

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Personal injuries (NSW) – motor cycle collided with a slightly open car door – whether negligence of car driver had been proven. See *Hamshere v Favelle* (I)

Contract (NSW) – whether contract of guarantee was unjust under the *Contracts Review Act* – whether there had been misleading and deceptive conduct. See *Tu v Primary Contracting Services Pty Ltd (trading as Australian Contracting Solutions)* (B)

Contract (NSW) – whether credit contract was unjust under the *Contracts Review Act* or the consumer credit code. See *Tobaji v National Australia Bank Limited* (B)

Insolvency law – whether there was a genuine dispute regarding an alleged debt. See *Nycon Custodian Pty Limited v Lane Cove Council* (B)

Real property (NSW) – law as to encumbering property which is co-owned. See *So v Li* (B)

Succession (NSW) – special letters of administration to enable preservation of assets. See *McCorquodale v Guth* (B)

Civil procedure (NSW) – leave to file a cross-claim – whether filing claim would achieve the overriding purpose of the *Civil Procedure Act*. See *Williams v Calivil Park Holsteins Pty Ltd* (B)

Building contract (Qld) – builder's entitlement to payments for variations and extensions of time – questions of law referred to the Court. See *Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd* (C)

Contract (Qld) – declarations as to proper construction of a contractual term. See *Queensland Power Company Limited v Downer Edi Mining Pty Ltd* (C)



Civil procedure (England and Wales) – principles regarding appeals from case management decisions – master’s decision to allow the amendment of a claim overruled. See *Clyde & Co Llp v New Look Interiors of Marlow Ltd (I)*

Monday 16 February 2009

Hamshere v Favelle [2009] NSWCA 4

Court of Appeal of New South Wales

Hodgson, Campbell & Macfarlan JJA

Personal injuries - appellant motor cyclist injured in collision with respondent's car door - whether respondent negligent in opening his car door or in leaving it open – primary judge had held negligence had not been proved - appeal dismissed.

[Hamshere](#) (I)

Tu v Primary Contracting Services Pty Ltd (trading as Australian Contracting Solutions) [2009] NSWCA 7

Court of Appeal of New South Wales

Macfarlan JA, Gyles AJA & Nicholas J

Guarantee – *Contracts Review Act* 1980 (NSW) - primary judge had found appellant liable under guarantee of indebtedness to respondent of a company of which he was a director – guarantee not unjust within s7 of the Act – s52 *Trade Practices Act* 1974– no misleading & deceptive conduct - appeal dismissed.

[Tu](#) (B)

Tobaji and Anor v National Australia Bank Limited [2009] NSWSC 41

Supreme Court of New South Wales

Johnson J

Credit contract - mortgage over residential property - substantial loan obtained through mortgage broker - whether plaintiffs aware of true quantum & purpose of loan – whether contract unjust – plaintiffs' claims under *Contracts Review Act* 1980 (NSW) & Consumer Credit Code 1995 (NSW) failed – judgment for defendant on the statement of claim - defendant had demonstrated entitlement to relief on its cross-claim for possession of the property – detailed consideration of case law.

[Tobaji](#) (B)

Walden v Foodco Group Pty Ltd [2009] NSWSC 45

Supreme Court of New South Wales

Barrett J

Corporations Act 2001 (Cth) – four defendant companies – plaintiff's application for interlocutory orders pending hearing of oppression suit - application dismissed – “substantial prejudice.”

[Walden](#) (B)

James v Ash Electrical Services Pty Ltd [2009] NSWSC 30

Supreme Court of New South Wales

Barrett J

Application for dismissal of winding up application on grounds of want of prosecution or abuse of process - whether plaintiff dilatory so as to justify termination of proceedings - whether shown that plaintiff's purpose is otherwise than to prosecute application to conclusion – application refused.

[James](#) (B, C)**Nycon Custodian Pty Limited v Lane Cove Council [2009] NSWSC 39**

Supreme Court of New South Wales

Macready AsJ

s459G *Corporations Act* 2001 (Cth) – application to set aside statutory demand served on plaintiff by defendant – parking meter collections – held that there was a genuine dispute – demand set aside.

[Nycon](#) (B)**So v Li [2009] NSWSC 32**

Supreme Court of New South Wales

Young CJ

Law as to encumbering property which is co-owned - plaintiff alleging she had lent money to first defendant – plaintiff had registered caveat over property held in joint tenancy between first & second defendants – application to extend caveat granted - at paragraph 6 of the judgment:

‘The law as to the encumbering of property which is co-owned is complex. It was summarised by the great Lord Coke in his work *Coke on Littleton* & is based on two maxims of the law, “*ius accrescendi praefertur oneribus*” on the one hand & “*alienatio rei praefertur iuri accrescendi*” on the other hand. Of course the first of those means that the law favours the alienation of property against the right of survivorship. The second being that the right of survivorship is put before the burdens.’

[So](#) (B)**McCorquodale v Guth [2008] NSWSC 1420**

Supreme Court of New South Wales

Young CJ

Succession - whether special letters of administration to enable preservation of assets should be granted – answer ‘yes’ - Administrator appointed to represent the estate to commence proceedings in order that assets be preserved.

[McCorquodale](#) (B)

Williams & Ors v Calivil Park Holsteins Pty Ltd & Ors [2009] NSWSC 31

Supreme Court of New South Wales

Schmidt AJ

Civil Procedure Act 2005 (NSW) - appeal against refusal of Master to allow filing of cross-claim – delay - proceedings for possession of farming property - refusing leave would not achieve overriding purpose of Act because it would result in the real issues between parties not being put before Court - appeal allowed – leave granted to file cross-claim together with amended defence, consistent with the terms of that cross claim – detailed examination of case law as to allowing amendments to pleadings & case management practices in Australian courts.

[Williams](#) (B)**Corbett Court Pty Limited v Quasar Constructions (NSW) Pty Limited [2008] NSWSC 1423**

Supreme Court of New South Wales

Hammerschlag J

Recoverability of interest – discretion to award interest on a verdict under s100(1) *Civil Procedure Act* 2005 (NSW) - *Building & Construction Industry Security of Payment Act* 1999 (NSW) – costs – plaintiff ultimately successful, however circumstances warranted departure from usual rule that costs follow event because plaintiff unsuccessful on various discrete issues & with respect to challenges to referee's report.

[Corbett Court](#) (I, C)

[Corbett Court](#) - decision 19 November, 2008 : see 'Benchmark' C & IBC Thursday 20 November 2008 - note: the decision referred to in the 19 December 2008 judgment at para. 2 is the decision 28 November, 2008. The 19 November decision included here for some factual background - construction of shopping mall at Picton - both parties contending report of referee should be accepted but each party contending for variations – report adopted without variation except those agreed or not contested.

Mount Isa Mines Ltd & Ors v Hare & Anor [2008] QCA 328

Court of Appeal of Queensland

Holmes JA

Personal Injuries Proceedings Act 2002 (Qld) - applicants seeking a stay of District Court judge's decision declaring that a notice of claim served by respondent on applicants pursuant to s9 of the Act was a complying notice of claim under that Act – notice of claim asserted that plaintiff had been exposed to & had absorbed dangerous levels of lead, arsenic, cadmium & other toxic elements at home, school and a park in Mt Isa – industrial practices – stay application adjourned – interesting review of case law as to classification of declaration for purpose of determining whether appeal lies as of right.

[Mount Isa Mines](#) (I)

Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd [2008] QSC 356

Supreme Court of Queensland

Chesterman J

Queensland Building Services Authority Act 1991 – building contract – construction of apartments at Mackay - dispute between parties as to respondent's entitlement to payments for variations & extensions of time for building project - arbitrator had given his written consent to the referral of three questions of law to the Court - declaration made that (i) superintendent appointed under building contract between applicant & respondent did not carry out or undertake to carry out 'building work' within the meaning of s42(1) &/or s42(2) of the Act as in force as at 5 February 2004 ; (ii) there was no 'contractor's licence of the appropriate class' relevant to the functions of the superintendent.

[Puerto Galera](#) (C)**Queensland Power Company Limited & Ors v Downer Edi Mining Pty Ltd [2009] QSC 006**

Supreme Court of Queensland

Chesterman J

Contract - tender to establish mine in Darling Downs & to extract coal & supply it to power station for seven years – respondent had won the contract - Settlement Agreement allowed a variation to contract price in force in the seventh year with regard to material increase in haul road length during the extended term &/or material variations in strip ratio during the extended term – declarations made as to meaning of 'any material increase in haul road length during the extended term' & 'any material variations in strip ratio during the extended term.'

[Queensland Power Company](#) (C)**From the District Court of New South Wales...****Commonwealth Bank of Australia v Hilellis & Ors [2009] NSWDC 9**

District Court of New South Wales

Levy SC DCJ

Fair Trading Act 1987 (NSW) - Trade Practices Act 1974 (Cth) - plaintiff claiming damages against vendors, purchasers & a witness to signatures on contract for sale of property alleging misleading & deceptive conduct – mortgage finance - judgment for plaintiff in sum of \$121,804.54.

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



From the United Kingdom...

Clyde & Co LLP & Anor v New Look Interiors of Marlow Ltd & Anor [2009] EWHC 173 (QB)

High Court of Justice of England & Wales (Queen's Bench Division)

Eady J

Case management – amendment of pleadings – challenge to an order made by Master giving plaintiff firm of solicitors permission to amend their particulars of claim ; [Master had declined to allow leave to appeal from this decision but a judge had given plaintiffs leave to appeal] – plaintiffs had used defendants as general contractors – now sought to reopen transactions & to recover 1.7 million pounds on basis they had been overcharged – held that Master had erred in exercise of his discretion – appeal allowed.

[Clyde & Co](#) (I)

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