

Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Pivotal Satellite Pty Ltd v Optus Mobile Pty Ltd - Varying interlocutory orders - exceptional circumstances (B)

Workers Compensation (Dust Diseases) Board of NSW v Smith, Munro & Seymour - *Workers' Compensation (Dust Diseases) Act 1942* (NSW) - statutory construction - each of appeals dismissed - "asbestosis" - "award of the court in point of law" - "dust disease" - "Helsinki criteria" - "lung cancer" - "material contribution" - "reasonably attributable" - "relative risk" (I)

Marshall v Fleming - Private international law - application by defendants for dismissal of proceedings or permanent stay - application dismissed (I)

Cole v Wenaline Pty Ltd - *Workplace Injury Management & Workers Compensation Act 1998* (NSW) - appeal from Workers Compensation Commission Appeal Panel (I)

Zappia v Grant Baines Transport Pty Ltd - *Corporations Act 2001* (Cth) - proceedings by creditor of insolvent company for recovery from director under s588M(3) (B)

Chua v Archiworks Architects Pty Ltd - Referee's report - decision in relation to cross-claim (C)

R v FRH Victoria Pty Ltd - *Occupational Health & Safety Act 1985* (Vic) - appeal allowed & appellant re-sentenced (I)

McIver v Barton & Ors - *Accident Compensation Act 1985* (Vic) - review of decision of medical panel (I)

Balnaves v Smith & Anor; Malone v Smith & Ors - Personal injuries - liability findings - *Navigation Act 1912* (Cth) - collision between Capri Runabout & speedboat (I)

Payne v Smyth as Litigation Guardian for Welk - *Succession Act* 1981 (Qld) - testamentary capacity - application made for leave to apply under s22 for an order for a Court authorised will - leave granted (I, B)

Laws v Web Scaffolding - *Limitation Act* 1985 (ACT) - personal injuries - decision of primary judge set aside & decision of Master restored (I)

Securities & Exchange Commission v Bank of America Corporation - Application by plaintiff seeking approval of Proposed Consent Judgment that would resolve two cases - proposed penalty - whether settlement fair, reasonable, adequate, & in the public interest (I, B, C)

Summaries with links (5 minute read)

Thursday 25 February 2010

Pivotel Satellite Pty Limited v Optus Mobile Pty Ltd [2010] FCA 121

Federal Court of Australia

Jagot J (in Sydney)

Application to vary interlocutory injunction - two stage dialling - music streaming - varying interlocutory orders - exceptional circumstances.

[Pivotel Satellite](#) (B)

Workers Compensation (Dust Diseases) Board of NSW v Smith, Munro & Seymour [2010] NSWCA 19

Court of Appeal of New South Wales

Allsop P, Basten JA & Handley AJA

Workers' Compensation (Dust Diseases) Act 1942 (NSW) - statutory construction - construction of composite provision - negligence - husband of each of respondents was a waterside worker who had died from lung cancer - each had been a regular & heavy smoker, but had also been exposed to asbestos for varying periods on the waterfront over many years - in the District Court expert evidence was adduced as to epidemiological & statistical basis for determining probability that exposure to asbestos had materially contributed to lung cancer, as well as expert evidence as to extent of exposure that each worker had undergone whilst on the waterfront - primary judge had

held each had satisfied test of causation & entitled to statutory benefits. The appellant appealed to this Court from her Honour's decision - each of appeals dismissed - extensive consideration of legislation & case law - "asbestosis" - "award of the court in point of law" - "dust disease" - "Helsinki criteria" - "lung cancer" - "material contribution" - "reasonably attributable" - "relative risk."

[Workers Compensation \(Dust Diseases\) Board Of NSW \(I\)](#)

Marshall v Fleming [2010] NSWSC 86

Supreme Court of New South Wales

Rothman J

Private international law - proper law of the contract - convenience of forum - professional negligence - application by defendants for dismissal of proceedings or permanent stay - aeroplane accident in Australia - both engines had failed - plaintiffs wife & son of person killed - proceedings commenced in the United States of America against manufacturer of aeroplane - United States solicitors' retainer agreements - settlement monies - proceedings in NSW: plaintiffs' causes of action founded in breach of contract (being retainer agreement), negligence or breach of duty of care, breach of fiduciary duty, & conspiracy - Court not clearly inappropriate forum - application dismissed.

[Marshall \(I\)](#)

[Murakami](#) - decision 15 February 2010 referred to at para 74 of judgment above : see 'Benchmark' Thursday 18 February 2010 - primary judge had ordered a permanent stay of proceedings on basis that issues to be agitated should be determined by the Courts of Indonesia, that jurisdiction being the law of matrimonial domicile - appeal allowed.

Cole v Wenaline Pty Ltd [2010] NSWSC 78

Supreme Court of New South Wales

Schmidt J

Workplace Injury Management & Workers Compensation Act 1998 (NSW) - appeal from Workers Compensation Commission Appeal Panel - construction of s323 - error made - appeal upheld - medical panel decision quashed - matter remitted.

[Cole \(I\)](#)

Zappia v Grant Baines Transport Pty Ltd [2010] NSWSC 98

Supreme Court of New South Wales

Hall J

Corporations Act 2001 (Cth) - proceedings by creditor of insolvent company for recovery from director under s588M(3) - requirement under s588R for written consent of liquidator to begin such proceedings - proceedings commenced before liquidation - subsequently amended statement of claim filed the day following receipt of written consent from liquidator - proceedings valid under amended statement of claim

[Zappia](#) (B)

Chua v Archiworks Architects Pty Ltd [2010] NSWSC 76

Supreme Court of New South Wales

McDougall J

Referee's report - decision in relation to cross-claim - whether referee's report should be adopted - whether referee erred in construction of orders for reference - no error in construction - whether referee misconstrued relevant provisions of construction management agreement - meaning of "costs of the works" in contract - costs - whether time limit for acceptance of offer of compromise was reasonable - not reasonable - report adopted - verdict for cross-claimant Archiworks against cross-defendants.

[Chua](#) (C)

R v FRH Victoria Pty Ltd [2010] VSCA 18

Court of Appeal of Victoria

Nettle & Neave JJA

Occupational Health & Safety Act 1985 (Vic) - man-hole maintenance - appellant had pleaded guilty to two counts of failing to provide & maintain a safe working environment contrary to s21 - whether failure caused death of the deceased - hearsay evidence - appeal allowed & appellant re-sentenced.

[R](#) (I)

McIver v Barton & Ors [2010] VSC 22

Supreme Court of Victoria

J Forrest J

Accident Compensation Act 1985 (Vic) - review of decision of medical panel - adequacy of reasons - panel had determined plaintiff had no present inability to perform his pre-injury duties of employment - surveillance film - no reviewable error established.

[McIver](#) (I)

Balnaves v Smith & Anor; Malone v Smith & Ors [2010] QSC 39

Supreme Court of Queensland

Applegarth J

Personal injuries - liability findings - contributory negligence - *Navigation Act 1912* (Cth) - collision between Capri Runabout & speedboat - three people injured - limitation of liability - contribution & apportionment under statute - whether the limitation period in s396(1) applies.

[Balnaves](#) (I)

Payne v Smyth as Litigation Guardian for Welk [2010] QSC 45

Supreme Court of Queensland

Margaret Wilson J

Succession Act 1981 (Qld) - testamentary capacity - application made for leave to apply under s22 for an order for a Court authorised will - applicant the mother of proposed testator - proposed testator had sustained permanent brain injury in motor vehicle accident - personal injury proceedings had been settled: Court had sanctioned compromise - leave granted.

[Payne](#) (I, B)

Laws v Web Scaffolding [2010] ACTCA 3

Court of Appeal of the Australian Capital Territory

Higgins CJ, Refshauge & North JJ

Limitation Act 1985 (ACT) - personal injuries - decision of primary judge set aside & decision of Master restored.

[Laws](#) (I)

[Laws](#) - decision of Master Harper 5th June 2009: see 'Benchmark I & IBC Wednesday 10 June 2009 - claim against employer - workers' compensation claim previously accepted - extension granted.

From the United States of America...**Securities & Exchange Commission v Bank of America Corporation, 09 Civ 6829 & 10 Civ 0215**

United States District Court - Southern District of New York

Jed S. Rakoff U.S.D.J

Application by plaintiff seeking approval of Proposed Consent Judgment that would resolve two cases - proposed penalty - whether settlement fair, reasonable, adequate, & in the public interest - Bank had sent Proxy Statement to shareholders soliciting their approval of merger with Merrill



Lynch & Co, Inc.- failure adequately to disclose Bank's agreement to let Merrill pay its executives & certain other employees \$5.8 billion in bonuses -measures designed to prevent such non-disclosures in future - penalty provision that is supposed also to serve the purpose of partially compensating victims: essentially \$150 million fine - application approved on terms.

[Securities & Exchange Commission](#) (I, B, C)

[United States District Court • Southern District of New York](#)