

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Monday 19 November 2007

Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324

Court of Appeal of New South Wales

Tobias, McColl JJA & Handley AJA

Easements - development consent - appellant, owner of servient tenement subject to a registered right of carriageway, refused to consent to development application by dominant owner - development would greatly increase traffic on right of way during construction phase & afterwards - trial judge ordered servient owner to give its consent to development application - servient owner appealed - whether the financial burden which the proposed development would impose on the appellant, as servient owner, constituted a "lawful reason" for its refusal of consent - detailed analysis of case law - appeal dismissed. [Sertari](#)

Chief Commissioner of State Revenue v Pacific National (ACT) Limited [2007] NSWCA 325

Court of Appeal of New South Wales

Hodgson, Ipp, Basten JJA

Taxes & duties - access rights - duties on lease instrument - lease defined by Duties Act 1997 s164A to include "an agreement....by which a right to use land in New South Wales is conferred on or acquired by a person" - statute vests NSW rail network & rail infrastructure facilities in a statutory corporation, & provides that this corporation could by agreement grant access to such facilities, even if situated on land owned by another statutory corporation - whether agreement granting such access was one by which a right to use land was conferred on or acquired by the grantee. [Chief Commissioner of State Revenue](#)

Jarrett & Ors v Perpetual Trustee Co Limited [2007] NSWSC 1231

Supreme Court of New South Wales

Hall J

Dividends – deceased estate - whether disputed dividends purportedly made to trustee companies during life of a director of payer companies were validly declared – whether meetings of directors and members of companies held – whether such minutes of meetings as existed established that meetings were in fact held at which resolutions declaring dividends were allegedly passed – what constitutes a “meeting” - what constitutes “payment” of dividends – deceased director ultimate beneficiary of the income of the group of companies - whether crediting of dividends in loan accounts constituted payment of dividends to deceased director - doctrine of unanimous consent – - book entries – case law considered. [Jarrett](#)

Greater Southern Area Health Service v Dr Angus [2007] NSWSC 1211

Supreme Court of New South Wales

Adams J

Medical negligence - contribution between joint tortfeasors - Law Reform (Miscellaneous Provisions) Act 1946 – causation – expert evidence - obstetrics - Jack Tori suffered brain damage during labour & delivery at Wagga Wagga Base Hospital in 1995 – by his next friend, he sued Greater Southern Area Health Service claiming damages for negligence of the Service in its management of the labour & delivery - those proceedings were ultimately settled for 7.5 million dollars plus costs & settlement approved by Levine J in 2003 - the Service commenced proceedings against defendant Dr George Angus pursuant to s5(1)(a) of the Act as a joint tortfeasor liable to contribute to the judgment approved by Levine J - Dr Angus was a visiting medical officer at the hospital & the specialist “on call” obstetrician on the day of Jack’s birth - not disputed by defendant that amount of judgment & costs paid by the Service to Jack were reasonable - defendant contended he was not liable to contribute – detailed analysis of medical evidence – Syntocinon – CTG monitoring – process of resuscitation – hypoxia - judgment for defendant with costs. [Greater Southern Area Health Service](#)

George Georges & 2 Ors v Richard Davies & Anor [2007] NSWSC 1284

Supreme Court of New South Wales

Nicholas J

Building contract – contract for construction by third plaintiff of two-storey house at Carlingford for defendants - first plaintiff a shareholder in & former

director of third plaintiff - second plaintiff sole director of third plaintiff - settlement of dispute in Consumer Trader & Tenancy Tribunal between builders & owners - owners' breach of settlement term – plaintiffs contended there should be an order for specific performance of the agreement by which defendants would be ordered to demolish improvements at the property – consideration of case law as to whether order for specific performance appropriate remedy – case law considered as to whether contractual obligation to demolish building improvements gave rise to fiduciary relationship between parties – quantification of damages. [George Georges](#)

Oil Basins Limited v BHP Billiton Limited & Ors [2007] VSCA 255

Court of Appeal of Victoria

Buchanan, Nettle & Dodds-Streeton JJA

Arbitrations - detailed consideration of case law - Commercial Arbitration Act 1984 - appeal from judgment in Commercial List of Commercial & Equity Division - interim arbitral award made as to application of overriding royalty agreement to Blackback oil field in Bass Strait - judge had set aside award for error of law on the face of the award & for technical misconduct constituted by inadequacy of majority arbitrators' reasons & their failure to deal with relevant evidence & significant submissions - whether failure to include adequate statement of reasons in award constitutes manifest error of law on face of award – whether failure to include adequate statement of reasons in award constitutes technical misconduct – whether appropriate to set aside award due to inadequacy of reasons. [Oil Basins Limited](#)

LivingSpring Pty Ltd v Kliger Partners (a firm) [2007] VSC 443

Supreme Court of Victoria

Robson J

Security for costs – discretionary factors – development project – apartments in Melbourne – defendants a firm of solicitors – solicitor's retainer - relevance of defendant having professional indemnity insurance – Corporations Act 2001 – threshold issue - case law considered including unreported decisions - order for security for costs made. [LivingSpring](#)

BMD Major Projects Pty Ltd v Victorian Urban Development Authority (No 2) [2007] VSC 441

Supreme Court of Victoria

Pagone J

Costs - Calderbank offer – see “Benchmark” Tuesday 23 October 2007: claim by BMD against VicUrban” under “latent conditions” clause of a contract – consideration of costs in building & engineering cases. [BMD Major Projects](#)

Wilson v The County Court of Victoria & Anor [2007] VSC 444

Supreme Court of Victoria

Cavanough J

Certiorari – criminal appeal to County Court – proceeding commenced two months out of time - admissibility of defence evidence – relief granted. [Wilson](#)

Davies & Anor v Chicago Boot Company Pty Ltd (No 3)[2007] SASC 399

Supreme Court of South Australia

Lunn J

Pleadings - application for leave to file a fresh statement of claim - evidence allowable on such an application – plaintiffs liquidators of each of Harris Scarfe Limited & Harris Scarfe Wholesale Pty Ltd seeking to recover under Part 5.7B Corporations Law alleged preferential payments made to defendant by HSL or HSW - rolled up pleadings of causes of action which were mutually exclusive. [Davies](#)

Irwin & Hayward v Meander Valley Council [2007] TASSC 91

Supreme Court of Tasmania

Tennent J

Stay of operation of order pending appeal - Council had granted two planning permits to people by name of Richards for purpose of enabling them to carry out forestry operations on their land – land adjoining had a conservation sanctuary on it – principles & case law considered as to exercising discretion to grant a stay. [Irwin & Hayward](#)

Tourism Holdings Australia Pty Ltd v Commissioner of Taxes [2007] NTCA 8

Court of Appeal of Northern Territory

Martin (BR) CJ, Mildren & Riley JJ

Stamp duty – valuation of good will - agreement for sale of motor vehicle rental business operating in Australia – “add-ons”, including insurance packages - sale of goodwill – some goodwill in Europe – appeal from decision of single Judge who dismissed appeal from assessment of stamp duty made

by respondent on sale of goodwill of the business partly conducted in Northern Territory - interpretation of s 9BA Taxation (Administration) Act considered - whether method of apportionment of value of goodwill for taxation purposes adopted by Commissioner resulted in excessive assessment of stamp duty - allocation of valuation of goodwill in Northern Territory - appeal dismissed. [Tourism Holdings Australia](#)

& One from the UK...

Taylor Walton (a firm) v Laing [2007] EWCA Civ 1146

Court of Appeal of England & Wales

Buxton, Laws, Moses LJ

Negligence – abuse of process – claim by architect & property developer against firm of solicitors (the appellants in these proceedings) – appellants appealing against refusal by Langley J. to strike out as an abuse of process claim in negligence brought by architect – in previous litigation between architect & another developer named Watson, dispute over terms on which a loan had been made (“the first case”) – in first case, trial judge HHJ Thornton QC had found for Watson – allegation by architect in these proceedings that judge wrong, & that architect had been exposed to risk of adverse findings because of breach of retainer, breach of duty & negligence of appellants – held these proceedings an abuse of process – proceedings were in substance a complete re-litigation of decision of Thornton J. – claim struck out. [Taylor Walton](#)

Key: (I) – Insurance; (B) – Banking & Finance; (C) Building & Construction