



Friday, 5 February 2016

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

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### Executive Summary (1 minute read)

**Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)** (FCAFC) - pleadings - refusal in part of permission to amend pleadings in separate proceedings - appeal dismissed

**Medallion Homes Pty Ltd v Lares Homes Pty Ltd** (FCA) - interlocutory injunction - consumer law - copyright - injunction restraining reproduction of floor plans and construction of display home refused

**Nightingale v Blacktown City Council** (NSWCA) - negligence - appellant injured when he stepped into depression in footpath - Council not liable - appeal dismissed

**Jobema Developments Pty Ltd v Zhu** (NSWSC) - real property - conveyancing - vendor refused permission to rescind off the plan contract for sale under sunset clause

**Metropolitan Fire and Emergency Services Board v Yarra City Council** (VSC) - environment and planning - negligence - entitlement to compensation - separate question - Court could order defendant to compensate plaintiff

**Zwiersen v Field & Hall Pty Ltd** (VSC) - negligence - contribution proceedings - apportionment of liability between employer and manufacturers/suppliers for contraction of mesothelioma in course of employment

**Milburn Lake Pty Ltd v Andritz Pty Ltd** (VSC) - security of payments - injunction granted in relation to determination of adjudication application

**ELS v Countrywide Nominees Pty Ltd (WASCA)** - negligence - slip and fall - CCTV footage did not 'incontrovertibly' contradict primary judge's findings of fact - appeal dismissed

## Summaries With Link (Five Minute Read)

### **Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2**

Full Court of the Federal Court of Australia

Gilmour, Perram & Beachy JJ

Pleadings - corporations - appellants appealed against refusal in part of applications to amend pleadings in separate proceedings - appellants contended exercise of primary judge's discretion miscarried, that primary judge failed to accord procedural fairness and that primary judge erred in finding that claim under s1041E *Corporations Act 2001* (Cth) liable to be struck out - ss37M & 37N *Federal Court of Australia Act 1976* (Cth) - rr8.21(1) & 16.53 *Federal Court Rules 2011* (Cth) - held: primary judge erred in finding appellant failed to explain importance of amendments but this was a minor error not material to outcome - even if Court obliged to exercise discretion it would not have done so differently - primary judge plainly correct in conclusions - appeal dismissed.

[Tamaya](#)

[From Benchmark Wednesday, 3 February 2016]

### **Medallion Homes Pty Ltd v Lares Homes Pty Ltd [2016] FCA 12**

Federal Court of Australia

Besanko J

Interlocutory injunction - consumer law - copyright - corporations - applicant sought interlocutory injunction restraining respondents from reproducing floor plans and constructing display home - applicant contended respondents copied its plans and also sought to restrain respondents from making allegedly misleading or deceptive representations on website and promotional material - *Australian Consumer Law* - s35 *Copyright Act 1968* (Cth) - *Corporations Act 2001* (Cth) - prima facie case - balance of convenience - held: applicant's causes of action failed to support grant of interlocutory injunction - balance of convenience in respondents' favour - application dismissed.

[Medallion](#)

[From Benchmark Tuesday, 2 February 2016]

### **Nightingale v Blacktown City Council [2015] NSWCA 423**

Court of Appeal of New South Wales

Beazley P; Basten, Macfarlan, Meagher & Simpson JJA

Negligence - appellant injured when he stepped into depression in footpath - appellant sued Council in negligence - trial judge dismissed claim on basis appellant failed to prove Council as "roads authority", had "actual knowledge of "particular risk the materialisation of which resulted in the harm" - provision in s45 *Civil Liability Act 2002* (NSW) that roads authority "not liable" if

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the harm arose from “a failure of the authority to carry out road work, or to consider carrying out road work” - “actual knowledge” - whether majority view in *North Sydney Council v Roman* [2007] NSWCA 27 correct - whether Council liable because it conducted inspections negligently - principle of restraint in relation to departure from previous authority - held: *Roman* should remain binding - no basis for inference that Council’s officers about whom evidence was led and with relevant knowledge for purposes of test in *Roman* had “actual knowledge” of relevant risk - immunity in s45 applied because failure to repair footpath caused injury - appeal dismissed.

[Nightingale](#)

[From Benchmark Wednesday, 3 February 2016]

## **Jobema Developments Pty Ltd v Zhu [2016] NSWSC 3**

Supreme Court of New South Wales

Black J

Real property - conveyancing - plaintiff vendor sought order under 66ZL *Conveyancing Act 1919* (NSW) permitting it to rescind off the plan contract for sale with fourth defendant under sunset clause - ss15, 16, 66ZL, 66ZL(4), 66ZL(6) & 66ZL(7) - *Conveyancing Amendment (Sunset Clauses) Act 2015* (NSW) - “sunset date” - whether just and equitable to grant leave - whether purchaser consented to rescission - whether plaintiff acted unreasonably or in bad faith - reason for delay in creating subject lot - effect of rescission on purchaser - whether reasons for rescission established - held: permission to rescind contract refused - application dismissed.

[Jobema](#)

[From Benchmark Tuesday, 2 February 2016]

## **Metropolitan Fire and Emergency Services Board v Yarra City Council [2015] VSC 773**

Supreme Court of Victoria

Riordan J

Environment and planning - negligence - plaintiff acquired site from State - plaintiff claimed compensation and damages against first defendant arising from remediation of contamination on site - preliminary issue of plaintiff’s entitlement to compensation and damages - whether defendant liable for breaches of alleged duties of care and provisions of *Environment Protection Act 1970* (Vic) - whether bluestone pit found on site was storage tank previously used by City for storing coal tar - liability pursuant to s62A(2) - disclosure duty - demolition duty - non-pollution duty - planning duty - statutory duty in s45(1) - causation - held: s62A(2) provided occupier who incurred costs complying with clean up notice could claim compensation from certain persons - defendant was person described in ss62A(1)(b) & (c) - Court could order defendant to compensate plaintiff - plaintiff did not establish any other causes of action.

[Metropolitan](#)

[From Benchmark Monday, 1 February 2016]

## **Zwiersen v Field & Hall Pty Ltd [2016] VSC 16**

Supreme Court of Victoria

Rush J

Negligence - contribution proceedings - joint tortfeasors - plaintiff electrician claimed damages for contraction of mesothelioma in course of employment due to negligent exposure to asbestos - defendants conceded breach of duty of care - plaintiff settled claim against first., second and fourth defendants - first, third and fourth defendants sought contribution against each other pursuant to Pt IV *Wrongs Act 1958* (Vic) - parties' respective responsibilities - apportionment between first defendant employer, and third and fourth defendant manufacturers/suppliers - contribution - held: in relation to culpability, third and fourth defendants, as compared to first defendant, should share more significant contribution on apportionment - first, third and fourth defendants liable for contraction of mesothelioma - liability apportioned in amounts of 20% for first defendant, 40% for third defendant and 40% for fourth defendant.

[Zwiersen](#)

[From Benchmark Wednesday, 3 February 2016]

### **Milburn Lake Pty Ltd v Andritz Pty Ltd [2016] VSC 3**

Supreme Court of Victoria

J Forrest J

Injunction - security of payments - parties in dispute over construction of mill - two payment claims made by plaintiff under *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act') - plaintiff sought injunction in relation to second adjudication determination - plaintiff contended adjudicator erred in determination and sought to prevent enforcement of determination - Div 2B, ss3 & 28 - ability of defendant to obtain adjudication certificate under s28Q which would enable enforcement of judgment - held: Court satisfied there was serious question to be tried - balance of convenience favoured granting to injunction on terms that money be paid into Court or agreed managed fund.

[Milburn](#)

[From Benchmark Wednesday, 3 February 2016]

### **ELS v Countrywide Nominees Pty Ltd [2016] WASCA 4**

Court of Appeal of Western Australia

Buss, Murphy & Mazza JJA

Negligence - appellant claimed she slipped on oil deposited by cooking station which respondent used to cook products offered to shoppers - appellant claimed respondent negligently allowed oil to drop and negligently failed to properly clean it - primary judge dismissed claim - appellant contended CCTV footage incontrovertibly demonstrated findings on cause of slip and fall were erroneous. s79 *District Court of Western Australia Act 1969* (WA) - s79C *Evidence Act 1906* (WA) - s58 *Supreme Court Act 1935* (WA) - held: CCTV footage did not 'incontrovertibly' contradict primary judge's findings of fact - primary judge's findings were amply justified - findings not 'glaringly improbable' or 'contrary to compelling inferences' - appeal dismissed.

[ELS](#)

[From Benchmark Tuesday, 2 February 2016]



# Benchmark

## **The Grasshopper**

BY RICHARD LOVELACE

To My Noble Friend, Mr. Charles Cotton

O thou that swing'st upon the waving hair  
Of some well-fillèd oaten beard,  
Drunk every night with a delicious tear  
Dropped thee from heaven, where now th' art reared;

The joys of earth and air are thine entire,  
That with thy feet and wings dost hop and fly;  
And, when thy poppy works, thou dost retire  
To thy carved acorn-bed to lie.

Up with the day, the sun thou welcom'st then,  
Sport'st in the gilt-plats of his beams,  
And all these merry days mak'st merry men,  
Thyself, and melancholy streams.

But ah, the sickle! Golden ears are cropped;  
Ceres and Bacchus bid good night;  
Sharp, frosty fingers all your flowers have topped,  
And what scythes spared, winds shave off quite.

Poor verdant fool, and now green ice! thy joys,  
Large and as lasting as thy perch of grass,  
Bid us lay in 'gainst winter rain, and poise  
Their floods with an o'erflowing glass.

Thou best of men and friends! we will create  
A genuine summer in each other's breast,  
And spite of this cold time and frozen fate,  
Thaw us a warm seat to our rest.

Our sacred hearths shall burn eternally,  
As vestal flames; the North Wind, he  
Shall strike his frost-stretched wings, dissolve, and fly  
This Etna in epitome.

Dropping December shall come weeping in,  
Bewail th'usurping of his reign:  
But when in showers of old Greek we begin,  
Shall cry he hath his crown again!



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Night, as clear Hesper, shall our tapers whip  
From the light casements where we play,  
And the dark hag from her black mantle strip,  
And stick there everlasting day.

Thus richer than untempted kings are we,  
That, asking nothing, nothing need:  
Though lords of all what seas embrace, yet he  
That wants himself is poor indeed.?

[RICHARD LOVELACE](#)

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