

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Thursday 3 April 2008

Australian Competition and Consumer Commission v PRK Corporation Limited [2008] FCA 403

Federal Court of Australia

Sackville J (at Sydney)

Trade Practices Act 1974 (Cth) - automotive terminals at Australian ports – thirteen respondents - corporations within Patrick Group - applications to strike out statement of claim pleading contravention of s45(2) - whether question of law should be determined on a strike out application – whether statement of claim pleaded all material facts. [PRK Corporation](#) (I,B,C)

Cadbury Schweppes Pty Ltd (ACN 004 551 473) v Amcor Limited (ACN 000 017 372) [2008] FCA 398

Federal Court of Australia

Gordon J (at Melbourne)

Inspection of documents - whether Visy's implied undertaking to Court not to use documents produced by other parties in course of the ACCC proceedings except in those proceedings prevented their disclosure to Cadbury in this (damages) proceeding - see 'Benchmark' Friday 22 February, 2008 for judgment 19.2.08 (link within this 28.3.08 judgment) - Visy to produce documents to Cadbury for inspection – moving party, the ACCC, to pay Cadbury's costs of & incidental to the application. [Cadbury Schweppes](#) (I,B)

Bell v Veigel; Bell v Broughton; Broughton v Veigel [2008] NSWCA 36

Court of Appeal of New South Wales

Mason P, Giles & Tobias JJA

Negligence – contributory negligence – road accident – whether failure to give way – whether defendant not keeping proper lookout - appeal & new trial – when new trial granted – preponderance of evidence in favour of unsuccessful party - interference with judge’s findings of fact – where gap in evidence supporting findings of liability should have been addressed – where conflicting evidence of witness relied upon should have been addressed – judgments or orders – amending, varying & setting aside. [Bell](#) (I)

Dennis v Australian Broadcasting Corporation [2008] NSWCA 37

Court of Appeal of New South Wales

Spigelman CJ, Basten & Campbell JJA

Defamation – television broadcast – failure of investment scheme - whether broadcast capable of conveying defamatory “acquiescence” imputations – held that acquiescence imputations were capable of arising from broadcast given references to the allegedly shared “controlling interest” held by the applicant & the “legal adviser” capacity of his role - case law as to test on a strike out application - power to grant leave to amend a pleading under the Civil Procedure Act. [Dennis](#) (I)

Guiney v Australand Holdings Ltd & Ors; Castlehaven Sales No 2 (t/as Castlehaven Realtors & Ors v Guiney & Ors [2008] NSWCA 44

Court of Appeal of New South Wales

Mason P, Giles JA & Einstein J

Negligence - personal injuries - slip & fall on wet tiles – first respondent builder of premises with defect – injury to member of immediate family of first occupiers of newly built home - measure & remoteness of damages in actions for tort - method of assessment - where “cushion” or “buffer” damages awarded – whether damages should have been assessed at specific rate - appeal & new trial - points & objections not taken below – when not allowed to be raised on appeal – question not raised in pleadings or in argument – where statute law changes after trial but before the giving of judgment – where opportunity to bring the change of law to the attention of the judge not taken by legal representatives - appeal against first respondent on liability upheld with costs - appeals as to quantum dismissed. [Guiney](#) (I,C)

Zisis v Knighton [2008] NSWCA 42

Court of Appeal of New South Wales

Hodgson, Tobias & McColl JJA

Partnership – sale of interest in partnership pursuant to agreement of sale – agreement of sale providing for purchaser to account to vendor for half of debts owing to business at time of completion – claim for money due under agreement – whether agreement on stated & settled account – answer ‘yes’ – whether proceedings in nature of action for accounts – answer ‘no’ – appeal dismissed. [Zisis](#) (B)

Masterton Homes Pty Limited v Palm Assets Pty Limited & Ors [2008] NSWSC 274

Supreme Court of New South Wales

Einstein J

Contract – residential strata title development at Parramatta – plaintiff engaged by defendants to construct development under written building contract - Deed of Mortgage & Assignment of Building Contract - equity – rectification - requirement of clear & convincing proof of a common intention inconsistent with the words deliberately employed - admissibility of post-contract communications - distinction between evidence admissible upon construction of contract as opposed to rectification - onus of proof – proceedings dismissed – extensive consideration of case law. [Masterton Homes](#) (B,C)

Kay v Archbold [2008] NSWSC 254

Supreme Court of New South Wales

White J

Cost capping application – family provision matter - case law considered - Civil Procedure Act 2005 (NSW) - Legal Profession Act 2004 (NSW) – application declined. [Kay](#) (I,B)

Vanuatu Indigenous Development Alliance Pty Ltd v Jezabelle Investments Pty Ltd [2008] NSWSC 288

Supreme Court of New South Wales

Barrett J

Corporations - winding up - statutory demand - application for order setting aside - whether genuine dispute - statutory demand set aside. [Vanuatu Indigenous Development Alliance](#) (B)

NAB v Meyers [2008] NSWSC 247

Supreme Court of New South Wales

Harrison AsJ

Application to strike out defence - summary judgment – clause in mortgage ‘...the Bank has given you a default notice allowing you a period of at least 31 days from the date of the notice to remedy the default...’ – case law considered - defence struck out - writ of possession to issue. [NAB](#) (B)

Vink v Tuckwell [2008] VSC 100

Supreme Court of Victoria

Robson J

Corporations Act - application for inquiry into conduct of liquidator – application by liquidator for dismissal of application for inquiry under inherent jurisdiction of Court on grounds application inevitably bound to fail - standing of complainant to seek an inquiry where complainant has no interest in the liquidation – initial onus on complainant to establish prima facie case that the matters complained of warrant an inquiry – procedure required to seek an order for an inquiry - affidavit to state facts in support of application - an interesting judgment. [Vink](#) (B)

Theden v Nominal Defendant & Anor [2008] QCA 071

Court of Appeal of Queensland

Keane, Holmes & Fraser JJA

Lawyers – remuneration – taxation of costs & fees – parties to appeal: second plaintiff/respondent; Nominal Defendant (first defendant/appellant); State of Queensland (second defendant/2nd appellant) - defendants had sought review of Registrar's costs assessment pursuant to r742 Uniform Civil Procedure Rules 1999 (Qld) – whether successful party can recover professional charges and outlays of a solicitor based outside of Queensland – orders were made at trial in favour of plaintiff for recovery of his costs of proceedings from defendants – plaintiff sought to recover costs in respect of work done by a solicitor based in New South Wales – solicitor did not hold a Queensland practising certificate – whether the costs related to work occurring solely in New South Wales in anticipation of & preparation Queensland proceedings – whether performance of work under retainer rendered illegal by operation of s38 & s39 Queensland Law Society Act 1952 (Qld) – detailed consideration of legislation & case law – appeal dismissed. [Theden](#) (I,B,C)

APT Finance Pty Ltd v Bajada [2008] WASCA 73

Court of Appeal of Western Australia

Pullin JA & Newnes AJA

Appeal against primary judge's decision dismissing appellant's application for substitution of assignee of debt in place of appellant as plaintiff in an action in District Court - equitable assignment of debt by plaintiff before action commenced against debtor in plaintiff's name - legal assignment of debt during course of action - effect of legal assignment - whether merits of claim by assignee to be considered on application for substitution – UK & Australian case law considered – appeal allowed – substitution order made.

[APT Finance](#) (I,B)

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