

# BENCHMARK

## Insurance, Banking & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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**Monday 26 May 2008**

**Lowe v Mack Trucks Australia Pty Limited (No 2) [2008] FCA 711**

Federal Court of Australia

Kenny J

Costs – see ‘Benchmark’ Banking, Construction & IBC Wednesday 9 April 2008 & link below for substantive judgment 4 April 2008 - indemnity costs order for costs thrown away by reason of the abandonment of two expert witness reports & for costs incurred by reason of late discovery of CD-ROM – otherwise costs on party/party basis - order for return of documents to respondent of which it had made discovery & regarded by respondent as of a commercially sensitive nature, including schematics & engineering drawing for every component in vehicle the subject of the proceedings - respondent stated it was concerned to ensure there were no copies of these documents in circulation – copies to be returned to respondent. [Lowe](#) (C)

And [Lowe](#) – judgment 4 April, 2008 - truck purchased for interstate long haul business – merchantability & fitness for purpose - expert evidence – admissibility – extensive consideration of case law – application dismissed.

**Firth v Wowk & Ors [2008] NSWCA 104**

Court of Appeal of New South Wales

Giles, McColl & Bell JJA

Legal Profession Act 2004 (NSW) – s348: costs order against law practice acting without reasonable prospects of success – s349: onus of showing facts provided reasonable prospects of success – appeal by solicitor from order that he indemnify defendants in District Court proceedings in respect of costs order – appeal allowed – order set aside. [Firth](#) (I, B)

**Rich v Long [2008] NSWSC 487**

Supreme Court of New South Wales

Young CJ in Eq

Ex parte application for extension of time for service of originating process- statement of claim against eight-five defendants who are partners in a firm of accountants filed but not served - limitation period expired- principles involved- analysis of proper practice – the English procedure – UK & Australian case law considered - unless proposed extension is no more than a month or there is suggestion that defendants may avoid service, defendants must be notified of order & period in which they may move to set aside the order- order made that time for service of originating process be extended ; defendants to be notified of order within seven days, & also notified that they have up until the expiration of twenty-eight days after service of process to set aside the order. [Rich](#) (I, B)

**Legal Services Commissioner v Dempsey [2008] QCA 122**

Court of Appeal of Queensland

McMurdo P, Keane JA & White J

Lawyers' remuneration – GST – 'disbursements' - "conduct of a speculative personal injury claim" - appellant solicitor arranged for loans to be made to his clients from litigation lender - loan monies from litigation lender were paid into appellant's trust account & then drawn upon as required to meet costs incurred – whether loan monies amounted to "disbursements" which "the client must pay, or reimburse, to the practitioner" within the meaning of s48IC Law Society Act 1952 (Qld) - whether appellant's right under retainer to recover from clients his GST liability precluded by operation of ss48IB & 48IC Law Society Act 1952 (Qld) – appeal dismissed – extensive consideration of case law. [Legal Services Commissioner](#) (I, B)

**Aquilina Holdings Pty Ltd v Lynndell Pty Ltd & Anor; Lynndell Pty Ltd & Anor v Capital Finance Australia Limited & Ors (No.2) [2008] QSC 98**

Supreme Court of Queensland

Daubney J

Costs – see 'Benchmark' Banking, Construction & IBC Monday 7 April 2008 for substantive judgment & link below - Corporations Act s471B – winding up – joint venture – land at Airlie Beach - where a company is in liquidation, whether leave to proceed is required for purposes of seeking a costs order against the company – leave under s471B granted. [Aquilina Holdings](#) (B, C)  
And [Aquilina Holdings](#) – judgment 1 April 2008 – subrogation – priority

**Barra v Reef Magic Cruises [2008] QSC 100**

Supreme Court of Queensland

Jones J

Negligence – Trade Practices Act 1974 (Cth) s52 – misleading or deceptive conduct - Workplace Health & Safety Regulation 1997 (Qld) - plaintiff suffered barotraumas & resulting tinnitus from resort's introductory scuba dive – whether defendant negligent for not refusing to allow the plaintiff to dive – whether defendant negligent for failing to appropriately supervise plaintiff – whether plaintiff was misled by company's brochure to believing a medical examination would be conducted on board – judgment for defendant. [Barra](#) (I)

**Allianz Australia Workers Compensation (NSW) Limited v NRMA Insurance Limited [2008] ACTCA 10**

Court of Appeal of the Australian Capital Territory

Higgins CJ, Refshauge & Graham JJ

Contribution – appeal - leave granted to rely upon a point not taken below - held that in respect of injuries sustained in New South Wales by a worker unloading a trailer, insured under prescribed form of compulsory third party insurance policy issued in Australian Capital Territory, there was no coordinate or common liability entitling relevant NSW workers compensation insurer to contribution. [Allianz Australia Workers Compensation \(NSW\)](#) (I)

## **From the United Kingdom...**

**Byrne (a minor) v the Motor Insurers Bureau & Anor [2008] EWCA Civ 574**

Court of Appeal of England & Wales

Waller, Keene & Carnwath LJ

Motor vehicle insurance – appeal by Motor Insurers Bureau & Secretary of State for Transport - whether limitation provisions of Untraced Drivers Agreement complied with European Union Law – need to ensure equivalence with system for insured drivers - detailed consideration of case law – appeal dismissed - primary judge's declarations upheld: (i) that MIB procedure should be subject to limitation period no less favourable than that which applies to the commencement of actions in the Courts in respect of claims brought by minors for personal injury in tort against a traced driver ; (ii) that the UK was in "sufficiently serious breach" of its obligations under European Community law to give rise in principle to liability in damages for failure to ensure conformity with the EU Directive in that respect. [Byrne \(a minor\)](#) (I)

## From Canada...

### **Mustapha v. Culligan of Canada Ltd 2008 SCC 27**

Supreme Court of Canada

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

Negligence – claim for psychological injury allegedly sustained by consumer of bottled water who discovered remains of flies in unopened bottle – remoteness of damages – claim failed. [Mustapha](#) (I)

## And from Hong Kong...

### **Commissioner of Inland Revenue v. HIT Finance Ltd - [2007] HKCFA 79; FACV000008/2007**

Court of Final Appeal of Hong Kong – 4 December 2007

Bokhary, Chan & Ribeiro PJJ, Litton & Hoffmann NPJJ

Inland Revenue Ordinance - deductions under s16(1)(a) – interest - Hutchison Whampoa Ltd - Banque Paribas - Strategic Investments International Limited - new subsidiary HITL - borrowing subsidiary HIT Finance Ltd – borrowing for the purpose of producing profits - Court unanimously allowed Commissioner’s appeal against HITL, confirmed the assessment on that company, dismissed her appeal against HIT Finance Limited & dismissed cross-appeals. (B)

[Commissioner of Inland Revenue](#) – no. 79

- [Commissioner of Inland Revenue](#) – no. 80
- [Commissioner of Inland Revenue](#) – no. 81
- [Commissioner of Inland Revenue](#) – no. 82

### **Commissioner of Inland Revenue v. Hongkong International Terminals Ltd - [2008] HKCFA39; FACV000008/2007**

Court of Final Appeal of Hong Kong – 19 May 2008

Bokhary, Chan & Ribeiro PJJ, Litton & Hoffmann NPJJ

Request for clarification of Courts orders 4 December 2007 – Commissioner’s contentions held to be correct. (B)

[Commissioner of Inland Revenue](#) – no. 39

- [Commissioner of Inland Revenue](#) – no. 40
- [Commissioner of Inland Revenue](#) – no. 41
- [Commissioner of Inland Revenue](#) – no. 42