



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Sogo Duty Free Pty Ltd v Commissioner of Taxation - s60, s61D *Excise Act* 1901 (Cth) (B)

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (No 5) - Production of documents - legal professional privilege (I, B, C)

Ekes v QBE Insurance (Australia) Ltd - *Bankruptcy Act* 1966 (Cth) - stay of sequestration order sought (I, B)

Holmes à Court v Papaconstuntinos - *Defamation Act* 2005 (NSW) - "community of interest", "occasion of qualified privilege", "reciprocity of interest" - appeal allowed (I)

Hancock v East Coast Timber Products Pty Ltd - Workers compensation - procedural fairness - expert evidence: principle in Makita - natural justice - appeal allowed (I)

Higgins & Ors v Sinclair - *Defamation Act* 2005 (NSW) - publications on internet & by email - assessment of damages (I)

Sand Excavation Pty Ltd v Nahas Constructions Pty Ltd - *Building & Construction Industry Security of Payment Act* 1999 (NSW) (C)



Woodland v Stopford & Ors - case from United Kingdom - personal injuries - swimming lessons - withdrawing admission (I)

Lancer Enterprises Ltd. v Saskatchewan Government Insurance - case from Canada - building & contents destroyed by fire - whether primary judge had applied the correct test for proof of the defence of arson - appeal dismissed (I)

Summaries with links (5 minute read)

Wednesday 23 March 2011

Sogo Duty Free Pty Ltd v Commissioner of Taxation [2011] FCAFC 36

Full Court of the Federal Court of Australia

Ryan, Jessup & Perram JJ (in Melbourne)

s60, s61D *Excise Act* 1901 (Cth) - statutory interpretation - for decision appealed from, see 'Benchmark' B & IBC Wednesday 8 September 2010 & link below - appeal dismissed.

[Sogo Duty Free](#) (B)

[Sogo Duty Free](#) - decision 6 September 2010 - taxpayer ran a business selling duty free goods to overseas travellers - taxpayer purportedly sold duty free cigarettes to crews of visiting ships - Commissioner concluded that the taxpayer had in fact sold these cigarettes in the Australian domestic market and assessed taxpayer for increased income tax and excise duty - taxpayer argued that the Commissioner's decision was so unreasonable that no reasonable decision maker could make it, that the Commissioner had taken irrelevant considerations into account, and that the Commissioner had failed to take relevant considerations into account - held: the taxpayer had fundamentally misconceived the nature of the Commissioner's reasoning, and its arguments had no merit - the taxpayer had failed to discharge its burden of proof - appeal dismissed with costs.

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (No 5) [2011] FCA 245

Federal Court of Australia

Yates J (in Sydney)

Production of documents - legal professional privilege - documents brought into existence for multiple purposes within a corporate group - whether dominant purpose test satisfied - inspection by applicants of documents permitted.

[Wingecarribee Shire Council](#) (I, B, C)

**Ekes v QBE Insurance (Australia) Ltd [2011] FCA 230**

Federal Court of Australia

Cowdroy J (in Sydney)

Bankruptcy Act 1966 (Cth) - stay of sequestration order sought - stay granted subject to conditions.

[Ekes](#) (I, B)

Holmes à Court v Papaconstuntinos [2011] NSWCA 59

Court of Appeal of New South Wales

Allsop P; Beazley, Giles, Tobias & McColl JJA

Defamation Act 2005 (NSW) - primary judge had found that appellant had failed to make out defence of qualified privilege at common law - "community of interest", "occasion of qualified privilege", "reciprocity of interest" - appeal allowed - judgment for appellant - comprehensive consideration of text & case law.

[Holmes a Court](#) (I)

[Headnote](#) for the same case ie: [Holmes à Court v Papaconstuntinos \[2011\] NSWCA 59](#)

[Papaconstuntinos](#) - decision 4 September 2009: see 'Benchmark' I & IBC Tuesday 8 September 2009 - defamation - letter sent to plaintiff's employer CFMEU - extent of publication - common law defence of qualified privilege - no occasion of qualified privilege - whether publication actuated by improper motive - honest belief - whether dominant purpose to discredit plaintiff - damages - judgment for plaintiff in sum of \$25,000.

Hancock v East Coast Timber Products Pty Ltd [2011] NSWCA 11

Court of Appeal of New South Wales

Beazley, Giles & Tobias JJA - 15 February 2011

Workers compensation - appellant had been employed as labourer stacking and sorting timber - matter first proceeded by arbitrator of Workers Compensation Commission who had made an award of weekly compensation - on appeal from the arbitrator, the President of the Commission had revoked the arbitrator's decision on the basis that the appellant had failed to discharge the onus of proving that his permanent incapacity had resulted from the original injury at work - procedural fairness - rejection of the evidence of treating orthopaedic surgeon - expert evidence: principle in *Makita* - natural justice - determination of matter on the papers where credit involved - appeal allowed - matter remitted to the Commission.

[Hancock](#) (I)

[Headnote](#) for the same case ie: [Hancock v East Coast Timber Products Pty Ltd \[2011\] NSWCA 11](#)

[East Coast Timber](#) - decision 6 October 2009 Workers Compensation Commission of New South Wales - Presidential



Higgins & Ors v Sinclair [2011] NSWSC 163

Supreme Court of New South Wales

Johnson J

Defamation Act 2005 (NSW) - publications on internet & by email - defence of substantial truth - defence not established - assessment of damages for defamation - the 'grapevine' effect - claim by corporate Plaintiff for relief under *Fair Trading Act 1987 (NSW)* - whether representations misleading & deceptive - whether made in trade or commerce - each of first & second plaintiffs to be awarded damages in sum of \$100,000.00 plus interest - plaintiffs entitled to appropriate orders by way of injunctive & declaratory relief.

[Higgins \(I\)](#)

Sand Excavation Pty Ltd v Nahas Constructions Pty Ltd [2011] NSWSC 184

Supreme Court of New South Wales

Macready AJ

Building & Construction Industry Security of Payment Act 1999 (NSW) - shoring, bulk earthworks & excavation works at Spring Street & Oxford Street, Bondi Junction - service of payment schedule - *Industrial Relations Act 1996 (NSW) s127*: liability of principal contractor for remuneration payable to employees of subcontractor - detailed analysis of legislation - judgment for plaintiff in sum of \$1,198,789.34.

[Sand Excavation \(C\)](#)

From the United Kingdom...

Woodland v Stopford & Ors [2011] EWCA Civ 266

Court of Appeal of England & Wales

Ward & Moore-Bick LJ; Lady Justice Arden

Personal injuries - claim brought by father as litigation friend - school had arranged with Direct Swimming Services to give children swimming lessons - hypoxic brain damage - at first instance, primary judge had allowed defendant Swimming Teachers Association to withdraw its admission of liability - appeal dismissed.

[Woodland \(I\)](#)



From Canada...

Lancer Enterprises Ltd. v Saskatchewan Government Insurance, 2011 SKCA 28

Court of Appeal of Saskatchewan

Lane, Richards & Ottenbreit JJA

Insurance - building & contents owned by appellant, and insured under a policy issued by respondent, totally destroyed by fire - claim refused - respondent defended action by appellant alleging fire deliberately set by appellant or one of its directors - primary judge found circumstantial evidence supported respondent's position the fire had been deliberately set & dismissed appellant's action - whether primary judge had applied the correct test for proof of the defence of arson - appeal dismissed.

[Lancer Enterprises \(I\)](#)

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