



## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Executive Summary (1 minute read)

**Turkmani v Visvalingam** - Personal injuries – contributory negligence – fatal motor vehicle accident – vehicle struck pedestrian - primary judge's assessed contributory negligence at sixty per cent – by majority, appeal allowed in part: contributory negligence assessed at eighty percent (I)

**Saint-Gobain Abrasives Pty Ltd v McPherson** - Personal injuries – *Trade Practices Act 1974* (Cth) – quality control in manufacturing – statutory defences - "defective goods" – "manufacturer's liability" - appeal dismissed (I)

**The Owners Strata Plan 61424 & Building Insurers' Guarantee Corporation v Reed Constructions Pty Limited** - *Home Building Act 1989* (NSW) – joint venture – whether first plaintiff a person entitled to benefit of a statutory warranty enforceable against defendant by operation of s18D – answer 'yes' – s18D avoided privity of contract rule (I, C)

**Marsden re Snowburn Pty Ltd** - *Corporations Act 2001* (Cth) - receivers seeking directions from Court under s424 - trust account (B)

**Sandhurst Holdings (Australia) Limited v Commissioner of State Revenue** - *Land Tax Act 1958* (Vic) - whether land exempt from land tax because used for 'out-door sporting recreation or cultural purposes or similar out-door activities' – appeals dismissed (B, C)

**Jones & Ors v Jones & Anor** - Director's duties - breach of fiduciary duty - contracts – illegality – Part IV *Income Tax Assessment Act 1936* (Cth) – s9 *Fair Trading Act 1999* (Vic) (I, B)

**Westgate Wool Co Pty Ltd (in liq) v Hammond & Ors** - Pleadings - statement of claim struck out with liberty to replead (I)



**Heartwood Architectural Timber & Joinery Pty Ltd & Ors v Redchip Lawyers** - Costs orders against solicitors – discretion to exercise the jurisdiction - duty of disclosure in obtaining ex parte orders (I, B, C)

**Charleville RSL Memorial Club Inc & Anor v Sheapalm Pty Ltd** - Legal professional privilege - discovery – first plaintiff's premises were destroyed by fire – loss assessors reports from loss assessors - first plaintiff had not established its claim for privilege (I)

**Goldamere Pty Ltd v Metso Minerals Industries Inc & Ors** - Legal professional privilege - discovery - fire at mine - witness statement & an investigator's report - partial disclosure of contents of documents in some emails – disclosure of contents of emails not inconsistent with maintenance of confidentiality – application dismissed (I)

## Summaries with links (5 minute read)

### Wednesday 29 July 2009

#### **Turkmani v Visvalingam [2009] NSWCA 211**

Court of Appeal of New South Wales

Beazley, Hodgson & McColl JJA

Personal injuries – contributory negligence - motor vehicle accident – appeal from District Court - respondents had sued appellant for damages pursuant to *Compensation to Relatives Act 1897* (NSW) on the basis that appellant's negligence in driving a motor vehicle had caused death of first respondent's husband – vehicle struck pedestrian crossing at an intersection against "don't walk" sign while out jogging - intersection with traffic lights corner Fox Valley Road & Comenarra Parkway in Wahroonga – evidence as to driver's use of mobile phone - whether primary judge's finding that driver liable was in error - whether primary judge's assessment of contributory negligence at sixty per cent was in error – finding of liability not disturbed - Beazley JA saw no reason to interfere with primary judge's apportionment of contributory negligence – by majority, appeal allowed in part :contributory negligence assessed at eighty percent.

[Turkmani](#) (I)

#### **Saint-Gobain Abrasives Pty Ltd v McPherson [2009] NSWCA 214**

Court of Appeal of New South Wales

Basten & Campbell JJA; Simpson J

Personal injuries – *Trade Practices Act 1974* (Cth) – quality control in manufacturing – statutory defences - respondent in business as mobile mechanic – he inserted a new disc in angle grinder & switched machine on – respondent's case that disc shattered & struck his left hand causing serious injury - disc was manufactured by appellant – primary judge had awarded him \$498,952 – District Court exercising federal jurisdiction – date of accident prior to the commencement of Part VIB *Trade Practices Act 1974* (NSW)- *Civil Liability Act 2002* (NSW) – "defective goods" – "manufacturer's liability" - appeal dismissed.

[Saint-Gobain Abrasives](#) (I)

#### **The Owners Strata Plan 61424 & Building Insurers' Guarantee Corporation v Reed Constructions Pty Limited [2009] NSWSC 692**

Supreme Court of New South Wales

Einstein J

*Home Building Act 1989* (NSW) – joint venture – development of strata title aged persons units at Woollahra – HIH insurance policy - whether first plaintiff a person entitled to benefit of a statutory warranty enforceable against defendant by operation of s18D – answer 'yes' – s18D avoided privity of

contract rule.

[Reed Constructions](#) (I, C)

**Marsden re Snowburn Pty Ltd [2009] NSWSC 710**

Supreme Court of New South Wales

Barrett J

*Corporations Act* 2001 (Cth) - receivers seeking directions from Court under s424 - monies received by company as agent for service providers - such moneys paid by customers into company bank account designated "trust account" - balance after commission paid out to services providers - whether trust monies.

[Marsden](#) (B)

**Sandhurst Holdings (Australia) Limited v Commissioner of State Revenue [2009] VSCA 167**

Court of Appeal of Victoria

Buchanan & Dodds-Streeton JJA & Beach AJA

*Land Tax Act* 1958 (Vic) - whether land exempt from land tax because used for 'out-door sporting recreation or cultural purposes or similar out-door activities' – whether construction of golf course & other out-door sporting facilities commenced on land but not completed constitutes use for the specified purposes – appeals dismissed.

[Sandhurst Holdings](#) (B, C)

**Jones & Ors v Jones & Anor [2009] VSC 292**

Supreme Court of Victoria

Judd J

Director's duties - breach of fiduciary duty - contracts – illegality – Part IV *Income Tax Assessment Act* 1936 (Cth) – s9 *Fair Trading Act* 1999 (Vic) – information technology business – first plaintiff & first defendant not related - company director acquired interest of minority shareholder without disclosing negotiations for sale of company business – duty not to prefer personal interests to joint interests of all shareholders – equitable compensation – order for compensation in sum of \$963,710.00 – detailed consideration of case law.

[Jones](#) (I, B)

**Westgate Wool Co Pty Ltd (in liq) v Hammond & Ors [2009] VSC 299**

Supreme Court of Victoria

Robson J

Pleadings - appeal from associate justice – whether statement of claim discloses good cause of action – whether failure to plead material facts -statement of claim struck out with liberty to replead.

[Westgate Wool Co](#) (I)

**Heartwood Architectural Timber & Joinery Pty Ltd & Ors v Redchip Lawyers [2009] QSC 195**

Supreme Court of Queensland

Applegarth J

Costs orders against solicitors – discretion to exercise the jurisdiction - duty of disclosure in obtaining ex parte orders - ex parte application for freezing orders – waiver – causation – measure of compensation – firm to pay costs that first applicant incurred in applying to set aside freezing orders on indemnity basis – detailed analysis of UK & Australian case law including Caboolture Park Shopping Centre Pty Ltd (in liq) v White (1993) 45 FCR 224 and Ken Morgan Motors Pty Ltd v Toyota Motor Corp Australia Ltd (unrep), Supreme Court of Victoria, 23 November 1993.

[Heartwood Architectural Timber & Joinery](#) (I, B, C)

**Charleville RSL Memorial Club Inc & Anor v Sheapalm Pty Ltd [2009] QSC 193**

Supreme Court of Queensland

Daubney J

Legal professional privilege - discovery – first plaintiff's premises were destroyed by fire – defendant a contractor which had been performing welding works at the premises - first plaintiff's Industrial Special Risks insurer engaged loss assessors to investigate circumstances of fire – solicitor for first plaintiff received reports from loss assessors – defendant sought disclosure of the reports & plaintiff resisted disclosure – whether legal professional privilege applied to the reports – first plaintiff had not established its claim for privilege in respect of the reports - detailed analysis of case law in an interesting judgment.

[Charleville RSL Memorial Club](#) (I)

**Goldamere Pty Ltd v Metso Minerals Industries Inc & Ors [2009] TASSC 52** Supreme Court of

Tasmania

Holt AsJ

Legal professional privilege - discovery - partial disclosure of content of privileged documents - plaintiff owner & operator of a mine - fire at mine caused extensive damage to equipment used in the mining operation - according to statement of claim, fire started in course of repair work being carried out under the supervision of first & second defendants - repairs involved welding work - methodology included use of heat mats – third defendant had been engaged to supply, install & operate the heat mats - application by first & second defendants against third defendant for order for production for inspection of a witness statement & an investigator's report - common ground that the documents, at the time of their creation, were protected by legal professional privilege – there had been partial disclosure of contents of documents in some emails – question as to whether this disclosure had resulted in an imputed waiver of privilege – answer: disclosure of contents of emails not inconsistent with maintenance of confidentiality – application dismissed.

[Goldamere](#) (I)

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