

Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Criminal Assets Recovery – whether Supreme Court vested with power incompatible with Federal judicial power. See *International Finance Trust Company v NSW Crime Commission* (B)

Separate Trial – previous order providing for separate trial on liability and damages in personal injury matter revoked. See *Hoban v NSW Land & Housing Corporation* (I)

Construction – damages for delay costs – whether appropriate to refer to arbitration – application for stay opposed based on potential liability of concurrent wrongdoers that may result in multiple proceedings. See *Vasp Group v Service Stream* (C)

Assignment of Chose in Action – where policy provided for payment of lump sum upon death of insured – whether payment to be made upon request of deceased to named persons or to Public Trustee. See *In the matter of an Application by Police Association of South Australia* (I, B)

Contract – whether sketches formed part of contract or merely a contractual condition. See *Aintree v Ground & Foundation Supports* (C)

Construction – damages for delay costs – application for leave to appeal refused – whether common law damages available. See *Silent Vector v Squarcini* (C)

Confidential Information – whether newspaper obliged to reveal source of information for newspaper article regarding plaintiff. See *Bond v West Australian Newspapers (No 2)* (I)



Tuesday 11 November 2008

International Finance Trust Company Limited & Anor v New South Wales Crime Commission [2008] NSWCA 291

Court of Appeal of New South Wales

Allsop P; Beazley JA and McClellan CJ at CL.

Constitutional law - *Criminal Assets Recovery Act* 1990 (NSW) s.10 – restraining orders - whether s10 invests Supreme Court with power repugnant to or incompatible with its exercise of Federal judicial power - forty-eight New Zealand bank accounts, one Australian bank account & two share trading accounts - allegation that property proceeds of tax avoidance scheme - promoter of scheme said to be Mr Robert Agius of accounting firm PKF Vanuatu – “reasonable grounds for suspicion” – “reasonable grounds for belief” – appeal allowed - comprehensive consideration of case law from Australia, UK & Hong Kong. (B)

[International Finance Trust Company](#)

Hoban v New South Wales Land & Housing Corporation [2008] NSWSC 1121

Supreme Court of New South Wales

McCallum J

Personal injuries - order made previously by Judicial Registrar for separate determination of issues of liability & quantum of damages - application by plaintiff to rejoin liability & quantum - traumatic brain injury not stabilised – order made that liability & quantum be rejoined & that all issues be tried at the same time. (I)

[Hoban](#)

Vasp Group Pty Limited v Service Stream Limited [2008] NSWSC 1182

Supreme Court of New South Wales

Hammerschlag J

Commercial Arbitration Act 1984 NSW – *Trade Practices Act* 1974 (Cth) - Installation Services Agreement - provision by plaintiff of telecommunications installation services at approximately one thousand & twenty-eight sites in Queensland – plaintiff claiming damages in nature of delay costs, alleging defendant's failure to hand over sites at times required under the agreement - application for stay of proceedings on basis that dispute that had arisen was within provision in agreement that disputes or differences arising out of or in any way in connection with agreement to be referred to arbitration - stay opposed on ground that defence to claim of plaintiff might raise liability of concurrent wrongdoers & result in multiplicity of proceedings – proceedings stayed. (C)

[Vasp Group](#)



In the Matter of an Application by Police Association of South Australia [2008] SASC 299

Supreme Court of South Australia

Doyle CJ

Assignment of chose in action – trusts - Police Association of South Australia a party to Group Life Policy issued by Hannover Life Re of Australasia Ltd as insurer - policy provided that if member of Association dies, & cover under the Policy is in force in respect of the member, Hannover Life will pay sum of \$100,000 - two members of the Association died - cover under the policy was in force in respect of both - Association asking Court to determine whether it was obliged to pay the money it had received from Hannover Life to persons named in a form of “request” completed by each of the deceased, or to the Public Trustee (the Administrator of the estate of each deceased) – in the alternative, if the Association had a discretion as to whom money was to be paid, Association asking Court to direct whether it would or would not be a proper exercise of that discretion to pay the money to Public Trustee or to the persons entitled to the estate of deceased member – held: that Association held proceeds of relevant policies on trust for the person or persons nominated in writing by the member to the Association, & failing any valid or effective nomination, for the legal personal representative of the deceased member. (I,B)

[In the Matter of an Application by Police Association of South Australia](#)

Aintree Holdings Pty Ltd v Ground & Foundation Supports Pty Ltd (2008) WASCA 225

Court of Appeal of Western Australia

Martin CJ, Buss JA, Le Miere AJA

Construction of written contract - contract formed in course of exchange of correspondence - respondent provider of geotechnical engineering services, including construction of retaining works & installation of lightweight sheet piling – appellant builder - sketches provided by respondent to appellant at appellant's request - whether sketches formed part of contract or whether provision of sketches was merely a contractual condition - whether implied term of contract that the contractual work would conform to sketches – appeal dismissed. (I,C)

[Aintree Holdings](#)

&

[Ground & Foundation Supports Pty Ltd v Aintree Holdings Pty Ltd](#) [2007] WADC 36 – decision 30 March, 2007

Silent Vector Pty Ltd t/as Sizer Builders v Squarcini [2008] WASC 246

Supreme Court of Western Australia

Jenkins J

Commercial Arbitration Act 1985 (WA) - interim award by arbitrator – applicant builder & respondent property developer - application for leave to appeal - construction of standard form building contract - availability of common law damages for delay – leave to appeal refused – at paras. 99 & 100 of the judgment:



“There is no doubt that there is an issue in the construction industry as to the meaning of amendments or additions to standard form contracts containing liquidated damages clauses which have rates for liquidated damages inserted as 'NIL' or 'N/A'. The construction of such contracts is not certain given the unlimited ways standard form contracts containing liquidated damages clauses can be altered and completed and given the different forms of unliquidated damages clauses in different standard form contracts... However, in my opinion, the delivery of another case interpreting such a clause in a particular contract which has been amended in a particular fashion by the parties is unlikely to add to the certainty of commercial law. [99] What is clear to me is that parties to such contracts should be careful to delete, amend or add clauses to such contracts in a consistent & clear manner. The uncertainty that exists in this area of commercial law, primarily exists because parties have failed to adhere to this principle.” (C)

[Silent Vector Pty Ltd t/as Sizer Builders](#)

Bond v West Australian Newspapers Ltd [No 2] [2008] WASC 249

Supreme Court of Western Australia

Newnes J

Inspection of documents - claims of conversion & breach of confidence against defendant newspaper proprietor in respect of information belonging to plaintiff - information allegedly used for newspaper article - whether inspection of documents revealing newspaper's source of information necessary in interests of justice - application of 'newspaper rule' - order made for inspection of documents – application for separate trial on liability refused.(I)

[Bond](#)

Allied Edge Products Pty Ltd v Vero Insurance Ltd [2008] WASC 253

Supreme Court of Western Australia

Master Sanderson

Leave sought to amend defence - plaintiff developer was developing five units in Mount Lawley - *Home Building Contracts Act 1991 (WA)* - defendant issued five separate policies of insurance to plaintiff to cover insolvency, death or disappearance of the builder - limit of cover on each policy was \$100,000 - builder went into voluntary administration - unable to complete the projects – plaintiff made insurance claims - defence requires reworking. (I,C)

[Allied Edge Products](#)



Howlett v Dobson Mitchell & Allport [2008] TASSC 65

Supreme Court of Tasmania

Holt AsJ

Negligence – breach of contract - operators of earthmoving business suing their former solicitors – alleged failure to include claim for 18% interest - application to amend statement of claim – limitation of actions – present case distinguishable from *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514. (I,C)

[Howlett](#)

Robert George Brennan v Glenys Freya McGuire 2008] ACTSC 119

Supreme Court of the Australian Capital Territory

Master Harper

Domestic Relationships Act 1994 (ACT) proceedings – conversation between defendant & solicitor before action – no retainer – solicitor later instructed by plaintiff – whether conflict of duty – whether solicitor in possession of confidential information material to proceedings – no conflict established – application to disqualify solicitor dismissed. (I)

[Robert George Brennan](#)

...from the District Court of New South Wales

Aitcheson v Nominal Defendant, GIO NSW and Ambulance Service NSW [2008] NSWDC 237

District Court of New South Wales

Sidis DCJ

Limitation of actions - extension of time in respect of deceased's cause of action – twenty-five years from date of injury – action by widow – allegation that deceased had contracted Hepatitis B from road accident victim while performing his duties as ambulance officer in 1983 - whether appropriate to join Nominal Defendant as party – applications dismissed – proceedings dismissed. (I)

[Aitcheson](#)

Peak v Dunleavy [2008] NSWDC 232

District Court of New South Wales

Levy SC DCJ

Personal injuries – motor vehicle collision – plaintiff unable to give evidence – post-traumatic amnesia & inability to speak - police investigation did not reveal point of impact in the collision -contributory negligence – damages agreed at \$5,000,000 before apportionment contributory negligence assessed at thirty-five percent – funds management charges to be assessed. (I)

[Peak](#)

&



Peak v Dunleavy (No 2) [2008] NSWDC 240

District Court of New South Wales

Levy SC DCJ

Funds management charges – added to verdict monies for fund management costs likely to be incurred by the plaintiff over her remaining lifetime - plaintiff's costs of trial awarded on an indemnity basis.

[Peak](#)

Leibeck v RMQ Contracting Pty Ltd [2008] NSWDC 239

District Court of New South Wales

Levy DCJ

Motor Accidents Compensation Act 1999 (NSW) - application to extend time for filing Statement of Claim – plaintiff alleging work related injury while driving employer's prime mover - plaintiff claiming that driver's seat, shock absorbers & suspension &/or other components of prime mover were unsafe, defective & unfit for intended purpose & that these conditions caused him to suffer a back injury consequent upon him driving truck over pothole or object on roadway which he was unable to avoid - expert evidence – whether plaintiff required at an early stage to demonstrate through expert evidence a viable claim in a motor accident case – no legal requirement to do so - plaintiff's application for extension of time granted. (I)

[Leibeck](#)



“Hostilities will cease at 11 hours today, November, 11th. Troops will stand fast on the line reached at that hour ...”

Field Marshall Haig’s signal sent out to all the Allied armies ninety years ago, at 6.50 am on Monday 11.11.1918

Silent Voices

Today the battlefields are silent upon which so many died
and gone is the barbed wire that did No Man’s Land divide.

The bombs & gas & bullets, no longer maim & kill,
and again the birds are singing for the cannons all lie still.

The fields now bathed in sunshine were once mud, blood & rain,
and beside the faded headstones, the grass has grown again.

For the diggers of the ‘Fighting Tenth,’ time has passed them by,
their ragged ranks have vanished but their deeds can never die.

Their silent voices whisper from that place beyond the grave,
voices of the fallen, the gallant & the brave.

Telling of their sacrifice, so all may understand
how their courage forged our nation in a far-off distant land.

- Rene Dikkenberg & Robert Kearney

[A Rugged Bunch of Diggers](#)

The poem above, “Silent Voices,” by Rene Dikkenberg & Robert Kearney, appears at the front of Mr. Kearney’s book “Silent Voices – the Story of the Tenth Battalion AIF in Australia, Egypt, Gallipoli, France & Belgium during the Great War 1914 – 1918 ” published by New Holland Publishers. The link is to the Foreword by Major General Neil Wilson AM RFD.

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