

BENCHMARK

Insurance, Finance & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 27 November 2007

Tillman v Attorney General for the State of New South Wales [2007] NSWCA 327

Court of Appeal of New South Wales

Mason P, Giles & Ipp JJA

Courts & judicial system – principle of comity – whether an intermediate appellate court of one Australian jurisdiction should, on grounds of comity, follow a decision of an intermediate appellate court of another Australian jurisdiction where the issue under consideration involves the interpretation of legislative provisions that are identical or substantially similar - Crimes (Serious Sex Offenders) Act 2006 (NSW) – continuing detention orders under s17(3) – “likely” – at par 50 of judgment of Mason P:

“Each judge is required to work within the confines of the judicial oath & to apply legal principles, including those principles that form part of the law of precedent. I remain to be persuaded that, prior to the decision of Giles JA & Ipp JA in this case, there is a binding principle of precedent that applies in the present situation.” [Tillman](#) (I)

Conti v Wollongong City Council [2007] NSWCA 334

Court of Appeal of New South Wales

Giles, Tobias & McColl JJA

Negligence – breach of contract – whether owner/operator of leisure centre should have foreseen sixteen year old girl would punch another patron, the appellant, in face - primary judge had dismissed proceedings – on appeal, held that primary judge did not err in concluding there was no foreseeable risk of harm calling for separation of the participants - cases as to risks of violent behaviour of other patrons considered in judgment of McColl J - appeal did succeed on costs issue – held that primary judge’s order that

appellant pay respondent's costs on a solicitor-client basis impaired by a fundamental error - primary judge appeared to have concluded appellant acted unreasonably in not acceding to a 'walk away' offer from respondent, when that offer was no longer open for acceptance - orders made that appellant pay respondent's costs of trial on ordinary basis - appellant to pay ninety per cent of costs of appeal. [Conti](#) (I)

Potier v General Manager & Governor, M.R.R.C [2007] NSWSC 1031

Supreme Court of New South Wales

Rothman J

Habeas corpus – Bail Act 1978 (NSW) - Bill of Rights 1688 1 Will & Mary sess 2 c 2 - succinct survey of history & principles as to grant of writ – prisoner sought that Court issue habeas corpus in order for him to prepare his appeal to the Court of Criminal Appeal with better facilities & access to his legal team - application not granted. [Potier](#) (I)

Janson v Janson [2007] NSWSC 1344

Supreme Court of New South Wales

Biscoe AJ

Undue Influence – burden of proof - voluntary transfer by old, deaf, almost blind, childless bachelor to nephew of virtually his only asset, house in which he had lived for almost his entire life – no independent advice – nephew held uncle's power of attorney & had given him care & assistance for many years – presumption of undue influence – absence of independent legal advice - presumption not rebutted – judgment sets out clearly principles to undue influence & onus of proof - where undue influence will be presumed from a relationship, the burden of rebutting the presumption is thrown on the party benefiting from the transaction – thorough analysis of case law – interesting judgment. [Janson](#) (I,F)

Riad Tayeh and Anthony De Vries v The Black Stump Enterprises Pty Ltd (in liquidation) [2007] NSWSC 1328

Supreme Court of New South Wales

Hammerschlag J

Corporations– ex parte application for directions under s511 Corporations Act 2001 (Cth) that liquidator justified in convening combined meeting of all known creditors of group for the purpose of voting on a resolution to approve

pooling deed under s510 Corporations Act 2001 (Cth) – application granted.
[Riad Tayeh](#) (F)

Ryan & Anor v Victorian Managed Insurance Authority [2007] VSC 474

Supreme Court of Victoria

Hollingworth J

Costs – appeal from Victorian Civil & Administrative Tribunal (VCAT) – VCAT had ordered that plaintiff home owners were entitled to reasonable costs of enforcing claim under insurance policy – VCAT subsequently ordered home owners to pay some of insurer’s costs under s109 VCAT Act – whether VCAT had power to make latter order – whether VCAT functus officio - owners were insured by a company in HIH group for purposes of House Contracts Guarantee Act 1987 (Vic) –“rescue package” designed to protect house owners who would otherwise have been unable, due to demise of HIH group, to recover in respect of damage suffered by them. [Ryan](#) (I,C)

Queensland Showerscreens and Wardrobes P/L v J M Kelly (Project Builders) P/L [2007] QCA 419

Court of Appeal of Queensland

McMurdo P, Jerrard JA & Daubney J

Procedure – deemed admissions – withdrawal - application for leave to appeal from decision given in District Court refusing appellant plaintiff leave to withdraw, under Uniform Civil Procedure Rules 1999 (Qld) r189(3), admissions deemed to have been made by it as plaintiff under UCPR r189(2) - those deemed admissions were made when appellant plaintiff did not, within fourteen days after service of a notice by respondent defendant, dispute facts asserted in Notice to Admit Facts served on plaintiff - plaintiff’s statement of claim pleaded it was engaged in business of manufacturing & installing wardrobes & bathroom cabinet-ware, & that defendant was a builder engaged in construction &/or renovation of building projects in Queensland – plaintiff alleged it had done work pursuant to the accepted quotes – defendant pleaded plaintiff’s work was incomplete and defective, & counterclaimed for cost of replacing items supplied, or not supplied, & for rectification work.
[Queensland Showerscreens and Wardrobes](#) (I,C)

Burlock v Keytan Pty Ltd [2007] QSC 347

Supreme Court of Queensland

Lyons J

Corporations – solvency - application for winding up of respondent company due to its failure to comply with a statutory demand - respondent presumed to be insolvent & bore onus of proving its solvency – s459C(2) Corporations Act - in order to discharge that onus the Court should be presented with fullest & best evidence of company's financial position - held that company had established its solvency - application for summary winding up dismissed. [Burlock](#) (F)

FWV Stanke Holdings Pty Ltd v O'Meara; Von Stanke v O'Meara [2007] SASC 413

Supreme Court of South Australia

Doyle CJ, Anderson & White JJ

Corporations - a judge had granted respondent permission to intervene in proceedings to take over defence of a company & to file a contribution notice - appeal by company & an intervener - whether respondent satisfied criteria under s237(2) Corporations Act 2001 (Cth) - whether respondent acting in good faith - whether serious question to be tried - whether in best interests of the company – held that save for a variation of the orders so as to require respondent to provide security for potential costs liability of company to other parties, the s237(2) criteria were properly held to have been established - appeals dismissed - discovery and interrogatories - inspection of documents - grounds for resisting production - "financial capacity to conduct litigation" - "probable company itself will not bring proceedings or take responsibility" - "good faith" - "serious question to be tried" - "best interests of company" - "honest belief as to good cause of action" - "collateral purpose" - "disclosure of documents." [FWV Stanke Holdings](#) (F)

Skerbic v McCormack & Ors [2007] ACTSC 93

Supreme Court of Australian Capital Territory

Master Harper

Negligence – trade practices - product liability – personal injury - garage roller door – adequacy of installation instructions.– consumer protection – supply of goods – defect – garage roller door – plaintiff tenant standing in garage open doorway under roller door, waiting for her husband to drive car out of the garage for them to go to work, after which, in accordance with their usual practice, she intended to lower & lock the roller door -while she was standing under it, one of the brackets supporting it came away from surrounding brick wall - roller door fell & struck her on the head - proceedings commenced against first defendant as her landlord – plaintiff

then joined to the proceedings second defendant, Gliderol International Pty Ltd, manufacturer & supplier of the roller door - second defendant subsequently joined installer, Sheridan Garage Doors (the present third defendant) as third party, claiming contribution or indemnity – still later, plaintiff joined Sheridan Garage Doors as defendant - by the time action came to trial, claim against first defendant had been withdrawn, although he remained a party - action heard as a claim in negligence & also product liability claim under Trade Practices Act 1974 (Cth) against manufacturer, & claim in negligence against installer - manufacturer, if found liable, was seeking contribution or indemnity from the installer – case against manufacturer as presented at trial was based not on any fault in design or manufacture of garage door, but on adequacy of instructions provided with door to distributors & installers, & specifically to third defendant – plaintiff succeeded in her claim against second defendant, the manufacturer & supplier of door & judgment entered for plaintiff against second defendant for \$84,000 - judgment entered in favour of first & third defendants - judgment entered in favour of third defendant in second defendant’s claim for contribution. [Skerbic](#) (I,C)

& one from the District Court of Queensland...

Wickes v Body Corporate for Kabi Kabi [2007] QDC 312

District Court of Queensland

Robertson DCJ

Occupiers liability - plaintiff injured in fall down external garden steps at night - whether relevant principles for liability for negligence in Civil Liability Act 2003 accord with common law principles - whether plaintiff by her actions voluntarily assumed risk of falling or contributed by her own negligence - assessment of damages - “mental disorder” - multiple injury claim - gratuitous services - whether threshold in Act reached – judgment for plaintiff for \$56,756.95. [Wickes](#) (I)

Key: (I) – Insurance; (F) – Finance & Banking; (C) Construction & Building