

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Wednesday 30 April 2008

Stewart v Biodiesel Producers Limited [2008] FCAFC 66

Federal Court of Australia

Ryan, Moore & Tamberlin JJ (at Perth, delivered in Sydney)

Appeal - primary judge had ordered rescission of resolution of board of directors of first respondent Biodiesel to issue performance shares – primary judge had set aside issue of performance shares & ordered refund of subscription money paid - primary judge had made further order that Biodiesel's share register be altered to give effect to rescission order – appeal dismissed. [Stewart](#) (B)

Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited [2008] FCA 554

Federal Court of Australia

Tamberlin J (at Sydney)

Legal professional privilege – discovery of documents provided by third party – confidentiality of & prejudice to third party – regime for disclosure - applicant seeking production of documents by fourth to sixth respondents ("the Visy parties") - whether copy documents, originals of which may not be privileged, are protected by a privilege claim where they were furnished by Australian Competition & Consumer Commission in response to a Notice to Produce & requests from solicitor acting for Visy parties in another proceeding before Court – purpose of creation – whether purpose of solicitor the relevant purpose when determining privilege – implied undertaking not to disclose discovered documents for another purpose – release from implied undertaking. [Jarra Creek Central Packing Shed](#) (I,B)

BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [2008] FCA 551

Federal Court of Australia

Finkelstein J (at Melbourne)

Arbitration agreement - stay application – application based on s7 International Arbitration Act 1974 (Cth) &, in the alternative, on court's inherent jurisdiction - applicant alleges it was induced by misleading & deceptive conduct of first respondent to enter into charterparty of cargo vessel, the "Global Hawk" - first respondent asserted proceeding brought in breach of twelve month contractual time bar for claims arising out of the charterparty & applied to have action stayed so that a London arbitrator could decide whether claim against it brought out of time – application dismissed – extensive consideration of texts & case law. [BHPB Freight](#) (I,B)

Wainter Pty Ltd ACN 008 725 586 v Freehills (a Firm) [2008] FCA 562

Federal Court of Australia

French J (at Perth)

Application to strike out statement of claim – substantial deficiencies in pleading – interactive television services – shares - statement of claim struck out – applicant have leave to file a substituted statement of claim. [Wainter](#) (B)

Zhang v University of Tasmania [2008] FCA 516

Federal Court of Australia

Heerey J (at Hobart)

Discrimination – applicant PhD student at university – whether actions by university staff constituted unlawful discrimination on disability, race and sex grounds – application dismissed. [Zhang](#) (I,B,C)

Raymond Murray Smith (Office of Workplace Ombudsman) v Zinifex Australia Ltd & Mark Brendan Emmett [2008] FCA 532

Federal Court of Australia

Heerey J (at Hobart)

Industrial law – power of workplace inspectors appointed under post-Work Choices legislation to bring proceedings under pre-Work Choices regime – allegation that in 2005 respondents contravened s170WG of the 1996 Workplace Relations Act by applying duress to some of first respondent Zinifex's employees in connection with an Australian Workplace Agreement (AWA) - effective from 27 March 2006 Workplace Relations Act was substantially amended by Workplace Relations Amendment (Work Choices) Act 2005 (Cth) – applicant a workplace inspector - respondents argued applicant did not have power to bring this proceeding in respect of

contraventions of the Old Act – question for determination: was applicant empowered to make this application – answer ‘yes.’ [Smith](#) (C)

Goodman Fielder Ltd v Hickson [2008] NSWCA 69

Court of Appeal of New South Wales

Giles, Hodgson JJA & Hislop J

Workers Compensation Act s151Z(1)(b) - Law Reform (Miscellaneous Provisions) Act 1965 – while riding a pushbike on a journey from his place of work, respondent struck by motor vehicle – by majority appeal allowed, and the following answers to questions substituted:

“Q1(a) Can s10(2) of the Law Reform (Miscellaneous Provisions) Act 1965 operate in reduction of the amount of workers compensation benefits repayable to the Plaintiff from damages recovered as a result of a settlement of the Defendant’s action against a third party tortfeasor when no determination was made by a Court in the settled proceedings concerning contributory negligence and the quantum of damages?

A. No.

Q1(b) If the answer to Question (a) is in the affirmative, is evidence admissible in these proceedings to establish the extent to which the damages recovered by the Defendant as a result of the settlement of his action against the third party tortfeasor were in fact reduced on account of his contributory negligence?

A. question does not arise.

Q.3. In the alternative to Question (b), if the answer to Question (a) is in the affirmative, is evidence admissible in these proceedings to establish the degree of the Defendant’s contributory negligence and the quantum of the damages to which the Defendant would have been entitled without reduction for contributory negligence?

A. question does not arise.” [Goodman Fielder](#) (I,C)

Spanos v Lazaris [2008] NSWCA 74

Court of Appeal of New South Wales

Beazley, Basten & Bell JJA

Apprehension of bias – *certiorari* – procedural fairness – [Fox v Percy](#) - District Court appeal from criminal conviction in Local Court to District Court - issue as to whether signature on power of attorney a forgery – criminal proceeding – application dismissed. [Spanos](#) (B)

Sudojo Consulting Pty Ltd v Africa Pacific Capital Pty Ltd [2008] NSWSC 353

Supreme Court of New South Wales

Einstein J

Contract - consultancy agreement – terms of retainer by defendant of investment banking services of plaintiff – disagreement as to precise terms - letter/email later sent by plaintiff purporting to summarise terms agreed upon & seeking signature but never signed on behalf of defendant – principles & case law considered. [Sudojo Consulting](#) (B)

John Holland Pty Ltd v Made Contracting Pty Ltd [2008] NSWSC 374

Supreme Court of New South Wales

Nicholas J

Building and Construction Industry Security of Payment Act 1999 – architectural welding & fabrication - adjudication procedure - whether withdrawal of adjudication application valid – whether adjudicator failed to determine adjudication application – whether entitlement to make new adjudication application established – whether claimant estopped from making new application – whether adjudicator’s determination of new application void – challenge to adjudication did not succeed. [John Holland](#) (C)

O’Neill & Anor v Kimhi & Ors [2008] SASC 109

Supreme Court of South Australia

Debelle J

Joinder – development application - application by neighbours to be joined to planning appeal - whether joinder in interests of justice – whether neighbours have common interest with the Council – held, neighbours to be joined as parties. [O’Neill](#) (C)

GIO General Limited v Insurance Australia Limited t/as NRMA Insurance [2008] ACTSC 38

Supreme Court of the Australian Capital Territory

Master Harper

Double insurance – claim by workers’ compensation insurer against third party insurer for contribution – whether identity of risk – pleading of claim by injured worker not determinative of whether dual insurance applies – third party liability insurance – motor vehicles – compulsory insurance legislation – Road Transport (General) Act 1999, s163 – injured worker unloading stationary truck – whether injury arising out of use of truck – consideration of case law & texts. [GIO General](#) (I)

Hobby v Dinah Beach Cruising Yacht Club Inc [2008] NTSC 20

Supreme Court of the Northern Territory

Thomas J

Negligence – assessment of damages - liability admitted – yacht damaged in accident at yacht club wharf - whether damage repairable – whether ship a write-off – no intention to repair – liability of defendants to pay storage fees.

[Hobby](#) (I)

& From the United Kingdom...

Mills v Birchall & Anor [2008] EWCA Civ 385

Court of Appeal of England & Wales

Mummery, Lawrence Collins LJJ & Munby J

Costs orders against non-parties - third party costs orders & receivers - whether, when a receiver appointed under a bank charge causes an insolvent company to sue, the action is unsuccessful & the successful party is unable to recover costs against the company, the successful party may recover the costs from the receiver under the jurisdiction in s51 Supreme Court Act 1981 to award costs against a non-party - position of receivers considered at par 23-27 of judgment of Lord Justice Lawrence Collins – consideration of position of liquidators at par 28 – detailed consideration of Australian High Court case of [Knight v FP Special Assets Ltd \(1992\) 174 CLR 178](#) at par 42-49 & 55-58 in judgment of Lord Justice Lawrence Collins – consideration of other case law from UK, Canada & Northern Ireland - appeal dismissed – Lord Justice Mummery at par 91:

“...A costs order against a non-party can be made by the court in its discretion, which, like all discretions, involves a balancing exercise controlled by principles of justice. The Chancellor's decision not to exercise that discretion against the Receivers was based on correct legal principles...” [Mills](#) (B)

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