

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Thursday 7 February 2008

The Polo/Lauren Company L.P. v Ziliani Holdings Pty Ltd [2008] FCA 49

Federal Court of Australia

Rares J

Intellectual property – copyright - whether respondents infringed copyright of Polo/Lauren by importing into Australia & then displaying & selling clothing with polo player logo embroidered on them in two shops in Chatswood without licence or consent of Polo/Lauren – held: non-infringing.

[The Polo/Lauren Company LP](#) (I,B)

Anglican Insurance Ltd [2008] NSWSC 41

Supreme Court of New South Wales

Barrett J

Insurance company - members voluntary winding up - application by liquidator for determination of question arising in winding up - insurance company, incorporated in 1930, entered into arrangements with another insurer Vero for transfer of engagements - arrangements resting in contract only - liquidator sought direction premised on effectiveness of arrangements to substitute second company as obligee under first company's insurance contracts - second company not a party and not before the court - direction refused – detailed consideration of legislation & case law – an interesting judgment. [Anglican Insurance](#) (I,B)

Galea v Commonwealth of Australia [2008] NSWSC 44

Supreme Court of New South Wales

Johnson J

Limitation of actions - collision between HMAS Voyager & HMAS Melbourne - admissibility of psychiatric opinion evidence - on balance of probabilities just & reasonable for plaintiff to have extension of time - plaintiff had satisfied

requirements of s60I & s60G of Limitations Act - order made extending limitation period. [Galea](#) (I)

State of Victoria v Subramanian [2008] VSC 9

Supreme Court of Victoria

Cavanough J

Negligence – personal injury - appeal from Magistrates’ Court on question of law – State school – alleged negligent failure to warn of dangers of lifting grilles over drains in school yard – reasonableness of school’s response to hazard – causation – magistrate failed to consider issues connected with efficacy of proposed warning sign – construction of appeal provision considered - “no evidence” test considered – appeal allowed – case remitted for rehearing on allegation of failure to warn. [Subramanian](#) (I)

Metrolink Victoria Pty Ltd v Inglis [2008] VSC 10

Supreme Court of Victoria

Smith J

Negligence – collision between car & tram owned by appellant – appeal against decision in Magistrates’ Court dismissing claim for damages brought by Metrolink against respondent driver of car – driver had admitted his negligence caused collision but contested liability as to damages - economic loss – operational performance penalties payable by appellant to Director of Public Transport – remoteness of damages – appeal dismissed. [Metrolink Victoria](#) (I)

One from the Land & Environment Court of New South Wales...

Tenacity Investments v Ku-Ring-Gai Council and Ors [2008] NSWLEC 27

Land & Environment Court of New South Wales

Pain J

Easements – imposition of drain easement - applicant had development consent granted by Court pursuant to s97 Environmental Planning & Assessment Act 1979 to develop land at Pymble - townhouses & a residential flat building - appeal under s40 Land & Environment Court Act 1979 seeking order that Court grant applicant an easement to drain water from the land into Ku-Ring-Gai Council’s existing drain located in an existing drainage easement across a number of properties – easement granted in terms sought by applicant – compensation for owner of burdened land – detailed consideration of legislation & case law. [Tenacity Investments](#) (C)

One from the District Court of New South Wales...

Civic Video Pty Ltd v Garfell Nominees Pty Ltd [2008] NSWDC 3

District Court of New South Wales

Rolfe DCJ

Trade practices – plaintiff had entered two franchise agreements with first defendant – two video stores – determination of separate issue – plaintiff alleged defendants agreed to extension of existing franchises – defendants claimed plaintiff had breached s51AD Trade Practices Act 1974 (Cth) & clause 11 of Franchising Code of Conduct – verdict for defendants. [Civic Video](#) (I)

One from the District Court of Queensland...

Corbett v Cousins [2008] QDC 6

District Court of Queensland

JM Robertson DCJ

Land Sales Act 1984 – objects of Act considered at par 107 of judgment - objects include facilitating property development in Queensland & protecting interests of consumers in relation to property development – reference to analysis of McPherson JA in Francis & Ors v NPD Property Development P/L [2004] QCA 343 of Second Reading debate on the bill which became the Land Sales Act 1984. [Corbett](#) (C)

Three from the District Court of South Australia...

Sheahan Pty Ltd v Murdock & Gediz P/L [2008] SADC 5

District Court of South Australia

Tilmouth J

Winding up – statutory construction - “may make one or more of the following orders” – at par 54 of his judgment, His Honour lists Commonwealth statutes in which that phrase is used – case law considered as to whether or not a company is insolvent for purposes of Corporations Act - developer & manufacturer of portable power packs - preferences - whether reasonable cause to suspect insolvency - running account - defences – defence of good faith under s588FG Corporations Act made out in respect of two transactions - detailed consideration of case law – an interesting judgment. [Sheahan](#) (B)

Sneaths Freightlines v Pertsinidis (No 2) [2008] SADC 3

District Court of South Australia

Nicholson J

Costs - depriving successful party of costs - considerations tending against the usual order - plaintiff interstate haulage contractor had engaged defendant subcontractor to transport freight by road train - dispute had arisen over state of parties' running account - plaintiff had filed its claim in Magistrates Court - defendant had filed defence & counterclaim seeking amounts of \$170,000 on accounting exercise issue & \$2,319,700 by way of damages with respect to contractual issue – case had been transferred to District Court - plaintiff's claim succeeded to extent of \$1,189 together with interest & defendant's counterclaim, in essence, had failed - refusal of application for indemnity costs. [Sneaths Freightlines \(No 2\)](#); [Sneaths Freightlines \(No 1\)](#) (I)

Registrar of the District Court v Marina Balalis [2008] SADC 4

District Court of South Australia

Burley J

Contempt - mental health – whether hearsay in medical reports probative of facts referred to - case law considered as to illusory distinction between civil & criminal contempt - application for permanent stay of criminal proceedings due to mental health of defendant – defendant was to stand trial for alleged contempt of court – allegation she had breached court order - Mareva injunction - medical report with history of plaintiff's complaints admitted pursuant to statutory provision – exceptional for stay to be granted on humanitarian grounds – heavy onus to be satisfied on application for in effect, judicially conferred immunity from prosecution – defendant had not given evidence on stay application – stay application refused. [Marina Balais](#) (I)

& One from the UK...

James v London Borough of Greenwich [2008] EWCA Civ 35

Court of Appeal of England & Wales

Mummery, Thomas & Lloyd LJ

Agency workers – here, nursing agencies - whether a contract of service with 'end user' could be implied in the tripartite setting of an agency worker under contract with an agency, which also has a contract with end user – state of UK authorities considered at par 46-52 of Lord Justice Mummery's judgment – employment tribunal had rejected appellant/claimant's unfair dismissal claim - whether tribunal had erred in law in finding claimant was not an employee of respondent London Borough of Greenwich (the Council), for which, through an employment agency, she had performed paid work for period of

three years prior to Council's decision to replace her with another worker supplied by the agency - whether, given the contract between claimant & nursing agencies under which her services were provided to Council, it was necessary to imply a contract of service between claimant & Council – held that tribunal had applied the correct test – appeal dismissed. [James](#) (I)

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