



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Subpoena to produce - Public interest immunity - Duty of full disclosure on *ex parte* application - Renewed call for production of documents - Exceptional circumstances – Held: it would be unjust not to allow Applicants to make further application to inspect the documents – See *P. Dawson Nominees Pty Limited v ASIC (No. 2)* (I, B, C)

Insurance – Demurrage - Excavation of Defendant's land required to lift 270 tonne sphere from barge onto Defendant's land - Responsibility for insuring barge - Excavation costs – See *Megalift Pty Limited v Terminals Pty Limited* (I, B, C)

Disclosure of documents - Confidentiality regime – See *Ontario Teachers' Pension Plan Board v Macquarie Infrastructure Investment Management Limited* (I, B, C)

Negligence - Personal injuries – Foreseeability - Duty of care - Bank giving line of credit to problem gambler sued by gambler and wife – Held: no duty to gambler or his wife – See *Politarhis v Westpac Banking Corporation* (I, B)

Copyright – Website – Account of profits – See *Prosperity Group International Pty Limited v Intellectual Properties Opportunities Pacific Pty Limited* (B)

Mandatory injunction – Loan agreement – Claim by broker for injunction that trailing commissions be paid dismissed – See *CB Direct v Challenger Mortgage Management* (B)

FROM THE UK:

'Without prejudice' rule - Public policy - Limitation of actions – Claim for adverse possession of land – "Without prejudice" letter relied on by claimant as acknowledgement of title – Held: claimant should not be allowed to rely on offer in the letter as an acknowledgement of title – See *Ofulue v Bossert* (I, B, C)



Joinder of excess insurer ordered - Client of insurance broker suing for failure to take out insurance it alleged it had instructed to be taken out - Valuations a significant part of client's business in property management – See *Dunlop Hayward (DHL) Limited v Erinaceous Insurance Services Limited* (I, B, C)



Thursday 30 April 2009

P. Dawson Nominees Pty Ltd v Australian Securities & Investments Commission (No 2) [2009] FCA 413

Federal Court of Australia

Goldberg J (in Melbourne)

Subpoena to produce – public interest immunity privilege claim by ASIC – case law as to duty of full disclosure by a party moving a court ex parte for orders – renewed call for production of documents – exceptional circumstances – exercise of discretion – held that it would be unjust not to allow applicants to make further application to inspect the documents.

[P Dawson Nominees](#) (I, B, C)

Prosperity Group International Pty Ltd v Intellectual Properties Opportunities Pacific Pty Ltd [2009] FCA 403

Federal Court of Australia

Greenwood J (in Brisbane)

Copyright – website - application for entry of judgment under s31A *Federal Court Act 1976* (Cth) – injunction sought – account of profits – judgment for applicant.

[Prosperity Group International](#) (B)

CB Direct v Challenger Mortgage Management [2009] NSWSC 334

Supreme Court of New South Wales

White J

Loan Origination & Management Agreement - plaintiff finance broker seeking mandatory interlocutory injunction that past trailing commissions due be paid, & that until further order future trailing commissions be paid – application dismissed.

[CB Direct](#) (B, C)

Megalift Pty Limited v Terminals Pty Limited [2009] NSWSC 324

Supreme Court of New South Wales

Bergin CJ in Eq.

Insurance – demurrage - plaintiff specialist in transportation of heavy materials - defendant operating premises near Geelong in Victoria where it stores bulk liquids & gas - defendant had commissioned manufacture of two hundred & seventy tonne sphere in Thailand to enable it to store large quantities of butadiene – sphere transported from Thailand in MV BBC 'Frisia' which docked in Port Melbourne - sphere lifted off ship onto barge which transported it across to defendant's premises to be lifted onto foundations that had been constructed at defendant's premises - not possible to discharge sphere safely from barge without excavating defendant's land – delay – responsibility for insuring barge - plaintiff

claiming defendant indebted to it for services that it provided including claim for demurrage - defendant claiming plaintiff indebted to it for various amounts, including excavation costs to facilitate safe discharge of sphere from barge.

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

Ontario Teachers' Pension Plan Board (first pl); Golden Apple Infrastructure Inc (second pl.) v Macquarie Infrastructure Investment Management Ltd (first def.) ; Macquarie Infrastructure Group International Ltd (second def.) [2009] NSWSC 300

Supreme Court of New South Wales

Einstein J

Disclosure – confidentiality - defendants seeking order permitting disclosure of number of identified documents subject to confidentiality regime to a sub-committee of MIG Board - competing considerations involved in application to release legal adviser from confidentiality undertaking to permit disclosure of documents to a party – case law considered.

[Ontario Teachers' Pension Plan Board](#) (I, B, C)

AGL Energy Ltd v Queensland Competition Authority & Anor; Origin Energy Retail Ltd v Queensland Competition Authority & Anor [2009] QSC 90

Supreme Court of Queensland

McMurdo J

Electricity Act 1994 (Qld) – statutory interpretation - notified prices – fixing of tariffs under the Act – benchmark retail cost index – National Electricity Market - NEM load – spot prices – recalculating index – Explanatory Note to the Bill – declaration that Authority's decision not in accordance with the Act.

[AGL Energy](#) (B, C)

Politarhis & Anor v Westpac Banking Corporation [2009] SASC 96

Full Court of Supreme Court of South Australia

Doyle CJ; Sulan & Vanstone JJ

Negligence – personal injuries – foreseeability – duty of care – liability of bank - respondent bank had provided a loan by way of line of credit to appellants - bank not aware first appellant a problem gambler - funds quickly dissipated - appellants sought increase in limit on line of credit - bank agreed - mistake by bank so that significantly more funds available to appellants than was intended - first appellant claiming damages including for psychological & psychiatric conditions suffered by him - second appellant claiming damages representing financial loss & psychiatric injury - held no breach of duty – no breach of contract – appeal dismissed.

[Politarhis](#) (I, B)

[Politarhis](#) – decision 21 April 2009 – application for stay of order for possession refused.

From the United Kingdom...

Ofulue & Anor v Bossert [2009] UKHL 16

House of Lords

Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Neuberger of Abbotsbury, Lord Scott of Foscote (dissenting)

The 'without prejudice' rule – public policy – limitation of actions – appeal from primary judge's determination that effect of appellant's title to property in Bow Street London was barred by time of issue of these proceedings - claim by appellant for possession – earlier action for possession had been struck out in April 2002 & fresh proceedings taken - defence by respondent to possession claim based on claim to have been in adverse possession of property for a period in excess of twelve years : s15 *Limitation Act* 1980 (U.K.) - 'without prejudice' letter 14 January 1992, sent by solicitors on behalf of respondent, relied on by appellant as acknowledgement of her & her husband's title to property - appeal dismissed – per Lord Rodger, appellant should not be allowed to rely on offer in the letter as an acknowledgment of title for purposes of s29(2)(a) *Limitation Act* 1980 (UK) - extensive review of UK case law in an interesting decision.

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

Dunlop Haywards (DHL) Ltd & Anor v Erinaceous Insurance Services Ltd & Ors [2009] EWCA Civ 354

Court of Appeal of England & Wales

Rix & Wilson LJ; Sir Peter Gibson

Insurance – joinder – interlocutory application - primary policy – excess policy - negligence – contract – disclosure – claimant in this interlocutory application an insurance broker being sued by client, in business of commercial property management, surveying & valuations, for failing to obtain for its client the insurance policy which client alleged it was instructed to obtain – valuations a significant part of client's business - broker seeking to join underwriters under that policy & to bind underwriters by joinder in these proceedings – Civil Procedure Rules (UK) - appeal allowed - joinder ordered of excess insurers for purpose of participating in issues of rectification & construction.

[Dunlop Howards](#) (I, B, C)

'And their place shall know them no more'

Trucanini's Dirge

by Robert Dudley Adams* - b.1829 – d.1912 at Sydney

"As for man, his days are as grass : as a flower of the field,
so he flourisheth. For the wind passeth over it, & it is gone:

& the place thereof shall know it no more."

– *Psalm 103 verses 15& 16*



“They make a solitude & call it peace.”

- from Byron’s *The Bride of Abydos* adapting a quotation in “Agricola,” by the Roman historian Tacitus: “*Ubi solitudinem faciunt pacem appellant*” – “Where they create a desert, they call it peace.” The words are attributed to Calgacus, the Caledonian chief, speaking of the Romans.

‘..... No more, no more – ah ! never no more,
 Shall the feet of my people skim
 O’er the tufted grass up the mountain pass,
 Or the bush tracks greenly dim.

Never, no never ! Alas ! for ever
 They have faded from rivers & shore ;
 Yea ! have passed like a dream or a summer-dried stream,
 And their place shall know them no more !

My days are past, & I die, tho’ last
 Of the tribes ! So let me rest
 In my long, last home, where they loved to roam,
 Where the hills face the dying west;

And the shadows deep of the mountains sweep
 O’er the lonely wandering stream;
 There lay my head, in its last cold bed,
 For the sleep that has never a dream

***Born** Robert Dudley Sidney Powys Herbert in 1829 (at sea) – joined Royal Navy 1843, wounded & invalided – read law – private secretary to Hon. Sidney Herbert 1845-6 – arrived Sydney September 1851 – journalist ‘*Empire*’ & ‘*Sydney Morning Herald*’ – partner R.T. Ford & Co, customs house agents – helped found N.S.W. Mortgage Land & Agency Co 1879 ; Sydney Harbour Mining Co. 1896 – wrote regularly for ‘*The Times*,’ ‘*Fraser’s Magazine*,’ ‘*Cornhill Magazine*,’ & Australian papers as ‘R.A.,’ ‘R.D.A.’ & ‘Alpha Crucis’ – published ‘*The Song of the Stars & other poems*’ in 1882 – “*Trucanini’s Dirge*’ is included, with her name spelt as shown here. It is a poem of twenty-three verses – verses 17, 18, 21 & 22 are reproduced above.

Truganini

Born 1812 ? Bruny Island, Tasmania – died May 1876 Hobart, Tasmania – her funeral took place a hundred years later, on 30 April 1976 - at the request of the Tasmanian Aboriginal community her remains were cremated & scattered on the waters of the D’Entrecasteaux Channel near her homeland.

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