

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 13 May 2008

Triad Health Products Group of Companies Pty Ltd v Food Improvers Pty Ltd [2008] FCA 617

Federal Court of Australia

Cowdroy J (in Sydney)

Corporations – oppression – Constitution s51(xxxi) – production of tea tree oil – right to consultancy fees - winding up of BGR Corporation Pty Ltd & its associated companies sought on grounds of oppression – application for leave to appeal out of time – application for leave to appeal from interlocutory judgment - ‘special reasons’ as referred to in O.52 r15(2) Federal Court Rules – discretion to extend time - case law considered – slip rule– applications dismissed. [Triad Health Products Group of Companies](#) (B)

Phisci Pty Ltd v Green Frog Nominees Pty Ltd [2008] FCA 638

Federal Court of Australia

Finkelstein J (in Melbourne)

Interlocutory injunction – ownership of shares in dispute – Opes among defendants - application to restrain disposition of shares – interlocutory injunction granted. [Phisci](#) (I, B, C)

Lovell v Penkin, in the matter of the bankrupt estate of Kevin Michael Penkin [2008] FCA 637

Federal Court of Australia

McKerracher J (in Perth)

Bankruptcy – negligence action – professional indemnity – claim of negligence against solicitor – whether such a claim provable in bankruptcy of solicitor – professional indemnity insurer had obtained stay in light of bankruptcy – applicant brought application seeking to take fresh step in the action, alternatively, a declaration that no leave needed, on basis that cause of

action is for unliquidated damages, rather than breach of retainer – conditional leave granted. [Lovell](#) (I, B)

Laws v GWS Machinery Pty Ltd & Anor; Laws v GWS Machinery Pty Ltd & Anor (No 4) [2008] NSWSC 453

Supreme Court of New South Wales

Rothman J

Application by CGU to vary orders made on 2 & 13 November 2007 such that liability of CGU no greater (including costs) than \$5M, which is said to be limit of liability under relevant insurance policy - see Benchmark Tues. 6 November 2007 & links below – injury to father & son when fitting tyre - leave sought by father to reopen to amend orders to limit liability otherwise ordered - requirement to amend pleadings and adduce evidence - operation of 'slip rule' – application by CGU dismissed – in relation to father's application, judgment varied. (I)

[Laws](#) – judgment 9 May 2008

[Laws](#) – judgment 21 December 2007

[Laws](#) – judgment 2 November 2007

[Laws](#) – judgment 4 June 2007 - Reported Decision: 209 FLR 53

Martin John Green in his capacity as liquidator of Arimco Mining Pty Limited (in liquidation) v CGU Insurance Limited & Ors [2008] NSWSC 449

Supreme Court of New South Wales

Einstein J

Security for costs - litigation funding - plaintiff liquidator bringing proceedings seeking to recover approximately \$40,000,000 including interest, whether liquidators should be required to provide security for costs where litigation is funded by external funder – extensive analysis of case law. [Martin John Green](#) (I, B)

Capital Finance Australia Ltd v Struthers [2008] NSWSC 440

Supreme Court of New South Wales

Hamilton J

Guarantee & indemnity - which of two equitable interests had priority over the other, one of them being an equitable mortgage granted by a husband to plaintiff financier in a guarantee – Family Court consent orders - plaintiff's equitable interest postponed to wife's equitable interest – application by plaintiff to vary property settlement orders refused. [Capital Finance Australia](#) (B)

Australian Receivables Ltd v Tekitu Pty Ltd & 2 ors [2008] NSWSC 433

Supreme Court of New South Wales

Brereton J

Interlocutory injunctions – distinction from Mareva injunction – application’s aim is to preserve fund to which plaintiff claims to be beneficially entitled - interlocutory & limited Mareva injunction granted. [Australian Receivables](#) (B)

National Australia Bank Limited v Landy Chen-Conway & Anor [2008] NSWSC 448

Supreme Court of New South Wales

Einstein J

Farm Debt Mediation Act (1994) NSW -construction of particular provisions. [National Australia Bank](#) (B)

North Sydney Leagues Club Limited v Synergy Protection Agency Pty Limited (formerly known as Joseph Merhi Industries Pty Limited) trading as Synergy Protection Agency [2008] NSWSC 413

Supreme Court of New South Wales

Einstein J

Contract – construction of agreement – business commonsense test – sensible commercial operation - defendant carried on business as provider of security services to clubs & other organisations – whether agreement compelled plaintiff to use defendant’s services to exclusion of any other provider of the same or similar services – case law considered. [North Sydney Leagues Club](#) (B)

Chief Commissioner of State Revenue v Rafferty's Resort Management Pty Ltd (in liq) [2008] NSWSC 452

Supreme Court of New South Wales

Austin J

Corporations - voluntary administration - whether directors of company abused provisions of Part 5.3A so as to warrant order for termination of administration - see paragraphs 41 to 43 inclusive of judgment:

“The facts of this case point to a need for law reform, in my view[43] I shall ask the Registrar to draw these anomalous results to the attention of the Commonwealth Treasury so that consideration can be given to the question whether legislative amendments are needed.” [Chief Commissioner of State Revenue](#) (B)

Brian Leigh Smith & Anor v Coastivity Pty Ltd [No.2] [2008] NSWSC 450

Supreme Court of New South Wales

McDougall J

Costs – Building and Construction Industry Security of Payment Act 1999 - costs should follow event - no reason to deflect application of that general rule. [Brian Leigh Smith](#) (C)

Commonwealth Bank of Australia v Kyriackou [2008] VSC 146

Supreme Court of Victoria

Judd J

Solicitors – applicant the defendant, & the plaintiff by counterclaim, in proceeding commenced by Commonwealth Bank of Australia in which bank claims repayment of money together with interest - applicant seeking an order restraining bank's solicitors from acting - duty of confidence – duty of loyalty – inherent jurisdiction of the court to control its officers – application dismissed. [Commonwealth Bank of Australia](#) (I, B)

Geeveekay Pty Ltd & Ors v Director of Consumer Affairs Victoria (No 2) [2008] VSC 152

Supreme Court of Victoria

Bell J

Costs – legal question of national importance - resolution in public interest – whether terms contracts for sale of land were credit contracts regulated by Consumer Credit Code - whether court should or should not make usual order as to costs – insufficient reasons to make other than usual order – unsuccessful appellant ordered to pay respondent's costs. [Geeveekay](#) (I, B)

Wolfe v State of Queensland [2008] QCA 113

Court of Appeal of Queensland

Keane & Muir JJA, Douglas J

Limitation of actions - personal injury – motor accident – vehicle crashed into tree after hitting welts on surface of highway - action against State of Queensland as entity responsible for design, construction & maintenance of highway - primary judge had allowed plaintiff's application to amend statement of claim to add allegation his injuries were caused by negligence of State's servants or agents, in that they failed "on maintenance of the road to provide adequate sub-surface drainage with the result that the welts formed." - State seeking leave to appeal decision of primary judge – leave to appeal granted – appeal allowed – application for amendment refused. [Wolfe](#) (I)

From Canada...

Martin v. Findlay 2008 ABCA 161

Court of Appeal of Alberta

Hon Ronald Berger,* Hon Peter Martin & Hon Patricia Rowbotham JJ

[* did not participate in the judgment]

Medical negligence – informed consent – case law reviewed - stroke suffered after elective surgery – plaintiff alleged the neurosurgeon failed to obtain informed consent – doctor found liable in damages at first instance – doctor appealed - held that standard of care did not oblige doctor to use word “stroke” – appeal allowed. [Martin](#) (I, C)

Design Services Ltd. v. Canada, 2008 SCC 22

Supreme Court of Canada

McLachlin CJ, Binnie, Deschamps, Fish, Abella, Charron & Rothstein JJ

Negligence – whether an owner in a tendering process owes a duty of care in tort to subcontractor - recovery for pure economic loss – owner awarded construction contract to non-compliant bidder following “design-build” tendering process – appellants were the subcontractors to contractor which should have been awarded contract – appellants suing owner in tort for economic loss suffered – whether owner owed duty of care to subcontractors – whether claim fits within recognized duty of care category – whether new duty of care between owner & subcontractors should be recognized – appeal dismissed. [Design Services](#) (I, C)

And from the United Kingdom...

The Claimants appearing on the Register of the Corby Group Litigation v. Corby Borough Council [2008] EWCA Civ 463

Court of Appeal of England & Wales

Ward, Dyson & Smith LLJ

Public nuisance – negligence – breach of statutory duty – whether damages for personal injury recoverable in public nuisance - appeal from Master’s decision in which he dismissed Council’s application to strike out claim in public nuisance - eighteen claimants born between 1986 & 1999 with deformities of upper limbs - between 1983 & 1989, Council acquired land in Northamptonshire from British Steel Corporation with a view to reclamation & redevelopment – land heavily contaminated - claimants allege their mothers, who lived close to the land, were exposed during embryonic stage of their pregnancies to toxic materials in course of Council's reclamation &

decontamination programme & that this exposure caused the deformities – examination of case law & article by Professor Newark “The Boundaries of Nuisance” (1949) 65 LQR 480 in judgment of Lord Justice Dyson - at para 13 of Dyson LJ’s judgment:

“It is clearly established that damages for personal injury cannot be recovered for *private* nuisance. This is because private nuisance is a tort based on interference by one occupier of land with the right in or enjoyment of land by another

At para 32 of Dyson LJ’s judgment:

“ I do not consider that it is open to this court to decide that damages for personal injury are not recoverable in public nuisance. The fact that the law may be developed by the House of Lords deciding to accept Professor Newark’s thesis is not a reason for this court not to apply the law as it now stands.” [Claimants appearing on the Register of the Corby Group Litigation \(I\)](#)

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