

Friday, 11 March 2016

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Victoria v Tatts Group Ltd (HCA) - contract - Tatts not entitled to terminal payment from State under agreement - State's appeal allowed

Tabcorp Holdings Ltd v Victoria (HCA) - statutory interpretation - Tabcorp not entitled to terminal payment provided for in s4.3.12(1) *Gambling Regulation Act 2003* (Vic) - appeal dismissed

Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) (UKSC) - negligence - home-carer injured when she slipped on snow-covered icy foot path outside client's house - employer's failure to provide footwear attachments was breach of *Personal Protective Equipment at Work Regulations 1992* and negligence at common law - appeal allowed

JR Consulting & Drafting Pty Limited v Cummings (FCAFC) - contract - copyright - ownership and control of software used in design and manufacture of items used in construction of buildings - appeal dismissed - cross-appeal allowed in part

Barrak Corporation Pty Ltd v Jaswil Properties Pty Ltd (NSWCA) - contract for sale of land - vendor not entitled to terminate contract for purchaser's breach of essential time stipulation - appeal dismissed - cross-appeal allowed

ANZ v Loftus (VSC) - mortgage - fraud - bank could enforce judgment debt against mortgagor - mortgage was valid - bank's security interest not defeasible for fraud

Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd (VSCA) - contract - farm lease extensively amended before execution - liability for costs of rates taxes assessments and outgoings levied on landlord - ambiguity - construction of lease - appeal allowed

Rankilor v City of South Perth (WASCA) - negligence - trip and fall on protruding paver - no breach of duty of care by City - appeal dismissed

Summaries With Link (Five Minute Read)

Victoria v Tatts Group Ltd [2016] HCA 5

High Court of Australia

French CJ; Kiefel, Bell, Keane & Gordon JJ

Contract - appeal concerning parties' entry into agreement in 1995 after privatisation of TAB - agreement provided for terminal payment to be made to respondent (Tatts) "[i]f the Gaming Operator's Licence expires without a new gaming operator's licence having issued to [Tatts]" - whether Tatts entitled to payment under clause of agreement due to State's allocation of gaming machine entitlements under *Gambling Regulation Act 2003* (Vic) - meaning of "new gaming operator's licence" in clause of agreement - held: "new gaming operator's licence" meant a gaming operator's licence granted under Pt 3 *Gaming Machine Control Act 1991* (Vic) - a "new gaming operator's licence" was never issued - respondent not entitled to payment under clause of agreement - appeal allowed.

[Victoria](#)

[From Benchmark Friday, 4 March 2016]

Tabcorp Holdings Ltd v Victoria [2016] HCA 4

High Court of Australia

French CJ; Kiefel, Bell, Keane & Gordon JJ

Statutory interpretation - appellant (Tabcorp) claimed entitlement to terminal payment under s4.3.12(1) *Gambling Regulation Act 2003* (Vic) - Tabcorp contended allocation of gambling machine entitlements was "grant of new licences" under of s4.3.12(1) as the entitlements were "substantially similar" to Tabcorp's licences - meaning of "grant of new licences" in s4.3.12(1) - statutory construction - held: "grant of new licences" meant "grant of wagering licence and gaming licence" issued under Pt 3 of Ch 4 *Gambling Regulation Act 2003* (Vic) - Tabcorp not entitled to terminal payment - appeal dismissed.

[Tabcorp](#)

[From Benchmark Friday, 4 March 2016]

Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] UKSC 6

Supreme Court of the United Kingdom

Lady Hale, Deputy President; Lord Wilson, Lord Reed, Lord Toulson & Lord Hodge

Negligence - appellant employed by respondent as home carer - appellant injured wrist when

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she slipped on sloping public footpath covered in snow overlying ice outside client's house - appellant was wearing flat boots with ridged soles when she slipped and fell - employer's duty of care - risk assessments - precautions - causation - admissibility of expert evidence on health and safety practice - held: employer's failure to provide footwear attachments to appellant constituted both a breach of *Personal Protective Equipment at Work Regulations 1992* and negligence at common law - appeal allowed.

[Kennedy](#)

[From Benchmark Wednesday, 9 March 2016]

JR Consulting & Drafting Pty Limited v Cummings [2016] FCAFC 20

Full Court of the Federal Court of Australia

Bennett, Greenwood & Besanko JJ

Contract - proceedings relating to ownership and control of software used in design and manufacture of items used in construction of buildings - primary judge determined Deed of Agreement between first appellant and first respondent abandoned and termination of licence agreement between second appellant and second respondent invalid - construction of contract - doctrine of abandonment - principles in relation to copyright in computer software - ss236, 237 *Australian Consumer Law* - ss10(1), 13(2), 14(1), 22(1), 29(1) & (2), 31(1), 32(1) and (2), 36(1), 36(1A), 115 & 135AQ(2) *Copyright Act 1968* (Cth) - s126 *Trade Marks Act 1995* (Cth) - appeal dismissed - cross-appeal allowed to extent of variation of restraint orders and declaration to be made.

[JR Consulting](#)

[From Benchmark Monday, 7 March 2016]

Barrak Corporation Pty Ltd v Jaswil Properties Pty Ltd [2016] NSWCA 32

Court of Appeal of New South Wales

Beazley P; Sackville & Emmett AJJA

Conveyancing - equity - appellant vendor and respondent purchaser entered contract for sale of land - agreed completion date passed - vendor issued notice to complete with time of the essence - vendor failed to provide transfer pursuant to s27 *Corporations Act 2001* (Cth) at settlement - vendor served notice of termination on purchaser - purchaser sought specific performance and damages for delay - primary judge held contract validly terminated for breach of essential time stipulation but ordered equitable relief in purchaser's favour - vendor appealed against grant of equitable relief to purchaser and sought declaration contract terminated and vendor entitled to forfeit deposit - purchaser sought declaration that contract was not terminated and remittal of matter for determination of damages - "preventing principle" - held: a vendor who failed to provide transfer to purchaser in registrable form was not willing and able to complete - a vendor not willing and able to complete was not entitled to terminate for failure of purchaser to complete - vendor's termination was invalid - appeal dismissed - cross-appeal allowed.

[Barrak](#)

[From Benchmark Tuesday, 8 March 2016]

ANZ v Loftus [2016] VSC 58

Supreme Court of Victoria
Cameron J

Mortgage - fraud - defendant was registered proprietor of property - defendant defaulted on repayment pursuant to loan agreement with plaintiff bank - bank sought possession of property alleging that defendant agreed to grant registered mortgage over property as security - defendant contended he never signed mortgage, that signature was forged and bank's mortgage security was defeasible - Associate judge found in favour of bank and ordered payment of judgment debt - whether mortgage procured by fraud - whether bank could enforce judgment debt over property in reliance on mortgage - ss42, 76 & 78. *Transfer of Land Act 1958* (Vic) - held: bank could enforce judgment debt - mortgage was valid - bank's security interest not defeasible for fraud - judgment for bank.

[ANZ](#)

[From Benchmark Friday, 4 March 2016]

Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd [2016] VSCA 23

Court of Appeal of Victoria
Santamaria, Kyrou & McLeish JJA

Contract - farm lease - printed standard form 'farm lease' extensively amended before execution - lease entered in 1988 between company as landlord and Mr Morris as tenant - lease granted for 99 years - entire rental paid at lease's commencement - respondent acquired leasehold reversion - Mr Morris assigned and transferred term of lease to appellant - respondent sought payment of money for accrued rates taxes assessments and outgoings - appellant appealed against decision in which primary judge construed clause of lease in respondent's favour - ambiguity - parts of lease struck out but which were legible in executed document - held (by majority): appellant succeeded in contesting primary judge's interpretation of clause of lease - appeal allowed.

[Gee Dee](#)

[From Benchmark Tuesday, 8 March 2016]

Rankilor v City of South Perth [2016] WASCA 29

Court of Appeal of Western Australia
Buss, Newnes & Murphy JJA

Negligence - appellant injured when she fell after tripping on protruding paver - appellant sued respondent for failure to maintain footpath to prevent tree roots from lifting the pavers - ss5B & 5Z *Civil Liability Act 2002* (WA) - ss9.56 & 9.57 *Local Government Act 1995* (WA) - s5(4)(a) *Occupiers' Liability Act 1985* (WA) - primary judge dismissed claim - held: open to primary judge to find respondent did not breach duty of care - appeal dismissed.

[Rankilor](#)

[From Benchmark Thursday, 3 March 2016]



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Aspens

BY EDWARD THOMAS

All day and night, save winter, every weather,
Above the inn, the smithy, and the shop,
The aspens at the cross-roads talk together
Of rain, until their last leaves fall from the top.

Out of the blacksmith's cavern comes the ringing
Of hammer, shoe, and anvil; out of the inn
The clink, the hum, the roar, the random singing—
The sounds that for these fifty years have been.

The whisper of the aspens is not drowned,
And over lightless pane and footless road,
Empty as sky, with every other sound
Not ceasing, calls their ghosts from their abode,

A silent smithy, a silent inn, nor fails
In the bare moonlight or the thick-furred gloom,
In tempest or the night of nightingales,
To turn the cross-roads to a ghostly room.

And it would be the same were no house near.
Over all sorts of weather, men, and times,
Aspens must shake their leaves and men may hear
But need not listen, more than to my rhymes.

Whatever wind blows, while they and I have leaves
We cannot other than an aspen be
That ceaselessly, unreasonably grieves,
Or so men think who like a different tree.

[BY EDWARD THOMAS](#)

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