bring recognition & enforcement proceedings under s35 of the *Arbitration Act*;

[Larkden](#) – decision 1 April 2011: see Benchmark Monday 11 April 2011 - s16(9) *Commercial Arbitration Act* 2010 – intellectual property - licensing agreement - jurisdiction of arbitrator to determine dispute concerning patents - meaning of term "dispute" in arbitration clause – plaintiff's challenge to jurisdiction failed.

## **Nabeth Taleb v National Australia Bank Ltd [2011] NSWSC 1562**

Supreme Court of New South Wales

Bryson JA

s43A *Real Property Act* 1900 (NSW) – Deed of Acknowledgement – competing equitable interests in land – proceedings dismissed – extensive consideration of UK & Australian case law.

[Nabeth Taleb](#) (B)

**Lake Burrendong State Park Trust v Thompson [2011] NSWSC 1554**

Supreme Court of New South Wales

Hallen AsJ

Costs – each party seeking costs of proceedings – no hearing on merits – plaintiff's application dismissed – plaintiff to pay defendants' costs of the proceedings & their applications – detailed consideration of case law from NZ & Australia.

[Lake Burrendong State Park Trust](#) (I, B, C, G)

**Holden Ltd v Rundle & Ors [2011] VSC 663**

Supreme Court of Victoria

Osborn J

*Accident Compensation Act 1985 (Vic)* - industrial deafness – order sought quashing opinion of medical panel - whether medical panel was required to disaggregate from the assessment of impairment attributable to hearing loss resulting from industrial deafness the impairment resulting from exposure to noise while the worker was in Vietnam – proceeding dismissed.

[Holden](#) (I)

**Victorian WorkCover Authority v Sharma [2011] VSC 641**

Supreme Court of Victoria

Emerton J

*Accident Compensation Act 1985 (Vic)* – injury suffered in road traffic accident while defendant working overseas – claim by Victorian WorkCover Authority for recovery of compensation under s85(6) – order made for recovery of compensation of A\$680,178.84 pursuant to s85(6) plus interest - counterclaim dismissed - “whether within or outside Australia”.

[Victorian WorkCover Authority](#) (I)

**RCL Kalynda Pty Ltd & Anor v Urbex Pty Ltd & Anor [2011] VSC 650**

Supreme Court of Victoria

Pagone J

Contracts – land development - whether a Notice of Dispute given by plaintiffs to defendants satisfies conditions in a clause of Sub-participation Agreement – dispute to be referred to independent expert.

[RCL Kalynda](#) (C)

**Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd & Anor [2011] VSC 661**

Supreme Court of Victoria

Kaye J

Contracts – contract for construction & installation of fence – repudiation by purchaser – whether entitled to repayment of deposit less damages incurred by vendor – whether relief against forfeiture in equity – appeal from Magistrates' Court dismissed.

[Fiorelli Properties](#) (C)**Doolan v Belgravia Health and Leisure Group Pty Ltd [2011] ACTSC 202**

Supreme Court of the Australian Capital Territory

Besanko J

Personal injuries – occupier's liability - *Civil Law (Wrongs) Act 2002 (ACT)* - when leaving swimming pool, plaintiff's right leg had become lodged in gap in grating covering drain near pool stairs – finding of breach of duty against defendant, & contributory negligence of 30% – assessment of damages after deduction for contributory negligence of \$97,719.83.

[Doolan](#) (I)

## In the District Court of New South Wales...

**Foreshew v Imsies & Anor [2011] NSWDC 198**

District Court of New South Wales

Levy SC DCJ

Personal injuries - *Motor Accidents Compensation Act 1999 (NSW)* - second defendant driver of first defendant's motor vehicle at time of collision with plaintiff riding his motorcycle - defendants admit liability but alleging contributory negligence – although there had been contributory negligence on plaintiff's part, defendants had failed to establish that such contributory negligence was a relevant cause of plaintiff's injuries – assessment of damages - verdict for plaintiff in sum of \$1,210,042.

[Foreshew](#) (I)

We'll be continuing to publish Benchmark this week. The last bulletin for the year will be dated  
Friday 23 December 2011

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