

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Immunity/Private International Law – whether claim against Sultan of Brunei gave rise to immunity pursuant to laws of Brunei. See *Garsec v The Sultan of Brunei* (I, B, C)

Damages – whether damages available for breach of contract giving rise to alleged loss including distress, humiliation and injury to reputation. See *Russell v Trustees of the Roman Catholic Church* (I, B)

Statutory Duty – whether defence of contributory negligence available to action for breach of statutory duty arising before commencement of *Civil Liability Act* (NSW). See *Transfield Construction v Peers* (I, C)

Fraud – whether husband liable to repay moneys misappropriated by his wife in the course of her employment on the basis that the moneys were deposited into an account held jointly by both husband and wife. See *SCEGGS v Barbour* (I, B, C)

Payment Claim – whether “construction contract” & whether payment claim complied with *Security of Payment Act* (NSW). See *Peter's of Kensington v Seersucker* (C)



Wednesday 10 September 2008

Garsec v His Majesty The Sultan of Brunei [2008] NSWCA 211

Court of Appeal of New South Wales

Spigelman CJ; Hodgson & Campbell JJA

Torts & contracts - private international law – constitutional immunity - source of power of the Court to stay proceedings – for decision of primary judge 15 August 2007, see ‘Benchmark’ Thursday 16 August 2007 & link below - claimant had sought order for specific performance of alleged agreement for sale of manuscript copy of Holy Koran – claims in alternative for breach of warranty of authority & negligent misstatement – alleged contract & law governing claim in tort - Article 84B Constitution of Brunei conferred immunity from suit on the Sultan in a personal & official capacity & on persons acting on behalf or under the authority of the Sultan in an official capacity – primary judge had stayed proceedings, declining to exercise jurisdiction on grounds of clearly inappropriate forum – appeal – “oppressive” - “vexatious” – comprehensive consideration of case law – at par 1 of judgment of Spigelman CJ:

“... the constitutional provisions in Brunei which protect the Sultan from suit are substantive, rather than procedural, for purposes of the Australian choice of law rules. On the authorities to which Campbell JA refers, an Australian court would apply the law of Brunei with the consequence that the proceedings in Australia against the Sultan are futile. Accordingly, the order Justice McDougall made was correct.” (I, B, C)

[Garsec](#), and

[Garsec](#) – 15 August 2007 reported decision : 213 FLR 331 - plaintiff’s case that contract made in NSW – case law on forum non conveniens considered - “clearly inappropriate forum” test - whether proceedings had a closer connection to Brunei than to NSW - whether sovereign immunity available to defendants under law of Brunei - whether alleged contract illegal under Bruneian law - whether “legitimate personal or juridical advantage” accrued by choice of forum - held: NSW Supreme Court a clearly inappropriate forum for the action & proceedings should be stayed.

Russell v the Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2008] NSWCA 217

Court of Appeal of New South Wales

Giles, Basten & Campbell JJA

Employment - oral employment contract - internal investigation into sexual misconduct allegations in respect of children – employment terminated -whether respondents had breached contract in dismissing appellant without notice – primary judge had found dismissal was in breach of contract; but had rejected each of claimed heads of damage : see link below to judgment 19 February 2007 – appeal as to availability of specific heads of damage & as to costs - whether breach of implied term of good faith, mutual trust & confidence in contract by their investigation & termination of employment - if so, whether appellant could recover damages for distress, humiliation, injury to feelings or loss of reputation – whether appellant could recover costs of unfair dismissal proceedings in Industrial



Relations Commission, where appellant had been successful, as mitigation of loss resulting from termination without reasonable notice – whether appellant could recover costs involved in hiring public relations consultant to mitigate loss caused by adverse publicity resulting from termination without reasonable notice – whether appellant could recover damages for injury to reputation & for humiliation & injury to feelings for breach of contract arising from termination without reasonable notice – appeal dismissed. (I, B)

[Russell](#), and

[Russell](#) – judgment 19 February 2007 reported at 167 IR 121 – extensive consideration of U.K. & Australian case law– review of history of development of contract of employment – abrogation of common law rights.

Transfield Construction v Peers [2008] NSWCA 215

Court of Appeal of New South Wales

McCull & Campbell JJA; Barr J

Torts – breach of statutory duty – liability - respondent working on construction site - Mittagong sewerage treatment works - appellant head contractor - respondent suffered a fall – respondent claimed he had fallen into unfenced hole 1.8m-2m deep – at trial, issue as to whether respondent’s account of how his injury was sustained should be accepted – primary judge accepted plaintiff’s case & made award of damages - availability of defence of contributory negligence to cause of action that accrued before Civil Liability (Personal Responsibility) Act 2002 (NSW) took effect - evidence by telephone - erroneous statement in expert’s report - appeal allowed – matter remitted to District Court for re-trial.

[Transfield Construction](#) (I, C)

SCEGGS Redlands Ltd v Alison Barbour & Anor [2008] NSWSC 928

Supreme Court of New South Wales

Rein J

Constructive notice – texts & case law considered - first defendant employed as payroll officer - misappropriated funds of plaintiff employer & placed those funds in joint bank accounts held with second defendant husband from whom she was separated - husband's access to statements of account & control of accounts - whether benefit to him - whether failure to look at bank statements constituted fault, rendering him liable to reimburse employer – held that employer school had failed to establish notice of the fraud or notice of a fact which was known to husband that would have made an ordinary person suspicious, & therefore has not established actual or constructive notice, or relevant ‘fault’ on the part of husband - an interesting judgment.

[SCEGGS Redlands](#) (I, B, C)



Islamic Association of Western Suburbs Sydney v Dr H R K Survery [2008] NSWSC 875

Supreme Court of New South Wales

Rein J

Adoption of a referee's report – succinct consideration of principles & case law - distinction between factual & legal issues determined by Referee - question of who are members of Association eligible to vote at Annual General Meeting - s18 Associations Incorporation Act 1984 (NSW) – whether Court should adopt report or part of it.

[Islamic Association of Western Suburbs Sydney](#) (I, B, C)

Nigel Charles Purves v Corcum Group Limited [2008] NSWSC 924

Supreme Court of New South Wales

Hammerschlag J

Directors' duties – cross-claimant sought damages for breach of a director's fiduciary & statutory duties in respect of expenses incurred by cross-defendant director – judgment for cross-claimant against cross-defendant for \$282,019.04 plus interest.

[Nigel Charles Purves](#) (I, B, C)

A.M. Retail Solutions Pty Limited v Hainbury Pty Limited [2008] NSWSC 926

Supreme Court of New South Wales

Hammerschlag J

s459G Corporations Act 2001 (Cth) - application to set aside statutory demand - claim for rent – Fruit Barn - plaintiff asserts entitlement to abatement – genuine dispute raised – demand set aside.

[A.M. Retail Solutions](#) (B)

Seana Constructions Pty Ltd v Bright Construction Group Pty Ltd [2008] NSWSC 920

Supreme Court of New South Wales

Hammerschlag J

s459G Corporations Act 2001 (Cth) - application to set aside to set aside statutory demand – plaintiff alleging it was entitled to withhold payment because of an offsetting claim & because defendant had failed to provide written statements as required by s127(5) Industrial Relations Act 1996 (NSW) & s175B(7) of the Workers Compensation Act 1987 (NSW) – statutory demand varied to extend payment date.

[Seana Constructions](#) (C)



Peter's of Kensington v Seersucker Pty Limited [2008] NSWSC 897

Supreme Court of New South Wales

McDougall J

Building & Construction Industry Security of Payment Act 1999 (NSW) – Environmental Planning & Assessment Act 1979 (NSW) – payment claim by Seersucker said to be for design development & contract documents in relation to "Stage 2 (Warehouse/Retail/Office)" & "Stage 2 (Carpark)" - Peter's disputed claim – matter referred to second defendant adjudicator who determined that Peter's liable to pay - Peter's obtained interlocutory injunction restraining Seersucker from obtaining or registering as a judgment an adjudication certificate - whether contract for provision of architectural services was construction contract - answer 'yes' – whether payment claim furnished by the first defendant to the plaintiff complied with the requirements of section 13(2) Payment Act.

[Peter's of Kensington](#) (C)

Grizonic v Suttor [2008] NSWSC 900

Supreme Court of New South Wales

Brereton J

Application by plaintiff to merge common law proceeding into equity proceeding – dissolution of restaurant partnership - issues raised by common law proceeding closely interwoven with equity proceeding – common law matter transferred to Equity Division to be heard with other proceedings there.

[Grizonic](#) (I)

Mathieu v Higgins & Anor [2008] QSC 209

Supreme Court of Queensland

Daubney J

Queensland Ambulance Service Discipline Policy – 'misconduct' specifically defined in policy – disciplinary proceedings - standard of care expected by Queensland Ambulance Service – applicant working as Acute Care Paramedic - first respondent had imposed penalty on applicant – applicant appealed to second respondent which confirmed first respondent's decision - judicial review - applicant submitted 'misconduct' involved something more than mere negligence, error of judgment or innocent mistake – second respondent's decision set aside & matter remitted – an interesting judgment.

[Mathieu](#) (I)

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