



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Australia

Motor Accidents – duty of care owed by unlicensed, inexperienced driver to supervising passenger. *Cook v Cook* overturned. See *Imbree v McNeilly* (I)

Trade Practices – whether agreement contravened industry code. See *Master Education Services v Ketchell* (I, B)

Winding Up – cooperation of domestic and international insolvency courts to proceed with examination summons. See *McGrath & Ors as Liquidators of HIH* (I, B, C)

Practice & Procedure – application to withdraw admissions in defence. See *Wolfert v Van den Biggelaar* (I, B, C)

Property Valuation – rental review of lease provisions. See *Eureka Funds Management v Freehills Services* (B, C)

Caveats – whether dealings should be registered pending appeal to remove caveat. See *Bank of Cyprus Australia v Registrar of Titles* (B)

United Kingdom

Negligence – competing causes of warehouse fire. See *Fosse Motor Engineers v Conde Nast* (I)

Arbitration – whether construction dispute sufficient to warrant referral to arbitration. See *VGC Construction v Jackson Civil Engineering* (C)

United States of America

Insurance Industry – largest failure of insurance company in California history. See *Poizner v Artermis* (I)



Friday 29 August 2008

Imbree v McNeilly; McNeilly v Imbree [2008] HCA 40

High Court of Australia

Gleeson CJ; Gummow, Kirby, Hayne, Heydon, Crennan & Kiefel JJ

Negligence – standard of care owed by inexperienced driver to passenger – see ‘Benchmark’ Wednesday 4 July 2007 for Court of Appeal decision 2 July 2007 & link below - appellant had allowed first respondent to drive a four-wheel drive station wagon on a gravel road between Kings Canyon & Hermannsburg, Northern Territory - first respondent then aged sixteen years & five months – as appellant knew, first respondent had little driving experience, was not licensed to drive, & did not hold any learner's permit - driver lost control of vehicle, which overturned - appellant, front-seat passenger, was seriously injured – appeal allowed – at par 27 of joint judgment of Gummow, Hayne & Kiefel JJ

“These reasons will show that the standard of care which the driver (the first respondent) owed the passenger (the appellant) was the same as any other person driving a motor vehicle - to take reasonable care to avoid injury to others. The standard thus invoked is the standard of the "reasonable driver". That standard is not to be further qualified, whether by reference to the holding of a licence to drive or by reference to the level of experience of the driver. Cook v Cook [(1986) 162 CLR 376] should no longer be followed. ” (I)

[Imbree](#), and

[McNeilly v Imbree](#) - decision 2 July 2007 – Court of Appeal.

Master Education Services Pty Limited v Ketchell [2008] HCA 38

High Court of Australia

Gummow ACJ; Kirby, Hayne, Crennan & Kiefel JJ

Franchise agreements – s51AD in Pt IVB Trade Practices Act 1974 (Cth) which provides a corporation must not, in trade or commerce, contravene an applicable industry code - whether agreement invalidated where it has been entered into by a corporate franchisor which had contravened the Franchising Code of Conduct, that contravention being entry into agreement without receiving required statement from franchisee, confirming receipt of information about the franchise & franchisor and confirming that franchisee has had sufficient time to understand that information – appeal by franchisor allowed. (I, B)

[Master Education Services](#), and

[Ketchell v Master of Education Services](#) - NSW Court of Appeal decision 19 July 2007.

[Ketchell v Master Education Services](#) – NSW Supreme Court decision 29 April 2005.



Dorajay Pty Ltd v Aristocrat Leisure Limited [2008] FCA 1311

Federal Court of Australia

Stone J (in Sydney)

Class actions - representative proceeding under Part IVA Federal Court of Australia Act 1976 (Cth) – proposal to settle proceeding – Court order that group members provide proof of their share trading by 24 June 2008 in order to participate in settlement – failure of some members to meet deadline of 24 June 2008 – whether such failure should lead to exclusion – persons listed in Schedule 1 not excluded, those listed in Schedule 2 excluded.

[Dorajay](#) (B)

McGrath & Anor as Liquidators of HIH Insurance Ltd [2008] NSWSC 881

Supreme Court of New South Wales

Barrett J

Winding up - liquidators' application for examination summons - persons concerned resident in London - letter of request to High Court of Justice of England & Wales to act in aid of, & be auxiliary to, NSW Supreme Court in conducting examination - availability to liquidators of alternative & direct procedure under UK law adopting UNCITRAL Model Law on Cross Border Insolvency – Co-operation of Insolvency Courts (Designation of Relevant Countries & Territories) Order 1986 (UK) - orders made for issue of examination summonses; granting leave to serve in the United Kingdom; and for issue of letter of request.

[McGrath & Anor as Liquidators of HIH Insurance](#) (I, B, C)

Feeney v Feeney [2008] NSWSC 890

Supreme Court of New South Wales

White J

Trusts – wills – property at Austinmer – plaintiff seeking order for specific performance of a deed by which parties sought to adjust their entitlements under a will to a property at Austinmer or its proceeds of sale - whether deed effective to alter trusts of will – whether deed should be rectified – whether plaintiff estopped from seeking to enforce deed in accordance with its terms - whether the Court, in its discretion, should decline to enforce deed by an order of specific performance by reason of mistake on part of defendants & hardship to first defendant – extensive consideration of case law.

[Feeney](#) (B)

Eureka Funds Management Limited & Anor v Freehills Services Pty Ltd [2008] VSCA 156

Court of Appeal of Victoria

Neave & Redlich JJA; Cavanough AJA

Rental review provisions of a lease – commercial business premises in Melbourne central business district - building at 101 Collins Street - 'current annual market rental' - 'current annual market rental value' - valuer appointed under lease to determine 'Minimum Rent' at specified market review dates –



held that valuer had not undertaken a valuation in conformity with terms of the lease & accordingly, his determination was ineffective - whether a new valuer should be appointed to determine the minimum rent of subject premises - answer 'no,' to be remitted to same valuer.

[Eureka Funds Management](#) (B, C)

Bank of Cyprus Australia Limited v Registrar of Titles & Ors [2008] VSC 327

Supreme Court of Victoria

Whelan J

Caveats – whether Registrar should register dealings whilst purported appeal on caveat removal pending – s116 Transfer of Land Act 1958 (Vic) – Registrar ordered to register dealings – an interesting judgment.

[Bank of Cyprus Australia](#) (B)

Wolfert v Van Den Biggelaar [2008] TASSC 44

Supreme Court of Tasmania

Holt AsJ

Application to withdraw admissions, defendants having appointed new solicitors - comprehensive review of case law - proceedings relate to contract for design, construction & supply of mobile platform on which plaintiffs, who are vegetable farmers, planned to place a vegetable harvester.

[Wolfert](#) (B, C)

From the United Kingdom...

Fosse Motor Engineers Ltd & Ors v Conde Nast & National Magazine Distributors Ltd & Anor [2008] EWHC 2037 (TCC)

High Court of Justice, Queen's Bench Division, Technology & Construction Court

Akenhead J

Negligence – warehouse fire in Coventry – causation – principles & case law considered - consideration of several possible causes : cigarette carelessly discarded; intruder bent on arson; electrical equipment left by heating contractors – expert opinion as to likely place of ignition of fire - whether or not it was likely that conditions existed within a pallet to enable a fire to break out within twenty to forty minutes after alleged discard of lit cigarette – claim dismissed – judgment in favour of first defendant.

[Fosse Motor Engineers](#) (I)

VGC Construction Ltd v Jackson Civil Engineering Ltd [2008] EWHC 2082 (TCC)

High Court of Justice, Queen's Bench Division, Technology & Construction Court
Akenhead J

Arbitration – construction contracts - provision of ducts & cabling on M3 Motorway - delay & disruption – subcontractor made application to Institute of Civil Engineers for appointment of adjudicator – whether sufficient dispute, if any, to be referred to arbitration - defining of a dispute for purposes of an arbitration – whether any claim giving rise to a possible dispute was withdrawn - case law considered - claim by subcontractor to enforce decision of Adjudicator upheld.

[VGC Construction](#) (C)

And from the United States of America...

Poizner v Artermis sA, No. 06-55297

United States Court of Appeals for the Ninth Circuit
Nelson, Paez & sBybee JJ

Executive Life Insurance Company (ELIC) - judicially supervised rehabilitation plan after “largest insurance failure in California history” – bail-out by other insurer groups - insurance commissioner who oversaw rehabilitation of the company later discovered apparent conspiracy between some of the members who bailed out the company to defraud international members to prevent them from issuing insurance in California – civil suit filed alleging intentional misrepresentation, concealment & conspiracy to defraud – at 11653:

“We affirm the entry of judgment in favour of Artemis on the claims for intentional misrepresentation & concealment. We reverse the Post-Verdict Order & remand for a new damages phase trial limited to proffer of the NOLHGA [National Organization of Life & Health Insurance Guaranty Associations] Premise & a determination of damages (including punitive damages), if any, on that theory. We affirm the Order Re Punitive Damages, vacating the jury’s \$700 million punitive damages award under California law. We vacate the district court’s \$241 million restitution award with leave to reinstate, if warranted, at the close of the new damages phase trial.

Finally, we commend the district court for its heroic efforts to bring to closure a very complicated & lengthy trial & to find an equitable result. In the end, we reluctantly conclude that the district court was unsuccessful in reconciling the jury’s answered verdicts with a single, unanswered verdict”

[Poizner](#) (I)

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