



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

City of Swan v Lehman Brothers Australia Ltd - *Corporations Act 2001* (Cth) Pt 5.3A - clauses in deed of company arrangement – insurance claims – answers given to questions reserved for determination by Full Federal Court (I,B,C)

Floruit Holdings Pty Ltd & Anor v Sebastian - Builders & Developers Pty Ltd - Standard form building contract – whether "the works" included the plumbing certificate - appeal allowed (C)

Goulburn Wine Beer & Spirits Supply Pty Ltd v Riviera Cove Pty Ltd - Application to terminate winding up granted (B)

Brookfield Multiplex Capital Management Ltd & Ors: Re Multiplex Acumen Property Fund - s266(4) *Corporations Act 2001* - registration of charges - lodgement of notices pursuant to s264 (B)

Meriton Apartments Pty Ltd v Council of the City of Sydney - *Recovery of Imposts Act 1963* (NSW) – kerbside usage fees (C)

Central Goldfields Shire v Haley & Ors (No. 2) - Costs – personal injuries – respondents granted indemnity certificate - Sanderson order sought by plaintiff made as to costs of trial – order sought by successful appellant as to costs of appeal made (I,C)

Macedon Ranges Shire Council v Thompson - Costs - discontinuance of appeal (I,C)

De Simone v Archer & Ors - Application for injunctive relief to prevent solicitor from acting dismissed (I)

Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors - *Corporations Act 2001* (Cth) – oppression - directors' duties - trustees & beneficiaries (B)

Davies v Global Strategies Group Hong Kong Ltd & Anor - UK decision - negligence –claimant's

husband died in Iraq, shot through windscreen of vehicle in which he was travelling – claimant contending inadequate protection amounting to breach of duty – held that claimant had not established any causative breach of duty on part of defendants (I)

KT v Lothian NHS Board - Scottish decision - medical negligence – obstetrician – anaesthetist – negligence not established (I)

Summaries with links (5 minute read)

Wednesday 30 September 2009

City of Swan v Lehman Brothers Australia Ltd [2009] FCAFC 130

Full Federal Court of Australia

Stone, Rares, & Perram JJ (in Sydney)

Corporations Act 2001 (Cth) Pt 5.3A - clauses in deed of company arrangement – insurance claims – power to include releases binding on dissenting creditors – scope of s444D(1) – extrinsic aids to statutory construction - legislation affecting fundamental rights, including property rights - eight questions reserved for determination by Full Federal Court & duly answered – question 1: whether clause 7.1 of the DOCA conferred on Deed Administrators the sole conduct & control of any Insurance Claim & an absolute discretion regarding the prosecution & resolution of any Insurance Claim, which otherwise could have been conducted, prosecuted or resolved by a creditor of the company against an insurer for indemnity or other relief in respect of any insurance policy which insures or otherwise provides benefits to the Company or a Lehman Entity, excluding any claim for indemnity under any insurance policy held by Lehman Brothers Asia Holdings Ltd (in liq'n) – answer to question (1): 'yes' – held that deed of company arrangement void ; impugned clauses not severable & not capable of binding creditors in respect of their rights against persons or entities other than the company - extensive consideration of UK & Australian case law.

[City of Swan](#)

Floruit Holdings Pty Ltd & Anor v Sebastian - Builders & Developers Pty Ltd [2009] NSWCA 303

Court of Appeal of New South Wales

Allsop P, Young JA, & Bergin CJ in Eq

Standard form building contract – construction of four townhouses at Kiama -whether contract entitled respondent builder to withhold delivery of plumbing certificate - whether "the works" included the plumbing certificate - appeal allowed – orders of District Court set aside - answer to separate question "no."

[Floruit Holdings Pty Ltd](#)

**Goulburn Wine Beer & Spirits Supply Pty Ltd v Riviera Cove Pty Ltd [2009] NSWSC 1022**

Supreme Court of New South Wales

White J

Application to terminate winding up – termination of winding-up would allow deed of company arrangement to be executed which would release claims of all existing unrelated unsecured creditors - winding-up terminated.

[Goulburn Wine Beer & Spirits Supply Pty Ltd](#)

Brookfield Multiplex Capital Management Ltd & Ors: Re Multiplex Acumen Property Fund [2009] NSWSC 1014

Supreme Court of New South Wales

Bergin CJ in Eq

s266(4) *Corporations Act* 2001 - registration of charges - lodgement of notices pursuant to s264 - change of responsible entity - failure to lodge notices in time - orders made extending period for lodging requisite notices.

[Brookfield Multiplex Capital Management Limited](#)

Meriton Apartments Pty Ltd v Council of the City of Sydney [2009] NSWLEC 166

Land & Environment Court of New South Wales

Sheahan J

Recovery of Imposts Act 1963 (NSW) – kerbside usage fees – application by respondent Council to summarily dismiss or strike out a substantial part of proceedings in which applicant company seeking to recover certain monies paid to respondent in respect of establishing “work zones” outside building project known as “Mosaic” in Sydney - application dismissed.

[Meriton Apartments Pty Ltd](#)

Central Goldfields Shire v Haley & Ors (No. 2) [2009] VSCA 203

Court of Appeal of Victoria

Neave, Redlich JJA, & Pagone AJA

Costs – personal injuries – slip & fall on temporary footpath - Court of Appeal had allowed appeal against an award of damages by a County Court jury for injuries sustained by plaintiff/first respondent: for decision Court of Appeal 24 June 2009 , see ‘Benchmark’ I,C & IBC Thursday 25 June 2009 & link below - Council, as successful appellant, seeking costs of trial & appeal, contending first respondent & the second, third & fourth respondent hoteliers should pay its costs of appeal – plaintiff seeking Bullock or Sanderson order against the hoteliers for Council’s costs of both trial & appeal – both plaintiff & hoteliers seeking indemnity certificate pursuant to s4(1) *Appeal Costs Act* 1998 (Vic) : respondents granted indemnity certificate - Sanderson order sought by plaintiff made, requiring hoteliers to pay Council’s costs of the trial – order sought by Council as to costs of appeal made.



[Central Goldfields Shire](#)

[Central Goldfields Shire](#) – decision 24 June 2009 - personal injuries – extensive renovation works at hotel in Maryborough - temporary footpath constructed by hotelier ; input by Council as to materials, method & inspection - Council's liability to pedestrian slipping on footpath – appellant contending that primary judge had been wrong to conclude that Council was not acting as a highway authority or that the immunity conferred by s37A *Transport Act 1983* (Vic) did not apply – whether Council was occupier – appeal allowed, jury's verdict set aside & judgment entered for Council - comprehensive review of principles & case law in judgment of Redlich JA.

Macedon Ranges Shire Council v Thompson [2009] VSCA 209

Court of Appeal of Victoria
Redlich JA & Beach AJA

Costs - discontinuance of appeal – indemnity costs – whether punitive cost order appropriate when unrepresented litigant discontinues appeal – application for indemnity costs dismissed - Council to have party/party costs paid out of monies paid into Court by appellants pursuant to order for security for costs made in 2007.

[Macedon Ranges Shire Council](#)

De Simone v Archer & Ors [2009] VSC 432

Supreme Court of Victoria
Davies J

Application for injunctive relief to prevent solicitor from acting – confidentiality – conflict of interest – application dismissed.

[De Simone](#)

Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors [2009] VSC 428 Supreme Court of

Victoria
Davies J

Corporations Act 2001 (Cth) – directors' duties – trustees & beneficiaries – breach of fiduciary duty – onus of establishing informed consent – oppressive conduct – derivative action – five proceedings heard together – election for an account of profits – extensive consideration of UK & Australian case law

[Vigliaroni](#)

From the United Kingdom...

Davies v Global Strategies Group Hong Kong Ltd & Anor [2009] EWHC 2342 (QB)

High Court of England & Wales, Queen's Bench Division
Burnett J

Negligence – claim by widow on her own behalf & on behalf of son – claimant's husband died in 2004 shortly after being shot by insurgents through windscreen of vehicle in which he was



travelling on outskirts of Mosul in Iraq – defendants two companies part of an organisation providing defence & security services to governments - protection of human & material assets in Northern Iraq - claimant contending inadequate protection amounting to breach of duty, that defendants should have fitted bullet resistant windscreens to their vehicles, provided armoured vehicles or that deceased's body armour should have been fitted with a collar - a bullet resistant windscreen would have prevented the injury which killed deceased - disputed that a collar would have made any difference - defendants denying negligence & additionally contending deceased voluntarily accepted any breach of duty that might be established – expert evidence – held that claimant had not established any causative breach of duty on part of defendants.

[Davies](#)

KT v Lothian NHS Board [2009] [2009] CSOH 132

Scottish Court of Sessions

Lady Clark of Calton

Medical negligence – obstetrician – anaesthetist – child with cerebral palsy - whether breaches of duty – causation – spinal anaesthesia - conflict in expert evidence as to causation & timing – negligence not established.

[KT](#)