

Friday, 13 November 2015

Weekly Construction Law Review 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)

Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel (SCC) - trusts - liens - interaction between statutory remedies of construction liens and statutory trusts in provincial legislation - trust and lien provisions existed separately and could be concurrently pursued - appeal dismissed

TriCare (Hastings) Ltd v Allen (NSWCA) - competency of appeal - appeal misconceived and incompetent because brought against reasons, not "judgment or order" - appeal dismissed

Haixing Group Pty Ltd v Chan (NSWSC) - real property - contract - no serious question to be tried that plaintiff validly exercised call option under deed - no order for extension of operation of caveat - leave not granted to lodge further caveat

Re Hammond (VSC) - real property - modification of restrictive covenant to remove singular expression and replace it plurally

Nichols v Earth Spirit Home Pty Ltd (QCA) - building contract - no error in decision that oral building contract was enforceable - leave to appeal granted - appeal dismissed

Commissioner of State Taxation v T & S Liapis Pty Ltd (SASCFC) - land tax - respondent entitled to primary producer exemption under *Land Tax Act 1936 (SA)* - appeal dismissed

Summaries With Link (Five Minute Read)

Stuart Olson Dominion Construction Ltd. v. Structural Heavy Steel, 2015 SCC 43

Supreme Court of Canada

McLachlin C.J. and Rothstein, Cromwell, Moldaver, Wagner, Gascon & Côté JJ

Trusts - liens - appellant was general contractor - respondent was subcontractor for construction project - respondent filed builder's lien against property on which work being done - appellant filed lien bond in amount of respondent's claim and sought declaration it had satisfied its trust obligations - respondent sought payment of its past-due invoices upon appellant receiving funds from owner - Court of Appeal overturned decision of motion judge that security in form of lien bond extinguished appellant's trust obligations pursuant to *Manitoba Builders' Liens Act* - Court of Appeal concluded subcontractors had two rights to sue for breach of contract beyond common law right: right to statutory trust and right to file lien - interaction of statutory remedies of construction liens and statutory trusts in provincial legislation - held: trust and lien provisions independent and could be pursued concurrently under s66 - lien bond secured contractor's or subcontractor's lien claim and did not extinguish obligations under statutory trust - filing of lien bond did not affect existence and application of trust remedy - appeal dismissed.

[Stuart Olson Dominion](#)

[From Benchmark Wednesday, 11 November 2015]

TriCare (Hastings) Ltd v Allen [2015] NSWCA 344

Court of Appeal of New South Wales

Ward & Simpson JJA; Tobias AJA

Competency of appeal - NSW Civil and Administrative Tribunal (NCAT) terminated residential site agreements concerning respondent's relocatable dwellings under s113 *Residential Parks Act 1998* (NSW) (the Act) and granted appellant vacant possession of land on which dwellings located - NCAT awarded respondents compensation pursuant to s128 - respondents sought judicial review of NCAT's findings - appellant sought to challenge primary judge's obiter observations concerning construction of s130A regarding valuation of dwellings - appellant also sought variation of primary judge's remittal order in light of its construction of s130A - s101(1)(a) *Supreme Court Act 1970* (NSW) - held: appeal misconceived and incompetent because it was brought against reasons not "judgment or order" - appeal dismissed as incompetent.

[TriCare](#)

[From Benchmark Wednesday, 11 November 2015]

Haixing Group Pty Ltd v Chan [2015] NSWSC 1637

Supreme Court of New South Wales

Darke J

Real property - contract - parties entered Deed of Put and Call Option in respect of property - defendant registered proprietor entered deed as grantor - plaintiff entered deed as grantee - deed provided call option granted by defendant to plaintiff in respect of property in consideration of call option fee - after deed made plaintiff lodged caveat over the Property claiming an interest as grantee of option - plaintiff purported to exercise the call option - defendant disputed plaintiff validly exercised call option - defendant served notice of proposed lapsing of caveat - plaintiff

sought declaratory relief that it validly exercised call option and defendant bound by contract attached to deed - plaintiff also sought extension of operation of caveat or leave to lodge further caveat claiming interest as holder of purchaser's lien - whether serious question to be tried that plaintiff validly exercised call option - s74K *Real Property Act 1900* (NSW) - construction of deed - held: there was not a serious question to be tried that plaintiff validly exercised call option - Court not satisfied plaintiff's claimed interest in property as grantee had or may have substance within meaning of s74K(2) - no order for extension of operation of caveat - leave not granted to lodge further caveat.

[Haixing](#)

[From Benchmark Monday, 9 November 2015]

Re Hammond [2015] VSC 608

Supreme Court of Victoria

Mukhtar AsJ

Real property - restrictive covenant - purchaser of land in residential subdivision made restrictive covenant not to erect any building on land other than 'a' private dwelling house - plaintiff successors to covenantor sought under s 84(1)(c) *Property Law Act 1958* (Vic) to modify covenant to remove singular expression and replace it plurally with 'any buildings other than private dwelling houses' - plaintiffs contended modification would not substantially injure persons entitled to restriction's benefit - held: no substantial injury would be caused by covenant being modified - order made modifying covenant by replacing the expression 'any building other than a private dwelling house of stone or brick' with the expression 'any buildings other than private dwelling houses' - application granted.

[Re Hammond](#)

[From Benchmark Monday, 9 November 2015]

Nichols v Earth Spirit Home Pty Ltd [2015] QCA 219

Court of Appeal of Queensland

M McMurdo P, Philipides JA & Boddice J

Building contract - applicant sought leave to appeal against Queensland Civil and Administrative Tribunal decision to uphold enforcement of oral building contract between applicant and respondent - respondent sought to support decision on basis it was entitled to recover judgment sum on restitutionary basis - whether wholly oral building contract enforceable under provisions of *Queensland Building and Construction Commission Act 1991* (Qld) and public policy - ss67E(2) & 67G - held: Appellate Tribunal correctly found oral contract not unenforceable due to fact respondent committed offence by entering building contract which was not reduced to writing - Appeal Tribunal also correctly found nothing in s67E(2) required finding that contract was unenforceable - no good reasons of public policy to support conclusion contract unenforceable - leave to

[Nichols](#)

[From Benchmark Tuesday, 10 November 2015]

Commissioner of State Taxation v T & S Liapis Pty Ltd [2015] SASCFC 151



Full Court of the Supreme Court of South Australia

Gray, Sulan & Stanley JJ

Land tax - respondent owned land - respondent subdivided land - some hectares subdivided into residential lots - remaining hectares used as olive grove - all but one residential lot sold - respondent's shareholder worked full time on olive grove - respondent sold olives and olive oil from olive grove cultivated with respondent's machinery - significant earthworks and grafting had taken place to enable grove's expansion - primary judge allowed appeal against land tax assessment in respect of olive grove - held: primary judge correct to conclude respondent was conducting business of primary production and that shareholder was engaged in business on substantially full time basis - primary judge did not err in construction of s5(10)(g)(vi)(A) *Land Tax Act 1936* (SA) - respondent entitled to primary producer exemption under s5(10)(g)(vi) - appeal dismissed.

[Commissioner of State Taxation](#)

[From Benchmark Thursday, 5 November 2015]



Benchmark

The Lake Isle of Innisfree

BY WILLIAM BUTLER YEATS

I will arise and go now, and go to Innisfree,
And a small cabin build there, of clay and wattles made;
Nine bean-rows will I have there, a hive for the honey-bee,
And live alone in the bee-loud glade.

And I shall have some peace there, for peace comes
dropping slow,
Dropping from the veils of the morning to where the cricket
sings;
There midnight's all a glimmer, and noon a purple glow,
And evening full of the linnet's wings.

I will arise and go now, for always night and day
I hear lake water lapping with low sounds by the shore;
While I stand on the roadway, or on the pavements grey,
I hear it in the deep heart's core.

[WILLIAM BUTLER YEATS](#)

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