

Thursday 4 July 2013

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Knezevic v Perpetual Trustees Victoria Ltd** (NSWCA) - loan agreement not unjust - lender's solicitor did not engage in misleading and deceptive conduct (I, B)

**Dungan v Chan** (NSWCA) - negligence - taxi hit pedestrian on pedestrian crossing - no breach of duty by taxi driver (I)

**Steele v Holmes** (NSWSC) - real property - no specific performance of alleged agreement for lease (B)

**WTE Co-Generation v RCR Energy Pty Ltd** (VSC) - building contract - dispute resolution clause unenforceable - stay of proceedings refused (I, B, C)

**TCM Builders Pty Ltd v Nikou** (VSC) - building contract - decision of VCAT - *double compensation* defence not established - appeal dismissed (I, B, C, G)

**Visic v Proude** (SASCFC) - limitations - representative action commenced at time of filing summons - appeal dismissed (I, B, C, G)



**Eden Energy Ltd v Drivertrain USA Inc [No 2] (WASC)** – legal professional privilege – no waiver by pleadings or conduct (I, B)

## Summaries with links (5 minute read)

### **Knezevic v Perpetual Trustees Victoria Ltd [2013] NSWCA 199**

Court of Appeal of New South Wales

Basten, Meagher & Ward JJA

Loans and mortgages - unjust contract - misleading and deceptive conduct - appellant borrower defaulted on loan secured by mortgage - lender sought possession - borrower sought to set contract aside under *Contracts Review Act 1980* (NSW) or because lender's solicitor engaged in misleading and deceptive conduct - held: no error in primary judge's conclusion that contract not unjust - borrower not shown to be unable to reasonably assess and protect her interests - no dishonest or misleading conduct - in absence of evidence from borrower, she should be taken to have appreciated risks of entering loan including risk she would default and lose her property - appeal dismissed.

[Knezevic](#) (I, B)

### **Dungan v Chan [2013] NSWCA 182**

Court of Appeal of New South Wales

Ward, Emmett & Gleeson JJA

Negligence - road accident - pedestrian injured when hit by taxi on pedestrian crossing, having begun to cross when pedestrian light flashing red - appellant contended taxi driver had a duty to look carefully to see whether any pedestrians were still on pedestrian crossing and had he done so he would have avoided collision - held: no error by trial judge in concluding no breach of duty by driver - collision caused by pedestrian's ill-advised conduct - appeal dismissed.

[Dungan](#) (I)

### **Steele v Holmes [2013] NSWSC 875**

Supreme Court of New South Wales

Lindsay J

Real property - Torrens title - leases - plaintiff claimed entitlement to occupy property as a tenant for life - defendant was registered proprietor of estate in fee simple in strata title property -



plaintiff sought specific performance of alleged oral agreement for lease between her and successive predecessors in title of defendant by which defendant had allegedly agreed to abide - held: plaintiff's claim failed on the facts - agreements unenforceable under statute of frauds provisions of *Conveyancing Act 1919* (NSW) - summons dismissed.

[Steele](#) (B)

## **WTE Co-Generation v RCR Energy Pty Ltd [2013] VSC 314**

Supreme Court of Victoria

Vickery J

Building contract - stay - defendants applied pursuant to ss47 & 48 *Civil Procedure Act 2010* (Vic) or s30 *Supreme Court Act 1986* (Vic) and Court's inherent jurisdiction for stay of proceedings until parties complied with contractual dispute resolution clause - construction of contract - principles for determining whether stay should be granted where contract requires dispute resolution as a pre-condition to litigation - held: dispute resolution clause did not prescribe method for resolving dispute - not appropriate for Court to substitute own mechanism where parties failed to agree in contract - sub-clause amounted to an agreement to agree on process of dispute resolution and was not enforceable due to inherent uncertainty - stay refused.

[WTE Co-Generation](#) (I, B, C)

## **TCM Builders Pty Ltd v Nikou [2013] VSC 322**

Supreme Court of Victoria

Vickery J

Building contract - damages - builder instituted proceedings in Victorian Civil & Administrative Tribunal claiming balance of adjusted contract sum from property owners - property owners counterclaimed for defects - additional building professionals joined by counterclaim - owners settled with all professionals except builder - whether and to what extent settlements should be taken into account in assessing any residual liability of builder - builder contended settlements raised presumption that owners had been fully compensated for loss and damage claimed against it - onus of proof when defence of *double compensation* raised - held: owners did not receive compensation in respect of concurrent claims - builder failed to establish defence - appeal dismissed.

[TCM Builders](#) (I, B, C, G)

**Visic v Proude [2013] SASCF 62**

Full Court of the Supreme Court of South Australia

White, Peek & Stanley JJ

Limitation of actions – appeal against order under r81 *Supreme Court Civil Rules 2006* (SA) authorising plaintiff to bring representative action in respect of 2005 bushfire at Port Lincoln – time at which action of group members commenced for purposes of s35(c) *Limitation of Actions Act 1936* (SA) – primary judge found action commenced when plaintiff filed originating process - appellant contended action commenced when Court granted authorisation and that by filing summons plaintiff had only commenced personal action - held: there was only one action, which was the action brought as representative action in accordance with the Rules – r81 provided that action was commenced as representative action at time of filing summons - action was commenced within six year limitation period – appeal dismissed.

[Visic](#) (I, B, C, G)

**Eden Energy Ltd v Drivertrain USA Inc [No 2] [2013] WASC 249**

Supreme Court of Western Australia

Pritchard J

Legal professional privilege – waiver - discovery – plaintiff brought action for payment of amount under contract – defence and counterclaim included *knowing assistance* claim under second limb of *Barnes v Addy* - plaintiff sought production of document containing legal advice - defendants argued document was subject to legal professional privilege – plaintiff contended privilege waived by defendants – held: defendants' pleading and conduct not inconsistent with maintenance of confidentiality in advice - nothing in defence and counterclaim constituted express assertion about content of the legal advice or expressly laid the legal advice open to scrutiny – application dismissed.

[Eden Energy](#) (I, B)

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