



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Consumer, Trader & Tenancy Tribunal Act 2001 (NSW) – Right of appeal from CTTT – Nature of power of CTTT to terminate residential tenancy agreement – See *Scicluna v NSW Land & Housing Corporation* (I)

Procedural fairness – Removal from voluntary office – Officeholder entitled to procedural fairness – See *Castle v Director-General State Emergency Service* (I)

Estoppel in pais – Employer estopped from denying reimbursement to employee of work-related expenses – See *Australian Beverage Distributors v Kellert* (I)

Limitation of action – Plaintiff filed Sixth Amended Statement of Claim raising new trade practices claims – Claim struck out – See *Zonebar v Global management Corporation* (I, B, C)

Personal injury – Slip & fall – Verdict for 76 year-old Plaintiff for more than \$300K – See *McDonald v Moama Bowling Club* (I)

Limitation of action – Application of limitation period to equitable claim – Disapproval of separate trial of limitation period – See *Italiano Oliveri v Invocare Australia* (B)

Conveyancing – Protection of purchasers – Obligations of vendor – See *Hedley Commercial Property Services v BRCP Oasis Land* (B, C)

From the District Court of New South Wales:

Personal injury – Duty – Gas explosion – Separate hearing on liability - Whether parent's reaction to son's injury comprised a recognised psychiatric illness – See *Webber v West Lindfield Bowling Club Co-Op* (I)

Friday 31 October 2008

Rojas v Esselte Australia Pty Limited (No 2) [2008] FCA 1585

Federal Court of Australia

Moore J (in Sydney)

Workplace Relations Act 1996 (Cth) – applicant alleging he was unlawfully dismissed from his employment – applicant had participated in industrial action - reverse statutory onus - burden cast on respondent employer to prove that applicant's membership or delegateship of an industrial organisation did not form part of reason for the termination of his employment – failure by employer to do so – penalty of \$12,000 imposed.

[Rojas](#) (I)

Fitzgerald, in the matter of Advance Healthcare Group Ltd (Administrators Appointed) [2008] FCA 1604

Federal Court of Australia

Finkelstein J (in Melbourne)

Corporate insolvency - deed of company arrangement – employee creditors not given priority – employee creditors fail to approve deed – circumstances in which court will approve deed – consideration of *Corporations Amendment (Insolvency) Act* 2007 (Cth) & review by Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency Laws: A Stocktake' (Canberra 2004)

[Fitzgerald, in the matter of Advance Healthcare Group](#) (B)

Wilson Parking Australia 1992 Pty Ltd v Rush [2008] FCA 1601

Federal Court of Australia

Jessup J (in Melbourne)

Employment law – confidential information - application for interlocutory injunction – first & second respondent formerly worked for applicant Wilson, now working for competitor S & K Car Park Management Pty Ltd - commercial operation of car parks - Wilson alleging first & second respondent took from Wilson confidential & commercially sensitive documents, data & other information & have since used it in their employment with s& K - equitable obligation of confidence - ss182 & 183 *Corporations Act* 2001 (Cth), *Copyright Act* 1968 (Cth) - confidentiality provisions of contracts of employment - Wilson seeking declarations, orders for delivery up, temporary & permanent injunctions, damages & account of profits – injunctions granted broadly as sought, with some fine tuning to meet respondents' criticisms.

[Wilson Parking Australia 1992](#) (B)

**Rambaldi; in the matter of Philip Charles Weeden, a bankrupt v Weeden [2008] FCA 1597**

Federal Court of Australia

Heerey J (in Melbourne)

Bankruptcy Act 1966 (Cth) - "market value"- valuation of minority shareholdings in proprietary companies - transfer of small minority shareholding in closely-held private company to majority shareholder – transfer for nominal sum on day prior to minority shareholder filing for bankruptcy – restrictive provisions in a company's Articles of Association -case law considered – an interesting decision.

[Rambaldi; in the matter of Philip Charles Weeden, a bankrupt](#) (B)

Vameba Pty Ltd v Maxwell Daniel Markson & Ors [2008] NSWCA 266

Court of Appeal of New South Wales

Allsop P, McColl JA & Young CJ in Eq

Application for leave to appeal from costs order – see link below to decision 21 December 2007 - purchase of house at Dover Heights – applicant real estate agent for vendors – first respondent Mr. Markson purchaser paid five percent deposit, not ten percent as per contract because applicant had told him the vendors agreed to this – primary judge had found real estate agent did not have authority to say this - application for leave to appeal dismissed. (I, B)

[Vameba](#), and

[Markson v Cutler & Anor](#) – decision 21 December 2007 – agency - real estate agent – ostensible authority – equitable estoppel - extensive consideration of case law.

O'Gorman v Sydney South West Area Health Service [2008] NSWSC 1127

Supreme Court of New South Wales

Hoeben J

Medical negligence - content of duty of care owed by breast screening organisation to plaintiff - breach of duty - causation - whether earlier intervention would have found tumour - whether plaintiff lost chance of a better outcome - damages - non-economic loss & loss of future earning capacity - judgment for plaintiff in sum of \$405,990.15.

[O'Gorman](#) (I)

Maylord Equity Management Pty Ltd v ReelTime Media Ltd (No 2) [2008] NSWSC 1133

Supreme Court of New South Wales

Palmer J

Indemnity costs – held that actions of administrators in provoking & in defending litigation were so unreasonable that, despite not being formally joined as parties, they should pay plaintiff's costs personally on indemnity basis. (B)

[Maylord Equity Management](#), and

[Maylord Equity Management](#) - decision 3 October 2008 - Deed of Company Arrangement terminated.

**NAK Australia Pty Ltd v Starkey Consulting Pty Ltd [2008] NSWSC 1136**

Supreme Court of New South Wales

Brereton J

Discovery – computer access – application by defendants for access to computer & email account – where authenticity of copy of relevant email in dispute – plaintiff proposing to tender contents of computer as evidence – computer not within previously ordered categories of discovery – expanding categories of discovery – whether independent expert should be appointed to inspect the computer – whether defendant should be present at inspection – inspection to take place with conditions.

[NAK Australia](#) (I, B, C)**Australian Securities & Investments Commission v Macdonald (No 4) [2008] NSWSC 1101**

Supreme Court of New South Wales

Gzell J

Evidence – admissibility & relevance - twelve defendants with James Hardie Industries NV twelfth defendant - late application to file affidavit correcting mistakes in earlier affidavit & establishing document path to plaintiff of copies of documents of eleventh defendant ABN 60 Pty Ltd from substantial shareholder & its representatives on board of eleventh defendant - challenge to ruling that affidavit admissible rejected.

[Australian Securities and Investments Commission](#) (I, B)**The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9] [2008] WASC 239**

Supreme Court of Western Australia

Owen J

Corporate insolvency – directors' duties – conflict of interest – equitable fraud - refinancing - plaintiffs alleging banks knowingly assisted directors to breach their fiduciary duties - four hundred & four hearing days – twenty banks – whether Bell Group of companies insolvent as at 26 January 1990 – plaintiffs partially successful – whether banks ranked ahead of bondholders in receiving proceeds of disposal of assets - 1st, 2nd & 3rd defendants (plaintiffs by counterclaim) partially successful – decision very lengthy, & therefore all links take time to open.

[The Bell Group](#) (I, B, C)**Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd [2008] WASC 238**

Supreme Court of Western Australia

Templeman J

Employment law – application for interlocutory injunction by employer – recruitment industry - employees resign & compete with employer - temporal & geographical restraint of trade clauses in employment contracts - misuse of confidential information alleged - whether cured by undertakings – application for interlocutory injunction declined but defendants required to give formally to Court undertakings proffered by their counsel in relation to confidential information, on plaintiff's cross-undertaking as to damages. [Workpac](#) (I, B, C)

From the United Kingdom...

Secretary of State for Business Enterprise & Regulatory Reform v Aaron & Ors [2008] EWCA Civ 1146

Court of Appeal of England & Wales
Buzton, Keene and Thomas LJ

Company Directors Disqualification Act 1986 - in disqualification proceedings, Secretary of State seeking to rely upon finding of fact & opinions set out in a Report of Financial Services Authority under s170 *Financial Services & Markets Act 2000* by investigators appointed under the Act & other materials - defendant directors contending findings of fact & opinions expressed in report and other documents inadmissible, principally because of the rule in Hollington v Hewthorn - Secretary of State contended that findings of fact & opinion set out in the report were admissible under an implied exception to strict rules of evidence developed in disqualification proceedings - Deputy Judge had decided the issue on all materials in favour of the Secretary of State - detailed consideration of case law in judgment of Lord Justice Thomas: at par 31:

"In my view there is good reason to reaffirm not only the principle of the implied exception and its scope as extending to whatever is contained in the reports and other materials obtained under the statutory scheme, but also its eminent good sense in relation to disqualification proceedings such as this"

[Secretary of State for Business Enterprise & Regulatory Reform](#) (I, B)

And from New Zealand...

Te Mata Properties Limited and Ors v Hastings District Council NZCA 446 Court of Appeal of New Zealand

O'Regan, Robertson & Baragwanath JJ

Negligence – alleged breach of a duty of care to avoid economic loss to a property owner by reason of physical damage - appellants had bought two motels at Havelock North - then discovered that each suffered from what has become known as leaky building syndrome – they sued, among others, Council in the High Court for cost of remedial works, loss of value of the property, consequential losses & general damages – appellants claiming Council negligent in performing its obligations under Building Act 1991, including grant of building permits, inspection of construction & issue of certificates of compliance with Building Code – primary judge struck out claim on the ground that Council under no legal obligation to appellants – appeal from that decision - Donoghue & Stevenson - the duty not to produce a defective thing - appeal dismissed – comprehensive consideration of case law from UK, New Zealand, Canada & Australia in a very interesting judgment by Baragwanath J.

[Te Mata Properties](#) (I, C)

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