



## Insurance Banking & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Nick Scali Ltd v Super A-Mart Pty Ltd** - s52, s53 *Trade Practices Act 1974* (Cth) - comparative advertising of lounge suites - "standard, quality, grade or composition" (I, B)

**Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970** - s14(1) *Limitation Act 1969* (NSW) - s5(1)(c) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - design & construction of block of home units - water penetration (I, C)

**Roche Mining Pty Ltd v Jeffs** - Personal injuries - duty of care - causation - appeal dismissed (I)

**Dargham v Kovacevic (No 2)** - Costs - personal injuries (I, C)

**Snowy River Alliance Inc v Water Administration Ministerial Corporation** - *Snowy Hydro Corporation Act 1997* (NSW) - summons dismissed (I, B, C)

**Beckett v State of New South Wales** - Discovery of documents (I)

**Brice v Nikolaidis** - Easements - private vehicle parking (I, C)

**Burns & Anor v Integrity Investment Management Pty Ltd & Ors** - Employment contracts (B)



**Steinebach (resp) v O'Brien** - Canadian decision - medical negligence - duty of care - causation - damages (I)

**Saskatchewan Government Insurance (app.) v Patricia Hotel (1973) Ltd** - Canadian decision - insurance contracts - whether appellant insurer has a duty to defend the City's claim - appeal allowed (I, C)

**Agribands Purina Canada Inc. v Kasamekas** - Canadian decision - tort of civil conspiracy - contracts - damages (I)

## Summaries with links (5 minute read)

### Friday 8 July 2011

#### **Nick Scali Ltd v Super A-Mart Pty Ltd [2011] FCA 751**

Federal Court of Australia

Yates J (in Sydney)

s52, s53 *Trade Practices Act* 1974 (Cth) - comparative advertising of lounge suites - commercial on television also available on internet - proceeding was commenced before 1 January 2011 - "standard, quality, grade or composition" - expert evidence - claim for damages dismissed - matter adjourned in relation to question of injunctive relief & costs.

[Nick Scali](#) (I, B)

#### **Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970 [2011] NSWCA 181**

Court of Appeal of New South Wales

Bathurst CJ; Basten & Young JJA

s14(1) *Limitation Act* 1969 (NSW) - "date on which cause of action first accrues" - s5(1)(c) *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) - "any other tort-feasor who is...liable" - eight storey residential building at The Entrance - water penetration into some units - whether six-year limitation period had expired before proceedings were commenced against appellant - whether appellant should be required to pay an amount by way of contribution to builder, in respect of a matter as to which it had been held to have no liability to Owners Corporation.



## [Cyril Smith \(I, C\)](#)

[The Owners Strata Plan No. 64970](#) - decision 31 May 2010: see 'Benchmark' I, C & IBC Thursday 3 June 2010 - costs - apportionment of costs - design & construction of block of home units on Central Coast - rainwater penetration - case law considered as to whether judgment should be entered on the cross-claims or merely a "verdict";

[The Owners Strata Plan No. 64970](#) - decision 23 April 2010: see 'Benchmark' I, C & IBC Wednesday 28 April 2010 - torts - joint tortfeasors - contribution - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - damage - referees - whether a dismissal of main proceedings against a joint tortfeasor on a procedural basis precludes a claim for contribution by another joint tortfeasor - whether imposition of statutory obligation on an Owners Corporation under s62 *Strata Schemes Management Act 1996* (NSW) amounts to "damage" - referee's reports to be adopted except for matters already rejected or the subject of settlement between parties;

[Eko Investments](#) - decision 31 March 2009: see 'Benchmark' Wednesday 1 April 2009 - negligence - claim for economic loss - referees & referees' reports - challenge to adoption of report - challenge to conclusions reached as to architect's responsibility - principles applicable to review of referees' reports in which errors of law are alleged - design & construction of eight-storey block of thirty-two home units on the Central Coast - rainwater penetration - vulnerability of a plaintiff - *Home Building Act 1989* (NSW) - *Strata Schemes Management Act 1996* (NSW) - duty of care - limitation defence - some parts of report adopted, others not.

## **[Roche Mining Pty Ltd v Jeffs \[2011\] NSWCA 184](#)**

Court of Appeal of New South Wales

McColl & Basten JJA; Tobias AJA

Personal injuries - duty of care - causation - whether mine operator had breached duty of care to plaintiff employee of labour hire company - s5B, s5C *Civil Liability Act 2002* (NSW) - appeal dismissed.

## [Roche Mining \(I\)](#)

[Jeffs](#) - decision 20 September 2010: see 'Benchmark' I & IBC Monday 27 September 2010 - personal injuries - proceedings in negligence against second defendant arising from accident at Wambo Coal Mine (proceedings against first defendant, the owner of the mine, had been discontinued before trial) - plaintiff had fallen approximately 2.5 metres while climbing into Caterpillar 785B dump truck - plaintiff employed by labour hire company as casual - second defendant in charge of running of the mine & owned the plant & equipment used at the mine, which included the Cat 785B - duty of care - notional liability of employer, had it been joined in proceedings assessed at twenty percent - contributory negligence - damages - *Civil Liability Act 2002* (NSW) - s151Z(2) *Workers Compensation Act 1987* (NSW) - judgment for plaintiff in sum of \$1,205,601.20.

## **[Dargham v Kovacevic \(No 2\) \[2011\] NSWSC 651](#)**

Supreme Court of New South Wales

Hislop J

Costs - personal injuries - Bullock order - for decision 31 January 2011, see 'Benchmark' I, C & IBC Tuesday 8 February 2011 & link below.



[Dargham](#) (I, C)

[Dargham](#) - decision 31 January 2011 - construction site accident - first & third defendants insured under a Contract Works Policy - refusal of indemnity to third defendant - interpretation of policy - *Home Building Act 1989* (NSW) - no duty of care owed by first defendant to plaintiff - duty of care owed by principal to independent contractor - third defendant owed duty to plaintiff as occupier & pursuant to principles in *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35 - s151Z(2) *Workers Compensation Act 1987* (NSW) - contributory negligence - assessment of damages - insurer liable to indemnify third defendant.

**Snowy River Alliance Inc v Water Administration Ministerial Corporation [2011] NSWSC 652**

Supreme Court of New South Wales

Hislop J

*Snowy Hydro Corporation Act 1997* (NSW) - plaintiff seeking judicial review in respect of purported five year review & the variation of Snowy Hydro Water Licence - summons dismissed.

[Snowy River Alliance](#) (I, B, C)

**Beckett v State of New South Wales [2011] NSWSC 626**

Supreme Court of New South Wales

Harrison J

Discovery of documents - plaintiff's application for discovery - claim for damages for malicious prosecution against the police - defendant should be required to give discovery limited to thirty-eight of the nominated categories.

[Beckett](#) (I)

**Brice v Nikolaidis [2011] NSWSC 682**

Supreme Court of New South Wales

White J

Easements - injunction sought to restrain defendants from allowing a private vehicle to be driven over the sandstone pavers: that application refused - plaintiff had argued that an unreasonable use of easement was actionable as a nuisance, & that the defendant should pay the costs of repairing pavers that had been damaged either when a car had been parked on them or driven over them - declaration that easement did not confer on owner of dominant tenement the right to park a vehicle on the right of carriageway where vehicle could reasonably be parked wholly on dominant tenement - amended summons otherwise dismissed - paragraph 1 of cross-summons to be dismissed - matter stood over in relation to costs, question of injunctive relief.

[Brice](#) (I, C)



**Burns & Anor v Integrity Investment Management Pty Ltd & Ors [2011] NSWSC 687**

Supreme Court of New South Wales

Bergin CJ in Eq

Employment contracts - application for injunction to restrain meeting to consider resolutions relating to first plaintiff's employment refused.

[Burns \(B\)](#)

## From Canada...

**Steinebach (resp) v O'Brien, 2011 BCCA 302**

Court of Appeal for British Columbia

Mackenzie, D. Smith & Groberman JJ

Medical negligence - duty of care - causation - damages - infant born with severe brain damage resulting in cerebral palsy as a result of lack of oxygen to brain shortly prior to birth - trial judge had found doctor & nurse negligent - doctor & nurse appealed - causation - assessment of future economic loss - appellants' appeal on liability dismissed - appellants contended primary judge erred in basing the loss of earning capacity award on male earnings statistics without an adequate recognition of female contingencies - they also contend he erred by inconsistently basing his loss of inter-dependency award on female earnings statistics - award of damages for loss of future earning capacity varied.

[Steinebach \(I\)](#)

**Saskatchewan Government Insurance (app.) v Patricia Hotel (1973) Ltd, 2011 SKCA 70**

Court of Appeal for Saskatchewan

Jackson, Richards and Ottenbreit JJA.

Insurance contracts - insurer's duty to defend insured - building under demolition had collapsed onto electrical sub-station owned by the City of Saskatoon - the City then sued several parties including respondent - respondent insured by appellant - whether appellant insurer has a duty to defend the City's claim - appeal allowed.

[Saskatchewan Government Insurance \(I, C\)](#)

**Agribrands Purina Canada Inc. v Kasamekas, 2011 ONCA 460**

Court of Appeal for Ontario

Goudge, Gillese and Juriansz JJA.



Tort of civil conspiracy - contracts - supply of livestock feed and pet food - trial judge had found appellants liable to respondents for tort of unlawful conduct conspiracy - trial judge also found Purina in breach of its contract with Raywalt - appellants appealing the finding of unlawful conduct conspiracy - appellants also contending trial judge made errors in calculating damages for that tort & in the rate he applied for prejudgment interest - Purina contesting method the trial judge used to calculate damages for breach of contract breach - Purina also appeals finding of punitive damages against it - appeal allowed on each of these issues except punitive damages & the alleged errors in calculating the tort damages.

[Agribrands Purina Canada \(I\)](#)

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