

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Tuesday 25 March 2008

Windsor v Sydney Medical Service Cooperative Ltd [2008] FCA 348

Federal Court of Australia

Edmonds J (at Sydney)

Trade Practices Act 1974 – Trade Practices Amendment Act 2001 – alleged breach of contract - identity of party to contract - misleading & deceptive conduct - alleged representations to enter into an agreement as an independent contractor to perform after-hours medical services - limitation period of actions - no reasonable cause of action disclosed – statement of claim struck out. [Windsor](#) (I)

Commissioner of Taxation v Cumins [2008] FCA 353

Federal Court of Australia

Gilmour J (at Perth)

Bankruptcy – petition for sequestration order – investments in “Infomercial” Schemes – respondent’s application for stay of proceedings pending application for special leave to High Court as well as applications to Administrative Appeals Tribunal - requirement to demonstrate genuine & arguable grounds in respect of applications both to the High Court & Administrative Appeals Tribunal – respondent’s application dismissed. [Cumins](#) (B)

Commissioner of Taxation v Cumins [No 2] [2008] FCA 354

Federal Court of Australia

Gilmour J (at Perth)

Discovery – applicant already provided significant discovery – failure by respondent to articulate need for discovery of further documents – whether it would be oppressive to grant discovery – respondent’s application dismissed. [Cumins \[No 2\]](#) (I,B,C)

State of New South Wales v Fahy [2008] NSWCA 34

Court of Appeal of New South Wales

Bell JA

Restitution - claim for restitutionary interest on capital sum & periodic payments made as conditions of stay – police officer – post-traumatic stress disorder – High Court judgment 22 May, 2007: see link below - application dismissed. [Fahy](#); &

[New South Wales v Fahy \[2007\] HCA 20](#) (I)

Ciavarella v Polimeni [2008] NSWSC 234

Supreme Court of New South Wales

Young CJ in Eq

Tender document - purchase of vineyard & water rights - whether written notification of acceptance from vendor is mandatory - answer "yes" - no written notification of acceptance - no formal contract - informal contract within meaning of "fourth class" of [Masters v Cameron](#) – part-performance - acts constituting part performance must be in performance of the contract, not merely in reliance on it - proprietary estoppel by encouragement - calculation of equitable compensation - reasonable foreseeability of plaintiff's expenditure in reliance on the defendants' representation – plaintiff wished to add NAB as defendant – NAB resisted application – application to add NAB rejected.

[Ciavarella](#) (B,C)

Mukherjee v WorkCover Authority of New South Wales [2008] NSWIRComm 53

Industrial Court of New South Wales

Schmidt, Boland & Backman JJ

Application for leave to appeal & appeal – charge under Workplace Injury Management & Workers Compensation Act 1998 - application of s65 Evidence Act 1995 - whether statements made by critical witness who was not available for cross-examination were properly admitted - whether prosecutor established witness' unavailability - failure to bring witness before Court pursuant to bench warrant - failure to take other reasonable steps - prosecutor had not established all reasonable steps taken to secure attendance or to compel witness to give evidence - appeal upheld. [Mukherjee](#) (I)

Garde-Wilson v Legal Services Board [2008] VSCA 43

Court of Appeal of Victoria

Buchanan, Nettle & Dodds-Streeton JJA

[Legal Profession Act 2004](#) (Vic) - Legal Services Board retained power to determine whether to renew a solicitor's practising certificate

notwithstanding its delegation of that power to the Law Institute. [Garde-Wilson](#) (I)

Macedon Ranges Shire Council v Romsey Hotel Pty Ltd & Anor [2008] VSCA 45

Court of Appeal of Victoria

Warren CJ, Maxwell P & Osborn AJA

Planning - gaming - Victorian Civil & Administrative Tribunal – review of decision refusing approval of hotel premises for gaming – ‘net economic & social impact of approval’ – whether ‘detrimental to well-being of community’ – evidence of community opposition to introduction of electronic gaming machines - whether community opposition relevant – how community opinion to be ascertained. [Macedon Ranges Shire Council](#) (I,B,C)

Law Institute of Victoria Ltd v Maric & Anor [2008] VSCA 46

Court of Appeal of Victoria

Warren CJ, Neave & Kellam JJA

Carrying on conveyancing business - Conveyancers Act 2006, assented to on 10 October 2006 but as at date of judgment not proclaimed – Act coming into operation no later than 1 July, 2008 - meaning of ‘engaging in legal practice’ – whether preparation of statements under s32 Sale of Land Act 1962 necessarily involves giving of legal advice contrary to s314 Legal Practice Act 1996 – whether judge erred by refusing to grant a permanent injunction restraining the respondents from preparing s32 statements - appeal dismissed. [Law Institute of Victoria](#) (I,B,C)

Protec Pacific Pty Ltd v Cherry [2008] VSC 76

Supreme Court of Victoria

Habersberger J

Expert witness – legal professional privilege – interlocutory injunction – supply & installation of high density polyethylene (“HDPE”) lining material to process tanks at WMC (Olympic Dam Corporation) Pty Ltd’s Olympic Dam mine - confidentiality of instructions – contractual obligation to keep information confidential – whether expert witness in possession of privileged or confidential information – whether privilege or confidentiality waived by serving of expert witness statement pursuant to court order – whether expert witness able to speak to lawyers for opposing party about his reports & reports of other experts – whether there was real & sensible possibility of misuse of privileged or confidential information – opposing party free to call expert witness at trial. [Protec Pacific](#) (I,B,C)

Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd
[2008] VSC 77

Supreme Court of Victoria

Harper J

Application to file a further amended statement of claim – whether proposed pleading defective - major project to construct a gas pipeline in Tasmania - plaintiff a sub-contractor - idea was to take advantage of trench in which gas pipeline was to be laid by adding to it an optical fibre telecommunications cable, which was the task plaintiff agreed to perform - allegation delay caused by negligence or breach of sub-contract by defendant in failing to provide access to site - held that proposed further amended statement of claim would have to be re-cast requiring that it be repleaded in accordance with His Honour's reasons – plaintiff given leave to do so – a thorough, interesting judgment. [Downer Connect](#) (I,C)

Roman Catholic Trusts Corporation for the Diocese of Melbourne v Whitehorse City Council [2008] VCAT 388

Victorian Civil & Administrative Tribunal

Senior Member Margaret Baird

Subdivision – significant heritage building - “Yielima,” grand 19th century Italianate residence, later known as “St Aubins” & “The Nunnery,” used as part of primary school - Trusts Corporation sought permit from Whitehorse City Council to subdivide the land into four lots & to demolish hall and shed - permit application was refused & review of Council's decision sought by the Corporation - decision of Council set aside – permit granted, subject to conditions, allowing subdivision of land into three lots & demolition of hall shed. [Roman Catholic Trusts Corporation for the Diocese of Melbourne](#) (C)

& From the District Court of South Australia...

Curtis v the Queen Elizabeth Hospital [2008] SADC 22

District Court of South Australia

McIntyre DCJ

Medical negligence – causation - plaintiff alleged doctor employed by defendant failed to properly diagnose & treat her for meningitis causing complete sensorineural deafness of the right ear - defendant admitted it fell short of required standard of care on the basis that the plaintiff was diagnosed and treated for migraine and discharged without considering a differential diagnosis of meningitis – on appeal, whether delay in diagnosis and appropriate treatment materially contributed to the plaintiff's hearing loss – held that plaintiff had established causation - no evidence to establish that she

might have suffered a hearing loss in any event & accordingly no discount made to her damages - plaintiff had not failed to take appropriate steps to mitigate her loss - distinction drawn between hypothetical loss of earnings and loss of earning capacity. [Curtis](#) (I)

Seekamp v the Nominal Defendant [2008] SADC 24

District Court of South Australia

McIntyre DCJ

Negligence - road accident cases - onus of proof & sufficiency of evidence - plaintiff claimed he had been hit as pedestrian by unidentified vehicle - approach to evidence in Nominal Defendant matters - consideration of expert medical evidence - assessment of damages - held that plaintiff's injury could not have occurred in the manner described by plaintiff - plaintiff's claim failed - accordingly negligence and contributory negligence not considered - damages assessed at \$187,826.53. [Seekamp](#) (I)

Hayes v Woodcroft Tavern [2008] SADC 20

District Court of South Australia

Tilmouth DCJ

Torts - trespass - trespass to the person - elements of tort of assault & battery - documentary evidence - *res gestae* - damages - aggravated - exemplary - damages for loss of chance - bottle shop - plaintiff sought to buy alcohol - question of what time - analysis of till records as to closing time - fate of video or digital recordings made at time - held that assault & battery not proven on facts - admissibility of police report as a "business record" within the meaning of s45A Evidence Act 1929 (SA) considered - admissibility of statements made by the plaintiff shortly after event, under *res gestae* exception, considered. [Hayes](#) (I)

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