

Friday, 20 March 2015

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

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Executive Summary (1 minute read)

Khouzame v All Seasons Air Pty Ltd (FCAFC) – bankruptcy – adjudication certificate not accompanied by affidavit – judgment debt unenforceable – bankruptcy notice set aside

BHP Billiton Ltd v Dunning (NSWCA) - workers compensation - worker contracted mesothelioma during employment - employer liable

Barry v Queensland Building and Construction Commission (QSC) – Commission’s direction to rectify issued within time – declaratory relief refused

Avopiling (WA) Pty Ltd v Central Systems Pty Ltd (WASC) - contract - enforceable agreement to settle dispute

Summaries with links (5 Minute Read)

Khouzame v All Seasons Air Pty Ltd [2015] FCAFC 28

Full Court of the Federal Court of Australia

Robertson, Wigney & Gleeson JJ

Bankruptcy – respondent was subcontractor retained by appellant – payment dispute arose – adjudication carried out pursuant to *Building and Construction Industry Security of Payment Act 1999* (NSW) – adjudication concluded respondent entitled to payment – adjudication certificate issued – Local Court entered judgment for respondent – bankruptcy notice issued on application of respondent – primary judge dismissed application to set aside bankruptcy notice – primary judge found respondent’s failure to file affidavit at time of seeking entry of judgment as required by s25 did not rise as high as abuse of process for bankruptcy law purposes – statutory construction - held: adjudication certificate only became enforceable as judgment for debt when it *may be filed* and it *cannot be filed* unless accompanied by affidavit specified in s 25(2) – appeal allowed – bankruptcy notice set aside.

[Khouzame](#)

[From Benchmark 17 March 2015]

BHP Billiton Ltd v Dunning [2015] NSWCA 42

Court of Appeal of New South Wales

Basten, McFarlane & Meagher JJA

Workers compensation - worker suffering from mesothelioma claimed illness caused by inhalation of asbestos dust and fibre in course of employment with BHP - worker claimed BHP was negligent and breached its statutory duties - Tribunal found in worker’s favour - s3B(1)(b) *Civil Liability Act 2002* (NSW) - held: primary judge did not err in finding BHP breached duty of care because it did not take available practical alternative measures which would have reduced worker’s exposure to asbestos - no error in admission of former employee’s evidence, in finding worker exposed to asbestos dust and fibre during course of employment or in findings concerning available practical alternative measures - appeal dismissed.

[BHP Billiton Ltd](#)

[From Benchmark 13 March 2015]

Barry v Queensland Building and Construction Commission [2015] QSC 50

Supreme Court of Queensland

Flanagan J

Building and construction – applicants sought declaration that Direction to Rectify and/or Complete given by Commission on 22/8/14 pursuant to *Queensland Building Construction Commission Act 1991* (Qld) was void – applicants contended direction was given out of time – direction required to be given within 6 years and 3 months after completed - time limit for giving directions – s72(8) – determination of what constituted *the building work to which the direction relates* - held: *the building work to which the direction relates* was completed on issue of final



certificate on or about 26/8/08 – direction given by Commission was within time for purposes of s72(8) – declaratory relief refused – application dismissed.

[Barry](#)

[From Benchmark 18 March 2015]

Avopiling (WA) Pty Ltd v Central Systems Pty Ltd [2015] WASC 82

Supreme Court of Western Australia

Allanson J

Contract - parties disputed amounts owing under construction contract - plaintiff issued writ - in exchange of phone text messages, defendant offered and plaintiff accepted an amount 'in full and final settlement' - whether parties formed enforceable agreement to settle dispute which included settlement foreshadowed counterclaim by defendant - held: parties demonstrated intention to make legally binding agreement - agreement in full and final settlement of dispute - declarations made.

[Avopiling \(WA\) Pty Ltd](#)

[From Benchmark 13 March 2015]

Benchmark

From: A Dream of the Unknown

by P. B. Shelley

I DREAM'D that as I wander'd by the way
Bare winter suddenly was changed to spring,
And gentle odours led my steps astray,
Mix'd with a sound of waters murmuring
Along a shelving bank of turf, which lay
Under a copse, and hardly dared to fling
Its green arms round the bosom of the stream,
But kiss'd it and then fled, as thou mightest in dream.

There grew pied wind-flowers and violets,
Daisies, those pearl'd Arcturi of the earth,
The constellated flower that never sets;
Faint oxlips; tender bluebells, at whose birth
The sod scarce heaved; and that tall flower that wets—
Like a child, half in tenderness and mirth—
Its mother's face with heaven-collected tears,
When the low wind, its playmate's voice, it hears.

And in the warm hedge grew lush eglantine,
Green cow-bind and the moonlight-colour'd may,
And cherry-blossoms, and white cups, whose wine
Was the bright dew yet drain'd not by the day;
And wild roses, and ivy serpentine
With its dark buds and leaves, wandering astray;
And flowers azure, black, and streak'd with gold,
Fairer than any waken'd eyes behold.

[P. B. Shelley](#)

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