

## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Today's Cases

**Employer's Liability** – policeman injured while moving desk into police station - held no breach of duty of care by employer. See *Seage v State of NSW* (I)

**Guarantee Secured by Mortgage** – competing equitable claims – subrogation – guarantees secured by mortgage and application of rule in *Otter v Vaux*. See *Bofinger v Kingsway Group* (I, B, C)

**Proportionate Liability (NSW)** – professional negligence case by an investor against financial advisers – requirement for defendant to plead particulars in defence. See *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* (I, B, C)

**Land Valuation** – heritage protection order – appeals against valuation by Valuer-General of land on which Commonwealth Bank (Martin Pl/Pitt St Sydney) situated. See *Commonwealth Custodial Services v Valuer-General* (I, B, C)

**Apportionment** – apportionment of liability between employer, occupier and architect for personal injuries sustained by maintenance engineer on construction site. See *Ianello v BAE Automation & Electrical Services* (I, C)

**Building Dispute (Vic)** – whether claim a building dispute – whether permanent stay of proceedings should have been ordered. See *Nettleton v Vero Insurance Limited* (I, C)

**Consumer Protection (Vic)** – whether consumer contract issued by airline company contained an unfair term requiring passenger who wished to substitute a new passenger to pay additional fees. See *Jetstar Airways v Free* (I, B)



## Tuesday 9 December 2008

### **Australian Competition & Consumer Commission v Pratt (No 2) [2008] FCA 1833**

Federal Court of Australia

Ryan J (in Melbourne)

*Evidence Act 1995 (Cth)* – order made for determination of separate question to be heard after a hearing commencing on 8 December 2008.

[Australian Competition and Consumer Commission](#) (B)

### **Seage v State of New South Wales [2008] NSWCA 328**

Court of Appeal of New South Wales

Tobias & Macfarlan JJA; James J

Personal injuries - police detective sergeant injured back whilst moving desk in police station - commonplace activity not forming part of employee's regular duties - no breach of duty by employer - appeal dismissed.

[Seage](#) (I)

### **Bofinger & Anor v Kingsway Group Pty Ltd & Ors [2008] NSWCA 332**

Court of Appeal of New South Wales

Giles JA; Handley & Sackville AJJA

Guarantee – subrogation- rule in Otter v Vaux - plaintiffs guarantors of loans to developer which were secured by first, second & third mortgages over development property at Enmore, supported by first, second & third mortgages over their home & a private investment property – s3 *Law Reform (Miscellaneous Provisions) Act 1965 (NSW)* – appeal dismissed – extensive review of case law.

[Bofinger](#) (I, B, C)

### **Prestige Residential Marketing Pty Ltd v Depune Pty Ltd (No 2) [2008] NSWCA 341**

Court of Appeal of New South Wales

Beazley & Bell JJA; Mathews AJA

Costs – see ‘Benchmark’ Banking & IBC Friday 15 August 2008 & link below for decision 14 August 2008 – detailed consideration of case law. (I, B, C)

[Prestige Residential Marketing](#), and

[Prestige Residential Marketing](#) – decision 14 August 2008 - principal & agent – sale of property at Caringbah - action for recovery of commission by agent - whether agent effective cause of sale – answer ‘yes’ - appeal allowed.



**H.S.D. Co Pty Ltd v Masu Financial Management Pty Ltd [2008] NSWSC 1279**

Supreme Court of New South Wales

Rothman J

Proportionate liability - professional negligence claim by investor against financial advisers – investment in Westpoint Group – property development in York St. – defendant seeking leave to file amended defence - *Civil Procedure Act* 2005 (NSW) – detailed consideration of legislation, text & case law.

[H.S.D. Co](#) (I, B, C)

**Commonwealth Custodial Services Ltd v Valuer General [2008] NSWLEC 310**

Land & Environment Court of New South Wales

Biscoe J

Calculation of land valuation - *Valuation of Land Act* 1916 (NSW) - merit appeals against valuations of heritage restricted land by Valuer General - applicant Commonwealth Custodial Services Ltd the owner of land on which Commonwealth Bank Building erected, corner of Martin Place & Pitt Street, Sydney “The Moneybox” - approach to land value for heritage restricted land to which s14G of the Act applies – rental differential adjustment – appeals allowed - case law considered in an interesting decision.

[Commonwealth Custodial Services](#) (I, B, C)

**Ianello v BAE Automation and Electrical Services Pty Ltd & Ors [2008] VSC 544**

Supreme Court of Victoria

Forrest J

Accident compensation - workplace injury involving fall through skylight on roof – conversion of civic hall at Colac into a performing arts centre - plaintiff maintenance engineer – contribution – Part IV *Wrongs Act* 1958 (Vic) - apportionment of liability between employer, occupier and architect – relevance of experience of employee - contributory negligence – assessment of damages – plaintiff entitled to judgment against each of defendants in sum of \$420,000 plus any entitlement to interest - 65% attributable to occupier Council , 25% attributable to employer , 10% attributable to architect.

[Ianello](#) (I, C)

**Nettleton v Vero Insurance Limited & Anor [2008] VSC 554**

Supreme Court of Victoria

Beach J

Building dispute - domestic builder’s warranty insurance in respect of building works to be carried out at Donvale - *Domestic Building Contracts Act* 1995 (Vic) - meaning of “arising between” – appeal against County Court’s entry of judgment in favour of Vero, staying the proceeding – whether plaintiff’s claim a domestic building dispute - on appeal, jurisdictional error found – an interesting decision with detailed consideration of case law. [Nettleton](#) (I, C)





## Jetstar Airways Pty Ltd v Free [2008] VSC 539

Supreme Court of Victoria

Cavanough J

*Fair Trading Act 1999* (Vic) – statutory interpretation - statutory regulation of unfair terms in consumer contracts – term in standard form airline contract requiring purchaser wishing to substitute a new passenger to pay an administrative fee & to pay difference between fare originally purchased & fare available on the date of change – held by Victorian Civil & Administrative Tribunal Act to be an “unfair term” – appeal on questions of law - “contrary to the requirements of good faith” – whether a term “causes a significant imbalance in the parties’ rights & obligations arising under the contract to the detriment of the consumer” – appeal allowed – matter remitted for rehearing – detailed consideration of legislation, text & case law.

[Jetstar Airways](#) (I, B)

## Day One of the jury Trial of James Henry Leigh Hunt & his brother John on this day in 1812...

### The King v John & Leigh Hunt

9-10 December 1812

Court of King’s Bench, Westminster

Lord Ellenborough, Lord Chief Justice

for the prosecution - Sir William Garrow, Solicitor-General;

for the defence – Henry Brougham (q.v. ‘Benchmark’

Friday 19 September 2008)

Both defendants pleaded not guilty to a charge of “*publication of a libel tending to traduce & vilify the Prince of Wales, Regent of these realms, & to bring him into contempt & disgrace*” – the offending article, written by Leigh Hunt (1784-1859), had been published in a weekly paper, “the Examiner,” on 22 March, 1812 – Leigh was its Editor & chief contributor, & his older brother John its publisher – on 10 December, the jury took ten minutes to agree that both defendants were guilty – sentencing took place on Wednesday 3 February, 1813 before Ellenborough LCJ, Le Blanc & Bailey JJ – the defendants were sentenced to two years’ imprisonment ( in separate gaols – Leigh at Southwark, John at Clerkenwell) – in addition, each was fined five hundred pounds, with a further five hundred pound surety for good behaviour over the next five years. Le Blanc J addressed the defendants :

“ .... when they have before them men who have been convicted of offences like the present, it behoves those who are entrusted with the administration of the criminal justice to protect that government under which we all live, & to support the head of that government, without which the present state of society could not exist .....”

[The Newgate Calendar – John and Leigh Hunt](#)

[“The Wit in the Dungeon: The Remarkable Life of Leigh Hunt,” by ...](#)

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