

# BENCHMARK

## Insurance, Finance & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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**Thursday 29 November 2007**

**Maxwell-Smith v Donnelly [2007] FCAFC 180**

Federal Court of Australia

Bennett, Edmonds & Flick JJ (at Sydney)

Costs – costs of trustee for inquiry into conduct of the trustee under s129 Bankruptcy Act – no error in awarding costs to include remuneration, charges & expenses – additional submissions not considered by primary judge due to filing error – allegation of procedural fairness not established – appeal dismissed. [Maxwell-Smith](#) (F)

**Riddell v Federal Commissioner of Taxation [2007] FCA 1818**

Federal Court of Australia

Gordon J (at Melbourne)

Income tax – allowable deductions – where taxpayer is professional sportsperson – NRL player - whether sports management fee was an outgoing incurred in gaining or producing assessable income - whether management fee was an outgoing necessarily incurred in conducting a business. [Riddell](#) (F,C)

**Spriggs v Federal Commissioner of Taxation [2007] FCA 1817**

Federal Court of Australia

Gordon J (at Melbourne)

Income tax – allowable deductions – where taxpayer is professional sportsperson – AFL player - whether sports management fee was an outgoing incurred in gaining or producing assessable income - whether management fee was an outgoing necessarily incurred in conducting a business. [Spriggs](#) (F,C)

**Miller Street Pty Ltd v Porter [2007] FCA 1830**

Federal Court of Australia

Finkelstein J (at Melbourne)

Corporations – winding up – trustee company – duties of liquidator – finding new tenant for trust property – at par 26 of judgment:

“The liquidator’s failure to make the trust property productive has resulted in a loss to the discretionary trust of two months rent. The liquidator will be ordered to make good that loss.” [Miller Street](#) (F)

**State of New South Wales v Stanley [2007] NSWCA 330**

Court of Appeal of New South Wales

Beazley, Tobias JJA & Hislop J

Costs – exercise of discretion – apportionment of costs - appeal from primary judge’s costs orders – respondent brought proceedings in District Court against appellant – respondent alleged appellant was vicariously liable for actions of police officers – respondent alleged assault/battery, wrongful arrest, false imprisonment, malicious prosecution – held that it had not been demonstrated primary judge had been in error. [State of New South Wales](#) (I)

**Short v Crawley (No. 30) [2007] NSWSC 1322**

Supreme Court of New South Wales

White J

Directors - breach of fiduciary duties - consideration of circumstances in which directors may owe fiduciary duties to shareholders – numerous instances of oppression by director of companies – remedies – whether discretion to order winding up should be exercised – order to wind up a solvent company only as a last resort – valuation of shares - causation – breach of obligation to act for proper purpose distinguished from failure to disclose improper purpose – account of profits — conflict of interest – director owing concurrent fiduciary duties as solicitor – duties as director owed in addition to duties owed as solicitor – onus on fiduciary to show that fully informed consent obtained – what constitutes fully informed consent – circumstances requiring independent advice - limitation periods – equitable defences – laches & delay – meetings – voting – circumstances in which directors interested in transaction may vote on resolution to enter into transaction - a most comprehensive consideration of case law from Australian, UK, Canada & New Zealand. [Short](#) (I,F)

**Total & Universal Pty Ltd v Kingsway Property Investments (No. 2) Pty Ltd [2007] NSWSC 581**

Supreme Court of New South Wales

Campbell JA

Costs – indemnity – Calderbank offers - plaintiff was unsuccessful in proceedings – plaintiff assignee of lessee’s interest under long lease granted by predecessor of RailCorp - plaintiff acquired leasehold interest from defendant - issue as to provision in contract for sale that determined price of leasehold – defendant had initiated cross-claim against third party – cross-claim unsuccessful due to failure of original proceedings – cross-defendant’s solicitors had written to solicitors for defendant, inviting discontinuance of cross-claim & offering to consent to discontinuance on basis its costs paid on party/party basis – at par 22 of judgment:

“Such a letter is not a Calderbank letter: it is an invitation for the recipient of the letter to surrender. An invitation to surrender cast in the form of an offer of compromise under the rules of court does not trigger an entitlement to indemnity costs, even if the party issuing the invitation to surrender is totally successful in the litigation...” [Total & Universal](#) (I)

**R v The Herald and Weekly Times Ltd & Anor [2007] VSC 482**

Supreme Court of Victoria

Smith J

Contempt of court – the Queen, on the application of Director of Public Prosecutions of Victoria, brought proceedings against newspaper & editor-in-chief alleging they were guilty of contempt of court on two occasions – allegation that each of publications had tendency, or was calculated to interfere with, due administration of justice in pending criminal proceedings – case law considered as to publication of a person’s criminal history while criminal proceedings pending – not a fair report of committal proceedings – prejudice – proceedings for contempt dismissed. [R v The Herald and Weekly Times](#) (I)

**Paper Australia Pty Ltd v Ansell Ltd [2007] VSC 484**

Supreme Court of Victoria

Bongiorno J

Torts – duty of care – breach – damages – mitigation – betterment - contract – implied terms – limited warranty – applicability of exclusion clause - Paper Australia operates largest pulp & paper making factory in Australia at Maryvale in Gippsland – one machine produces both machine glazed &

machine finished paper – case concerned MG cylinder on this machine with which this case is concerned - delamination of rubber cover of pressure roller – plaintiff alleged that defendant was in breach of terms of its contract to service pressure roller &/or it was negligent - held that plaintiff entitled to judgment against defendant for \$4,645, 051.30 for its material damage & \$8,200,000.00 in respect of its consequential losses – total \$12, 845, 051.30. [Paper Australia \(I\)](#)

**Golden Plains Fodder Australia Pty. Ltd v Millard [2007] SASC 391**

Supreme Court of South Australia

Gray, White & David JJ

Workers Compensation – injury to hand at hay processing plant - appeal from determination of a preliminary issue by District Court judge – identity of plaintiff’s employer – no written contract of employment – worker injured – actual employer one of two related entities, Golden Plains & Macpri – plaintiff’s action against one of these two entities was statute-barred - consideration of intentions of parties – whether the involvement of nominal employer was a sham – whether documentary evidence reflected reality of the arrangements – in an interesting judgment by Gray J: case law as to duty of judicial officers to give adequate reasons; case law as to approach to be taken to a proposition that a document or arrangement is a sham; legal principles as to whether Golden Plains or Macri the employer - appeal dismissed - business arrangement with nominal employer not a sham & did reflect the reality of the arrangements - reasons of trial Judge adequate. [Golden Plains Fodder \(I,C\)](#)

**& one from the District Court of Western Australia...**

**Fremantle Port Authority v DP World Australia Ltd [2007] WADC 202**

District Court of Western Australia

O'Brien DCJ

Defendant's application for summary judgment - whether plaintiff estopped - issue estoppel - res judicata - Anshun estoppel – in plaintiff’s statement of claim, plaintiff alleged it owned a crane for loading & unloading from ships; defendant provided stevedoring services to plaintiff; strong winds moved the unsecured crane along its rails & it collided with a sweeper truck & barrier & finally ran off its rails – plaintiff claimed damages for emergency salvaging & make safe costs (\$300,000), loss of crane, assessors costs (\$5,770) – plaintiff alleged contract between plaintiff, the hirer CSBP Ltd, & defendant as operator – plaintiff claimed contract provided that defendant agreed to

operate the crane for CSBP & indemnify plaintiff against loss, damage, claims – in District Court proceedings, the driver of the sweeper truck had taken action against plaintiff & defendant for damages for injuries he received in incident – District Court trial judge had made factual findings as to circumstances of incident & apportionment of liability – trial judge had found no contract as pleaded between plaintiff & defendant & that plaintiff not entitled to contractual indemnity from defendant – case law as to summary judgment, issue estoppel & Anshun estoppel considered – application for summary judgment dismissed. [Fremantle Port Authority](#) (I,C)

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