



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Trade Practices – held that representation that offer remained open for a “limited time” was a breach of s52 of the *Trade Practices Act 1974* (Cth). See *Heritage Clothing v Mens Suit Warehouse* (I, B)

Trade Practices – evidentiary burden on maker of representation to prove reasonable grounds for making representation. See *ASIC v Sydney Investment House Equities* (I, B)

Motor Accident (Vic) – whether action by employer of injured person still available pursuant to *per quod servitium amisit* for losses suffered by employer. See *Martino Developments v Doughty* (I)

Tracing – whether misappropriated trust funds can be recovered pursuant to an equitable lien or restitution. See *Quince v Varga & Anor* (I, B)

Limitation of Actions (ACT) – claim for indemnity by workers’ compensation insurer against third party insurer – whether third party insurer had confirmed liability thereby extending the limitation period. See *Sessions v Phengsiaroun* (I)

Employer’s Liability – whether employer of nurse liable for failure to control aggressive behaviour of patient and failure to warn nurse of patient’s prior aggressive behaviour. See *McMurtrie v Quadriplegic Centre Board of Management* (I)

Capital Gains Tax – construction of phrase “at the leaving” time affecting calculation of capital gains tax payable on sale of shares. See *Handbury Holdings v Commissioner of Taxation* (B)



Development Application – whether application should be considered based on zoning conditions in existence at time of a prior planning scheme which had been superseded by rezoning laws. See *Genamson Holdings v Caboolture Shire Council* (C)

Building Dispute (WA) – whether building fit for occupation in a free and uninterrupted manner – whether complaint barred by limitation provision. See *Braham v Evans* (C)

Wednesday 3 December 2008

Heritage Clothing Pty Ltd trading as Peter Jackson Australia v Mens Suit Warehouse Direct Pty Ltd trading as Walter Withers [2008] FCA 1775

Federal Court of Australia

Heerey J (in Melbourne)

Trade Practices Act 1974 (Cth) – claim of misleading & deceptive conduct in advertising – contravening conduct - damages - retail market for men's suits – various representations - representation that offer open for "a limited time" – held that "limited time" representation contravened s52 – otherwise application dismissed - causation not established - declaration granted but no injunction.

[Heritage Clothing](#) (I, B)

Handbury Holdings Pty Ltd v Commissioner of Taxation [2008] FCA 1787

Federal Court of Australia

Kenny J (in Melbourne)

s711-45(1) *Income Tax Assessment Act* 1997 (Cth) – capital gains - application by way of an appeal against decision of respondent to disallow in full an objection by taxpayer to an income tax assessment - limited question as to correct construction of phrase "at the leaving time" - answer affects calculation of capital gains made by applicant on sale of issued shares in Murdoch Magazines Pty Ltd - application dismissed.

[Handbury Holdings](#) (B)

ASIC v Sydney Investment House Equities Pty Ltd [2008] NSWSC 1224

Supreme Court of New South Wales

Hamilton J

Duties & liabilities of officers of corporations – fiduciary & related statutory duties – of care, skill & diligence – to act honestly – conflicts of interest - trade practices – consumer protection - misleading, deceptive or unconscionable conduct – evidentiary burden on representor to prove reasonable grounds for making representations - extensive consideration of case law.

[ASIC](#) (I, B)

Roberts v Gilgandra Shire Council [2008] NSWSC 1244

Supreme Court of New South Wales

Bryson AJ

Road – status & ownership in issue – estoppel – reserved road passing through rural property – road once a public road, dedicated in 1926 but long disused – certificate of title referred to Crown Grant & Parish Map - whether road was part of plaintiffs' land - answer 'no' – judgment for defendant.

[Roberts](#) (C)

**Martino Developments Pty Ltd v Doughty [2008] VSC 517**

Supreme Court of Victoria

Vickery J

Abrogation of common law rights by statute - preliminary trial of separate questions - plaintiff employer has commenced proceedings in County Court of Victoria claiming damages suffered by it as a result of a motor vehicle accident which caused injury to its employee - statutory construction - *Transport Accident Act 1986 (Vic)* - cause of action pursued by plaintiff was an action per quod servitium amisit - whether per quod servitium amisit actions extinguished in relation to transport accidents - questions answered as follows: (a) is the claim pursued by the plaintiff in the proceeding extinguished? answer 'no' - (b) is the plaintiff precluded from recovering damages from the defendant? answer 'no' - a very interesting decision with detailed consideration of case law.

[Martino Developments](#) (I)**Quince v Varga & Anor [2008] QCA 376**

Court of Appeal of Queensland

Holmes JA, Mackenzie AJA & Douglas J

Fiduciary relationships - trusts - "receipt" - tracing - whether appellants knowingly assisted alleged breaches of fiduciary duty by their husband & father respectively, or received money misappropriated by him with notice of those breaches - he was undischarged bankrupt & had received \$445,000 from the respondent to invest for her - he had misappropriated it, spending it largely on himself & his family, after funnelling it through a family trust fund controlled by appellants - equitable liens - restitutionary use of constructive trust - unjust enrichment - appeal dismissed - thorough analysis of case law from UK, New Zealand & Australia. (I)

[Quince](#), and[Quince](#) - judgment 3 April 2008 - decision appealed from.**Genamson Holdings P/L v Caboolture Shire Council [2008] QCA 374**

Court of Appeal of Queensland

Keane & Fraser JJA; Chesterman J

Development applications - applicant had lodged development application under superseded planning scheme - new supermarket, specialty shops & car parking in association with some existing retail shopping space - applicant contending development which it now proposed was permitted development under 1988 planning scheme as a result of 1993 rezoning - whether learned primary judge had erred in holding applicant to be obliged to comply with conditions attached to 1993 rezoning - application for leave to appeal refused.

[Genamson Holdings](#) (C)

**EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd [2008] WASC 275**

Supreme Court of Western Australia

Martin CJ

Joint venture - plaintiff seeking declaration that first defendant had unreasonably withheld its consent to proposed change in control of participant - construction & operation of Emu Downs Wind Farm - provision for change of control of a participant with prior written consent of other participant - consent not to be unreasonably withheld - proviso that new party in control of the affected participant must have 'the financial & technical resources & experience to adequately support the affected participant' - burden of proof on party seeking consent - proceedings dismissed. (B, C)

[EDWF Holdings](#), and[EDWF Holdings](#) – Part 2 of decision**Braham v Evans [2008] WASC 274**

Supreme Court of Western Australia

Beech J

Builders Registration Act 1939 (WA) – building disputes - appeal against decision of State Administrative Tribunal refusing leave to review decision of Building Disputes Tribunal - whether complaint excluded by limitation provision - whether building 'fit for occupation in a free and uninterrupted manner' – appeal dismissed.

[Braham](#) (C)**Sessions v Phengsiaroun [2008] ACTSC 132**

Supreme Court of the Australian Capital Territory

Higgins CJ

Personal injuries - limitation of actions – application to extend time to commence proceedings - motor car accident whilst driving to work – whether time for commencement of proceedings had been extended by reason of confirmation of the cause of action - workers compensation claim – defendant's insurer had reimbursed employer's workers compensation insurer – whether acknowledgment by defendant's insurer of liability to pay damages to employer's insurer is confirmation – right of employer to indemnity – whether s183 *Workers Compensation Act* 1951 ACT creates separate cause of action – s32 *Limitation Act* 1985 (ACT) satisfied – extension of time granted.

[Sessions](#) (I)

From the District Court of Western Australia...

McMurtrie v The Quadriplegic Centre Board of Management [2008] WADC 170

District Court of Western Australia

Sleight DCJ

Personal injuries – negligence & breach of contract alleged - liability - duty of care of employer – *Law Reform (Contributory Negligence & Tortfeasors Contribution) Act 1947 (WA)* - nurse's assistant injured avoiding patient's arm movement - prior aggressive behaviour of patient - duty of employer to control resident - duty of employer to warn employee of prior aggressive behaviour of resident – causation – plaintiff's claim allowed reduced by 20% for contributory negligence – an interesting judgment.

[McMurtrie](#) (I)

In memory of Jørn Utzon

(b. at Hellebaek, about 5-6 kms from Elsinore 9 April 1918 – d. Copenhagen Saturday 29 November 2008)

The stroke of Winter – shortened days & duller skies ;

Time to go, to shed the weight of ninety years,

To sleep perchance to dream ;

So mused on Death another Dane at Elsinore –

But there's no rub for you in such a thought.

For, fifty years ago, you dreamed a building

In a land you'd never seen.

Whence came your inspiration ?

Yachts sketched & modelled in your father's

office after school,

Your boyhood sailing days,

Boats berthed in Old Town Copenhagen,

The massive ships & ferries at the harbour docks ?

Memories of Danish marinas,

With sailing craft all neatly in a row

In smallish coastal towns,

Or gaily massed on Århus summer afternoons,

When sea & sky are joined in bright-blued unity ?

A dream building in a land without the northern winter –

A harbour ; bright blue sky ;

“There must be sails. A Great Harbour,

admired by its discoverers, needs Great Sails.”

And so you drew it.

The dream building stayed in your dreams forever.
You came here, deposited a part of your dream in reality,
Then left, holding the ideal in your head forever,
While the real building took root in the consciousness of others.

Now your name is as Australian as a native bird or plant,
And while, faraway, you were thinking of the building for forty years,
To Sydneysiders, it became essential:
Without The Sails, we had no city.

For forty years The Sails have flitted through your soul
And through the City's soul as well.
As summer starts in Sydney now,
As winter starts in Denmark,
Forever more on Sydney Harbour flits a Danish soul.

D.F.
1 Dec., '08

[Christen Kobke paintings, prints & reproductions](#)

Christen Schiellerup Købke

(26 May 1810 – 7 February 1848)

From the Danish Golden Age of Painting - until 1833, he lived in the Citadel in Copenhagen, where his father held the post of master baker. In 1883, his parents moved to a country house on Blegdammen near Lake Sortesdam on the outskirts of Copenhagen. In 1838 he travelled via Dresden and Munich to Rome then on to Naples, returning to Blegdammen in 1840. In 1844-5, he helped to decorate the interior of Thorvaldsen's Museum. In 1845 he moved into a flat in Copenhagen.

[Christen Købke - Wikipedia, the free encyclopedia](#)

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