

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 4 March 2008

Martin John Green in his capacity as liquidator of Arimco Mining Pty Limited (in liquidation) v CGU Insurance Limited & Ors [2008] NSWSC 143

Supreme Court of New South Wales

Einstein J

Directors & Officers insurance - discovery - Notices to Produce – plaintiff liquidator of Arimco Mining Pty Ltd & seeking compensation from directors of Arimco under Corporations Act 2001 in respect of insolvent trading - plaintiff's claim in order of \$22 million - first defendant CGU was D & O insurer of directors - directors made claims on policy & CGU denied indemnity - plaintiff joined CGU to proceedings pursuant to s6 Law Reform (Miscellaneous Provisions) Act 1946: see Green v CGU Insurance Limited [2005] NSWSC 254: see link below - CGU's case is that if certain matters known to directors had been disclosed to its underwriters in late 1998 it would only have written policy on basis of an insolvency exclusion endorsement which would have excluded liability of directors for insolvent trading - CGU had served three affidavits by underwriters of directors & officers policy giving evidence of their underwriting practice in relation to insolvency exclusion clauses, & how they would have reacted to disclosure - matters identified by CGU as material to risk - applications before Court concerned plaintiff's endeavours to obtain access to documents & records said to be in first defendant's control – CGU sought to set aside notices to produce & sought alternate orders – parties agreed upon regime pursuant to which plaintiff was to obtain a subset of many of documents which had been sought.

[Martin John Green & \[2005\] NSWSC 254](#) – Bergin J - application granted for leave to proceed against insurer under s6 Law Reform (Miscellaneous Provisions) Act 1946. (I,B,C)

Dawson v LNG Holdings [2008] NSWSC 137

Supreme Court of New South Wales

White J

Trade Practices Act 1974 (Cth) – consumer protection – misleading or deceptive conduct or false representations – representations in relation to investment in property development at Balmain – whether reasonable grounds for representations – whether misleading conduct by non-disclosure – whether omissions advertent – accessory liability – causation of loss.

[Dawson](#) (I,B,C)

Balgra Office Enterprises v Commissioner of State Taxation [2008] SASC 50

Supreme Court of South Australia

Gray J

Stamp duty – valuation – shares - appeal against an assessment of stamp duty - appellant acquired a majority interest in a company that owned real estate - areas of the property were leased to tenants - appellant arranged valuation of real estate on basis that there were no tenants in property - valuation claimed that value of the property without tenants was less than 80% of value of price paid for shares – whether transfer of shares was a transfer of a "land-rich entity" for purposes of s94 Stamp Duties Act 1923 (SA) – appeal dismissed – held that "real property" included leasehold interests - the transfer was a transfer of a "land-rich entity" for purposes of s94 - stamp duty payable.

[Balgra](#) (B)

Aaron v Griffiths [2008] WASC 26

Supreme Court of Western Australia

McKechnie J

Informal wills - whether suicide note could also be a will – probate granted in solemn form. [Aaron](#) (B)

From the District Court of New South Wales...

Photi v Target Australia Pty Ltd (No 3) [2008] NSWDC 14

District Court of New South Wales

Gibson DCJ

Costs in defamation cases – first application by a plaintiff relying on s48A Defamation Act 1974 (NSW) - application for indemnity costs when trial adjourned due to late amendment – indemnity costs order made – another interesting judgment. [Photi](#) (I)

Hennessy v Lynch (No. 4) [2008] NSWDC 15

District Court of New South Wales

Gibson DCJ

Costs in defamation cases – each of parties sought costs orders under s48A Defamation Act 1974 (NSW) - no decisions on s48A Defamation Act 1974 (NSW) from NSW Supreme Court or the Court of Appeal as to interaction between Civil Procedure Act 2005 (NSW) & Uniform Civil Procedure Rules 2005 (NSW), in particular Parts 26 & 42 of the Rules concerning the offer of compromise provisions – defendant had made three offers, one immediately after the litigation was commenced & two before the trial, all far exceeding the damages awarded - there was no reply to these offers, although a counter-offer was made in the days before trial on liability - an interesting judgment in which His Honour examines the history of attempts by the legislature to make special provisions in relation to costs in defamation actions, particularly concerning costs where verdict is of modest size. [Hennessy](#) (I)

From New Zealand...

Bank of New Zealand & Anor v NZ Exchange & Anor [2008] NZCA 25

Court of Appeal of New Zealand

Robertson, Arnold & Ellen France JJ

Tort – allegation of breach of duty of care by New Zealand Exchange Unit in carrying out annual inspection & in subsequent conduct – auditing - whether NZX was a public regulator immune from private law duties – whether chain of causation broken - Access was a stockbroker & member of NXS - Access was placed in liquidation after its directors advised NZX that it was unable to meet obligations to clients of over \$4.5 million - Bank of New Zealand (“BNZ”) was Access’ banker - BNZ settled Access’ indebtedness & took assignments of Access’ clients’ rights of action - BNZ & Access issued proceedings against NZX & Deloitte Touche Tohmatsu, which undertook inspection functions in relation to Access on behalf of NZX for a period before NZX decided to carry out the inspection function itself - claim alleged NZX breached duties of care in tort to protect Access’ clients (who BNZ was subrogated for) & Access against their losses resulting from liquidation of Access - Access also pleaded breach of duties in contract - focus of claims was on NZX’s performance of its statutory functions of inspection of the financial information provided by Access in the year leading up to its failure - in [Bank of New Zealand v Deloitte Touche Tohmatsu \[2007\] 1 NZLR 663 \(HC\)](#), Harrison J had granted NZX’s application to strike out the claims against it by BNZ & Access - BNZ & Access appealed against decision to strike out – BNZ argued that NZX was a commercial body, listed on stock exchange &

operating a securities market for purpose of making a profit for its shareholders - NZX was not, in BNZ's submission, a statutory regulatory body representing the general public interest, the latter role being fulfilled by the Securities Commission – conclude that BNZ is right that NZX is primarily a commercial body, albeit with some regulatory functions - an important purpose of inspection regime was to protect interests of broker's clients – Securities Markets Act 1988 as to regulation, conduct & control of exchanges – Securities Act 1978 & role of Securities Commission - UK case law considered with Yuen Kun Yeu v Attorney-General of Hong Kong [1988]1 AC 175 (PC (HK)) & Davis v Radcliffe [1990] 2 All ER 536 (PC (IoM)) considered in detail - appeal allowed. [Bank of New Zealand](#) (I,B)

From Singapore...

NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] SGCA 5

Court of Appeal of Singapore

Andrew Phang Boon Leong & V K Rajah JJA

Arbitrations – role of Court in arbitration proceedings considered: when should Court lend its assistance to prospective or ongoing arbitration proceedings - how should Court exercise its powers in this regard – case law from Commonwealth countries considered - appeal by NCC International AB against refusal of High Court judge to grant an interlocutory mandatory injunction pending arbitration - appellant main contractor for construction of underground railway stations & tunnels - respondent Alliance was supplier of ready-mixed concrete to appellant pursuant to a Letter of Award & a contract - dispute arose following decision of the Indonesian government in late January 2007 to ban the export of sand, essential ingredient of ready-mixed concrete, to Singapore – appeal dismissed. [NCC International AB](#) (I,C)

& From Canada...

OK Investments Inc v Crocus Investment Fund et al 2008 MBCA 21

Court of Appeal of Manitoba

Scott CJ, Steel & Hamilton JJ

Subrogation – credit agreement – general security agreement - business creating & selling computer software - texts & case law considered as to characteristics of a guarantee – distinction between situation where a surety guarantees part of an ascertained debt & where a surety guarantees the whole debt but subject to a limit on surety's liability. [OK Investments Inc](#) (I,B)

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