



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

MG Corrosion Consultants Pty Ltd v Vinciguerra - *Corporations Act 2001* (Cth) - derivative action - requirements of s237(2) (B)

Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 2) - *Australian Securities & Investments Commission Act 2001* (Cth) - application for summary judgment claims by twelve councils against three respondents (I, B)

QBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd - Insurance contracts - whether appellant had elected under the policy to repair aircraft (I)

Lusk & Anor v Sapwell - Personal injuries - employer & employee - assault by customer when respondent working alone in backroom - appeal allowed (I)

Lange v Queensland Building Services Authority - *Queensland Building Industry Services Authority Act 1991* (Qld) - statutory insurance scheme - "residential construction work" (I, C)

Griffiths v State of Queensland - Personal injuries - *Workplace Health & Safety Act 1995* (Qld) - Manual Tasks Code of Practice 2000 - appeal allowed (I)

Richsilk Investments Pty Ltd v Cove Developments Pty Ltd - Contracts - call option agreement - specific performance (B, C)

Martens v Stokes & Anor Constitutional Law - suit to which Commonwealth is a party - *Personal Injury Proceedings Act* 2002 (Qld) (I)

Owston Nominees No. 2 Pty Ltd v Clambake Pty Ltd - *Trade Practices Act* 1974 (Cth) - misleading or deceptive conduct - interpretation of s4(2) - causation - accessory liability - three appeals (I, B, C)

Summaries with links (5 minute read)

Tuesday 5 April 2011

MG Corrosion Consultants Pty Ltd v Vinciguerra [2011] FCAFC 31

Full Court of the Federal Court of Australia

North, McKerracher & Jagot JJ

Corporations Act 2001 (Cth) - derivative action - requirements of s237(2) - appeal dismissed.

[MG Corrosion Consultants](#) (B)

[Vinciguerra](#) - decision 21 July 2010: see 'Benchmark' B & IBC Monday 26 July 2010 - *Corporations Act* 2001 (Cth) - derivative action - leave to commence proceedings under s237 - five requirements under s237(2) established - detailed consideration of United Kingdom & Australian case law.

Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 2) [2011] FCA 309

Federal Court of Australia

Jagot J (in Sydney)

Australian Securities & Investments Commission Act 2001 (Cth) - *Corporations Act* 2001 (Cth) - allegations of negligence & misleading & deceptive conduct - claims by twelve councils against three respondents - cross-claims - third respondent's application for summary judgment of one of the claims against it adjourned for mention on first day of hearing.

[Bathurst Regional Council](#) (I, B)

**OBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd [2011] QCA 60**

Court of Appeal of Queensland

Muir & Chesterman JJA; Margaret Wilson AJA

Insurance contracts - for decision appealed against, see 'Benchmark' Tuesday 31 August 2010 & link below - whether appellant had elected under the policy to repair the aircraft - no valid election under the policy to repair - cross-appeal against primary judge's failure to make findings in respondent's favour in respect of its compensatory damages claim - appeal allowed - judgment for respondent in sum of \$3,171,886.88 set aside - substituted judgment for respondent for \$1,807,367.88 together with interest thereon at the rate of ten per cent.

[OBE Insurance \(I\)](#)

[Cape York Airlines](#) - decision 27 August 2010 - damage to aircraft - construction of insurance policy - election - *Civil Aviation Act 1988 (Cth)* - *Civil Aviation Regulations 1988 (Cth)* - plaintiff's Cessna 208 Caravan Aircraft VH-CYC suffered engine failure & ditched in the sea off Green Island, near Cairns - whether three letters on which defendant relied constituted evidence of the making of & communication of an unequivocal election to repair - defendant did not make an election to repair under the policy - judgment for plaintiff in sum of \$1,942,367.88 plus interest to date of judgment of \$1,229,519, being a total judgment of \$3,171,886.88.

Lusk & Anor v Sapwell [2011] QCA 59

Court of Appeal of Queensland

Muir JA, Wilson AJA & Lyons J

Personal injuries - employer & employee - assault by customer when respondent working alone in backroom - backroom not installed with any "mechanism" to exclude others or to alert the respondent as to the presence of an intruder - post-traumatic stress disorder, depression and anxiety - whether risk of injury foreseeable - causation - damages - appeal allowed.

[Lusk \(I\)](#)

[Sapwell](#) - decision 15 September 2010: see Benchmark I & IBC Friday 17 September 2010 - personal injuries - employer's duty of care - safe system of work - plaintiff was employed by defendants as optical technician in optometry shop - employer owed duty of care to employees to take reasonable care to protect employees from the criminal behaviour of third parties - whether defendants had breached their duty to take reasonable care to avoid the foreseeable risk of injury to plaintiff - assessment of damages - gross assessment at \$496,846.74, less agreed refund to WorkCover \$109,212.92 - judgment for plaintiff in net sum of \$387,633.82.

Lange v Queensland Building Services Authority [2011] QCA 58

Court of Appeal of Queensland

McMurdo P, Wilson AJA & Lyons J



Queensland Building Industry Services Authority Act 1991 (Qld) - statutory insurance scheme - whether exclusion clause in policy applicable - whether "residential construction work" had same meaning throughout policy - whether *contra proferentem* maxim applicable - "payment on a claim under the insurance scheme" - appeal dismissed.

[Lange](#) (I, C)

[Lange](#)- decision 28 July 2010: see 'Benchmark' I, C & IBC Friday 30 July 2010 - proper construction of clause in statutory insurance policy - two people entered contract with applicant to construct three townhouses comprising one duplex & a single detached dwelling - the two people were insured under the policy - work not completed - applicant was placed in liquidation - insured made a claim for non-completion & were paid \$200,000 by respondent - respondent sought to recover \$200,000 from applicant - applicant seeking order under *Judicial Review Act 1991 (Qld)* that respondent's decision that the insured were entitled to indemnity be quashed or set aside - whether insurance policy was properly construed by respondent - application dismissed.

Griffiths v State of Queensland [2011] QCA 57

Court of Appeal of Queensland

Muir, Chesterman & White JJA

Personal injuries - appellant had injured her back whilst lifting medical equipment out of plastic tub sitting on top shelf of steel trolley - *Workplace Health & Safety Act 1995 (Qld)* - *Manual Tasks Code of Practice 2000* - whether respondent employer had exercised proper diligence and took reasonable precautions to discharge its obligation - appeal allowed.

[Griffiths](#) (I)

[Griffiths](#) - decision 6 August 2010: see 'Benchmark' I & IBC Tuesday 10 August 2010 - claim dismissed.

Richsilk Investments Pty Ltd v Cove Developments Pty Ltd [2011] QSC 63

Supreme Court of Queensland

Applegarth J

Contracts - plaintiff buyer & defendant seller had entered call option agreement - where exercise of option required buyer to deliver to seller "a properly completed & executed waiver of the cooling off period in Form 32a *Property Agents & Motor Dealers Act 2000 (Qld)*" - whether plaintiff had properly exercised option to purchase defendant's property - contract to be specifically performed.

[Richsilk](#) (B, C)

Martens v Stokes & Anor [2011] QSC 65

Supreme Court of Queensland

Jones J

Constitutional Law - suit to which Commonwealth is a party - *Personal Injury Proceedings Act 2002* (Qld) - non-compliance with pre-court procedures - first & second defendants seeking orders that plaintiff's claim be struck out or stayed - application granted.

[Martens](#) (I)**Owston Nominees No. 2 Pty Ltd v Clambake Pty Ltd [2011] WASCA 76**

Court of Appeal of Western Australia

McLure P; Pullin & Murphy JJA

Trade Practices Act 1974 (Cth) - misleading or deceptive conduct - role of silence - interpretation of s4(2) - causation - accessory liability - three appeals: CACV 34 of 2009 appeal dismissed; CACV 53 of 2009 appeal allowed; CACV 6 of 2010 appeal dismissed - claims arising out of a fire on 22 December 2002 which destroyed section of commercial building at Claremont owned by Clambake - building did not have a fire protection system that complied with the relevant regulatory framework at the time of the fire - Clambake had since December 1992 leased part of the building to Tipperary Projects Pty Ltd - in the leased premises were antiques, fine furniture, artworks & other valuable items of personal property valued at \$14,625,400 - agency - issue estoppel - res judicata - negligence - relevance of statutory building code to the standard of care.

[Owston](#) - part one of Court of Appeal judgment (I, B, C)[Owston](#) - part two of Court of Appeal judgment

[Clambake](#) - for CACV 6 of 2010 - decision Supreme Court of W.A. 14 December 2009: CIV 1707 of 2003, CIV 2093 of 2003 - see 'Benchmark' I & IBC Wednesday 16 December 2009 - guarantee & indemnity - s80 & 87 *Trade Practices Act 1974* (Cth) - in proceedings number CIV 1707 of 2003, application for special rate of interest on judgment debt dismissed - in proceedings no. CIV 2093: (i) new claim by first defendant Clambake for indemnity against defendant to counter-claim Mr Anderson for Clambake's liability to first plaintiff Owston dismissed; (ii) judgment for Mr Anderson on his cross-claim against Clambake for relief under s87; (iii) order for suspension of enforcement of judgment extended but on further conditions;

[Clambake](#) - CACV 34 of 2009 & CACV 53 of 2009 - decision Supreme Court of W.A. 9 March 2009: CIV 1707 of 2003, CIV 2093 of 2003 - see 'Benchmark' 11 March 2009 - negligence - nuisance - bailment - risk of fire - adequacy of fire protection system - insurance recommendations - action for damages for loss of property caused by fire at end of 2002 - fire started in roof of commercial property at Claremont - six separate tenancies - *Occupiers Liability Act 1985* (WA) - misleading & deceptive conduct: s52 & s82 of the *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1987* (WA) - silence as misleading & deceptive conduct - alleged obligation to disclose deficiencies in fire protection system in leased premises - whether tenant would have removed property from premises if informed of alleged inadequacies in



fire protection system - valuation of property - large collection of valuable & historic antiques, furniture, carpets, paintings - methods of valuation of rare collection of watercolour paintings of Australian bird life - claim for unpaid rent & outgoings - cross-claim for breach of covenant to insure against risks for public liability & fire - extent of liability - GST - whether claim for interest a penalty - set-off - liability of guarantor - costs - legal costs - ability of bailee to sue in its own name for entire value of property owned by bailor - a very lengthy judgment - review of case law from the United Kingdom, Canada, New Zealand & Australia.

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