

BENCHMARK

Insurance, Finance & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Wednesday 21 November 2007

APF Properties Pty Ltd v Kestrel Holdings Pty Ltd (No 2) [2007] FCA 1561

Federal Court of Australia

Heerey J (of Melbourne - heard in Hobart)

Negligence – sale of real property - duty of valuer – misleading & deceptive conduct – valuer’s disclaimer – whether vendor owed fiduciary duty to purchaser - proportionate liability – contributory negligence – damages - members of one family owned three farming properties on North West coast of Tasmania – the first three respondents grew crops of pyrethrum on them – pyrethrum provides ingredient in insecticides – crops grown under contracts to supply a company which had a monopoly over production of pyrethrum in Tasmania – the family wanted to set up a pyrethrum farming operation in competition with the company they were supplying – they engaged a merchant banker to advise & obtain investors – through a Melbourne firm of chartered accountants & financial advisers, he obtained investment funds from two investors – joint venture was established: APF, the applicant – applicant purchased the three properties – purchase partly financed by commercial bill facility from Bank of Melbourne - applicant complained of misrepresentations by vendors as to value, price & available cropping area of two of properties & breach of fiduciary duties & duties of care owed by vendors to their joint venture partners – allegation of negligence against fourth respondent Mantach, a company carrying on a valuation practice, in respect of valuations of those two properties provided to purchaser – issue also as to grant by applicant to third respondent of 99 year lease over homestead block on one of properties - applicant sought order setting aside lease - held that valuer negligent – valuer entitled to full indemnity from vendors – a lengthy judgment clearly setting out questions to be considered & answers to those questions - case law as to negligent advice, identification of

class of persons to whom duty owed, measure of damages. [APF Properties \(I,F,C\)](#)

Military Rehabilitation & Compensation Commission v Perry [2007] FCA

1586

Federal Court of Australia

Bennett J (at Sydney)

Safety, Rehabilitation and Compensation Act 1988 (Cth) - effect of amendment to s8(9) – respondent had served in Royal Australian Navy as Aircrew Observer - post-viral fatigue syndrome – respondent in receipt of increment, an allowance based on seniority which increased automatically every two years until "top tier"- whether s8(6) continued to apply to Commonwealth employee who had ceased to be employed – how s8(9B) applied where injury suffered prior to commencement of subsection – section 8(9B) provided for continued application of s8(6) – whether s8(9B) had retrospective operation – held amendment had future action on past events and was not retrospective.

[Military Rehabilitation & Compensation Commission](#) (I)

Origin Energy LPG Ltd & Ors v Bestcare Foods Ltd & Anor [2007] NSWCA

321

Court of Appeal of New South Wales

Spigelman CJ, McColl JA & Handley AJA

Common law rights - concurrent tortfeasor – Proportionate Liability - Clause 3 Civil Liability Regulation 2003 - Bestcare sued Origin for damages caused by explosion at its factory in 2003, alleging negligence of Origin caused or contributed to explosion – the Regulation excludes application of Pt 4 Civil Liability Act if liability arose before 26 July 2004 – the Regulation, if valid, preserves common law right of Bestcare to recover whole of its damages from Origin if the latter was liable as a concurrent tortfeasor - held that regulation valid. [Origin Energy LPG](#) (I)

Anderson v Hassett [2007] NSWSC 1310

Supreme Court of New South Wales

Brereton J

Civil contempt – detailed consideration of case law - failure by defendant to comply with order of court for production of documents – deceased estate - defendant, a solicitor, executor of estate - plaintiff a beneficiary of estate - whether plaintiff must prove specific intent to disobey order of court – held

that not necessary to establish that any failure to comply with an order was accompanied by specific intention to disobey court's order - failure to comply is contempt unless it is casual, accidental or unintentional - defendant adjudged guilty of contempt in relation to some of the documents he had been ordered to be produced. [Anderson](#) (I,F,C)

O'Shane v Burwood Local Court (NSW) & Ors [2007] NSWSC 1300

Supreme Court of New South Wales

McClellan CJ at CL

Certiorari - criminal law - non-publication order - pseudonym order - powers of courts & judges - superior court - statutory court – case law considered as to inherent jurisdiction - jurisdiction of Local Court - implied power of Local Court - case law as to open justice - exception to principles of open justice – well-established categories, informer, blackmail, national security, extortion, unacceptable consequences, intense media scrutiny, media attention, publicity, person in high public office - apprehended violence order – a pseudonym order quashed. [O'Shane](#) (I)

The Owners Strata Plan 50946 v Multiplex Constructions (NSW) Pty Ltd & Ors [2007] NSWSC 1308

Supreme Court of New South Wales

Einstein J

Separate question orders – detailed consideration of case law & principles to be applied – application by first & sixth defendants supported by fifth defendant for order for separate hearing of question of quantification of amount of damages (if any) payable by first & fifth defendants in respect of particular paragraphs of Technology & Construction List Statement or by cross-defendants in respect of corresponding paragraphs of any cross-claims filed in proceedings – application refused. [The Owners Strata Plan 50946](#) (I)

Tim Barr Pty Limited & Anor v Narui Gold Coast Pty Limited [2007] NSWSC 1306

Supreme Court of New South Wales

Einstein J

Pleadings – leave to amend – application by plaintiffs to file third further amended statement of claim – principles & case law succinctly summarised - defendant acquired large tract of land in northern New South Wales called Kings Forest – second plaintiff was project manager for defendant – first

plaintiff & defendant entered into lease by which defendant leased to first plaintiff 288 hectares of the land – option to purchase – defendant sought to terminate lease & re-enter – allegation of breach of implied duty of good faith - ‘General Steel test’ - whether implied duty of good faith is breached if defendant shown to have acted for an ulterior collateral motive – defendant argued no reasonable cause of action disclosed – discretion exercised to allow amendments – standard of proof for establishing abuse of process. [Tim Barr](#) (I,C)

H Developments Pty Limited v Cronin & Anor [2007] NSWSC 1314

Supreme Court of New South Wales

Barrett J

Injunction - to restrain completion of sale by mortgagee - plaintiff, mortgagor of property at Westmead, sought interlocutory injunction to restrain completion of a sale scheduled to complete at 3.30pm - sale was sale by receivers appointed by mortgagee, Suncorp Metway Limited - mortgage moneys not tendered or paid into court - sale said to be at undervalue - not possible so to conclude - in any event damages or equitable compensation an adequate remedy – application refused. [H Developments](#) (F)

Coleman v Watson & Shaw & Anor [2007] QSC 343

Supreme Court of Queensland

Cullinane J

Damages - compensatory – exemplary - false imprisonment , wrongful arrest, trespass to person – joint or several tortfeasors - plaintiff describes himself as an activist – historic event, meeting of Queensland Legislative Assembly at Townsville in 2002 - first & second defendants both police officers & third defendant State of Queensland - allegation that third defendant vicariously liable for the actions of first & third defendants - first & second defendant admitted liability for wrongful arrest & wrongful imprisonment - whether exemplary damages should be awarded – answer ‘no’ – damages of \$20,000 plus interest awarded to plaintiff against first defendant together with interest at rate of ten per cent for 5.2 years producing a figure of \$10,400 & total of \$30,400 – judgment for plaintiff against second defendant in sum of \$20,000 together with interest at rate of ten per cent for 5.2 years producing a figure of \$10,400 & total of \$30,400 - judgment for plaintiff against third defendant in sum of \$20,000 together with interest at rate of ten per cent for 5.2 years producing a figure of \$10,400 & total of \$30,400. [Coleman](#) (I)

Insurance Australia Limited v HIH Casualty & General Insurance Limited (in liq) & Anor (No 2) [2007] VSCA 258

Court of Appeal of Victoria

Chernov, Ashley & Redlich JJA

Costs - equitable contribution - Calderbank offer – whether indemnity costs should be awarded - answer ‘no.’ [Insurance Australia Limited](#) (I)

Atkins v Interprac Financial Planning Pty Ltd & Anor [2007] VSC 445

Supreme Court of Victoria

Hargrave J

Apportionable claim – concurrent wrongdoers - plaintiff alleges false, misleading or negligent advice given by defendants to plaintiff in connection with certain investments made by plaintiff on recommendation of defendants - application by defendants to join alleged concurrent wrongdoers as parties – whether arguable that proposed parties are concurrent wrongdoers – appropriate form of orders to join concurrent wrongdoers – Wrongs Act 1958 (Vic) – liability as to economic loss – duty of care of directors. [Atkins](#) (I,F)

Jefferson Ford Pty Ltd v Ford Motor Company of Australia Pty Ltd [2007] VSC 450

Supreme Court of Victoria

Hollingworth J

Diaries – Notice to Produce – confidentiality – sealing up part of a document - defendant served on plaintiff Notice to Produce documents – plaintiff sells & distributes Ford vehicles & parts through several dealership businesses – dealer agreements with defendant - whether affidavit made reference to deponent’s entire diary or only certain entries – whether plaintiff entitled to seal up non-relevant parts of diary – whether plaintiff required to produce entire diary for inspection – Supreme Court (General Civil Procedure) Rules 2005 – orders made that if plaintiff Jefferson Ford wished to make any claim for the covering up of any part of diaries on basis of commercial or personal confidentiality, it had fourteen days to file & serve application – with affidavit to be filed in support of application, a copy of each diary entry in respect of which confidentiality claimed to be annexed - any such exhibit, until further order, to be kept confidential to named barristers and solicitors engaged by defendant, upon their giving appropriate undertakings as to confidentiality – if parties unable to reach agreement as to confidential status of such entries, any disputed entries to be the subject of determination by court - plaintiff will be required to produce to defendant for inspection within, say, 14 days of

final determination of any dispute as to confidentiality, those parts of diaries which have been agreed or held not to be confidential - confidential entries will be covered over for purposes of inspection – at par 27 of an interesting decision:

“The only case which seems to have considered the possibility of sealing up part of a document caught by a notice to produce was the decision in the 1883 case of Quilter v Heatley.” [Jefferson Ford](#) (I,F,C)

R v White & Ors [2007] VSC 471

Supreme Court of Victoria

Whelan J

Suppression orders – criminal law – principles considered - co-accused giving evidence for the Crown – risk whilst in prison – encouragement to come forward – necessity not established in circumstances. [R v White](#) (I)

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