

Friday, 4 December 2015

Weekly Construction Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea (NSWCA) - contract - bond deed poll - consequences of valuation not being binding on parties - appeal allowed - cross-appeal and notice of contention dismissed

Damien v JKAM Investments Pty Ltd (NSWCA) - contract - building work debt - identity of contracting party - assignment of debt - appeal dismissed

Vartuli v Chief Commissioner of State Revenue (NSWCA) - taxes and duties - cattle-farming business - rural lands used for primary production exemption - objections to land tax assessments disallowed - appeal dismissed

Saville v Hallmarc Construction Pty Ltd (VSCA) - security of payments - adjudicator's determination that appellant was within time when he purported to serve first payment claim void - appeal dismissed

Zweck v Town of Gawler (SASCFC) - environment and planning - refusal to determine application for development plan consent for division of land - limb of clause of land management agreement invalid - appeal allowed

Range Resources Ltd v Lind Asset Management LLC (WASCA) - corporations - statutory demand - sale of shares in appellant - no genuine dispute about amount of debt - off-setting claim not made - appeal dismissed

Summaries With Link (Five Minute Read)

International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea [2015] NSWCA 363

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Ward JJA

Contract - appellant (IPBC) issued Exchangeable Bonds to respondent (IPIC) - IPBC raised amount which it used to finance participation in gas project - terms and conditions of Bonds contained in Bond Deed Poll made by IPBC - Maturity Date of Bonds was 5 March 2014 - mature Bonds subject to mandatory exchange into ordinary shares in capital of company whose shares were listed on Australian Securities Exchange (ASX) - if, on Maturity Date, Principal Amount of Bonds being redeemed exceeded Current Market Value of all of the Shares, IPBC as Issuer was to pay to IPIC as Holder a Cash Settlement Amount equivalent to shortfall - conditions incorporated mechanism to determine Current Market Value of Shares - terms and conditions included procedure for parties to appoint Independent Valuer to assess market value and average of two valuations taken - IPBC issued an Alternative Valuation Notice (AVN) - parties each appointed an Independent Valuer - primary judge found AVN valid - valuation by Independent Valuer appointed by IPBC (RBC) was not binding - valuation by Independent Valuer appointed by IPIC binding - held: primary judge erred in findings as to consequence under Bond Deed of RBC valuation not being binding on parties due to manifest or proven error - appeal allowed - cross-appeal and notice of contention dismissed.

[International Petroleum](#)

[From Benchmark Friday, 27 November 2015]

Damien v JKAM Investments Pty Ltd [2015] NSWCA 368

Court of Appeal of New South Wales

Gleeson & Simpson JJA; Tobias AJA

Contract - building work debt - assignment - appeal arising from proceedings concerning property owned by appellant - different parties claimed interest in property - disputes determined by Darke J, who ordered separate determination of cross?claim brought by respondent and second cross?claim brought by appellant - Rein J entered judgment for respondent following set-off - identity of contracting entity - refusal of tender of email correspondence - post-contractual conduct - held: primary judge correct to reject tender of email correspondence - primary judge made permissible use of post contractual conduct - more than open to primary judge to find appellant contracted with company (ACPL) concerning building work - no error in finding appellant liable to respondent as assignee of debt from ACPL - appeal dismissed.

[Damien](#)

[From Benchmark Monday, 30 November 2015]

Vartuli v Chief Commissioner of State Revenue [2015] NSWCA 372

Court of Appeal of New South Wales

Meagher, Ward & Gleeson JJA

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Taxes and duties - exemption for rural lands used for primary production - appellants conducted cattle business on land - Chief Commissioner assessed appellant for land tax - appellants' objections to assessments disallowed - appellants sought review - primary judge rejected challenge to assessments - primary judge found that the requirement that primary production use of land have "a significant and substantial commercial purpose or character" pursuant to under s10AA(2)(a) *Land Tax Management Act 1956* (NSW) was not met - appellants appealed - ss585, 586, 587, 591, 594, 597 Local Government Act 1993 (NSW) - held: complaint misconceived that primary judge misconstrued decision in *Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 40 - contention rejected that test for significance or substantiality under s10AA(2)(a) required comparison with competitor farms - contention rejected concerning findings as to significance of minimal profits - finding that appellant's primary motivation was enjoyment of work open on evidence - finding in relation to lack of profitability open on evidence - no error in approach to historical profits - no error in considering alternative test under character limb of s10AA(2)(a) - appeal dismissed.

[Vartuli](#)

[From Benchmark Wednesday, 2 December 2015]

Saville v Hallmarc Construction Pty Ltd [2015] VSCA 318

Court of Appeal of Victoria

Warren CJ; Kaye & Tate JJA

Security of payments - judicial review of adjudication determination under *Building and Construction Industry Security of Payment Act 2002* (VSCA) - whether appellant was out of time when he purported to serve first payment claim - whether primary judge was correct to hold adjudicator's determination that appellant was within time was void - scope of reviewability of decision by adjudicator - held: fixing of reference date by adjudicator was reviewable - no error in primary judge's conclusion that reference date fixed by adjudicator was wrong and therefore adjudicator ought not to have assumed jurisdiction - no error in finding adjudication determination was of no legal effect - primary judge's reasons were adequate - appeal dismissed.

[Saville](#)

[From Benchmark Tuesday, 1 December 2015]

Zweck v Town of Gawler [2015] SASCF 172

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Nicholson JJ

Environment and planning - appellant appealed against Environment, Resources and Development Court's dismissal of his appeal against Corporation of the Town of Gawler's refusal to determine application for development plan consent for land division - land was subject of a land management agreement under s57 *Development Act 1993* (SA) which contained clause precluding division of land or any application for development authorisation to divide it - held: Environment Court had power to determine validity of clause and no discretion to decline to determine question - second limb of clause which prevent lodgement of application for development authorisation was invalid - first limb, which precluded division related to

“development of land” was valid - proposed development was not hypothetical such that Environment Court was entitled to refuse to consider it - appeal allowed - application remitted to Development Assessment Panel for determination.

[Zweck](#)

[From Benchmark Tuesday, 1 December 2015]

Range Resources Ltd v Lind Asset Management LLC [2015] WASCA 233

Court of Appeal of Western Australia

Newnes & Murphy JJA; Corboy J

Corporations - statutory demand - respondent advanced funds to appellant pursuant to a Varied Funding Agreement (VFA) - default occurred - respondent served demand on appellant under s459E *Corporations Act 2001* (Cth) - appellant contended respondent sold shares in appellant issued and delivered as security for advances and that there was genuine dispute about amount of debt claimed - held: Master correct to hold there was no genuine dispute about amount of debt - any claim by appellant regarding sale of shares could only be off-setting claim - however appellant did not contend it had an off-setting claim - appeal dismissed.

[Range](#)

[From Benchmark Thursday, 26 November 2015]

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The Song of the Ungirt Runners BY CHARLES HAMILTON SORLEY

We swing ungirded hips,
And lightened are our eyes,
The rain is on our lips,
We do not run for prize.
We know not whom we trust
Nor whitherward we fare,
But we run because we must
Through the great wide air.

The waters of the seas
Are troubled as by storm.
The tempest strips the trees
And does not leave them warm.
Does the tearing tempest pause?
Do the tree-tops ask it why?
So we run without a cause
'Neath the big bare sky.

The rain is on our lips,
We do not run for prize.
But the storm the water whips
And the wave howls to the skies.
The winds arise and strike it
And scatter it like sand,
And we run because we like it
Through the broad bright land.

[CHARLES HAMILTON SORLEY](#)

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