

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 15 January 2008

Australian Competition & Consumer Commission v Kokos International Pty Ltd (No 2) [2008] FCA

Federal Court of Australia

French J (at Perth)

Trade practices – price fixing – Competition Code (WA) - companies providing education consultancy services to overseas students – agreement between companies not to offer or accept discounted tuition fees – admission of contraventions – consent orders - agreed statements of fact – no agreement as to pecuniary penalties – relevant factors. [Australian Competition & Consumer Commission](#) (I,B,C)

Shortall v White [2007] NSWCA 372

Court of Appeal of New South Wales

Hodgson, Santow JJA & Handley AJA

Trust - intention to create - agreement between former defacto partners – letter from appellant to respondent said appellant holding shares in trust for respondent to be transferred to her on request – respondent sued for breach of contract and breach of trust – shares subject to escrow – consideration of case law as to test of intention to create a trust – principles & authority supported application of an objective test to determine whether an alleged settlor intended that a bilateral transaction should create a trust – primary judge had entered judgment for respondent for \$548,452 as damages for breach of the promise to transfer the shares – appeal dismissed. [Shortall](#) (B)

Keramianakis & Anor v Regional Publishers Pty Ltd [2007] NSWCA 375

Court of Appeal of New South Wales

Beazley, Basten JJA & Rothman J

Right of appeal from civil jury trial – defamation action in District Court – detailed consideration of legislation & case law - “judge’s judgment or order” – “decision of a judge.” [Keramianakis](#) (I)

Fernandes Constructions v Tahmoor Coal (trading as Centennial Coal) [2007] NSWSC 381

Supreme Court of New South Wales

Technology & Construction List

McDougall J

Construction contract - Building & Construction Industry Security of Payment Act 1999 - payment claim - where tax invoice states that it "is prepared under" the Act - whether tax invoice complies with s13(2)(c) of the Act. [Fernandes Constructions](#) (C)

Nicholson v Mornington Peninsula Shire Council & Ors [2007] VSC 519

Supreme Court of Victoria

Forrest J

Administrative Law - a dog’s life - review of decision by statutory review panel - if plaintiff’s dog ‘Capone’ was a restricted breed dog under Domestic (Feral & Nuisance) Animals Act 1994 then first defendant Council was obliged to destroy him – ranger declared dog a restricted breed dog believing dog was an American Pit Bull Terrier - plaintiff appealed – two out of three members of review panel agreed dog was an American Pitt Bull Terrier – plaintiff knew parentage of dog & insisted he was not an American Pit Bull Terrier - a veterinarian supported her view – plaintiff maintained dog was an American Staffordshire Terrier cross Bull Mastiff - whether panel’s decision-making process complied with statute – panel was required to ‘consider’ application for review - case law as to meaning of ‘consider’ in judicial context – expert evidence - case law considered as to natural justice & procedural fairness - decision of panel quashed - fresh review to be conducted by a differently constituted panel. [Nicholson](#) (I)

Re Legal Profession Act 2004; re OG, a lawyer [2007] VSC 520

Supreme Court of Victoria

Warren CJ, Nettle JA & Mandie J

Legal practitioners – admission to practise – duty of disclosure – failure to make full & frank disclosure to Board of Examiners – collusion in preparation of university assignment – striking off roll – inherent jurisdiction – Legal Profession Act 2004 - Legal Practice (Admission) Rules 1999 - respondent struck off. [Re Legal Profession Act 2004](#) (I)

Ceneavenue Pty Ltd & Ors v Martin & Ors [2007] SASC 465

Supreme Court of South Australia

Bleby J

Shareholder's agreement – interpretation - application for summary judgment for part of plaintiff's claims – detailed consideration of principles & case law as to interpretation of commercial agreements – whether accountant acting as valuer or arbitrator in valuing shares – case law considered as to difference between arbitrator & valuer - whether principles of natural justice applied to valuation – case law considered as to whether valuer's methodology could be challenged – application for summary judgment granted - an interesting judgment. [Ceneavenue](#) (I,B)

Two from the District Court of Western Australia...

Spirkovski v Ogden [2007] WADC 222

District Court of Western Australia

Stevenson DCJ

Motor vehicle accident – liability - collision at intersection - defendant had been convicted of failure to stop at stop sign at a Court of Petty Sessions trial – weight to be given to fact of defendant's conviction – defendant denied going through stop sign - qualification of expert witness - admissibility of expert opinion evidence – verdict for defendant. [Spirkovski](#) (I)

Kingston v Insurance Commission of Western Australia [2007] WADC 222

District Court of Western Australia

Yeats DCJ

Motor vehicle accident – assessment of damages – plaintiff's retained earning capacity - plaintiff was passenger in taxi involved in head-on collision with another vehicle - driver of other vehicle deceased - defendant Insurance Commission admitted liability - defendant submitted plaintiff retained considerable earning capacity & pleaded that plaintiff had failed to mitigate his loss by failing to use reasonable endeavours to obtain alternative

employment – plaintiff forty years of age & was twenty-nine years of age at time of accident – poor recovery from knee operation – deep vein thrombosis which did not dissolve till ten months after surgery – chronic adjustment disorder – no longer able to work as truck-driver – total award \$780,764.
[Kingston](#) (I)

Two from the UK...

Ford Motor Company Ltd v Revenue & Customs [2007] EWCA Civ 1370

Court of Appeal of England & Wales

The Chancellor of the High Court, Rix & Lloyd LJ

Motor vehicle insurance - VAT - supply of goods or services - legislative exemption: "...insurance & reinsurance transactions, including related services performed by insurance brokers & insurance agents" - appellant Ford promoted sales of its cars by offers of free insurance & free RAC breakdown service to buyers of particular Ford models - whether there was a supply of insurance services for a consideration - held that there was no consideration for the insurance expressly or impliedly agreed between Ford or the dealer on the one hand & the buyer of the Ford on the other - extensive consideration of case law - appeal dismissed - Rix LJ made some *obiter dicta* observations [*'obiter dicta'* - L. 'said by the way' - observations made by a judge that do not form a necessary part of court's decision] at par 62:

"Although Ford was not the insurer itself, it did more than effect an insurance policy as a mere agent or broker. Whether or not its agreements with RAC, Guardian Direct and Norwich Union amounted to what was described in that case [European Court of Justice (ECJ) decision of Card Protection Plan v HM Commissioners for Customs & Excise [1999] STC270] as a group or block policy, they were agreements under which the relevant insurers gave to Ford the power and the authority to bind cover. They were forms of open cover. The insurers, within certain limits, promised Ford to provide cover to Ford's customers, & Ford promised its customers to procure the insurers' cover for them. I am inclined to think that this goes beyond the mere provision of the services of intermediaries in connection with the effecting of an insurance transaction. An insurance agent or broker does not typically warrant the procurement of insurance cover. If, however, I am wrong about that, it remains the case that, through Ford, insurance cover was provided directly from insurer to insured, and it seems me that that could well be described as related services provided by insurance agents or brokers..." [Ford Motor Company](#) (I,B)

DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd [2007]
EWHC 1584 (TCC)

In the High Court of Justice
Queen's Bench Division
Technology & Construction Court
Coulson J

Adjudications - whether temporary stay should be granted to restrain court proceedings until an adjudication of the underlying dispute has taken place - extensive consideration of case law - stay granted. [DGT Steel and Cladding](#) (I,B,C)

& One from Northern Ireland...

J & A Developments Ltd v Edina Manufacturing Ltd [2006] NIQB 85

High Court of Justice in Northern Ireland
Queen's Bench Division
Sir Liam McCollum

Tender process - failure to award tender to lower bidder held to be a breach of contract - damages awarded for cost of bid & lost profit. [J & A Developments](#) (I,B,C)

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