



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Damages – motor accidents claim including claim for domestic assistance – whether assessment should be on gratuitous or commercial rates. See *Kaszubowski v McGuirk* (I)

Procedural Fairness – whether Appeal Panel (workers compensation) hearing review of Medical Assessor's determination of whole person impairment afforded procedural fairness to the claimant. See *Bojko v ICM Property Service* (I)

Immunity – whether tortious liability arose in respect of a police officer recording a "person of interest" in a police report. See *Makucha v Richardson* (I)

Release – whether a release from liabilities and claims contained in Deed entered into between employer and employee extended to include agreement to purchase & transfer of shares so that employer could acquire employee's shares in the company upon his employment being terminated. See *Fraser v The Irish Restaurant & Bar Company* (I, B, C)

Company Arrangement – Application for termination of Deed of Company Arrangement. See *Irving v Smith* (B)

Tuesday 16 September 2008

Disney Enterprises, Inc v Sondavid Pty Ltd [2008] FCA 1394

Federal Court of Australia

Jagot J (in Sydney)

Intellectual property – protection of registered trademarks – Minnie Mouse tops bearing images of Minnie Mouse, words "Original Minnie" – order sought ex parte restraining Customs CEO until further order from releasing certain goods seized by Australian Customs Service as notified to the applicants – infringement proceedings – interlocutory order preventing release of the goods – orders made restraining CEO from releasing goods.

[Disney Enterprises](#) (B)

Irving v Smith [2008] FCA 1391

Federal Court of Australia

Goldberg J (in Melbourne)

Deed of company arrangement - resolution of creditors of Longreach Capital Pty Ltd (Administrators Appointed) that the Company execute Deed of Arrangement - whether debts split as a result of assignments – answer 'no' – assignments bona fide – deed not oppressive, unfairly prejudicial or unfairly discriminatory towards general body of creditors including plaintiff -application for termination of deed of company arrangement refused.

[Irving](#) (B)

Kaszubowski v McGuirk [2008] NSWCA 219

Court of Appeal of New South Wales

McColl & Bell JJA; Hoeben J

Motor Accidents Act 1988 (NSW) – personal injury – damages – liability admitted – in District Court, judgment entered for respondent in sum of \$2,641,789 – whether award for past & future care manifestly excessive – cross-appeal as to assessments regarding past & future care - whether respondent/cross-appellant's future care needs should have been assessed on commercial, as opposed to gratuitous, basis - whether judge erred in rejecting expert evidence – appeal & cross- appeal dismissed.

[Kaszubowski](#) (I)



Griffiths v Westernhagen [2008] NSWSC 954

Supreme Court of New South Wales

Hamilton J

Costs in family provision proceedings – case law considered – for substantive judgment 19 August 2008, see 'Benchmark' Banking & IBC Wednesday 27 August 2008 & link below. (B)

[Griffiths](#), and

[Griffiths](#) – judgment 19 August 2008 - adult children -further provision made by way of a legacy for one daughter.

Bojko v ICM Property Service Pty Ltd [2008] NSWSC 907

Supreme Court of New South Wales

Malpass AsJ

Workplace Injury Management Act 1998 (NSW) – referral of assessment of whole person impairment to approved medical specialist - appeal to Appeal Panel – whether failure to accord procedural fairness – whether error of law – plaintiff failed to make out his challenge to Panel's decision – application dismissed.

[Bojko](#) (I)

HSBC Bank Australia Ltd v Chang [2008] NSWSC 948

Supreme Court of New South Wales

Fullerton J

Appointment of tutor under Part 7 Uniform Civil Procedure Rules – substantive proceedings concern mortgage given by defendant over land at Artarmon & monies allegedly lent to her by plaintiff secured by that mortgage - daughter of defendant applying to be appointed as tutor for her mother - plaintiff Bank opposing appointment on primary basis defendant had failed to discharge evidential burden of establishing she is under a legal incapacity in conduct of substantive proceedings – application dismissed.

[HSBC Bank Australia](#) (B)

Makucha v Richardson [2008] NSWSC 945

Supreme Court of New South Wales

Fullerton J

Police – investigative immunity – tortious liability – case law considered - plaintiff seeking declaratory relief in respect of what was said to be defendant's failure to exercise, or to properly exercise his office &/or powers of a constable of police regarding investigation of an incident reported in a COPS entry in which plaintiff named as person of interest - no reasonable cause of action - power to strike out proceedings – application refused.

[Makucha](#) (I)



Fraser v The Irish Restaurant & Bar Company P/L [2008] QCA 270

Court of Appeal of Queensland

McMurdo P; Muir JA & Wilson J

Employment – sale of shares - construing a release – ‘in connection with’- unaccepted repudiation - applicant employed by respondent as general manager of two of respondent’s restaurants – applicant acquired 4.5 % of issued shares in capital of one of respondent’s restaurant companies - director of respondent offered to purchase applicant’s shares in company – dispute arose & applicant & respondent entered into deed of compromise - deed released respondent from all claims & liabilities “arising out of or in any way connected” with the applicant’s employment or termination – respondent argued contract for the transfer & purchase of shares fell within terms of deed - held that release effected by the deed did not extend to the applicant’s claim for monies owing pursuant to share repurchase contract - appeal allowed – an interesting judgment.

[Fraser](#) (I, B, C)

Ross v Council of the City of Logan [2008] QCA 280

Court of Appeal of Queensland

Holmes JA; Fryberg & Daubney JJ

Council passed

Prerogative writs – mandamus – privative clauses - respondent Council had sought judicial review of Small Claims Tribunal’s refusal to hear matter – primary judge had made order in nature of mandamus, directing referee of Small Claims Tribunal to hear and determine matter by making a termination order& issuing a warrant of possession.

[Ross](#) (B, C)

Mango Boulevard P/L v Spencer & Ors [2008] QCA 274

Court of Appeal of Queensland

Muir JA, Mackenzie AJA & Douglas J

Power of Court to stay or dismiss proceedings on basis of abuse of process – estoppel - application of doctrine of res judicata - deficiencies in documentary disclosure - plaintiff owner of half of issued shares in third defendant Kinsella - Kinsella in business of developing land at Mango Hill on outskirts of Brisbane – Shareholders’ Deed whereby parties agreed upon ownership of shares in Kinsella & way Kinsella should carry on development – finding by primary judge of abuse of process - appeal dismissed – detailed consideration of case law from UK & Australia.

[Mango Boulevard](#) (I, B, C)



McIntosh & Anor as T'ees of the Estate of Camm (A Bankrupt) v Linke Nominees P/L & Anor [2008] QCA 275

Court of Appeal of Queensland

Muir JA; Cullinane & Douglas JJ

Contract - guarantee & indemnity - liabilities of agent - damages for breach of warranty of authority - deed negotiated between respondents & appellant by which respondents agreed to give up their rights to bring proceedings relating to a parcel of land in exchange for payment of a settlement sum – appeals allowed – UK & Australian case law considered.

[McIntosh](#) (I, B, C)

Octaviar Limited (Formerly MFS Limited), Re [2008] QSC 216

Supreme Court of Queensland

McMurdo J

Winding up – application by Public Trustee of Queensland - effect of winding up on other transactions.

[Octaviar](#) (B)

Balnaves v Smith & Anor [2008] QSC 215

Supreme Court of Queensland

Douglas J

Discovery & interrogatories - personal injury claim - legal professional privilege – mention made of provision of “certain advices” in affidavit of plaintiff’s solicitor – whether waiver of privilege – UK & Australian case law considered.

[Balnaves](#) (I, B, C)

BMD v KWD [2008] WASC 196

Supreme Court of Western Australia

McKechnie J

Guardianship & Administration Act 1990 (WA) – decisions made by Public Trustee – valuation – land & business - appellant had failed to establish Public Trustee's decision was wrong or that decision of State Administrative Tribunal of Western Australia attended with sufficient doubt to justify appeal – case law considered.

[BMD](#) (B)

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