

Thursday, 10 December 2015

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

 Follow @Benchmark\_Legal

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd (FCA)** - application for interlocutory injunction restraining respondent from having recourse to two bank guarantees refused

**Pitt Street Pty Ltd v Universal 1919 Pty Ltd (NSWCA)** - contract - landlord and tenant - independent valuer complied with lease - parties bound by determination - appeal and cross-appeal dismissed

**ACN 005 057 349 Pty Ltd v Commissioner of State Revenue (VSCA)** - taxation - limitations - refusal to refund excess payments made as result of assessments - dismissal of proceedings for judicial review and restitution at common law - appeal allowed in both proceedings

**The MCF Group Pty Ltd v Coleman (QCA)** - interlocutory injunction - refusal of relief in relation to claim for return of excavators - leave to appeal refused

**Carbone Bros Pty Ltd v Shire of Harvey (WASCA)** - environment and planning - Shire had power to impose conditions in planning consents requiring payment of road levies for use of land for 'extractive industries'

# Benchmark

## Summaries With Link (Five Minute Read)

### **Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd [2015] FCA 1371**

Federal Court of Australia

Besanko J

Interlocutory injunction - applicant sought interlocutory injunction restraining respondent from having recourse to two bank guarantees - guarantees related to certain claims by applicant against respondent and provided pursuant to subcontract between parties - guarantees given by applicant's banker - Australian Consumer Law - ss7, 8, 17, 21, 29, 99 & 100 *Building and Construction Industry Payments Act 2004* (Qld) - *Corporations Act 2001* (Cth) - held: Court not satisfied applicant established prima facie case - not unconscionable or breach of implied obligation to act in good faith for respondent to assert its legal rights under subcontract - application for interlocutory injunction refused.

[Fabtech](#)

### **122 Pitt Street Pty Ltd v Universal 1919 Pty Ltd [2015] NSWCA 390**

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Meagher JJA

Contract - landlord and tenant - lessor leased part of building to defendant lessee - lease was for term of 10 years with option for further 10 years - lessee exercised option - lease provided for market review of base rent upon exercise of option to renew - lessor proposed new base rent - lessee engaged rent dispute mechanism under lease resulting in appointment of independent valuer - valuer determined market rent approximately \$500,000 less than figure proposed by lessor - if valuer complied with lease by disregarding value of fitout parties accepted they were bound by determination - primary judge found valuer complied with lease - lessor challenged determination - whether primary judge erred in finding that "to take into account an obligation about 'Fitout Work' did not involve taking anything into account about 'fitout'" - whether primary judge erred in finding valuer disregarded value of the "fitout" - held: nothing in clause of lease or elsewhere in lease to suggest "the Tenant's Fixtures or fitout" included reference not only to premises' condition at relevant time but also to future work likely to be carried - lessor did not establish valuer took value of future work into account - appeal and cross-appeal dismissed.

[122 Pitt Street](#)

### **ACN 005 057 349 Pty Ltd v Commissioner of State Revenue [2015] VSCA 332**

Court of Appeal of Victoria

Hansen & Tate JJA; Robson AJA

Taxation - limitation of actions - applications for leave to appeal dismissal of two proceedings brought by appellant - one proceeding was for judicial review of Commissioner's determination not to refund excess payments made as result of assessments - other proceeding was for restitution at common law - question raised by appeal was whether, where Commissioner had

raised land tax liability under *Land Tax Act 1958* (Vic) twice for same landholding, excess payments could be recovered by proceeding for mandamus - held: Court answered question in affirmative - Commissioner's statutory power to ensure assessments of land tax were complete and accurate gave rise to duty to direct excess payments be repaid which could be enforced by mandamus - any relevant limitation period satisfied - Court allowed appeal in both proceedings  
[ACN 005 057 349 Pty Ltd](#)

## **The MCF Group Pty Ltd v Coleman [2015] QCA 268**

Court of Appeal of Queensland

Fraser & Morrison JJA; Boddice J

Interlocutory injunction - primary judge dismissed applicant's applications for relief in relation to claim for return of excavators it allegedly owned - primary judge ordered applicant to pay respondents' costs of applications - applicant sought leave to appeal - whether leave should be granted pursuant to s118(3) *District Court of Queensland Act 1967* (Qld) - whether primary Judge erred in concluding offered undertakings were of doubtful value - held: applicant did not demonstrate strong prospects of success - applicant did not establish substantial injustice - leave to appeal refused.

[The MFC Group](#)

## **Carbone Bros Pty Ltd v Shire of Harvey [2015] WASCA 248**

Court of Appeal of Western Australia

McLure P, Murphy JA & Corby J

Environment and planning - appeal concerned validity of conditions in planning consents requiring appellant to pay road levies for use of land in Shire for 'extractive industries' - appellant contended s6.15 *Local Government Act 1995* (WA) (LGA) was exhaustive statement of local government's source of power of to impose revenue or income raising obligation, that Shire's District Planning Scheme and Shire's Extractive Industries Local Law 2007 were not a source of power, that levies were fees or charges within Local Government Act to which s 6.17 applied, and that the levies were invalid because they were not struck in accordance with s6.17 - held: appellant's contentions rejected - Shire had power to impose conditions under Scheme - power wide enough to allow Shire to impose conditions requiring financial contributions to its revenue or income - appeal dismissed.

[Carbone](#)

[Click Here to access our Benchmark Search Engine](#)