

## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Today's Cases

**Reinsurance** – trade credit & export credit – whether reinsurer liable to pay its reinsured sums under a quota share reinsurance treaty. See *General Reinsurance Australia v HIH Casualty & General (in liquidation) (I, B, C)*

**Motor Accident (NSW)** – “journey” claim – operation of s.151Z(1)(e) of *Workers’ Compensation Act 1987* (NSW) – where workers’ compensation insurer seeks indemnity of compensation payments from tortfeasor – whether compensation payments act as a defence to the plaintiff’s claim against the tortfeasor. See *Cai v Zheng (I)*

**Hotelier’s Liability** – duty of care of licensed hotelier to patrons to take reasonable care to avoid injury caused by other intoxicated patrons – whether duty extends to guard against criminally violent behaviour – foreseeability considered. See *Adeels Palace v Moubarak; Adeels v Bou Najem (I)*

**Motor Accident (NSW)** – Defendant’s appeal against finding of no contributory negligence – plaintiff a passenger in motor vehicle that veered off the road and sideswiped a rock wall – plaintiff holding onto a ceiling grab-rail – left elbow crushed between vehicle and wall when it left the road. Appeal dismissed. See *Grech v Sutton (I)*

**Contempt** – whether it was appropriate for solicitors to threaten to seek personal costs order against another solicitor during proceeding. See *Nuclear Utility Technology & Environmental Corporation v ABC (I, B, C)*

**Power of Sale** – appropriate distribution of surplus funds paid into court by bank following sale of property under Power of Sale and satisfaction of mortgage – whether surplus funds to be returned to former registered proprietors or to unsecured creditor who had obtained judgment. See *Re Commonwealth Bank of Australia (B)*



**Mortgages & Guarantees** – claim by bank for repayment of moneys lent plus interest together with possession of two properties said to have been given as security over the loans. Allegations of forged signatures. See *Elders Rural Bank v Mapplelane Enterprises & Ors* (B)

**Public Interest Immunity** – whether ATO entitled to access to documents held by Law Institute of Victoria concerning affairs of solicitor. See *Law Institute of Victoria v Deputy Commissioner of Taxation* (I, B, C)

**Private International Law** – whether proceedings are to decide title to foreign immovable property – whether the claims fall within the exceptions to the “Mocambique” rule – fraud alleged. See *Singh v Singh* (B)

**Insurance** – theft of BMW motor vehicle – defences of non-disclosure & misrepresentation – Verdict for Plaintiff. See *Gardener v GIO* (I)

## Monday 2 March 2009

### General Reinsurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liquidation) [2009] NSWCA 22

Court of Appeal of New South Wales

Allsop P; Hodgson & Macfarlan JJA

Reinsurance – “trade credit insurance” - quota share reinsurance treaty - construction of underlying insurance treaty – underlying primary insurance written by HIH in favour of Suncorp – primary judge had held that Suncorp policy a “Trade Credit” policy within the scope of the treaty - for decision appealed from see ‘Benchmark’ Tuesday 3 June 2008 & link below - whether supply of goods by financier on credit within scope of trade credit insurance treaty - sale of goods – passing of property – intention of parties – characterisation of commercial arrangements – construction of invoices & bills of lading - appeal dismissed.

[General Reinsurance Australia](#) (I, B, C)

[HIH Casualty & General Insurance Limited v General Reinsurance Australia](#) - decision 2 June 2008 - liability of insurer to indemnify – whether ‘trade credit’ claim outside scope of policy – whether claim an ‘insured debt’ – whether debt a trade related debt – primary judge had found for HIH.

### Cai v Zheng [2009] NSWCA 13

Court of Appeal of New South Wales

Giles & Basten JJA; Hoeben J

s128(3) *Motor Accidents Compensation Act 1999* (NSW) as amended by *Civil Liability Legislation Amendment Act 2008* (NSW) – 151Z(1) *Workers Compensation Act 1987* (NSW) – indemnity - liability had been admitted in proceedings in District Court – “proceedings determined before that commencement” - costs – damages - assessment of gratuitous care – correct approach to characterising payments from church: case law considered - appeal allowed - judgment in favour of respondent for \$300,681 set aside & in substitution: judgment entered for respondent in sum of \$17,447.91.

[Cai](#) (I)

### Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] NSWCA 29

Court of Appeal of New South Wales

Beazley, Giles & Campbell JJA

Personal injuries - conduct of restaurant/nightclub – New Year’s Eve function - on appeal, challenge to findings as to duty of care, breach & causation - duty of care owed by proprietor to patrons - can extend to taking reasonable care to guard against injury from intoxicated, unruly or violent behaviour of other patrons including criminal behaviour - depends on foreseeability of injury from the behaviour and control over it - on facts, duty of care was owed - desirability of discrimination in complaint of erroneous admission or rejection of evidence – appeals dismissed – very detailed review of case law in



the judgment of Giles JA.

[Adeels Palace](#) (I)

**Grech v Sutton [2009] NSWCA 23**

Court of Appeal of New South Wales

Ipp JA, Handley AJA & Hoeben J

Personal injuries - motor vehicle accident – appeal from primary judge’s finding of no contributory negligence - admissibility of medical reports - whether order limiting effect of evidence pursuant to s136 *Evidence Act* 1995 (Cth) should have been revoked - whether sufficient evidence to establish contributory negligence – appeal dismissed.

[Grech](#) (I)

**Nuclear Utility Technology & Environmental Corporation Inc v Australian Broadcasting Corporation; on the application of Bayliss v Australian Broadcasting Corporation [2009] NSWSC 78**

Supreme Court of New South Wales

McCallum J

Contempt – allegation of criminal contempt – propriety of threatening to seek costs against opposing solicitor personally before conclusion of proceedings – case law considered - whether the ABC should be required to produce documents in response to a notice to produce issued by applicant – “legal or other advice” – client legal privilege – Her Honour not satisfied there were reasonable grounds for finding that ABC had committed the offence of contempt – an interesting decision.

[Nuclear Utility Technology & Environmental Corporation](#) (I, B, C)

**Re Commonwealth Bank of Australia [2009] NSWSC 81**

Supreme Court of New South Wales

Young CJ in Eq

Surplus on mortgagee sale by Bank of property in Orange owned by more than one person - Bank as mortgagee paid into Court surplus after satisfying its mortgage over property – in the case of a joint tenancy, whether it is severed so that one-third of monies belong to each of former registered proprietors or whether joint tenancy still subsists in money in Court - order made that monies paid into court be paid out to an unsecured creditor with judgment debt.

[Re Commonwealth Bank of Australia](#) (B)

**Council of the City of Sydney v The Spanish Club Ltd [2008] NSWLEC 335**

Land & Environment Court of New South Wales

Preston CJ

*Environmental Planning & Assessment Act* 1979 (NSW) – s121B order - non-compliance with fire safety order - administrator appointed for respondent - regime addressing fire safety risk agreed by parties, involving vacation of premises & fire safety upgrades.

[Council of the City of Sydney](#) (B, C)

**Elders Rural Bank Ltd v Mapplelane Enterprises Pty Ltd & Ors [2009] VSC 46**

Supreme Court of Victoria

Mandie J

Facility agreements – guarantee – claim by Bank for monies lent plus interest pursuant to various alleged agreements - Bank also seeking possession under two mortgages allegedly given as security in relation to the loans - allegation of forged signatures – alleged set-off agreement – Bank’s claim succeeded.

[Elders Rural Bank](#) (B)**Nicholson & Ors v Knaggs & Ors [2009] VSC 64**

Supreme Court of Victoria

Vickery J (in Melbourne)

Wills – lack of testamentary capacity – elderly person with disabilities – care giving burden - shift to a human rights based approach to disability with ageing demographic - undue influence – circumstantial evidence – standard of proof – Convention on the Rights of Persons with Disabilities 2006 - construction of Article 12 – an interesting decision.

[Nicholson](#) (I, B)**Law Institute of Victoria Limited v Deputy Commissioner of Taxation [2009] VSC 55**

Supreme Court of Victoria

Pagone J

Public interest immunity – Law Institute of Victoria – documents relating to affairs of solicitor – whether Federal Commissioner of Taxation entitled to access to documents – s264 *Income Tax Assessment Act* 1936 (Cth) – constitutional Law – inconsistency – s6.4.5 *Legal Profession Act* 2004 (Vic) – matter to be listed for parties to make submissions about further Court directions.

[Law Institute of Victoria](#) (I, B, C)**Singh v Singh [2009] WASCA 53**

Court of Appeal of Western Australia

Martin CJ, Pullin JA &amp; Newnes AJA

s189 *Property Law Act* 1969 (WA) - private international law - 'Mocambique rule' – exceptions to rule - case law considered - property in Malaysia - whether alienation of property with intention to defraud creditors – lex situs - forum non conveniens – appeal dismissed – ‘alienation’ – ‘void’ - comprehensive review of case law – an interesting decision.

[Singh](#) (B)



## In the District Court of New South Wales...

### **Anthony John Gardener v GIO General Limited [2009] NSWDC 20**

District Court of New South Wales

Sidis DCJ

Insurance on BMW – claim made when car stolen - whether non-disclosure & misrepresentation – underwriting guidelines - defendant had not discharged onus of proving it would not have insured plaintiff's car had it been informed vehicle was a 1997 740IL automatic sedan & that it was fitted with a non-standard electrical accessory that cost \$3,200 at the time of original purchase – verdict for plaintiff.

[Anthony John Gardener](#) (I)

## From the District Court of South Australia...

### **Brown & Brown v Unique Building Pty Ltd [2009] SADC 13**

District Court of Sydney

McIntyre J

Building contracts - defendant to construct four, three-storey townhouses upon property owned by plaintiffs at Tam O'Shanter Place, Adelaide -plaintiffs alleging breach of contract or of statutory warranties, failure to perform work in a proper manner & in accordance with specifications resulting in a number of defects – defendant contending plaintiffs not entitled to maintain this action in view of dispute resolution processes in the contracts - defendant counterclaiming for unpaid progress payments – held that plaintiffs entitled to maintain action notwithstanding dispute resolution procedures in contracts - plaintiffs entitled to damages - proper measure of damages - defendant entitled to judgement on counterclaim for unpaid progress claim number 3.

[Brown](#) (C)

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