



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Legal professional privilege – Litigation privilege – Distinction between privilege and implied undertaking – Operation of legal professional privilege in relation to a final version of a witness statement – See *ACCC v Cadbury Schweppes* (I, B, C)

Limitation of actions – Insurance notification – Personal injuries – Duty of care – Alleged inadequacy of security arrangements at nightclub – Not just to extend limitation period – Proceedings dismissed – See *Certain Lloyds Underwriters v Kathy Giannopoulos*; *Certain Lloyds Underwriters v Marlene Giannopoulos* (I)

Workers' compensation – Statutory interpretation – Whether employer/tortfeasor can use statutory provisions to obtain medical assessment of worker for recovery proceedings – See *Kurnell Passenger & Transport Service v Randwick City Council* (I)

Contribution – Personal injuries – Joint & several tortfeasors – Apportionment of liability – See *Tvedsborg v Vega* (I)

Personal injuries – Anti-suit injunction – Plaintiff suffered injury in Fiji while on vessel owned by First Defendant – Plaintiff had not satisfied the tests for the issuing of an anti-suit injunction – See *Mody v South Seas Cruises* (I)

Income tax – Part IVA, section 177E – Whether scheme to diminish value of assets of a company was a scheme in the nature of dividend stripping – Section 177E applied to scheme – See *Lawrence v FCT* (B)



Tuesday 24 March 2009

Australian Competition & Consumer Commission v Cadbury Schweppes Pty Ltd [2009] FCAFC 32

Full Federal Court of Australia

Mansfield, Kenny & Middleton JJ (in Melbourne)

Legal professional privilege – litigation privilege – for interlocutory decision appealed from dated 28 March 2008, see 'Benchmark' I, B & IBC Thursday 3 April 2008 & link below - distinction between privilege & implied undertaking – leave granted to intervener – appeal dismissed - comprehensive review of UK & Australian case law – at para. 2 of judgment:

"The matters argued before the Full Court raise important issues concerning the principles of legal professional privilege & the operation of those principles in relation to a final version of a witness statement or proof of evidence intended at the time of its creation to be filed in court & served upon an opponent to existing litigation & then in fact so filed and served pursuant to an order of the Court."

[Australian Competition and Consumer Commission](#) (I, B, C)

[Cadbury Schweppes](#)– decision 28 March 2008 - whether Visy's implied undertaking to Court not to use documents produced by other parties in course of the ACCC proceedings except in those proceedings prevented their disclosure to Cadbury in this (damages) proceeding - see 'Benchmark' Friday 22 February 2008 for judgment 19.2.08 (link within this 28.3.08 judgment) - Visy to produce documents to Cadbury for inspection – moving party, the ACCC, to pay Cadbury's costs of & incidental to the application.

Lawrence v Commissioner of Taxation [2009] FCAFC 29

Full Federal Court of Australia

Ryan, Stone & Edmonds JJ (in Melbourne)

Part IVA *Income Tax Assessment Act* 1936 (Cth)– s177E – for decision appealed from see 'Benchmark' B & IBC Wednesday 15 October 2008 & link below - whether scheme to diminish value of assets of a company was a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping – whether scheme involved a 'distribution' of profits of the company – whether application of s177E had to give way to specific provisions of legislation which might or might not have application – appeal dismissed – s177E applied to the scheme.

[Lawrence](#) (B)

[Lawrence](#)– decision 10 October 2008 - income tax - diminutions (on revenue account) in value of shares held by companies in which taxpayer the only shareholder & corresponding increases (on capital account) in value of shares held by another company on trust for discretionary beneficiaries confined to taxpayer & his family – whether "schemes" – whether schemes were by way of or in nature of dividend stripping –whether schemes had tax avoidance as dominant purpose – whether schemes involved distribution of profits - "scheme benefit" - "base penalty amount."

**Carlisle Homes Pty Ltd v Barrett Property Group Pty Ltd [2009] FCAFC 31**

Full Federal Court of Australia

Tamberlin, Sundberg & Besanko JJ (in Melbourne)

Copyright - building design - house plan – primary judge had found infringement - for decision appealed from see 'Benchmark' C & IBC Wednesday 26 March 2008 & link below – obligation to give reasons - appeal dismissed.

[Carlisle Homes](#) (C)

[Barrett Property Group](#) – the decision is dated 20 March 2008 (not 28.4.08) - al fresco quadrant – whether sufficient similarity – answer 'yes.'

Certain Lloyds Underwriters v Kathy Giannopoulos; Certain Lloyds Underwriters v Marlene Giannopoulos [2009] NSWCA 56

Court of Appeal of New South Wales

Giles, Ipp & Campbell JJA

Limitation of actions - approach to appellant intervention concerning decision whether to extend limitation period - insurance notification - personal injuries – duty of care - alleged inadequacy of security arrangements at nightclub - nervous shock – Compensation to Relatives action - witness died outside limitation period but after filing of originating process – orders of primary judge set aside – not just & reasonable to extend limitation period - proceedings dismissed – extensive consideration of case law.

[Certain Lloyds Underwriters](#) (I)

Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council [2009] NSWCA 59

Court of Appeal of New South Wales

Giles, McColl & Basten JJA

Workers compensation – constitutional law – statutory interpretation - s119 *Workplace Injury Management & Workers Compensation Act* 1998 (NSW), Ch 4 - s151Z(1)(d) *Workers Compensation Act* 1987 (NSW) - WorkCover Guidelines on Independent Medical Examinations & Reports (2006) – for decision appealed from see 'Benchmark' I & IBC Monday 7 April 2008 & link below - whether employer & putative tortfeasor can use s119 *Workers Compensation Act* 1987 (NSW) to obtain medical assessment of worker for purposes of s151Z proceedings - whether Guidelines prevent use of s119 in s151Z(1)(d) proceedings - rights & liabilities created by s151Z(1)(d) – extent of indemnity – preconditions to s151Z(1)(d) – purpose of s151Z – legislative history of s151Z – legislative history of s119 – scope of s119 – “under this section” – appeal dismissed – comprehensive review of case law.

[Kurnell Passenger & Transport Service](#) (I)

[Randwick City Council](#) – decision 4 April 2008 - statutory interpretation - defendant's application for limited stay of substantive proceedings - injured worker recovered compensation from his employer as a result of injury caused by the tort of third party - plaintiff employer seeking indemnity against the defendant tortfeasor for past and future liability or damages under s151Z *Workers Compensation Act* 1987 (NSW) - injured worker refusing to attend medical examinations arranged by defendant - whether an employer may require an injured worker not a party to proceedings to attend medical



examinations under s119 *Workplace Injury Management & Workers Compensation Act 1998* (NSW) for purposes of a third party - limits imposed upon demands of medical examination of injured workers - purpose of s119 is the determination of claim by an injured worker against an employer - s119(2) not available either to an employer or a third-party tortfeasor for the purpose of a claim under s151Z.

Tvedsborg v Vega [2009] NSWCA 57

Court of Appeal of New South Wales

Beazley, Hodgson & Basten JJA

Contribution – personal injuries - joint & several tortfeasors - apportionment of liability - whether primary judge had erred in attributing sole responsibility for accident to applicant motorcyclist - duty of care owed to pillion passengers - duty of care owed by motorcyclists to other motorcyclists - damages - two defendants - use of same expert.

[Tvedsborg](#) (I)

Thiess Pty Ltd & Anor v Lane Cove Tunnel Nominee Company Pty Ltd & Anor [2009] NSWCA 53

Court of Appeal of New South Wales

Giles & Tobias JJA; Handley AJA

Building & Construction Industry Security of Payment Act 1999 (NSW) – for decision appealed from see ‘Benchmark’ C & IBC Thursday 24 July 2008 & link below - whether contract required a time for provision of payment schedule – appeal dismissed.

[Thiess](#) (C)

[Thiess](#) - decision 4 July 2008 - *Building & Construction Industry (Security of Payment) Act 1999* (NSW) s14(4)(b)(i) & (ii) - Design & Construction Deed – whether contract required different time for provision of payment schedule from ten business days otherwise required – ‘business day’ - held that four day period in clause 14.3A of contract not a provision intended to supplant nor did it supplant the ten day period in s14.4(b)(ii) of the Act – summons dismissed.

Mody v South Seas Cruises Ltd & Anor [2009] NSWSC 183

Supreme Court of New South Wales

Hoeben J

Personal injuries - anti-suit injunction – private international law - plaintiff suffered injury in Fiji while on vessel owned by first defendant – plaintiff alleging he drank from unlabelled bottle containing dangerous & caustic liquid - plaintiff brought proceedings in NSW – first defendant shipping company seeking declaration in High Court of Fiji that as the owner of the ship ‘SV Seaspray’ it should have its limitation of liability determined pursuant to s178(1) *Marine Act 1986* (Fiji) in relation to the incident in which plaintiff injured – plaintiff’s application for injunction to restrain Fiji proceedings - whether foreign proceedings vexatious or oppressive - whether foreign proceedings raise same issues as local proceedings - whether relief sought in foreign proceedings not available in local proceedings – plaintiff had not satisfied tests for issuing of an anti-suit injunction set out in CSR Limited v Cigna Insurance Australia Limited & Ors (1996-1997) 189 CLR 345 - plaintiff’s application dismissed.

[Mody](#) (I)



Rae v Beddison Corporation Pty Ltd (No 2) [2009] NSWSC 178

Supreme Court of New South Wales

Harrison J

Costs – defendant's contention that proceedings commenced in wrong jurisdiction – whether costs in Supreme Court more substantial than equivalent costs in District Court - indemnity costs – offer of compromise – whether circumstances when offer made different to circumstances prevailing at hearing – circumstances different – indemnity costs refused.

[Rae](#) (I, B)

[Rae](#) – principal judgment 10 February 2009 – sale of shares in recruitment company – dispute as to interest received by company - recruitment costs - manager's salary adjustment -bonuses.

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