



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

Today's Cases

Discovery of documents – volume of documents – case management conference - See *Sadiqi v Commonwealth*

Claim against solicitor – negligent advice – causation – See *Hamze v Bradstreet*

Solicitor/client taxation of costs – need to supervise work of articulated clerk – See *Challen v O'Halloran*

Assessment of damages for personal injuries – loss of chance – very large award for economic loss – See *Collett v Middlesbrough Football Club*

Express trusts – certainty – requirement of writing - See *Pascoe v Boensch*

Injunction founded upon contractual provision – form of order - *Genesys Wealth Advisers v Miles*

Wednesday 20 August 2008

Pascoe v Boensch [2008] FCAFC 147

Full Federal Court of Australia

Finn, Dowsett & Edmonds JJ (in Sydney)

Express trusts – creation by unilateral declaration – certainty of intention & object – ss23C(1)(b) & (c) Conveyancing Act 1919 (NSW) requirement of writing – appellant the trustee in bankruptcy of first respondent, the second respondent's former husband – Federal Magistrate had held Memorandum of Trust constituted a valid declaration of trust - appeal dismissed.

[Pascoe](#) (B)

Bonnell v Commissioner of Taxation [2008] FCAFC 146

Full Federal Court of Australia

Lindgren, Emmett & Edmonds JJ (in Sydney)

Income tax – judicial review of decision not to remit additional tax – summary dismissal on basis that proceeding had no reasonable prospect of success – see 'Benchmark' Banking & IBC for decision 30 June 2008 & link below - whether judgment interlocutory or final – whether an invalid decision not to remit additional tax invalidates assessment of primary tax contained in same notice – held 'no.' (B)

[Bonnell](#), and

[Bonnell](#) – decision 30 June 2008.

Construction, Forestry, Mining & Energy Union v Clarke [2008] FCAFC 143

Full Federal Court of Australia

Tamberlin, Gyles & Gilmour JJ (in Perth)

Costs – proceedings in a matter arising under Workplace Relations Act 1996 (Cth) – consideration of s824 of that Act – whether respondent's conduct of proceedings involved an "unreasonable act or omission."

[Construction, Forestry, Mining and Energy Union](#) (I, C)

Sadiqi v Commonwealth of Australia [2008] FCA 1262

Federal Court of Australia

McKerracher J (in Perth)

Discovery of documents - further particular discovery – detailed consideration of case law from UK & Australia - specific categories of documents – relevance – volume of documents – case management conference.

[Sadiqi](#) (I)

**Hamze v Bradstreet [2008] NSWCA 191**

Court of Appeal of New South Wales

Hodgson & Ipp JJA; Handley AJA

Negligence - solicitor - negligent advice – for decision appealed from see link below - worker's alternative rights - loss of common law rights - causation - worker's hypothetical decision on receipt of proper advice - trial judge not persuaded worker would have elected to sue at common law – appeal dismissed. (I)

[Hamze](#), and

[Hamze](#) – decision 5 April 2007.

Toll Pty Limited v Craig Morrissey [2008] NSWCA 197

Court of Appeal of New South Wales

Beazley JA, Handley AJA & McDougall J

Workers compensation – appeal from decision of arbitrator – correct test – onus - appeal must be allowed unless error of arbitrator could not possibly have affected the result - subpoena for production – employer entitled to assess financial records of claimant – appeal allowed.

[Toll](#) (I)

Haroun v Rail Corporation New South Wales & Ors [2008] NSWCA 192

Court of Appeal of New South Wales

McColl JA, Handley AJA & McDougall J

Workers compensation - permanent impairment - medical assessment –primary judge had decision dismissed worker's claim to judicially review assessment of Appeal Panel made under s328 Workplace Injury Management & Workers' Compensation Act 1998 (NSW) – application dismissed.

[Haroun](#) (I)

Martin John Green in his capacity as liquidator of Arimco Mining Pty Limited (in liquidation) v CGU Insurance Limited & Ors [2008] NSWSC 825

Supreme Court of New South Wales

Einstein J

Insurance - directors & officers' liability - insolvent trading claim under s588M Corporations Act 2001 (Cth) brought by plaintiff in his capacity as liquidator - Section 6(4) Law Reform (Miscellaneous Provisions) Act - non-disclosure/misrepresentation - relevant test that of reasonable insured not prudent insurer - knowledge requires considerably more than "suspicion" or "belief" - legislative history of ss21 & 28 Insurance Contracts Act 1984 (Cth) – Terms of settlement – extensive consideration of case law.

[Martin John Green in his capacity as liquidator of Arimco Mining](#) (I, B,C)



Genesys Wealth Advisers Ltd v Miles (No 2) [2008] NSWSC 842

Supreme Court of New South Wales

Palmer J

Injunction founded upon contractual provision - form of order – for judgment 7 August 2008 see link below & 'Benchmark' Monday 11 August 2008 -whether appropriate to restrain breach of covenant in terms used in covenant – an interesting judgment. (I, B, C)

[Genesys Wealth Advisers](#), and

[Genesys Wealth Advisers](#) – decision 7 August 2008 - plaintiff employer alleging breach of terms of restraint clauses in Deed of Release - whether defendant had confidential information which he might use to compete with plaintiff to its detriment – “client” - “customer” - held that plaintiff entitled to injunctions as sought.

Seniors Provident Pty Limited v Allco Finance Group Limited [2008] NSWSC 844

Supreme Court of New South Wales

McDougall J

Joint venture agreement – injunction – whether serious question to be tried - whether valid termination of agreement – whether assets formed part of business of joint venture – whether relief should be granted compelling continuance of deteriorated personal relationship – whether damages adequate remedy – plaintiff's application for interlocutory relief dismissed.

[Seniors Provident](#) (B)

Challen v Paul O'Halloran & Associates [2008] WASC 169

Supreme Court of Western Australia

Templeman J

Costs – application by solicitor for review of taxation of his bill of costs - taxing officer found that s124(2) Legal Practice Act 2003 (WA) did not relieve practitioner of obligation to prove that work carried out by articulated clerk was supervised – issue as to charging for preparation of bill of costs.

[Challen](#) (I)

From the United Kingdom...

Benjamin Collett v Gary Smith & Middlesbrough Football & Athletics Company (1986) Ltd [2008] EWHC 1962 (QB)

High Court of Justice, Queen's Bench Division

Swift J

Assessment of damages – personal injuries – loss of a chance – case law considered - claimant, now aged twenty-three – when he was eighteen, he was playing for Manchester United Football Club Reserves team in a match against second defendant's Reserves team – he was tackled by first defendant - tackle was high & "over the ball" - claimant suffered fracture of tibia & fibula of right leg - liability initially an issue but defendants admitted negligence before trial – claimant missed end of 2002/2003

season, all pre-season training & half of 2003/2004 season - returned to training in January 2004 – never regained pre-injury form – informed his contract with Manchester United would not be renewed – evidence as to claimant's prospects of successful career in professional football – comparison with careers of contemporaries – evidence from three experts including Mr Howard Wilkinson & an expert in and Finance at the Leeds University Business School, and has particular expertise in the economics, finance & management of professional team sports – evidence about players' remuneration – several heads of damage, including £ 3,854,328.00 for future loss of earnings.

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

Richardson v Russell [2008] EWHC 1708 (QB)

High Court of Justice, Queen's Bench Division

Swift J

Mesothelioma – liability issue as to whether exposure to asbestos in course of employment with defendant - damages agreed - claim by widow under Law Reform (Miscellaneous Provisions) Act 1934 & Fatal Accidents Act 1976 - deceased died aged sixty-seven - he worked for defendant as plumbing/heating engineer – asbestos lagging material on pipework & boilers - claimant alleged defendant exposed deceased to asbestos dust in course of his employment negligently &/or in breach of statutory duty & that his exposure made a material contribution to risk that he would develop a mesothelioma - judgment for claimant in sum of £118,610, inclusive of interest.

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

Berlin Wall

Sunday 13 August 1961 – Thursday 9 November 1989

(twenty-eight years, two months & twenty-seven days)

Peter Fechter (14 January, 1944 – 17 August, 1962) - he became one of the early victims of the border guards, trying to escape from East to West Berlin, & died on the eastern side of Checkpoint Charlie. West Berliners who had witnessed his death laid flowers & wreaths at the site & set up a memorial. Citizens & members of the government gather there each year on 13 August.

[Berlin Wall - Wikipedia, the free encyclopedia](#)

“... Alas for me, where shall I get the flowers when

It is winter, and

Where the sunshine & shadows of Earth ?

The walls stand speechless & cold,

The banners rattle in the wind.”

Friedrich Hölderlin (1770 – 1843)

Swabian poet - from 'Hälfte des Lebens.'

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