

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Vidler v Commissioner of Taxation - *A New Tax System (Goods & Services Tax) Act 1999* (Cth) - GST status of vacant land (B, C)

AXA Asia Pacific Holdings Ltd v Commissioner of Taxation - Capital gains tax - disposal of shareholding in wholly-owned subsidiary (B)

Bracks v Smyth-Kirk - s5(1)(b) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - joint tortfeasors - "damage" (I)

Gilberg v Maritime Super Pty Ltd (No 2) - Costs (I, B)

Zurich Australian Insurance Ltd v Motor Accidents Authority of New South Wales - *Motor Accidents Compensation Act 1999* - refusal by CARS assessor to permit insurer to cross-examine claimant - application for stay pending challenge (I)

FAI Car Owners Mutual Insurance Company Pty Ltd & Ors - *Corporations Act 2001* (Cth) - winding up by the Court - surplus after payment of debts & claims in full (I, C)

Oakland Property Holdings Pty Ltd v Chief Commissioner of State Revenue - *Duties Act 1997* (NSW) - properties at Chatswood & Macquarie Park (B, C)

Owners SP 62930 v Kell & Rigby - Contracts - exclusion clauses - whether clause sufficient to limit statutory liability - strata title development (I, B, C)

Bitannia Pty Ltd v Parkline Constructions Pty Ltd - Building & construction contracts - redevelopment of Ettalong Hotel - principles applicable to adoption of referee's report (B, C)

Tinworth v W V Management Pty Ltd & Anor - Personal injuries - application by first defendant to amend defence - s134AB(12) *Accident Compensation Act* 1985 (Vic) (I)

JGM Nominees Pty Ltd & Ors v Tulip Investments Pty Ltd & Anor - Funds in court - proceeds of mortgagee sale (C)

Graham Geoffrey Walker & Thelma Jean Walker as trustees for the Walker Superannuation Fund v Clough Property Claremont Pty Ltd - *Sale of Land Act* 1970 (WA) (B, C)

Summaries with links (5 minute read)

Tuesday 8 December 2009

Vidler v Commissioner of Taxation [2009] FCA 1426

Federal Court of Australia

Stone J (in Sydney)

ss40-65 & 195-1 *A New Tax System (Goods & Services Tax) Act* 1999 (Cth) - GST status of vacant land - properties in Ipswich - Administrative Appeals Tribunal had rejected claim that properties were "residential premises" as defined in s195 - application dismissed.

[Vidler](#) (B, C)

[Vidler](#) - decision AAT 1 June 2009

AXA Asia Pacific Holdings Ltd v Commissioner of Taxation [2009] FCA 1427

Federal Court of Australia

Jessup J (in Melbourne)

Capital gains tax - disposal of shareholding in wholly-owned subsidiary - partial scrip-for-scrip roll-over relief under Subdivision 124-M *Income Tax Assessment Act* 1997 (Cth) - appeal allowed - detailed analysis of case law.

[AXA Asia Pacific](#) (B)

Bracks v Smyth-Kirk [2009] NSWCA 401

Court of Appeal of New South Wales

Allsop P; McColl & Young JJA

s5(1)(b) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - joint tortfeasors - for decision appealed from, see 'Benchmark' I & IBC Thursday 11 September 2008 & link below - successive defamation proceedings by plaintiff against different defendants - first proceedings settled in plaintiff's favour & judgment satisfied - second proceedings dismissed as abuse of process - whether claim in second proceedings brought in respect of "damage" claimed in first proceedings - appeal dismissed - comprehensive review of text & case law from the United Kingdom, Australia & New Zealand.

Bracks (I)

Bracks - decision 9 September 2008 - s5(1)(b) *Law Reform Miscellaneous Provisions Act 1946* (NSW) - defamation - campaign letter - election for committee of Australian Jockey Club - republication - order sought for dismissal of proceedings as an abuse of process - joint tortfeasors - whether damages previously recovered in respect of same damage against another person - distinction between "damage" & "damages" - recovery of additional damages precluded under s5(1)(b) - proceedings dismissed.

Gilberg v Maritime Super Pty Ltd (No 2) [2009] NSWCA 394

Court of Appeal of New South Wales

Allsop P; Hodgson & Campbell JJA

Costs - for Court of Appeal decision 8 October 2009, see 'Benchmark' I, B & IBC Wednesday 14 October 2009 & link below - relief obtained by successful appellant substantially less than sought at first instance & on appeal - less than reasonable participation in settlement negotiations - order that there be no order as to costs at first instance; each party bearing its own costs - respondent to pay appellant's costs of appeal.

Gilberg (I, B)

Gilberg - decision NSW Court of Appeal 8 October 2009 - *Superannuation (Resolution of Complaints) Act 1993* (Cth) - *Superannuation Industry (Supervision) Act 1995* (Cth) - entitlement to benefit - rules requiring supporting reports from medical practitioners - non-satisfaction of requirement & rejection of claim - whether trustee had power to consider further claim by same member - what the duty of a trustee when a further claim is made entails - whether that duty was breached - appeal allowed.

John Gilberg - Supreme Court decision 25 November 2008

Zurich Australian Insurance Ltd v Motor Accidents Authority of New South Wales [2009] NSWSC 1314

Supreme Court of New South Wales

Harrison J

Motor Accidents Compensation Act 1999 (NSW) - CARS assessment - refusal by CARS assessor to permit an insurer to cross-examine claimant - application for stay pending challenge- whether risk that insurer will not be able to recover damages from claimant if stay not granted - application for stay refused.

[Zurich Australian Insurance](#) (I)

FAI Car Owners Mutual Insurance Company Pty Ltd & Ors [2009] NSWSC 1350

Supreme Court of New South Wales

Barrett J

Corporations Act 2001 (Cth) - winding up by the Court - liquidators of thirteen companies in HIH Group seeking orders directed towards completion of respective windings up & deregistration of the companies -surplus after payment of debts & claims in full - proposed distribution to contributories - whether necessary to settle list of contributories - ascertaining entitlements to surplus - whether assignment of right under winding up of another company is an "agreement" within s477(2B) - liquidator's remuneration.

[FAI Car Owners Mutual Insurance](#) (I, C)

Oakland Property Holdings Pty Ltd v Chief Commissioner of State Revenue [2009] NSWSC 1190

Supreme Court of New South Wales

Gzell J

Stamp Duties - *Duties Act 1997 (NSW)* - properties at Chatswood & Macquarie Park - plaintiff executed contracts for sale of land in New South Wales as purchaser for stated prices - deeds executed at same time for vendor to pay plaintiff amounts to be setoff against fit out rebates for tenants - whether consideration for agreements for sale were stated price less payments under the deeds - application dismissed.

[Oakland Property Holdings](#) (B, C)

Owners SP 62930 v Kell & Rigby [2009] NSWSC 1342

Supreme Court of New South Wales

McDougall J

Contracts - exclusion clauses - whether clause sufficient to limit statutory liability - strata title development at Kirribilli - plaintiff alleging defective building work - plaintiff suing builder & developers - developers joined, as a cross-defendant, firm of engineers who had contractual responsibility for, among other things, mechanical services - determination of separate questions.

[Owners SP 62930](#) (I, B, C)

Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2009] NSWSC 1302

Supreme Court of New South Wales

White J

Building & construction contracts - redevelopment of Ettalong Hotel - principles applicable to adoption of referee's report - referee's report substantially adopted.

[Bitannia](#) (B, C)

Tinworth v W V Management Pty Ltd & Anor [2009] VSC 552

Supreme Court of Victoria

J Forrest J

Personal injuries - plaintiff suing defendants in negligence alleging he contracted Q fever whilst employed at abattoir - application by first defendant on day trial commenced to amend defence - draft alleging three new matters: a revised plea of contributory negligence; voluntary assumption of risk; that by reason of s134AB(12) *Accident Compensation Act 1985* (Vic), plaintiff was precluded from making a claim for damages for pecuniary loss - amendment sought to refine allegations of contributory negligence permitted - application otherwise refused - detailed analysis of case law.

[Tinworth](#) (I)

JGM Nominees Pty Ltd & Ors v Tulip Investments Pty Ltd & Anor [2009] VSC 545

Supreme Court of Victoria

Daly AsJ

Funds in court - proceeds of mortgagee sale - competing equitable interests.

[JGM Nominees](#) (C)



Graham Geoffrey Walker & Thelma Jean Walker as trustees for the Walker Superannuation Fund v Clough Property Claremont Pty Ltd [2009] WASC 367

Supreme Court of Western Australia

Kenneth Martin J

Sale of Land Act 1970 (WA) - plaintiff purchasers seeking to avoid contract of sale - 'off-the-plans' strata unit in a multi-storey apartment development proposed for construction at Claremont - plaintiffs' action dismissed.

[Graham Geoffrey Walker](#) (B, C)