



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Statutory power - Compulsory power to require production of documents – Validity of notices – Implied constraints on power – Application for review dismissed - See *A B Pty Limited v Australian Crime Commission* (I, B, C)

Costs – Whether letters contained Offers of Compromise – Power of Court to vary orders after entry of Judgment – See *Hancock v Arnold; Dodd v Arnold (No. 2)* (I)

Trespass – Deceptive & misleading conduct – Whether presence of electricity infrastructure on private land constituted trespass – Whether representations made as to future removal of infrastructure – No reasonable grounds for making representation – No damage suffered by reason of the conduct – See *Rosebanner Pty Limited v EnergyAustralia* (I, B, C)

Insurance – Time from which it became unreasonable for insurer to withhold payment from insured – Offer of Compromise – Indemnity costs – See *McConnell Dowell Middle East LLC v Royal & sun Alliance Insurance plc* (I, B, C)

Building & Construction Industry Improvement Act 2005 (Cth) – Interim injunctions granted – Unions approached both principal contractor & sub-contractor with requests for an industrial agreement – See *Williams v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union (No. 2)* (C)

And from the House of Lords

Negligence – Foreseeability – Duty to take action to protect someone from injury – Common law claim rejected – Foreseeability alone is not enough to impose a duty to safeguard a person from the criminal acts of third parties – See *Mitchell v Glasgow City Council* (I)



Monday 23 February 2009

Health World Limited v Shin-Sun Australia Pty Ltd [2009] FCAFC 14

Full Federal Court of Australia

Emmett, Besanko & Perram JJ (in Sydney)

Appeals – proceedings in relation to trademark – standing – ‘aggrieved person’ - at pars 45-48 of judgment of Perram J, Kuru v New South Wales [2008] HCA 26 considered – desirability that intermediate appellate courts determine all issues rather than remit – appeals dismissed.

[Health World](#) (I, B, C)

A. B. Pty Limited v Australian Crime Commission [2009] FCA 119

Federal Court of Australia

Flick J (in Sydney)

Statutory power conferred upon an examiner to compulsorily obtain documents - *Australian Crime Commission Act* 2002 (Cth) - validity of notices requiring production of documents issued under s29 – “a document or thing specified in the notice” - implied constraints on power – competing factors - encroachment upon established rights and freedoms – confidentiality – will of Parliament - applications for review dismissed – thorough examination of legislation & case law from UK & Australia in an interesting decision.

[A. B.](#) (I, B, C)

Williams v Automotive, Food, Metals, Engineering, Printing Kindred Industries Union (No. 2) [2009] FCA 103

Federal Court of Australia

Jessup J (in Melbourne)

Building & Construction Industry Improvement Act 2005 (Cth) – interim injunctions sought in two proceedings - upgrade of West Gate Bridge in Melbourne – unions have approached both principal contractor & subcontractor with requests that they make an industrial agreement – strike & picket line - early stages of a \$240 million project – significant piece of infrastructure of Victorian road transport network – public interest – interim injunctions granted.

[Williams](#) (C)

Canberra Residential Developments Pty Ltd v Canberra Land Developments Pty Ltd [2009] FCA 110

Federal Court of Australia

Stone J (in Sydney, via video link to Canberra)

Applicant seeking orders that first respondent be restrained from instructing second respondent, its solicitors, from taking any steps to deal with certain funds or to release them to any person - proceeds of sale of land at Gungahlin – dispute arising out of joint venture – for decision 30 January, 2009 see



'Benchmark' Banking, Construction & IBC Tuesday 3 February 2009 & link below – notice of appeal not yet filed – balance of convenience – application declined.

[Canberra Residential Developments](#) (C)

[Canberra Residential Developments](#) – fiduciary duties owed by director of a trustee company developing land on behalf of a syndicate of builders who formed a joint venture to do so – held: no breach of fiduciary duty by director – detailed consideration of UK & Australian case law.

Hancock v Arnold; Dodd v Arnold (No. 2) [2009] NSWCA 19

Court of Appeal of New South Wales

Ipp, McColl & Basten JJA

Costs - whether letters contained offers of compromise – time allowed for acceptance - r36.16 *Uniform Civil Procedure Rules* 2005 (NSW) - scope of leave given to challenge costs orders - power of Court to vary orders after entry of judgment.

[Hancock](#) (I)

Rosebanner Pty Limited v EnergyAustralia [2009] NSWSC 43

Supreme Court of New South Wales

Ward J

Trespass – contracts – *Trade Practices Act* 1974 (Cth) - whether presence of electricity infrastructure on private land in Woollooware constituted trespass – whether infrastructure lawfully installed by Sydney County Council - whether EnergyAustralia had lawful authority to maintain presence of infrastructure – held there was no trespass as infrastructure lawfully installed & maintained on land - whether parties entered binding contract obliging EnergyAustralia to remove infrastructure - whether representation made as to future removal of infrastructure – whether representation in course of without prejudice settlement negotiations was made in trade or commerce – whether reasonable grounds existed for making of representation – whether any damage suffered by reason of misleading & deceptive conduct – held that representation made in trade or commerce – no reasonable grounds for making representation – no damage suffered by reason of the misleading & deceptive conduct – claim dismissed.

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

McConnell Dowell Middle East LLC v Royal & Sun Alliance Insurance plc [2008] VSC 501

Supreme Court of Victoria

Hansen J

Insurance - “Construction Risks Material Damage” policies covering “occurrence” - for decision 25 November 2008 see 'Benchmark' Thursday 27 November 2008 & link below – interest under statute – time from which it became unreasonable for insurer to withhold payment from insured – s57 *Insurance Contracts Act* 1984 (Cth) – Offer of compromise – indemnity costs.

[McConnell Dowell Middle Eat LLC](#) (I, B, C)

[McConnell Dowell Middle East LLC](#) – decision 25 November 2008 - plaintiff insured, a contracting & engineering



company incorporated in United Arab Emirates, claimed indemnity, alternatively damages, from defendant insurer incorporated in United Kingdom under two policies of insurance in respect of loss of items of plant & equipment which plaintiff alleged were stolen from a diamond mine it had operated near Carnot in Central African Republic - plaintiff contended it was entitled to be paid "Reinstatement Value" of plant & equipment (US\$4,187,432) plus other associated costs & interest - plaintiff had left Central African Republic in December 2000, abandoning other property which it never recovered - defendant denied liability & that property had been stolen - whether losses an occurrence - exclusion clause not applicable as both losses attributable to theft - basis of settlement - whether insured property "Contract &/or Works" or "Construction Plant & Equipment" - reinstatement value payable - meaning of "theft," "market value" - whether relocation costs should be deducted - judgment for the plaintiff - a lengthy, interesting decision.

John R Ring Pty Ltd v the Commissioner of the Office of Consumer & Business Affairs [2009] SASC 35

Supreme Court of South Australia

Sulan J

Land & Business (Sale & Conveyancing) Act 1994 (SA) - advertisements published in marketing residential land made representation as to likely price range which was less than prescribed minimum advertising price, as those terms are defined by the Act - appropriate to make a declaration to that effect, notwithstanding impact that declaration might have on future criminal proceedings which may be commenced against plaintiff under the Act - "likely price", "likely price range", "prescribed minimum advertising price", "sales agency agreement", "buyer inquiry range."

[John R Ring](#) (B, C)

And from the House of Lords...

Mitchell & Anor v Glasgow City Council (Scotland) [2009] UKHL 11

House of Lords

Hope, Scott, Rodger, Hale & Brown LJ

Negligence - foreseeability - the right to life under European Convention on Human Rights - criminal acts of third parties - duty to take action to protect someone from injury - proceedings had been brought in Scottish Court of Session by widow & daughter of man who died from assault by next door neighbour - both men were tenants of the local housing authority & had been neighbours since the 1980s - previous threats by assailant to kill deceased - deceased & family had consulted city councillors and member of the Scottish Parliament, who wrote to defendant authority about abuse which deceased was suffering - per Lord Rodger of Earlsferry at par 69, the public authority with the positive duty to protect deceased from criminal assaults by assailant was Strathclyde Police, not the Council - common law claim rejected - foreseeability alone is not enough to impose a duty to safeguard a person from the criminal acts of third parties - Council under no obligation pursuant to article 2 of the Convention - appeal allowed, cross-appeal dismissed.

[Mitchell](#) (I)

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