BENCHMARK

A Daily Bulletin listing Decisions of Superior Courts of Australia Compiled for Insurers

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Arms v WSA Online Limited (ACN 081 121 495) (Subject to a Deed of Company Arrangement) [2007] FCA 1712
Federal Court of Australia
Ryan J (at Melbourne)
Costs – equitable lien – insurance policy - substantive proceeding were a claim for damages by applicant 'Arms' against first respondent WSA, second respondent, Houghton, who was employed by WSA as a project manager or strategist & third respondent, Student, who was employed by WSA as a communications strategic planner – after proceedings issued it emerged WSA was insolvent & a Deed of Company Arrangement was entered into – the Court then granted leave to applicant under s444E(3) Corporations Act to pursue his claim against WSA - claim was defended in WSA's name by solicitors instructed by CGU Professional Risks Insurance ("CGU"), its insurer under a Civil Liability Professional Indemnity Insurance Policy - Court gave judgment in favour of applicant against WSA for $58,331 – contended on behalf of Arms that any monies paid to WSA by CGU in discharge of CGU's liability under policy have been brought into existence solely as a result of expenditure by Arms of costs & disbursements in prosecuting the action - applicant contended therefore Arms had a lien to extent of costs & disbursements so incurred over any monies which had been paid by CGU to administrators of WSA – contended that lien had priority over claims of WSA's unsecured creditors - case law considered - declaration made that applicant entitled to a lien or charge over any monies paid or payable by CGU Professional Risks Insurance to first respondent by way of indemnity pursuant to policy in respect of claim by applicant, such lien or charge being to extent of costs & disbursements reasonably expended by applicant in

prosecuting action against first respondent & having priority over claims of administrators & creditors under Deed of Company Arrangement in relation to first respondent. Arms

Downer Engineering Power Pty Ltd v P & H Minepro Australasia Pty Ltd [2007] NSWCA 318

Court of Appeal of New South Wales
Giles, Basten JJA & Hoeben J

Sale of business - referral of disputes to valuer - appellant seller of business involving rotating machine repair & maintenance - appellant was plaintiff in proceedings in District Court - respondent was purchaser – adjustment of purchase price after completion – appellant alleging unpaid additional amounts - construction of clause relating to work in progress - provision for referral of disagreement to valuer - whether matters for referral to valuer were restricted to accounting exercises or whether any sort of dispute as to steps to be taken in preparation of completion statement might be referred – case law considered as to effect of a determination by a valuer – appeal allowed. Downer Engineering Power

TGI Australia Limited & Anor v QBE Insurance (Europe) Limited [2007] NSWSC 1254

Supreme Court of New South Wales
Hammerschlag J

Insurance contracts - construction of clause – Rail Infrastructure Corporation ("RIC") contracted with Barclay Mowlem Constructions to carry out certain works at Redfern railway station – Mr. Buckman by his tutor brought action against Barclay Mowlem & RIC for injury at work - Barclay Mowlem held two current insurance policies, one with TGI Australia Ltd ["underlying insurance"] which covered it up to $2.5M – other policy ["umbrella insurance"] was with second plaintiff, Allianz Australia Insurance Limited which covered it for liability in excess of amount recoverable under underlying insurance up to $20M for any one occurrence - RIC held a policy obtained through London Insurance & Reinsurance Market Assurance with first defendant QBE Insurance (Europe) Limited, second defendant ERC Frankona Reinsurance (III) Limited & Independent Insurance Company Ltd - last mentioned company failed & was not a party to these proceedings – first & second defendants each undertook one third of the risk under LIRMA policy - Barclay Mowlem & RIC entered into an apportionment agreement under which amount of any liability to Mr Buckman would be apportioned 80

per cent to Barclay Mowlem & 20 per cent to RIC - agreed that it remained open for first plaintiff to seek contribution from any other party or any other insurer in respect of liability which had arisen – it was also agreed that solicitors who had been acting for Barclay Mowlem in the proceedings would act on behalf of both Barclay Mowlem & RIC – Mr Buckman's proceedings were settled - Barclay Mowlem & RIC, under indemnity from plaintiffs, paid Mr Buckman $3.2M, plus an amount of $365,784 for funds management, & an amount of $385,000 for his costs of proceedings - plaintiffs paid Barclay Mowlem's & RIC's costs of defending proceedings in sum of $272,753.24 - plaintiffs assert Barclay Mowlem was an insured under LIRMA policy in respect of its liability to Mr Buckman & that defendants were obliged to indemnify it accordingly - plaintiffs claimed that defendants were liable to contribute rateably to amounts paid by them on behalf of Barclay Mowlem to Mr Buckman – plaintiffs also asserted that defendants were obliged to make contribution with respect to costs incurred by them in defending his claim - contribution sought from each defendant was one third of half of what was paid by plaintiffs, which amounted to $572,230.07 - whether, on the proper construction of the terms of the LIRMA policy, Barclay Mowlem was an insured under terms of LIRMA policy - if Barclay Mowlem was an insured under the LIRMA policy, whether RIC was liable for a share of the defence costs & had indemnity in respect of those costs from defendants so that defendants were obliged to make contribution to plaintiffs in respect of plaintiffs' payment of those defence costs – held Barclay Mowlem did not qualify as an Additional Insured under the LIRMA policy. TGI Australia

Urban House v Purnell Bros [2007] NSWSC 1248
Supreme Court of New South Wales
Gzell J
Conveyancing - contracts were exchanged for purchase by plaintiffs a block of land in Bankstown from the defendant - land had been used as a used car sale yard & previously, as a service station - there was an extensive concrete hardstand area & a brick and metal building containing several offices and amenities - settlement of contract had been extended & was finally due to take place on 26 September 2005 but on 22 September 2005, the building was damaged by fire - solicitors for plaintiffs gave notice of rescission of contract relying upon the Conveyancing Act 1919, s66L - solicitors for defendant then gave notice of termination for failure to complete the contract - held that plaintiffs had validly rescinded contract – the fire had rendered the land materially different from that which plaintiffs had contracted to buy - fire had rendered building on the land untenantable. Urban House

Programmed Solutions P/L v Dectar P/L [2007] QCA 385
Court of Appeal of Queensland
de Jersey CJ, Jerrard JA & Dutney J
Application for leave to appeal - costs - application for security for costs dismissed by District Court - primary judge satisfied that respondent plaintiff company unlikely to be able to meet costs order if made against it - director of respondent plaintiff offered personal guarantee - leave to appeal refused – at par 13 of de Jersey CJ's judgment:
"Also, litigants should not come to expect that applying for leave is the gateway to a comprehensive hearing on the merits – as effectively occurred here. An unduly broad canvassing of the merits, where leave is denied, may have significance in costs. It may lead, for example, to an order that an unsuccessful applicant pay indemnity costs. It should in most cases be possible to advance an application for leave, of this character, without dipping, in any comprehensive way, into the merits of the case." Programmed Solutions

Seal & Ors v Malaugh Holdings (No 2) Pty Ltd & Ors [2007] SASC 388
Supreme Court of South Australia
Bleby, Anderson & White JJ
Procedure - application for permission to amend notices of appeal - sale of business – principles & case law succinctly considered- application refused. Seal

Hamilton v Madden [2007] ACTSC 89
Supreme Court of Australian Capital Territory
Master Harper
Limitation – application for extension – motor accident - cause of action arose in June 2000 - action was not commenced until 3 November 2006, about five months out of time – plaintiff did not seek legal advice about her entitlement to claim damages till December 2004 after being injured in another motor accident in October that year - she consulted solicitors about the second accident - on taking instructions, they formed the view she appeared to have a right to damages arising from the first accident as well - NRMA Insurance Limited third party insurer of both of vehicles whose drivers had been apparently at fault in the two accidents – in December 2004 plaintiff's solicitors forwarded personal injury claim notification form to NRMA in relation to the 2000 accident - principles to be applied in exercising discretion to extend limitation period - Brisbane South Regional Health Authority v

Taylor (1996) 186 CLR 541 considered – limitation period extended - at par 31 of judgment:

"For the reasons I have explained above, I am satisfied that there is not likely to be any significant prejudice to the defendant in relation to either liability or quantum if the extension is granted. This is not a case where the insurer could reasonably have assumed when the limitation period expired that its liability had been extinguished. In the first place, the insurer was by then well aware that the plaintiff was legally represented and was pursuing a claim. Secondly, provided that the originating process is filed within the limitation period, there is no obligation on the plaintiff to serve it immediately. By virtue of rule 74 of the Court Procedures Rules 2006, an originating process is valid for service for one year from the date of filing. A prudent insurer would accordingly wait for a year after expiry of a limitation period before arranging its affairs on the assumption that its liability had been extinguished." **Hamilton**