

## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Today's Cases

**Litigation Funding** – whether funding arrangement for plaintiffs in class action was illegal. See *Brookfield Multiplex Limited v International Litigation Funding Partners PTE (I, B, C)*

**Personal Injury** – claim for damages by plaintiff against Council for personal injury allegedly suffered when plaintiff fell over low unfenced retaining wall of drain – defence of intoxication – assessment of damages – verdict for defendant at first instance - plaintiff's appeal allowed. See *Jackson v Lithgow City Council (I)*

**Building Dispute (NSW)** – proceedings before CTTT – tribunal determined separate question concerning validity of termination of contract – appeal to Supreme Court succeeded – further appeal to single justice of Court of Appeal – application by appellant to have respondent's Notice of Contention struck out – application failed. See *HIA Insurance Services v Kostas & Ors (I, C)*

**Limitation Period (NSW)** – application for extension of time – excessive amount of materials tendered in support of application - duty of parties' legal representatives to tender only relevant material – implications on costs orders. See *SDW v Church of Jesus Christ of Latter-Day Saints (I)*

**Defamation (NSW)** – application by defendants to strike out imputations contained in Statement of Claim – application by plaintiff to amend – amendment granted and large amount of imputations struck out. See *Burns v Harbour Radio & Anor (I)*

**Jurisdiction (NSW)** – application by defendant for an order declining to exercise jurisdiction in relation to plaintiff's claim for damages for personal injuries suffered by plaintiff whilst on holiday in Fiji. Application refused. See *Mody v South Seas Cruises Limited & Anor (I)*

**Motor Accident (NSW)** – sections 108 & 109: *Motor Accidents Compensation Act 1999* – whether “full and satisfactory” explanation – leave to commence proceedings granted. See *Butler v Korkidas* (I)

**Workers’ Compensation (Vic)** – forklift driver injured at work – interpretation of “in suitable employment” – s134AB(38)(f) of *Accident Compensation Act*. See *Smorgon Steel Tube Mills v Majkic* (I)

**Insurance** – whether broker liable for alleged negligent misrepresentation to insured regarding cover to be provided by motor fleet policy – interpretation of policy. See *Middleton v AON Risk Services Australia Limited* (I)

**Bankruptcy Notice** – whether overstatement in notice rendered it invalid – whether Court has power to cure invalidity. See *Skouloudis v St George Bank* (B)

**Oppression Proceedings** – whether company funds can be used to defend oppression proceedings. See *Sellar v Lasota* (B)

**Trade Practices** – moneys lent on mortgage – failed joint venture – whether breach of contract induced – defence of estoppel. See *Super 1000 v Pacific General Securities* (B, C)

**Stamp Duty** – option to enter into lease and sub-lease agreements – whether stamp duty payable. See *Westpac Funds Management v Chief Commissioner of State Revenue* (B)

**Contract for Sale of Land** – whether contract validly terminated – whether specific performance should be ordered. See *Exhibition Marketing v Richmond Valley Council* (B, C)

**Contract for Sale of Land** – whether contract validly terminated – whether deposit should be repaid. See *Proctor v Chahl* (B, C)

**Contract for Sale of Land** – whether contract validly terminated – notice to complete issued - whether specific performance should be ordered. See *Blackley Investments v Burnie City Council* (B, C)



## Friday 28 November 2008

### **Skouloudis v St George Bank Ltd [2008] FCA 1765**

Federal Court of Australia

Edmonds J (in Sydney)

*Bankruptcy Act 1966* (Cth) - whether overstatement in bankruptcy notice rendered notice invalid from the time of its issue if requirements of s41(5) are satisfied — whether Court has power to amend a bankruptcy notice under s33(1)(b) once it is invalid – held that bankruptcy notice was invalid; s33(1)(b) conferred no power on Court to amend invalid bankruptcy notice.

[Skouloudis](#) (B)

### **Sellar v Lasotav Pty Ltd; In the Matter of Lasotav Pty Ltd [2008] FCA 1766**

Federal Court of Australia

Foster J (in Sydney)

Oppression proceedings - application by plaintiffs for interlocutory injunction whereby first & second defendants to be restrained from paying any of legal expenses incurred by fourth & fifth defendants in connection with the proceedings – litigation concerning Como Marina – principles & case law as to use of company funds to defend oppression proceedings – application dismissed - parties ordered to attend mediation.

[Sellar](#) (B)

### **Brookfield Multiplex Limited v International Litigation Funding Partners PTE Ltd [2008] FCA 1769**

Federal Court of Australia

Finkelstein J (in Melbourne)

Litigation funding – plaintiffs are defendants in securities fraud class action pending in Federal Court – Wembley Stadium - class action is being funded by litigation funder – Canada – Singapore - plaintiffs contending arrangement pursuant to which funding provided is illegal - definition of managed investments scheme – held that plaintiffs had shown enough to justify order for service out of the jurisdiction.

[Brookfield Multiplex](#) (I, B, C)

### **Craig William Jackson v Lithgow City Council [2008] NSWCA 312**

Court of Appeal of New South Wales

Allsop P, Basten JA & Grove J

Personal injuries – causation – measure of damages - future economic loss – non-economic loss – loss of earnings & earning capacity – future care – past care - intoxication – contributory negligence – appellant had been found lying unconscious in concrete drain in a park in Lithgow shortly before 7 am with serious head injuries & other injuries, having taken his dogs for a walk at about 3:30 that morning



whilst intoxicated - no memory of events in question or of events from middle of the day before – no witnesses of accident appellant had sued council having care & management of the park, alleging he had fallen over the low, unfenced retaining wall of drain & down approximately 1.5 metres on to the concrete drain - appeal allowed.

[Craig William Jackson](#) (I)

**HIA Insurance Services Pty Limited t/as Home Owners Warranty v Kostas & Ors [2008] NSWCA 297**

Court of Appeal of New South Wales

Bell JA

Appeals - “a question with respect to a matter of law” - residential building dispute – determination of separate question by Consumer Trader & Tenancy Tribunal that respondents had not validly terminated contract – on appeal to Supreme Court, appeal had been allowed, findings & orders of Tribunal set aside & matter remitted – applicant filed Amended Notice of Appeal - respondent filed Notice of Contention that decision should be affirmed on grounds other than those found by primary judge – applicant’s striking out application refused. (I, C)

[HIA Insurance Services](#), and

[Kostas](#) – decision 30 October 2007

**SDW v Church of Jesus Christ of Latter-Day Saints [2008] NSWSC 1249**

Supreme Court of New South Wales

Simpson J

Personal injuries – limitation of actions - application for extension of time dismissed – constitutional law – religious confession – argument misconceived - excess documents put before the court - excessive photocopying - delay - cost order.

[SDW](#) (I)

**Gary Burns v Harbour Radio Pty Ltd & Anor [2008] NSWSC 1254**

Supreme Court of New South Wales

Simpson J

Defamation - consecutive radio broadcasts – plaintiff Executive Producer of ‘Footy Show’ – defendants’ challenges to statement of claim ; capacity of broadcasts to convey imputations pleaded.

[Gary Burns](#) (I)

**Mody v South Seas Cruises Limited & Anor [2008] NSWSC 1261**

Supreme Court of New South Wales

Adams J

Personal injuries - gastrointestinal injuries while on holiday in Fiji - action commenced in NSW – defendant’s application for stay on ground that Court clearly inappropriate forum – application dismissed.

[Mody](#) (I)



**Butler v Korkidas [2008] NSWSC 1259**

Supreme Court of New South Wales

Adams J

Motor accidents claim - time expired - whether full & satisfactory explanation - claimant trusted solicitors & acted reasonably - whether damages likely to exceed statutory limit - leave granted to commence proceedings.

[Butler](#) (I)

**Super 1000 v Pacific General Securities; Bonic v Pacific General Securities [2008] NSWSC 1222**

Supreme Court of New South Wales

White J

Torts - *Trade Practices Act 1974* (Cth) – unsuccessful joint venture - development of land at Dee Why – misleading & deceptive conduct – statement of opinion made on reasonable grounds – directors’ duties - intentionally inducing breach of contract – estoppel – money lent on mortgage security - comprehensive consideration of UK & Australian case law.

[Super 1000](#) (B, C)

**Westpac Funds Management Ltd v Chief Commissioner of State Revenue [2008] NSWSC 1245**

Supreme Court of New South Wales

Young CJ in Eq

Stamp duties on leases - *Duties Act 1997* (NSW) in respect of documents executed between plaintiff & Woolworths (Project Finance) Pty Ltd - premises at Norwest Business Park - plaintiff had acquired call option to enter into lease & sublease agreements - whether proposed lease instrument dutiable - whether call option fee part of dutiable costs of lease being a "premium" paid or payable in respect of lease - held that "premium" means money paid in consideration for grant of leasehold interest - "premium" - "in respect of" - "evidence of" – detailed consideration of case law.

[Westpac Funds Management](#) (B)

**Exhibition Marketing Pty Limited ACN 010 519 329 v Richmond Valley Council [2008] NSWSC 1253**

Supreme Court of New South Wales

Ward J

Contract for sale of land – defendant Council the vendor - drainage channel for storm water from Casino - whether contract validly terminated – whether implied or express obligation on part of purchaser to construct drainage works – whether vendor could terminate for failure to register easement within time specified - no repudiation – purported termination ineffective - held not appropriate to order specific performance - declaration made – extensive consideration of UK & Australian case law.

[Exhibition Marketing](#) (B, C)



**Proctor v Chahl [2008] NSWSC 1252**

Supreme Court of New South Wales

Ward J

Contract for sale of land – “Bella Vista” heritage listed property at Mayfield, currently used as function centre - whether contract validly terminated – vendor plaintiffs contending they validly terminated contract & that consequently deposit paid was forfeited to them - vendors seeking orders for damages consequent upon resale of “Bella Vista” for lesser purchase price - times, weights & measures - “12 months after the date of this contract” – judgment for defendants/cross claimants – vendor to repay deposit with interest – detailed consideration of case law.

[Proctor](#) (B, C)

**Smorgon Steel Tube Mills Pty Ltd v Majkic [2008] VSCA 230**

Court of Appeal of Victoria

Buchanan & Kellam JJA; Robson AJA

s134AB(38)(f) *Accident Compensation Act* 1985 (Vic) – serious injury – respondent had been struck by forklift operated by fellow employee - loss of earning capacity attributable to physical injury not psychological or psychiatric consequences of injury – ‘in suitable employment’ - appeal dismissed.

[Smorgon Steel Tube Mills](#) (I)

**Middleton v AON Risk Services Australia Ltd [2008] WASCA 239**

Court of Appeal of Western Australia

McLure & Buss JJA; Murray AJA

Negligent misrepresentation – economic loss - State Government Insurance Office motor fleet insurance policy - *Trade Practices Act* 1974 (Cth) – affidavit in other proceedings settled in Supreme Court - statements of fact or opinion – reasonable grounds for opinion – duty of care - restoration work on 1899 Renault Voiturette – vehicle damaged by fire - first respondent insurance broker – primary judge had dismissed claims by appellant of fraudulent & negligent misrepresentation & breach of s52 of the Act arising from statements made by second respondent, an employee of first respondent - whether cover under the SGIO policy held by motor vehicle service & repair business York Heritage was limited to the locations specified – evidence established affidavit deponent’s opinion unreasonably held & representation negligently made – evidence did not compel inference that representation dishonest or made with reckless disregard for truth – immunity rule did not apply - applicability of exclusion clauses - appeal allowed – Notice of Contention & cross-appeal on theft dismissed – a very interesting judgment by McLure JA with detailed consideration of case law. (I)

[Middleton](#), and

[Middleton](#) – District Court decision 23 February 2007

**Blackley Investments Pty Ltd v Burnie City Council [2008] TASSC 74**

Supreme Court of Tasmania

Tennent J

Contract for sale of land – defendant Council agreed to sell two blocks of land at Camdale - contract was to be completed "within ninety days of a planning permit for the Development being issued as a result of the s43A application becoming effective in accordance with s43I" – no such permit was ever issued - Council purported to terminate contract as a consequence – plaintiff purchaser did not accept termination as lawful & issued notice to complete which was not complied with - plaintiff's application for specific performance dismissed.

[Blackley Investments](#) (B, C)

## Scotland the Brave - this Sunday 30 November, 2008 is St Andrew's Day

### Robert Burns (25 January, 1759 – 21 July, 1796)

The traditional Burns Suppers held on the birthday of Scotland's national poet will have a special significance on Sunday 25 January 2009, for that date will mark the 250<sup>th</sup> anniversary of his birth.

He was born at Alloway, Ayrshire – a farmer for much of his life, then from 1789 an exciseman - his poems came mainly from a burst of creativity between 1784 & 1786 – "Holy Willie's Prayer"; "The Holy Tulzie" ('tulzie' means a quarrel or brawl - Burns described the poem as 'a burlesque lamentation'); "Love & Liberty" often known as "The Jolly Beggars"; "The Cotter's Saturday Night"; "To a Mouse" – his collection "Poems, Chiefly in the Scottish Dialect," was published on 31 July, 1786.

From May 1787 till his death nine years later at thirty-seven, his focus shifted to writing lyrics for old Scottish songs – "The Birks of Aberfeldy," "Afton Water," "Scots wha hae," "O, my Love's like the red, red rose," "Auld Lang Syne" - with one notable exception, the poem "Tam o' Shanter," written in 1790 – late at night & befuddled with drink, farmer Tam is riding home on his mare Meg, when he encounters warlocks & witches dancing to bagpipes – there follows a chase, with Tam only just managing to ride to safety across the Brig o' Doon.

#### To a Mouse

On Turning Her Up in Her Nest with the Plough, November, 1785  
(the poem has eight verses ; these are verses 2, 7 & 8)

.... I'm truly sorry man's dominion  
Has broken Nature's social union,  
An' justifies that ill opinion  
Which makes thee startle



At me, thy poor earth-born companion,  
 An' fellow-mortal!

... But Mousie, thou art no thy-lane\*,  
 In proving foresight may be vain:  
 The best laid schemes o' Mice an' Men,  
 Gang aft agley,  
 An' lea'e us nought but grief an' pain,  
 For promis'd joy!

Still, thou art blest, compar'd wi' me!  
 The present only toucheth thee:  
 But Och! I backward cast my e'e,  
 On prospects drear!  
 An' forward, tho' I canna see,  
 I guess an' fear!

*\*no thy-lane = not alone*

### [To a Mouse](#)

[Robert Burns Country; the official Robert Burns site](#)

### [The Story of the Scottish Flag](#)

The white diagonal cross on the blue ground of the Saltire flag is attributed to St. Andrew the Apostle of Jesus, fisherman & brother of St. Peter, crucified in 69 A.D. while preaching the Gospel at Patras in Greece. He is said to have chosen the diagonal form of crucifixion in deference to Jesus who had died on an upright cross.

As to how St. Andrew came to be associated with Scotland, there is more than one legend, with a common theme – that relics of the saint were brought to Scotland - one story has St. Acca doing so in the 8<sup>th</sup> century ; a Pictish king, Angus, adopted him as patron in the eighth or ninth century when the cross appeared in the sky during a battle.

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