



## A Daily Bulletin listing Decisions of Superior Courts of Australia Compiled for those in Insurance

### Today's Cases

**Cost-Plus contract for building works** – what principles apply when a judge decides whether to accept a referees' report. See *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd*

**Insurance policy** – whether a policy obliging the insured to take reasonable care during construction was a "construction contract" within the meaning of the *Building and Construction Industry Security of Payment Act 1999* (NSW). See *Zurich Specialities London Ltd v Thiess Pty Ltd*

**Negligence** - whether natural progression of unrelated disease would have led to disability anyway – whether plaintiff failed to take care for her own safety. See *Hoad v Peel Valley Exporters Pty Ltd*

**Restraint of Trade** – whether interlocutory order restraining a former employee of a real estate business should be made. See *Cerilian Pty Ltd v Graham Fraser*



## Monday 29 September 2008

### Australian Communications & Media Authority v Clarity1 Pty Ltd [2008] FCA 1449

Federal Court of Australia

McKerracher J (in Perth)

Service – reopening of final orders - estimate of costs made by Registrar – no notice of objection to estimate filed – certificate of taxation issued – respondent claimed certificate not received – respondent seeking to set aside order of Registrar – statutory framework considered – application granted - detailed consideration of case law & legislation from UK & Australia regarding evidence as to service ; reopening of final orders.

[Australian Communications & Media Authority](#)

### Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd [2008] NSWCA 228

Court of Appeal of New South Wales

Spigelman CJ, Allsop P & Campbell JA

Cost-Plus contract for building works – referees’ report - subcontracting - subcontractor a related company - cost of services by subcontractor - damages for decision appealed from, see ‘Benchmark’ Construction & IBC Monday 10 December 2007 & link below – whether primary judge had erred in adopting referees’ report - whether, on findings of fact made by referees & adopted by primary judge, there had been proved a loss appropriately measured by damages awarded – appeal dismissed – at par 56 of judgment of Spigelman CJ and Allsop P:

“..... If a party complains about how a referee has dealt with the issues on the reference, it may be difficult to persuade a judge that a referee has not dealt with an issue, or not dealt with it adequately, if that issue had not been placed before the referee with the requisite clarity.”

[Bellevarde Constructions](#), and

[CPC Energy v Bellevarde Constructions](#) - decision 5 December 2007 - adoption of referees' report - plaintiff had acquired five adjoining residential properties in Miller Street, Cammeray, with a view to demolishing them & developing the land they occupied formerly into eighteen high quality apartments – development known as ‘The Canopy’ – plaintiff entered into a cost-plus building contract for demolition of houses & building of apartments with the defendant Bellevarde - fraud finding - Jones v Dunkel – case law & principles to be applied on whether to adopt or reject referees’ report - trade practices - referees’ report to be adopted.

### Zurich Specialities London Ltd v Thiess Pty Ltd [2008] NSWSC 1010

Supreme Court of New South Wales

Bergin J

Construction Risks Insurance Policy – collapse of portion of Lane Cove Tunnel in 2005 - Building & Construction Industry Security of Payment Act 1999 (NSW) - provision in insurance policy requiring insured to take reasonable precautions to safeguard subject matter insured from loss or damage - “recognised financial institutions” – held that reasonable precautions clause not a construction contract



between plaintiffs & defendants; the Act did not apply to the policy.

[Zurich Specialities London](#)

## **Hoad v Peel Valley Exporters Pty Ltd [2008] NSWSC 981**

Supreme Court of New South Wales

Harrison J

Negligence – duty of care – spinal injury - liability of defendant "host employer"/occupier of premises used to conduct an abattoir at which plaintiff sent to work by her employer - employer a company related to defendant – plaintiff injured in course of lifting boxes of meat products from work table to conveyor – defendant negligent in failing to eliminate unsafe system – assessment of employer & defendant's respective liability for purposes of s151Z(2)(c) Workers Compensation Act 1987 (NSW) – plaintiff with asymptomatic condition rendered symptomatic by injury in course of employment - whether natural progression of disease would have led to disability absent the work injury – whether plaintiff failed to take care for her own safety by performing work other than in the way designed – no contributory negligence - verdict for plaintiff for \$705,554.33.

[Hoad](#)

## **Vane-Tempest v Century 21 Forster [2008] NSWSC 979**

Supreme Court of New South Wales

Harrison AsJ

Indemnity clause – managing agency agreement - appeal against Magistrate's determination on cross-claim brought by Century 21 as managing agents against plaintiffs seeking indemnity – plaintiffs the owners of property at Forster – they had entered into four agency agreements with managing agent – tenant of one property had tripped on an unstable or wobbly paver located on property sustaining injury to her left foot – issue for determination before Magistrate : whether plaintiffs liable to indemnify managing agents for legal costs & disbursements incurred in defending Local Court proceedings - thorough examination of case law – appeal upheld – judgment on cross-claim entered in favour of plaintiffs.

[Vane-Tempest](#)

## **Khamas v Anton [2008] NSWSC 975**

Supreme Court of New South Wales

Harrison AsJ

'Costs to date' - appeal from Magistrate's decision - Magistrate had found there was no settlement reached between the parties in the matter – correspondence between parties construed - plaintiffs contending Magistrate ought to have found there was a binding settlement agreement between the parties & that the proceedings should be dismissed according to that settlement agreement – no error of law – appeal dismissed.

[Khamas](#)



**Quintano v B W Rose Pty Ltd [2008] NSWSC 1012**

Supreme Court of New South Wales

Brereton J

Evidence Act 1995 (NSW) – whether witness ‘not available’ - witness statement tendered as evidence where witness unavailable for cross-examination –whether second defendant had taken “all reasonable steps” – second defendant retained process server to serve subpoena on witness at last known address & to undertake certain database searches – whether second defendant should have made enquiries with the Department of Immigration, the NSW Police & Australian Electoral Commission – private investigator also retained - discretion to exclude witness statement – statement made contemporaneously with event in issue – statement made to NSW Police with knowledge that it could be tendered as evidence & penalties could apply for false statements – witness statement admitted to evidence.

[Quintano](#)

**Cerilian Pty Ltd v Graham Fraser [2008] NSWSC 1016**

Supreme Court of New South Wales

Brereton J

Employment contract – restraint of trade – defendant had been employed by plaintiff as sales executive in plaintiff’s real estate agency at Gosford – plaintiff seeking interlocutory injunction - whether seriously arguable case – balance of convenience – various orders made, including restraining order till 17 October 2008.

[Cerilian](#)

**State of Queensland v B [2008] QSC 231**

Supreme Court of Queensland

Wilson J

Parens patriae jurisdiction - Court asked to consider lawfulness of termination of a minor’s pregnancy by administration of a drug – provisions of Criminal Code considered including s286 regarding duty of person who has care of child.

[State of Queensland](#)

**The New South Wales Solicitors Mutual Indemnity Fund v the Hancock Family Memorial Foundation Ltd [2008] WASCA 197**

Court of Appeal of Western Australia

Miller JA

Pre-action discovery – stay of orders made pending appeal.

[The New South Wales Solicitors Mutual Indemnity Fund](#)



## And remembering W. H. Auden, who died on this day in 1973...

Auden's plaque in Poets' Corner, Westminster Abbey reads:

WYSTAN HUGH AUDEN  
1907-1973

*In the prison of his days  
Teach the free man how to praise*

Buried at Kirchstetten  
Lower Austria

The quotation is taken from the conclusion of Auden's "In Memory of W.B. Yeats" - Yeats died in January, 1939, seven months before the outbreak of the War. The poem was written within one month of Yeats' death & published shortly thereafter.

*"... Follow, poet, follow right  
To the bottom of the night,  
With your unconstraining voice,  
Still persuade us to rejoice.*

*With the farming of a verse  
Make a vineyard of the curse  
Sing of human unsuccess  
In a rapture of distress.*

*In the deserts of the heart  
Let the healing fountains start,  
In the prison of his days  
Teach the free man how to praise."*

[In Memory of W. B. Yeats - Poets.org - Poetry, Poems, Bios & More](#)

[The W. H. Auden Society](#)

(21 February 1907 – 29 September 1973)