

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 11 December 2007

Foots v Southern Cross Mine Management Pty Ltd [2007] HCA 56

High Court of Australia

Gleeson CJ, Gummow, Kirby, Hayne & Crennan JJ

Bankruptcy - provable debt - costs order - trial judge gave judgment & awarded damages in favour of second respondent against first respondent & appellant - after judgment appellant became bankrupt upon presentation of own petition - after appellant's bankruptcy trial judge made order for indemnity costs against appellant - whether costs order was a provable debt within meaning of s82 Bankruptcy Act 1966 (Cth) - whether costs order was a debt or liability arising from an obligation before bankruptcy - whether costs order was a contingent liability - whether costs order was "incidental" to a provable debt - statutory interpretation - relevance of legislative history & antecedent statutes - relevance of decision in In re British Gold Fields of West Africa [1899] 2 Ch 7 - "contingent liability", "costs order", "incidental", "liability", "provable debt" - held by majority [Kirby J dissenting] that costs order not a debt or liability within s82. [Foots](#) (I,B)

URS Australia Pty Ltd v Australian Securities & Investments Commission [2007] FCA 1939

Federal Court of Australia

McKerracher J (at Perth)

Reinstatement of deregistered but formerly insured company - geotechnical investigation of Geraldton Port - plaintiff sought reinstatement of Arundel Scientific Pty Ltd ACN 008 946 638 (deregistered) - URS wished to join Arundel in proceedings which had been issued against URS - although Arundel would have no assets with which to indemnify URS, Arundel was insured by QBE Insurance Limited at material time - whether Arundel should be reinstated - whether there should be reinstatement without the

appointment of a liquidator - QBE responding – QBE objected to its joinder under s601AG Corporations Act – doubt about applicability of s601AG – doubt resolved by reinstatement under s601AH – inappropriate to dispense with condition that liquidator be appointed to replace liquidator in office at time of deregistration – an interesting judgment on an interesting issue. [URS Australia](#) (I)

Acer Computer Australia Pty Limited v Carter (No 2) [2007] FCA 1943

Federal Court of Australia

Graham J (at Sydney)

Joinder – application for joinder of nine separate actions by suppliers of goods to companies within a retail chain where relief sought against receivers & managers of the various companies – leave to amend in circumstances where there may be no reasonable prospect of the claims the subject of the amendment being successfully prosecuted – Order 6 rule 2 Federal Court Rules – s1321 Corporations Act 2001 considered in detail, including its derivation in earlier legislation - at par 54 of judgment, liquidator’s duties & prerogatives in determining steps in administration of a company - case law considered as to where courts might interfere at instance of a creditor - application for joinder dismissed – parties better served by running one individual case separately & before all the other cases. [Acer Computer Australia](#) (I,B)

Publishing and Broadcasting Limited, in the matter of Publishing and Broadcasting Limited (No 2) [2007] FCA 1944

Federal Court of Australia

Lindgren J (at Sydney)

Corporations – schemes of arrangement – applications by two corporations for orders under s411 Corporations Act 2001 (Cth) confirming schemes of arrangement – ultimate objective of demerging media and gaming businesses carried on by one company into media business to be carried on by it and gaming business to be carried on by other company (recently formed for the purpose) – directions for convening of meetings previously made – schemes supported by majorities required by s411(4)(a)(ii) of the Act - held: orders made confirming the two schemes. [Publishing and Broadcasting Limited](#) (B)

Tweed Shire Council v Hancomatic Music Pty Ltd & Anor Hancomatic Music Pty Ltd v Letitia Hancock Hancomatic Music Pty Ltd v Anthony Richard Hancock Hancomatic Music Pty Ltd v Luke Hancock by his next friend Anthony Hancock [2007] NSWCA 350

Court of Appeal of New South Wales

Mason P, McColl JA & Bell J

Negligence – duty of care - appeal - interference with judge’s findings of fact – functions of appellate court – findings on issue of negligence – fatal accident – six year old child ran into sliding glass door - building found to be constructed before Ordinance &/or Australian Standard came into effect – council gave approval for building – whether council had a duty to advise or require plaintiffs’ and owners’ compliance with Ordinance – whether owner under a duty to conduct a safety audit when renovations carried out – duty not so specific – duty is to take reasonable care in the circumstances – where no knowledge of dangers of annealed glass – annealed glass not a dangerous defect – appeals upheld. [Tweed Shire Council](#) (I)

Palasty v Parlby [2007] NSWCA 345

Court of Appeal of New South Wales

Mason P, Tobias JA & Handley AJA

Damages – measure & remoteness of damages in actions for breach of contract – vendor & purchaser – appellant purchaser contracted to purchase from respondent a home at Hunters Hill - in reliance upon purchaser completing the contract, vendor entered into a contract to purchase a home in Killara - first contract breached by defendant – plaintiff unable to complete second contract & suffered forfeiture of deposit he had paid on that contract.

[Palasty](#) (I,C)

Nominal Defendant v Clancy [2007] NSWCA 349

Court of Appeal of New South Wales

Santow, McColl & Campbell JJA

Negligence – damage – causation – shifting evidentiary burden – whether appellant demonstrated its case to a prima facie level so as to require respondent to explain or contradict that case - substantial area of dispute at trial was whether motor vehicle accident either precipitated a condition known as severe multi-directional glenohumeral instability (“MDI”) in respondent’s right shoulder or, at least, severely exacerbated a pre-existing minor shoulder condition - appellant argued primary judge erred in finding motor vehicle accident was a cause of the MDI, drew the wrong inferences from the evidence, & that primary judge’s conclusion was contrary to weight of the evidence – principles & case law as to appellate court review of findings of a trial judge - limitations flowing from disadvantage appellate court has when compared with trial judge in evaluation of witnesses’ credibility - whether the decision at trial glaringly improbable or contrary to compelling inferences – whether trial judge adequately considered contemporaneous documents - witnesses – failure to call witness – whether witness one

expected to be called by one party rather than the other – adverse inferences - whether trial judge adequately considered appellant’s case - whether trial judge exposed his reasons for resolving a point critical to contest between the parties – whether trial judge did justice to issues posed by appellant’s case – appeal dismissed, McColl JA dissenting. [Nominal Defendant v Clancy](#) (I)

Mallik v McGeown [2007] NSWSC 1414

Supreme Court of New South Wales

Nicholas J

Defamation - pleading - defamation action by solicitor/advocate - advocate's immunity from suit - whether immunity similar to protection afforded under parliamentary privilege - whether immunity precludes defendant from maintaining, and the court from hearing, defences which question advocate’s in court conduct - parliamentary privilege - advocate's immunity and parliamentary privilege distinguished - principles considered - whether plaintiff’s reply should be struck out under r14.28 – answer ‘yes’ - at par 16 & 17 of this interesting judgment:

“Article 9 of the Bill of Rights 1688 (UK) declares:

“That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court of place out of Parliament.”

[17] It is in force in New South Wales (Imperial Acts Application Act 1969, s6). It confirms the common law principle that common law courts will not examine what is said or done within the walls of a parliamentary chamber ([Egan v Willis](#) [1998] HCA 71; (1998) 195 CLR 424, per McHugh J pp 461-462). It is a privilege of the Parliament, an important reason for which is that a Member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences ([Sankey v Whitlam](#) [1978] HCA 43; (1978) 142 CLR 1, per Gibbs ACJ p 35.)” [Malik](#) (I)

Luxford & Anor v Sidhu & 3 Ors [2007] NSWSC 1356

Supreme Court of New South Wales

Bryson AsJ

Real estate agents - fraudulent misrepresentation – tort of deceit - domestic property at Pymble – plaintiff vendors sued for damages & for deposit after first defendant, a prospective purchaser failed to complete – first defendant issued cross-claims against estate agent & solicitor – cross-claim against agent for fraudulent misrepresentation about interest of supposed other purchaser – – purchaser alleged failure to complete arose from (1) discovery after exchange of SEPP53 providing for likely medium-density development of neighbouring property (but not of property sold) (2) discovery that agent

misrepresented existence of rival purchaser & called for immediate exchange - factual disputes between vendor & agent about responsibility for misrepresentation – expert evidence as to responsibilities of solicitor to client purchasing a property considered – held that purchaser’s solicitor not negligent - on valuation evidence, property's value was equal to the sale price, hence no damages - cross-claims failed & damages awarded to vendors for failure to complete - vendors' alternate claim against agent, purchaser's claim against her solicitor dismissed. [Luxford](#) (I,C)

Nominal Defendant v Ravenscroft [2007] QCA 435

Court of Appeal of Queensland

Jerrard, Muir JJA & McMurdo J

Motor Accident Insurance Act (Qld) - rules of statutory construction – words to be given literal & grammatical meaning – respondent was walking along public pathway when struck by an off-road trail bike & injured – vehicle was unregistered & with no compulsory third party insurance under Motor Accident Insurance Act 1994 (Qld) – it was agreed that motorcyclist was negligent – whether s5 Motor Accident Insurance Act 1994 (Qld) was source of obligation on Nominal Defendant to indemnify first defendant – issue at trial whether motor bike required to be registered – interesting & thorough review of case law by Muir JA as to whether it is possible for a court, in an exercise in statutory construction, to remedy problem caused by legislative inadvertence and/or inaction/*casus omissus* – at par 76 of judgment of McMurdo J:

“Applying what is in my view the correct meaning of “motor vehicle”, which is a vehicle of a kind for which registration is required under the Regulation, this motorcycle was plainly a motor vehicle. It follows that it was an uninsured motor vehicle, and that the learned trial judge was correct to hold that the Nominal Defendant was liable.” [Nominal Defendant v Ravenscroft](#) (I)

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