

Friday, 18 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)

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate (HCA) - civil penalties - adjournment of proceedings - Court not precluded from receiving and accepting civil penalty submission - appeals allowed

Pitt Street Pty Ltd v Universal 1919 Pty Ltd (NSWCA) - contract - landlord and tenant - independent valuer complied with lease - parties bound by determination - appeal and cross-appeal dismissed

NSW Commissioner of Police v Folkes (NSWSC) - public assembly and procession - holding of public assembly prohibited pursuant to s25(1) *Summary Offences Act 1988* (NSW)

Chan v Acres (NSWSC) - negligence - damages - purchase of renovated house with serious defects - breach of statutory warranties by vendor - breach of duty of care by Council - apportionment

ACN 005 057 349 Pty Ltd v Commissioner of State Revenue (VSCA) - taxation - limitations - refusal to refund excess payments made as result of assessments - dismissal of proceedings for judicial review and restitution at common law - appeal allowed in both proceedings

Kalabakas v Chubb Insurance Company of Australia Ltd (VSC) - insurance - fire causing damage to home and property - fraudulent non-disclosure and misrepresentation - insurer entitled to avoid renewed policy

Carbone Bros Pty Ltd v Shire of Harvey (WASCA) - environment and planning - Shire had power to impose conditions in planning consents requiring payment of road levies for use of land for 'extractive industries'

Summaries With Link (Five Minute Read)

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate [2015] HCA 46

High Court of Australia

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

Civil penalties - appeals from Full Court of the Federal Court's adjournment of civil penalty proceedings under *Building and Construction Industry Improvement Act 2005* (Cth) in which parties sought imposition of agreed penalties - whether Full Court erred in adjourning proceedings on basis decision in *Barbaro v The Queen* [2014] HCA 2. applied to civil penalty proceeding - whether *Barbaro* precluded court from receiving submission as to pecuniary penalty to be imposed - held: *Barbaro* did not apply to civil penalty proceedings - Court not precluded from receiving and accepting agreed or other civil penalty submission - appeal allowed.

[Commonwealth of Australia](#)

[From Benchmark Friday, 11 December 2015]

122 Pitt Street Pty Ltd v Universal 1919 Pty Ltd [2015] NSWCA 390

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Meagher JJA

Contract - landlord and tenant - lessor leased part of building to defendant lessee - lease was for term of 10 years with option for further 10 years - lessee exercised option - lease provided for market review of base rent upon exercise of option to renew - lessor proposed new base rent - lessee engaged rent dispute mechanism under lease resulting in appointment of independent valuer - valuer determined market rent approximately \$500,000 less than figure proposed by lessor - if valuer complied with lease by disregarding value of fitout parties accepted they were bound by determination - primary judge found valuer complied with lease - lessor challenged determination - whether primary judge erred in finding that "to take into account an obligation about 'Fitout Work' did not involve taking anything into account about 'fitout'" - whether primary judge erred in finding valuer disregarded value of the "fitout" - held: nothing in clause of lease or elsewhere in lease to suggest "the Tenant's Fixtures or fitout" included reference not only to premises' condition at relevant time but also to future work likely to be carried - lessor did not establish valuer took value of future work into account - appeal and cross-appeal dismissed.

[122 Pitt Street](#)

[From Benchmark Thursday, 10 December 2015]

NSW Commissioner of Police v Folkes [2015] NSWSC 1887

Supreme Court of New South Wales

Adamson J

Public assembly and procession - plaintiff sought order under s25 *Summary Offences Act 1988* (NSW) prohibiting holding of public assembly arranged by Party for Freedom - defendant Chairman of the Party for Freedom had signed Notice of Intention to Hold a Public Assembly - plaintiff contended that if public assembly took place there was substantial risk that it would degenerate into violent event - Sch 1 Pt 4, ss23, 24, 25 & 27 - balance between participants' rights to freedom of speech and association and other persons' rights not to have activities impeded by exercise of the rights - held: Court accepted Chief Inspector's unchallenged evidence that potential for conflict and public disorder was high - public assembly and associated gatherings likely to present significant challenge to police officers to keep peace - order made under s25.

[Folkes](#)

[From Benchmark Tuesday, 15 December 2015]

Chan v Acres [2015] NSWSC 1885

Supreme Court of New South Wales

McDougall J

Negligence - damages - plaintiffs bought house from first defendant and former wife - before plaintiffs bought house they procured pre-purchase inspection report from second defendant - claim against second defendant settled - plaintiff claimed on basis of report they decided to buy house knowing of some defects but that after they moved in they discovered very serious defects, particularly in first defendant's work - first defendant had engaged third defendant to prepare structural drawings - fourth defendant was Council - whether third or fourth defendants owed and/or breached duty of care to plaintiffs - whether first defendant breached statutory warranties - whether work defective - costs of rectification - apportionment - held: first defendant breached statutory warranties under *Home Building Act 1989* (NSW) - third defendant did not owe plaintiffs a duty of care - Council as Principal Certifying Authority (PCA) owed duty of care to plaintiffs in performance of inspections and issuing final occupation certificate - duty of care coextensive with duty Council owed to first defendant under PCA Agreement - substantial allegations of breach of duty against Council proved - parties to bring in draft orders to give effect to reasons.

[Chan](#)

[From Benchmark Tuesday, 15 December 2015]

ACN 005 057 349 Pty Ltd v Commissioner of State Revenue [2015] VSCA 332

Court of Appeal of Victoria

Hansen & Tate JJA; Robson AJA

Taxation - limitation of actions - applications for leave to appeal dismissal of two proceedings brought by appellant - one proceeding was for judicial review of Commissioner's determination not to refund excess payments made as result of assessments - other proceeding was for

restitution at common law - question raised by appeal was whether, where Commissioner had raised land tax liability under *Land Tax Act 1958* (Vic) twice for same landholding, excess payments could be recovered by proceeding for mandamus - held: Court answered question in affirmative - Commissioner's statutory power to ensure assessments of land tax were complete and accurate gave rise to duty to direct excess payments be repaid which could be enforced by mandamus - any relevant limitation period satisfied - Court allowed appeal in both proceedings
[ACN 005 057 349 Pty Ltd](#)

[From Benchmark Thursday, 10 December 2015]

Kalabakas v Chubb Insurance Company of Australia Ltd [2015] VSC 705

Supreme Court of Victoria

McMillan J

Insurance - plaintiff own property on which home was constructed - plaintiff had insured the property with defendant for 7 December 2010 to 7 December 2011 - plaintiff renewed initial policy for 7 December 2011 to 7 December 2012 - dwelling and contents on property damaged by fire on 6-7 July 2012 - defendant declined plaintiff's claim under renewed policy on basis of fraudulent misrepresentations and non-disclosures by plaintiff pursuant to s28(2) *Insurance Contracts Act 1984* (Cth) - ss21(1), 26 & 28 - held: plaintiff's failure to disclose four relevant matters to defendant was fraudulent and plaintiff's misrepresentations to defendant were also fraudulent - defendant entitled to avoid renewed policy pursuant to s28(2) or to reduce its liability to nil pursuant to s28(3).

[Kalabakas](#)

[From Benchmark Tuesday, 15 December 2015]

Carbone Bros Pty Ltd v Shire of Harvey [2015] WASCA 248

Court of Appeal of Western Australia

McLure P, Murphy JA & Corby J

Environment and planning - appeal concerned validity of conditions in planning consents requiring appellant to pay road levies for use of land in Shire for 'extractive industries' - appellant contended s6.15 *Local Government Act 1995* (WA) (LGA) was exhaustive statement of local government's source of power of to impose revenue or income raising obligation, that Shire's District Planning Scheme and Shire's Extractive Industries Local Law 2007 were not a source of power, that levies were fees or charges within Local Government Act to which s 6.17 applied, and that the levies were invalid because they were not struck in accordance with s6.17 - held: appellant's contentions rejected - Shire had power to impose conditions under Scheme - power wide enough to allow Shire to impose conditions requiring financial contributions to its revenue or income - appeal dismissed.

[Carbone](#)

[From Benchmark Thursday, 10 December 2015]



Benchmark

De Profundis

BY CHRISTINA ROSSETTI

Oh why is heaven built so far,
Oh why is earth set so remote?
I cannot reach the nearest star
That hangs afloat.

I would not care to reach the moon,
One round monotonous of change;
Yet even she repeats her tune
Beyond my range.

I never watch the scatter'd fire
Of stars, or sun's far-trailing train,
But all my heart is one desire,
And all in vain:

For I am bound with fleshly bands,
Joy, beauty, lie beyond my scope;
I strain my heart, I stretch my hands,
And catch at hope.

[CHRISTINA ROSSETTI](#)

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