

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 4 December 2007

Knight v Beyond Properties Pty Ltd [2007] FCAFC 170

Federal Court of Australia

French, Tamberlin & Rares JJ (at Sydney)

Tort of passing off – trade practices - intellectual property – claims of misleading or deceptive conduct & passing off – whether appellant’s connection with name ‘Mythbusters’ sufficient to establish reputation – name broadly descriptive, not distinctive to appellant – class of addressees television viewing public – temporary or commercially irrelevant misapprehension of association due to use of name not misleading or deceptive conduct. [Knight](#) (I)

Print National v Helps [2007] NSWSC 1050

Supreme Court of New South Wales

Associate Justice Harrison

Appeal – extension of time sought to file appeal from decision of magistrate – credit application form with guarantor whether there was a valid guarantee – case law considered – allegation of misleading or deceptive conduct - case law considered on common law estoppel - application for an extension of time to file the appeal is refused - at par 4 of judgment:

“In Swain v Waverley Municipal Council (2005) 220 CLR 517, the Chief Justice at [2] reiterated that in the common law system of civil justice, the issues between the parties are determined by the trial process. The system does not regard the trial as merely the first round in a contest destined to work its way through the judicial hierarchy until the litigants have exhausted either their resources or their possibilities of further appeal.” [Print National](#) (I)

Puttick v Fletcher Challenge Forests Pty Ltd [2007] VSCA 264

Court of Appeal of Victoria

Warren CJ, Maxwell P & Chernov JA

Tort – asbestos - private international law — *forum non conveniens* - whether leave required to appeal from order to stay proceedings on ground of *forum non conveniens* – whether order is interlocutory or final in nature - place of commission of tort/*lex loci delicti commissi* – omission – failure to warn or provide safe system of work – employer New Zealand company – widow has continued action on behalf of deceased employee - claim for damages for exposure to asbestos in Belgium & Malaysia – extensive review of Australian case law as to location of tort in judgments of Warren CJ & Maxwell P, including asbestos cases. [Puttick](#) (I,B)

Kelso v Tatiara Meat Co Pty Ltd [2007] VSCA 267

Court of Appeal of Victoria

Buchanan, Nettle, Ashley, Kellam & Dodds-Streeton JJA

Accident Compensation – appeal from County Court - leave to bring common law proceedings – appeal from determination regarding serious injury - Court directed to ‘decide for itself’ – meaning & effect - judge’s reasons inadequate – proceeding remitted – Accident Compensation Act 1985. [Kelso](#) (I)

Commissioner for Equal Opportunity v ADI Limited [2007] WASCA 261

Court of Appeal of Western Australia

Martin CJ, Wheeler & Pullin JJA

Anti-discrimination - application for exemption from operation of s 37 & s 39 Equal Opportunity Act 1984 (WA) - exemptions relating to nationality of employees, job applicants & contract workers - discretion of State Administrative Tribunal - balancing of interests in determining rational basis for discriminatory conduct - objects, scope & purpose of Act - appeal from decision of State Administrative Tribunal which had granted exemption – exemption was restricted to apply only where conduct necessary to enable applicant to undertake defence projects in compliance with laws of United States of America & applicant had taken all steps reasonably available to avoid necessity of engaging in conduct – appeal dismissed. [Commissioner for Equal Opportunity](#) (I,B,C)

Neilson v City of Swan [No 2] [2007] WASC 278

Supreme Court of Western Australia

Practice and procedure

Templeman J

Procedure - plaintiffs seeking to replead - misfeasance in public office - negligence - breach of statutory duty - judicial review statute-barred - whether allegation of bias arguable - whether arguable that misfeasance by presentation of deficient report - whether damages arguably available for unlawful approval of development plans - whether exemplary or aggravated damages arguably available for conscious wrongdoing as alleged - substituted statement of claim allowed. [Neilson](#) (I,C)

Gray v John Fairfax Publications Pty Ltd [2007] WASC 274

Supreme Court of Western Australia

Newnes J

Defamation - article in 'Weekend Australian Financial Review' - application to strike out imputations pleaded by plaintiff - relevant principles. [Gray](#) (I)

Willoughby v Clayton Utz [2007] WASC 281

Supreme Court of Western Australia

Acting Master Chapman

Procedure - application by defendant for summary judgment - defendant contended plaintiffs' claim frivolous or vexatious; that defendant had good defence on merits & relied on inherent jurisdiction of court to summarily dispose of action which was abuse of process - defendant argued plaintiff's action identical in substance to 1998 application,, which was dismissed - defendant contended plaintiff's action statute -barred - cases considered as to doctrine of *res judicata* - doctrine applied in this case - issue estoppel - conduct of defendant's insurer - acquisition of causes of action by way of assignment from Official Trustee in bankruptcy - whether Lawcover acting as agent of defendant - answer 'no' - actions of Lawcover not imputed to defendant - whether issue of limitation period a defence - nothing to preclude defendant relying on limitation point - indemnity costs order made against plaintiffs - no dereliction of duty by their solicitors & no order for costs against plaintiff's solicitors - judgment for defendant. [Willoughby](#) (I)

& two from the House of Lords...

Ward (AP) (Appellant) v Police Service of Northern Ireland (Respondents) (Northern Ireland)[2007] UKHL 50

House of Lords

Lord Bingham of Cornhill, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Carswell & Lord Brown of Eaton-under-Heywood

Terrorism Act 2000 - affairs of Northern Ireland - international terrorism - rights of person arrested under s41(1) of the Act - constable may arrest

without warrant – review & extension of detention of persons detained – appellant had been arrested on suspicion of involvement in bank robbery in Northern Belfast – police made application to judge to extend time of detention on basis interviewing had reached crucial stage & they wanted to ask him about five topics – to hear what these topics were, & on application of police, judge excluded appellant & his solicitor from hearing for about ten minutes – they returned to the hearing then judge gave his decision extending the warrant – appellant sought judicial review of judge’s decision – application dismissed – it was this decision appellant was appealing from – appeal dismissed. [Ward](#) (I)

Watt (formerly Carter) (sued on his own on behalf of the other members of the Labour Party) (Respondent) v Ahsan (Appellant)

House of Lords

Lord Hoffmann, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Carswell & Lord Brown of Eaton-under-Heywood

Discrimination – appellant was a Labour Party councillor for a ward in Birmingham – newspaper articles implied that appellant was recruiting or inventing fellow countrymen from Pakistan to support his parliamentary ambitions – he was not chosen as a candidate by Labour Party – appellant made complaints to an employment tribunal alleging discrimination on racial grounds – victimisation – question before House of Lords: whether Labour Party was a qualifying body for purposes of Race Relations Act s12, which fell under general heading of discrimination in employment field – answer ‘no’ – relevant prohibition against political parties discriminating against candidates was s25 dealing with discrimination by associations against members & prospective members – but s25 proceedings had to be brought in County Court – Employment Appeals Tribunal wrong to hold Labour Party was a qualifying body within s12 & that it had jurisdiction – issue estoppel – decision binding on parties – decision of employment tribunal’s finding for Mr Ahsan restored – at par 25 & 26 of Lord Hoffmann’s judgment:

“The Labour Party, on the other hand, takes its admission procedures seriously. Applicants for membership must accept the principles & policies of the party and not belong to inconsistent or proscribed organisations. Constituency parties & the General Secretary have the right to object to applicants for membership. Members of the general public are not free, either in theory or in practice, to attend party meetings. [26] It is true that in emphasising the private nature of the Conservative Club, both Lord Reid (at p886) & Lord Morris of Borth-y-Gest (at p895) [in Race Relations Board v Charter [1973] AC 868] said that “Conservatives” (but not members of the

club) were a section of the public. But I suspect that what they had in mind was Conservative supporters rather than the persons admitted to membership under the Party's constitution. In any event, the remarks were obiter dicta." [Watt](#) (I)

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