

# BENCHMARK

## Insurance, Banking & Construction

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

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**Monday 4 February 2008**

**Fitzpatrick v Keelty [2008] FCA 35**

Federal Court of Australia

Moore J (at Sydney - via videolink to Canberra)

Bankruptcy – where applicant became a bankrupt after proceedings commenced – proceedings related to termination of applicant’s employment with Australian Federal Police – trustee in bankruptcy deemed to have abandoned proceedings - whether applicant could continue proceedings in own name under s60(4) Bankruptcy Act 1966 (Cth) – stay of legal proceedings commenced by a person who subsequently becomes bankrupt - meaning of an action in respect of "any personal injury or wrong" [s60(4)(a)] – proceedings dismissed - at par 39 of judgment:

“...The test as to the meaning of the words "personal injury or wrong done to the bankrupt" is whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property: see *Cox v Journeaux* (No 2) [1935] HCA 48; (1935) 52 CLR 713 at 721 per Dixon J.”  
[Fitzpatrick](#) (I,B,C)

**Acohs Pty Ltd v Ucorp Pty Ltd [2008] FCA 41**

Federal Court of Australia

Jessup J (at Melbourne)

Costs – case law considered as to circumstances in which Court will order that costs be paid forthwith rather than at conclusion of proceedings – allegation of copying of literary works - HTML & PDF files for Material Safety Data Sheets - His Honour not persuaded by respondents that filing by applicant of Fifth Further Amended Application & Fifth Further Amended Statement of Claim was an appropriate occasion to depart from normal procedure. [Acohs](#) (I,B,C)

**Racing NSW v NSW Self Insurance Corporation (a continuance of the NSW Insurance Ministerial Corporation), trading as Treasury Managed Fund No. 1 [2008] NSWSC 6**

Supreme Court of New South Wales

Einstein J

Workers Compensation - statutory construction – injury on premises of Wellington Race Club while engaged in trackwork - meaning of word 'employer' in former s158 Workers Compensation Act 1987 (NSW) – legislative provision for workers compensation concessions to employers who engaged trainees under Australian Traineeship System – definition of 'trainee' - defendant contended that person injured was a trainee within s158(1) – comprehensive examination of legislation & case law. [Racing NSW](#) (I)

**Capital Radio Network Pty Ltd v Garrott [2008] NSWSC 17**

Supreme Court of New South Wales

Barrett J

Contracts - Family Court settlement agreement - construction - provision for particular matter to be resolved by expert determination if not agreed by parties - whether determination of expert validly & effectively made in accordance with the provision – held that plaintiffs had failed to show that expert's determination regarding "Accounting Fees" was made otherwise than in accordance with contract - plaintiffs' claims for declaratory relief dismissed – at par 1:

"These proceedings involve the construction of an agreement...by which certain proceedings in the Family Court of Australia were settled. The central question is whether a particular determination by a chartered accountant is a valid & effective determination pursuant to a contractual provision for expert determination. The plaintiffs seek declarations that it is not. The defendants, by their cross-claim, seek a declaration to the contrary effect & money judgments." [Capital Radio Network](#) (I,B,C)

**Alamdo Holdings Pty Limited v Australian Window Furnishings (NSW) Pty Ltd [2008] NSWSC 7**

Supreme Court of New South Wales

Barrett J

Costs - departing from general rule - proceedings straddling commencement of Civil Procedure Act & the uniform rules - plaintiff had recovered damages of \$223,000 upon claims quantified at \$924,000 – proceedings concerned repair covenants in lease agreement of industrial premises - claims for repair & remedial work, establishment costs & geotechnical consultant - where mixed outcome - whether feasible to judge outcome according to issues, matters or

heads of controversy - resort to matters of impression and evaluation - whether rules of court in force at inception but no longer applicable should be considered relevant - answer 'no' – detailed examination of case law - defendant to pay one-half of plaintiff's costs as agreed or assessed. [Alamdo Holdings](#) (I,B,C)

**Broulee Developments Pty Limited v Mackay [2008] NSWSC 32**

Supreme Court of New South Wales

McLaughlin AsJ

Abandonment of contracts – comprehensive consideration of case law – proposed plan of subdivision of Old System land on the South Coast of NSW - contract for sale of land - contract not completed after almost fifteen years – plaintiff purchaser sought specific performance - whether contract had been abandoned - whether discretionary relief should be refused because of plaintiff's delay in bringing proceedings – His Honour not satisfied that evidence objectively disclosed abandonment - held that plaintiff had established entitlement to relief by way of specific performance of contract – an interesting judgment. [Broulee Developments](#) (I,B,C)

**Perpetual Trustees Victoria Limited v Ford [2008] NSWSC 29**

Supreme Court of New South Wales

Harrison J

Mortgage – claim for possession of land – mortgagor illiterate & intellectually disabled – whether capable of understanding transaction – *non est factum* – Contracts Review Act 1980 – whether contract unjust – unconscionable bargain – agency – whether mortgage broker agent of mortgagee – restitution – moneys advanced on basis of mistake – unjust enrichment – judgment for plaintiff - restitution ordered notwithstanding defence of *non est factum* – extensive consideration of case law. [Perpetual Trustees Victoria](#) (B)

**Nicholson v Matler [2008] VSC 8**

Supreme Court of Victoria

Bell J

Negligence – negligent property valuation – overvaluation of property by valuer – valuation relied upon in proceedings in County Court by seller against her real estate agent – County Court proceedings settled with each party bearing own costs – seller brought action in Magistrates' Court against valuer - seller claimed loss of legal costs thrown away in County Court proceeding – whether negligence of valuer caused loss claimed – whether magistrate erred in finding the valuer's negligence was not causally responsible for the loss claimed – “a” causal factor – “but for” test for

causation – whether magistrate erred in finding seller would have issued the proceeding in the County Court in any case – held that sufficient evidence to make finding – no error – reasons for decision adequate and sufficient. [Nicholson](#) (I,B,C)

## **& Two from the District Court Western Australia...**

### **Ross v Profile Packaging Pty Ltd & Anor [2008] WADC 8**

District Court of Western Australia

Schoombie DCJ

Tort - product liability – computerised machinery - defective machinery - duty of care - foreseeability of risk by second defendant, the manufacturer - instructions on safe use of machinery by first defendant, the employer - apportionment of liability - contributory negligence - assessment of damages - while employed as machine operator & setter, plaintiff then aged twenty-three, had suffered a severe injury to his right hand when it got caught between two moving platens of a thermo forming machine - these machines produce various shapes of plastic products like containers, lids and biscuit trays – expert evidence as to safety options – plaintiff succeeded against both defendants – total award of \$695,373.00. [Ross – Part I](#); [Ross – Part II](#) (I,C)

### **Coull by his joint next friends Sheila Coull and Lorna Ann Cross v Makings [2007] WADC 221**

District Court of Western Australia

Nisbet DCJ

Interrogatories – motor vehicle accident litigation - plaintiff had sought leave to interrogate defendant - appeal from decision of Deputy Registrar - refusal of leave to administer interrogatories - whether interrogatories permissible - case law considered including [Dunbar v Perc](#) [1956] VLR 583 & [Wisniewski v Tolley](#) (1967) 10 FLR 157 – His Honour considered each interrogatory, allowing some & disallowing others. [Coull](#) (I)

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