



Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Combis (Trustee) v Spottiswood - Service of documents - substituted service (I, B, C)

Dib Group Pty Ltd v Ventouris Enterprises Pty Ltd - s51A(2) *Trade Practices Act 1974* (Cth) - s41(2) *Fair Trading Act 1987* (NSW) - appeal dismissed (I, B)

Gales Holdings Pty Ltd v Tweed Shire Council - Nuisance - whether presence of stormwater runoff on land constituted nuisance - nuisance established (I, C)

Pakis & Ors v Pakis - *Powers of Attorney Act 2003* (NSW) - application for order varying terms of enduring power of attorney dismissed (B)

National Australia Bank Ltd & Anor v Horne & Anor - *Corporations Act 2001* (Cth) - appeal against decision to validate appointment of administrators (B)

Chua v Lowthian & Ors - s28LL(3) *Wrongs Act 1958* (Vic) - whether Medical Panel misdirected itself (I)

Khayat Investments Pty Ltd v Winston Holdings Pty Ltd [No 2] - *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) - appeal allowed (B)



Civil Properties Pty Ltd v Miluc Pty Ltd - *Planning & Development Act 2005 (WA)* - whether one developer entitled to claim contribution to cost of upgrading road from second developer - appeal dismissed, except as to costs order (C)

Rubenstein v HSBC Bank Plc – United Kingdom decision - professional negligence claim - contracts - investment advice - scope of duty - causation - foreseeability - remoteness (I, B)

Hackney Empire Ltd v Aviva Insurance UK Ltd - United Kingdom decision - building contracts - insurer not discharged from liability under the bond (I, C)

Castledine v RSM Bentley Jennison (a firm) & Anor - United Kingdom decision - partnership agreement - nature of goodwill as partnership asset (B)

Summaries with links (5 minute read)

Friday 23 September 2011

Combis (Trustee) v Spottiswood [2011] FCA 1082

Federal Court of Australia

Logan J

Service of documents - application by trustees of a bankrupt estate that steps taken to date to serve originating application on respondent be deemed service pursuant to *Federal Court Rules 2011 (Cth)* r10.23 or, alternatively, that an order be made pursuant to r10.24 of the Rules for substituted service - case was one not for a deeming of service but rather for making of a substituted service order - in High Court of Justice for England & Wales, practice had developed in respect of the requirement of what would suffice in ordinary cases for obtaining of an order for substituted service - “not practicable.”

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



Dib Group Pty Ltd v Ventouris Enterprises Pty Ltd [2011] NSWCA 300

Court of Appeal of New South Wales

Allsop P, Macfarlan JA & Handley AJA

s51A(2) *Trade Practices Act* 1974 (Cth) - s41(2) *Fair Trading Act* 1987 (NSW) - misleading & deceptive conduct - representations as to future matters - whether necessary to show existence of reasonable grounds in fact relied upon by representor - appeal dismissed.

[Dib Group](#) (I, B)

[Ventouris Enterprises](#) - decision 13 September 2010: see 'Benchmark' I, B & IBC Wednesday 15 September 2010 - torts - interference with contractual relations - concurrent wrongdoers - trusts and trustees - claim of knowing receipt of trust property - family company made \$100,000 loan advance - borrower defaulted - apportionment made under s87CD *Trade Practices Act* 1974 (Cth) & s35 *Civil Liability Act* 2002 (NSW) - damages - conclusions at par 198-201 of judgment - operation of lender's floating charge over borrower's assets - extensive consideration of United Kingdom & Australian case law.

Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128

Supreme Court of New South Wales

Bergin CJ in Eq

Nuisance - whether presence of stormwater runoff on land constitutes nuisance - plaintiff the registered proprietor of undeveloped land at Kingscliff - nuisance alleged by plaintiff was that since 1994, defendant had conducted itself so as to allow untreated & polluted stormwater runoff to discharge onto the land & to prevent & obstruct stormwater flowing away from the land - plaintiff contending foreseeable consequences were ephemeral ponding of water resulting in establishment of habitat & breeding of wallum froglets (*crinia tinnula*) - *Civil Liability Act* 2001 (NSW) - defendant unsuccessfully relied on s45: special non-feasance protection for roads authorities - defendant unsuccessfully relied on s733 *Local Government Act*: exemption from liability-flood liable land, land subject to risk of bush fire and land in coastal zone - unreasonable interference - nuisance established - plaintiff entitled to damages: see from par 438 of judgment - comprehensive review of text & case law from United Kingdom & Australia.

[Gales Holdings](#) (I, C)

Pakis & Ors v Pakis [2011] NSWSC 1073

Supreme Court of New South Wales

Brereton J

Powers of Attorney Act 2003 (NSW) - plaintiffs' application for order pursuant to s36(4), varying the terms of a registered general enduring power of attorney - application dismissed.

[Pakis](#) (B)



National Australia Bank Ltd & Anor v Horne & Anor [2011] VSCA 280

Court of Appeal of Victoria

Buchanan & Mandie JJA & Almond AJA

Corporations Act 2001 (Cth) - voluntary administration - appeal against decision to validate appointment of administrators - incorrect factual premise which was material - at par 24 of judgment of Almond AJA: primary judge's order to be set aside; Court of Appeal to exercise its discretion afresh based on same material - appointment pursuant to s436C of administrators a valid appointment - detailed examination of legislation & case law in an interesting decision.

[National Australia Bank](#) (B)

[Australian Property Custodian Holdings](#) - decision 29 October 2010 - question as to validity of appointment of administrators - whether appointment should be validated - whether s447A *Corporations Act* (Cth) should be used to validate what had already been done: consideration of Australian case law.

Chua v Lowthian & Ors [2011] VSC 468

Supreme Court of Victoria

Osborn J

Medical negligence claim - Medical Panel's decision as to threshold level of impairment - medical practitioner contending Panel misdirected itself - s28LL(3) *Wrongs Act* 1958 (Vic) - jurisdictional error or error of law on the face of the record - matter to be remitted.

[Chua](#) (I)

Khayat Investments Pty Ltd v Winston Holdings Pty Ltd [No 2] [2011] WASCA 196

Court of Appeal of Western Australia

Martin CJ, Newnes & Murphy JJA

Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) - whether State Administrative Tribunal has jurisdiction to determine amount of rent to be paid under retail shop lease following rent review, even though a valuer appointed by agreement of parties to lease has determined rent payable following review - appeal allowed - in such a case, at least until such time as valuer's determination has been set aside, jurisdiction conferred upon Tribunal by s11 does not empower Tribunal to determine amount of rental payable following review.

[Khayat](#) (B)

[Khayat](#) - decision 13 December 2010



Civil Properties Pty Ltd v Miluc Pty Ltd [2011] WASCA 195

Court of Appeal of Western Australia

Newnes & Murphy JJA & Hall J

Planning & Development Act 2005 (WA) - street in Forrestfield on opposite sides of which were subdivision developments carried out by appellant & respondent - whether one developer entitled to claim contribution to cost of upgrading road from second developer - whether second developer contributed to cost of upgrading road - whether water & sewerage pipes in road reserve were service ducts "in connection with the road" - appeal dismissed, except as to costs order: order for indemnity costs set aside.

[Civil Properties](#) (C)

[Civil Properties](#) - *Civil Properties Pty Ltd v Miluc Pty Ltd [2010] WADC 116* - decision District Court of Western Australia - plaintiff's claim dismissed.

From the United Kingdom ...

Rubenstein v HSBC Bank Plc [2011] EWHC 2304 (QB)

High Court of England & Wales, Queen's Bench Division

Parker J

Professional negligence claim - contracts - investment advice - scope of duty - causation - foreseeability - remoteness - mitigation of loss - claimant alleging he was wrongly advised by defendant Bank to invest in AIG Premier Access Bond - enhanced variable rate fund - product brochure & key features document - risk factors, warning - when Lehman Brothers collapsed in September 2008, withdrawals from the Bond were temporarily suspended - when claimant eventually cashed in his investment, he suffered loss of capital - *Financial Services & Markets Act 2000 (United Kingdom)* - Conduct of Business Rules - case law considered as to "advice" - whether advice negligent or such as to constitute a breach of contract - whether contract one for advice or "execution only" - at par 94 of judgment: negligence established but not causative of loss - breaches of procedural rules in COB 5.2 & 5.3 could give rise to no more than nominal damages; claim for substantial damages dismissed.

[Rubenstein](#) (I, B)

**Hackney Empire Ltd v Aviva Insurance UK Ltd [2011] EWHC 2378 (TCC)**

High Court of England & Wales, Technology & Construction Court
Edwards-Stuart J

Building contracts - whether defendant insurer liable under bond - liability hearing - claimant owner of Hackney Empire Theatre in east London - in 2001, decision to carry out extensive works of refurbishment to theatre - contractor fell into considerable delay & was unable to complete the work; it went into administration in 2003 defendant insurer together with contractor executed bond in favour of claimant in the sum of £1,106,852 - advancement of money by claimant to contractor on account of claims - interaction between side agreement & building contract - answers to agreed issues set out at par 172 of judgment - insurer not discharged from liability under the bond - detailed examination of United Kingdom case law.

[Hackney Empire](#) (I, C)

Castledine v RSM Bentley Jennison (a firm) & Anor [2011] EWHC 2363 (Ch)

High Court of England & Wales, Chancery Division
Cooke J

Partnership agreement - nature of goodwill as partnership asset - construing agreement - claimant had joined firm of chartered accountants as equity partner in 1999 - he retired as partner with effect from April 2003 - whether, when he joined the firm he had acquired an equal share in firm's goodwill - whether he had ceased to own his share in the goodwill at some date after his retirement - claim unsuccessful.

[Castledine](#) (B)

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