



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Australia

Testamentary Trusts – Social Security Act 1991 (Cth) – disability support pension – controlled private trusts – appeal from decision of Administrative Appeals Tribunal. *See Elliot v Secretary, Department of Education, Employment and Workplace Relations* (I, B)

Family Provision – claim by widow – financial & material circumstances of plaintiff – competing claims of other beneficiaries. *See Guisande v Rosario* (B)

Employment Contract – Repudiation & Termination – Restraint of Trade – Fixed term contract, Defendant employee resigned prematurely to work for competitor – injunction enforcing restraints. *See Tullet Prebon (Australia) v Simon Purcell* (I, B, C)

Liquor Law – licensing – landlord & tenant – where application to surrender operating authorities to Queensland Office of Gaming Regulation complied with lease provisions prohibiting surrender application during term of lease. *See Goode & Anor v State of Queensland & Ors* (B)

Discovery – application by defendant for better discovery by plaintiff – implied undertakings as to use of documents after disclosure - whether Court should exercise its discretion to refuse to allow the plaintiff to amend material which may be in breach of implied undertakings. *See Viscariello v Macks (No 3)* (I, B, C)

Medical Negligence – Claim after complications following spinal surgery – whether treatment in accordance with acceptable professional standards of competent medical practice. *See Hawes v Holley* (I)

Uniked Kingdom

Employment Contract – claim for damages for breach – whether clause in agreement a penalty clause – case law considered. *See Tullet Prebon Group v El-Hajjali* (I, B, C)



Monday 25 August 2008

Elliot v Secretary, Department of Education, Employment & Workplace Relations [2008] FCA 1293

Federal Court of Australia

Kenny J (in Melbourne)

Testamentary trust – disability support pension – disability wife's support pension - Administrative Appeals Tribunal had held that the applicants were not eligible to receive the benefits they sought because they held beneficial interests in the corpus or income of a trust, which, by virtue of par 1207V(2)(d) Social Security Act 1991 (Cth) was a "controlled private trust" in relation to them – decision of AAT set aside.

[Elliot](#) (I, B)

Lynne Maree Rogers v Asset Loan Co Pty Ltd [2008] FCA 1304

Federal Court of Australia

Logan J (in Brisbane)

Application for leave to appeal against interlocutory judgment – see link below for decision 1 November 2007 & 'Benchmark' Insurance & Banking Wednesday 7 November 2007 - no reasonable prospect of success for proposed appeal - application dismissed.(I, B)

[Rogers](#), and

[Rogers](#) – 1 November 2007 decision appealed from - trade practices - Australian Securities & Investments Commission Act 2001 (Cth) - application for summary dismissal - whether attempt to re-litigate matters already determined by Court - consumer protection provisions identical to facts, matters & circumstances pleaded in respect of earlier claim under Trade Practices Act 1974 (Cth) – bankruptcy - alleged counterclaim or set-off for damages for financial loss & psychological or mental damage – held: substantive application summarily dismissed – to allow application to proceed would constitute abuse of process as an attempt to re-litigate a matter already determined by the court - "no reasonable prospects of success" - no counterclaim or set off existed as facts, matters & circumstances on which claim for damages for financial loss & psychological or mental damage relies had already been dismissed – detailed consideration of legislation & case law.

Gregory Eric Rogers v Asset Loan Co Pty Ltd [2008] FCA 1305

Federal Court of Australia

Logan J (in Brisbane)

Application for summary judgment – substantive application dismissed.

[Rogers](#) (I, B)

Mahenthirarasa v State Rail Authority of New South Wales (no 2) [2008] NSWCA 201

Court of Appeal of New South Wales

Giles, Basten & Bell JJA

Costs – judicial review – whether costs follow the event – see 'Benchmark' Insurance & IBC Thursday 22 May 2008 & link below for judgment 21 May 2008 - successful appellant seeking costs against first

respondent State Rail Authority - such an order resisted by SRA on basis SRA did not appear in opposition to the proceedings either in Common Law Division or in Court of Appeal - in each proceeding it filed an appearance, submitting save as to costs - whether respondent required to act as "model litigant" - state owned corporation - functions of SRA - SRA as part of executive government - application of model litigant principles - State Revenue & Other Legislation Amendment (Budget) Act 2007 (NSW) - order made that first respondent pay appellant's costs of proceedings in Common Law Division & in Court of Appeal on the usual basis. (I)

[Mahenthirarasa](#), and

[Mahenthirarasa](#) - judgment 21 May 2008 - Workplace Injury Management & Workers Compensation Act 1998 (NSW) - role & functions of Registrar of Workers Compensation Commission - "exists" - "demonstrable error" - inconsistency in medical assessment certificate - decision of Registrar set aside.

Nuclear Utility Technology & Environmental Corporation Inc v Australian Broadcasting Corporation [2008] NSWSC 841

Supreme Court of New South Wales

McCallum J

Defamation - broadcast of two stories on television - first plaintiff incorporated in state of Delaware - Delaware general corporations law - effect of law of Delaware - first plaintiff has no standing to bring these proceedings.

[Nuclear Utility Technology & Environmental Corporation](#) (I, B)

Guisande v Rosario [2008] NSWSC 860

Supreme Court of New South Wales

McLaughlin AsJ

Family provision - claim by widow - thirty-one year marriage - matrimonial home only significant asset - plaintiff given right of residence - financial & material circumstances of plaintiff - whether plaintiff had been left without adequate provision for her proper maintenance - competing claims of other beneficiaries. [Guisande](#) (B)

Tullett Prebon (Australia) Pty Ltd v Simon Purcell [2008] NSWSC 852

Supreme Court of New South Wales

Brereton J

Employment - contract - repudiation/termination - injunctions - restraint of trade - fixed term contract where defendant employee prematurely resigned before conclusion of fixed term of employment to work for competitor employer - plaintiff a brokerage business in wholesale financial market, facilitating trading activities between major dealers such as commercial & investment banks - defendant a broker - interest rates swaps & derivatives market - plaintiff contended contract remained on foot, defendant that it had been terminated - gardening leave - held that contract remained on foot - injunction enforcing restraints for a period expiring six months after the end of actual employment.

[Tullet Prebon \(Australia\)](#) (I, B, C)



Goode & Anor v State of Queensland & Ors [2008] QSC 184

Supreme Court of Queensland

Dutney J

Liquor law – licensing – landlord & tenant – third respondent leased hotel from applicant – lease prohibited third respondent from surrendering operating authorities during term of lease – lessee applied to Queensland Office of Gaming Regulation to surrender operating authorities after lease terminated – whether surrender application complied with provisions of lease.

[Goode](#) (B)

Viscariello v Macks (no 3) [2008] SASC 225

Supreme Court of South Australia

Lunn J

Discovery - application by defendant for better discovery by plaintiff of documents relating to his general financial affairs – application to amend statement of claim - plaintiff a legal practitioner – defendant an accountant & liquidator – eight court actions pleaded in Amended Statement of Claim - no dispute there was an implied undertaking by all parties to an action in any Court that documents disclosed in the course of that action by the other party, & the information in them, were not to be used by the party obtaining them for any purpose unrelated to that action without first obtaining the leave of that Court to do so – whether any of the material sought to be pleaded by the plaintiff in the ASOC is in breach of the implied undertaking in any of the 8 actions - whether this Court in this action should exercise its discretion to refuse to allow the plaintiff to amend to plead material which may be in breach of the implied undertakings – detailed consideration of case law as to nature of implied undertakings – an interesting judgment.

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

From the District Court of New South Wales...

Hawes v Holley [2008] NSWDC 147

District Court of New South Wales

Hungerford ADCJ

Medical negligence claim – complications following spinal surgery – action had settled as between plaintiff & second defendant - held that first defendant's treatment of plaintiff was in accordance with acceptable professional standards of competent medical practice – no negligence - verdict entered for first defendant against plaintiff – if liability in negligence by first defendant had been found : damages quantified in amount of \$95,005.18.

[Hawes](#) (I)



And from the United Kingdom...

Tullett Prebon Group Ltd v El-Hajjali [2008] EWHC 1924 (QB)

High Court of Justice, Queen's Bench Division

Nelson J

Employment - contract - claim for damages for breach of contract - global foreign exchange, commodities, interest rates & equity markets - defendant entered contract with claimants - defendant had changed his mind after signing the contract & before joining the claimants, deciding to remain with his original employers - claimants inter-dealer brokers - defendant a Senior Derivatives Broker & manager of Variance Swaps broking at Link - defendant approached by claimants to leave Link & join Tullett Prebon – clause in agreement which provided defendant to take necessary steps to put agreement into effect & failure to do so would mean he was liable “to pay to the Company, by way of agreed liquidated & ascertained damages, a sum equal to fifty percent of the net basic salary and (if any) fifty percent of your signing payment (if any) that the Company has contracted to pay to you during the Term of this Employment Agreement” – whether clause a penalty clause, that is one imposing a penalty for its breach rather than a genuine estimate of the loss likely to be sustained in the event of a breach – case law considered - held that defendant had failed to discharge burden of showing clause a penalty clause – held that clause was a liquidated damages clause, not a penalty clause, & that defendant's arguments on causation failed- he was therefore in breach of the clause & liable for that breach.

[Tullet Prebon Group](#) (I, B,C)

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