



Friday, 16 October 2015

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

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Executive Summary (1 minute read)

Alcan Gove Pty Ltd v Zabic (HCA) - limitations - negligence - claim for damages for mesothelioma caused by inhalation of asbestos fibres - cause of action accrued before provisions of *Workers Rehabilitation and Compensation Act* (NT) came into force - respondent's cause of action not statute-barred - appeal dismissed

McCloy v New South Wales (HCA) - constitutional law - special case - implied freedom of communication on governmental and political matters - validity of provisions of *Election Funding, Expenditure and Disclosures Act 1981* (NSW) upheld

Kessly v Hasapaki (NSWCA) - contempt - not open to trial judge to make declaration of contempt in appellant's absence when he had previously indicated intention to make practical orders - appeal allowed

Wang v Kaymet Corporation Pty Ltd (NSWSC) - contract - purchase of units "off the plan" - draft Strata Documents not registered by date for Registration - vendors did not fail to use "reasonable endeavours"- vendors entitled to rescind contracts - proceedings dismissed

NRW Pty Ltd as Trustee for NRW Unit Trust v Samsung C & T Corporation (WASC) - construction contract - determination that Samsung pay amount to NRW- certiorari refused - leave to enforce determination granted

Summaries With Link (Five Minute Read)

Alcan Gove Pty Ltd v Zabic [2015] HCA 33

High Court of Australia

French CJ; Keifel, Bell, Keane & Nettle JJ

Limitations - respondent claimed damages in negligence for mesothelioma caused by inhalation of asbestos fibres in course of employment with appellant between 1974 and 1977 -- substantive provisions of *Workers Rehabilitation and Compensation Act (NT)*, which abolished common law actions in negligence for workplace injuries and provided limited statutory rights to compensation, came into force on 1 January 1987 - if respondent's cause of action accrued on or after 1 January 1987 it would be statute-barred - judge at first instance found cause of action did not accrue until after 1 January 1987 - Court of Appeal of the Northern Territory reversed decision - hindsight - nature of trigger - whether risk of mesothelioma sufficient to constitute compensable damage - held: Court of Appeal correct to find it was possible to say with benefit of hindsight that respondent's mesothelial cells so damaged shortly after respondent inhaled asbestos fibres between 1974 and 1977 as to lead to onset of malignant mesothelioma "inevitably and inexorably" - Court of Appeal correct to find damage done to the mesothelial cells shortly after inhalation was non-negligible compensable damage sufficient to found cause of action and malignant mesothelioma was part of damage arising in accrued cause of action - appeal dismissed.

[Alcan](#)

[From Benchmark Thursday, 8 October 2015]

McCloy v New South Wales [2015] HCA 34

High Court of Australia

French CJ; Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ

Constitutional law - special case - implied freedom of communication on governmental and political matters - plaintiffs contended provisions of *Election Funding, Expenditure and Disclosures Act 1981 (NSW)* which imposed cap on political donations, prohibited property developers from making donations, and restricted indirect campaign contributions, were invalid because they infringed freedom of political communication on governmental and political matters implied by Australian Constitution - Pt 6, Divs 2A, 4A, s96E- ss7, 24, 62, 64, 128 Constitution - held: Court upheld provisions' validity - challenged provisions did not impose impermissible burden on the implied constitutional freedom - burdens imposed by donation caps in Div 2A not impermissible - anti-avoidance provision in s96E upheld on basis its validity depended on validity of Div 2A - prohibition on donations by property developers in Div 4A valid.

[McCloy](#)

[From Benchmark Thursday, 8 October 2015]

Kessly v Hasapaki [2015] NSWCA 316

Court of Appeal of New South Wales

Basten & Macfarlan JJA; Sackville AJA

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Contempt - appellant sued respondent neighbour in Land and Environment Court after realising respondent's home encroached on her land - consent orders made pursuant to which appellant agreed to grant easement to respondent in return for payment of amount - respondent sought to have appellant committed for contempt of court for not complying with the orders - appellant sought adjournment application on basis she could not attend hearing of motion due to a recent operation - trial judge refused application and found appellant guilty of contempt - appellant appealed - s94 Civil Procedure Act 2005 (NSW) - s57 *Land and Environment Court Act 1979* (NSW), held: no error in the refusal of adjournment application but not open to trial judge to make declaration of contempt in appellant's absence, after he had previously indicated an intention to make practical orders which did not involve such a declaration - appeal allowed - declaration of contempt and costs orders set aside.

[Kessly](#)

[From Benchmark Tuesday, 13 October 2015]

Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 145

Supreme Court of New South Wales

Stevenson J

Contract - plaintiff purchasers exchanged contracts with defendant vendors for purchase of units "off the plan" - contracts contained clause requiring completion 21 days after date on which defendants served notice of registration of strata plan on purchaser's solicitors - contracts also contained condition that defendants use "reasonable endeavours" to register "draft Strata Documents" by the "Date for Registration" - contracts provided that either party could rescind if "for any reason" draft Strata Documents not registered by the Date for Registration - draft Strata Documents not registered by the Date for Registration or at all - defendants purported to rescind contracts - whether defendants were entitled to rescind - whether defendants used their reasonable endeavours to register draft Strata Documents by Date for Registration - held: plaintiffs established development delayed for want of reasonable endeavours by defendants' in certain period in relation to piling but delay did not cause defendants to fail to register draft Strata Documents by Dates for Registration - plaintiffs failed to establish relevant breach of clause of contracts, nor that defendants were not entitled to rescind contracts - proceedings dismissed

[Wang](#)

[From Benchmark Thursday, 8 October 2015]

NRW Pty Ltd as Trustee for NRW Unit Trust v Samsung C & T Corporation [2015] WASC 369

Supreme Court of Western Australia

Mitchell J

Judicial review - construction contract - Samsung sought to quash adjudicator's determination under *Construction Contracts Act 2004* (WA) that Samsung amount to NRW - held: payment dispute arose when Samsung disputed payment claim made by NRW - adjudication application made within permissible time - adjudicator determined merits of dispute by reference to terms of construction contract - any error by adjudicator in construing certain contractual provisions was

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no more than misconstruction of construction contract and error within adjudicator's jurisdiction - Samsung's claimed set offs did not provide valid reason to refuse leave to enforce determination - certiorari refused - leave to enforce determination granted.

[NRW](#)

[From Benchmark Friday, 9 October 2015]

La Belle Dame sans Merci: A Ballad

By John Keats

O what can ail thee, knight-at-arms,
Alone and palely loitering?
The sedge has withered from the lake,
And no birds sing.

O what can ail thee, knight-at-arms,
So haggard and so woe-begone?
The squirrel's granary is full,
And the harvest's done.

I see a lily on thy brow,
With anguish moist and fever-dew,
And on thy cheeks a fading rose
Fast withereth too.

I met a lady in the meads,
Full beautiful—a faery's child,
Her hair was long, her foot was light,
And her eyes were wild.

I made a garland for her head,
And bracelets too, and fragrant zone;
She looked at me as she did love,
And made sweet moan

I set her on my pacing steed,
And nothing else saw all day long,
For sidelong would she bend, and sing
A faery's song.

She found me roots of relish sweet,
And honey wild, and manna-dew,
And sure in language strange she said—



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'I love thee true'.

She took me to her Elfin grot,
And there she wept and sighed full sore,
And there I shut her wild wild eyes
With kisses four.

And there she lullèd me asleep,
And there I dreamed—Ah! woe betide!—
The latest dream I ever dreamt
On the cold hill side.

I saw pale kings and princes too,
Pale warriors, death-pale were they all;
They cried—'La Belle Dame sans Merci
Thee hath in thrall!'

I saw their starved lips in the gloam,
With horrid warning gapèd wide,
And I awoke and found me here,
On the cold hill's side.

And this is why I sojourn here,
Alone and palely loitering,
Though the sedge is withered from the lake,
And no birds sing.

[John Keats](#)

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