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Weekly Construction Law Review

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Executive Summary (1 minute read)

PT Bayan Resources TBK v BCBC Singapore Pte Ltd (HCA) - contract - freezing orders - Supreme Court of Western Australia had power to make freezing order in relation to prospective judgment of foreign court - appeal dismissed

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (HCA) - contract - construction of contract - ore mined in Mount Bruce Mining Pty Ltd's (MBM's) area by entities deriving title through or under MBM - MBM obliged to pay royalty to respondents - appeal dismissed

Bailey v Director-General, Department of Natural Resources NSW (NSWCA) - malicious prosecution - planning and environment - clearing of native vegetation without consent - malicious prosecution not established - no error in award of indemnity costs - appeal dismissed

BB Retail Capital Pty Ltd v Alexandria Landfill Pty Ltd (NSWCA) - contract - commercial agreement - amount of borrowings was "organic debt" in terms of issue - appeal allowed - cross-appeal dismissed

EPS Constructions Pty Ltd v Mass Holdings Pty Ltd (NSWCA) - contract - partnership - joint venture - challenges to factual findings - no error in finding partners entered oral agreement - appeal dismissed

Summs of Qld Pty Ltd v Boon (QCA) - security for costs - negligence - respondent stabbed in hand with Leatherman knife by applicant's employee during lunchbreak - neither employee nor applicant found liable - applicant refused security for costs of respondent's appeal

Diploma Construction (WA) Pty Ltd v CIMC Modular Building Systems (Australia) Pty Ltd (WASC) - subpoena - insurer's objection to inspection of insurance policy dismissed

Summaries With Link (Five Minute Read)

PT Bayan Resources TBK v BCBC Singapore Pte Ltd [2015] HCA 36
High Court of Australia
French CJ; Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ
Freezing orders - corporations - appellant incorporated in Indonesia - appellant owned shares in Australian company (KRL) - respondent incorporated in Singapore - parties owned all shares in company incorporated in Indonesia (KSC) - parties rights as shareholders in KSC subject of joint venture agreement governed by law of Singapore - respondent commenced proceedings against appellant in High Court of Singapore claiming damages for breach of joint venture agreement - proceeding was pending - BCBC sought freezing orders against appellant and KRL in respect of appellant's shares in KRL - freezing orders sought in Supreme Court of Western Australia pursuant to O 52A *Supreme Court Rules 1971* (WA) - whether Supreme Court of Western Australia had power to make freezing order in relation to prospective judgment of foreign court registrable under *Foreign Judgments Act 1991* (Cth) - held: Supreme Court had inherent power to make freezing order within authority to adjudicate conferred by s39(2) *Judiciary Act 1903* (Cth) - exercise of power regulated by O 52A r5 validly made under s167(1)(a) *Supreme Court Act 1935* (WA) and applied by S79 *Judiciary Act* - no inconsistency with Foreign Judgments Act - appeal dismissed.
PT Bayan
[From Benchmark Friday, 16 October 2015]

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37
High Court of Australia
French CJ; Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ
Contract - Wright Prospecting Pty Ltd (WPPL), Hancock Prospecting Pty Ltd (HPPL) (together Hanwright), Hamersley Iron Pty Ltd (Hamersley Iron) and appellant (MBM) entered agreement (1970 Agreement) - dispute concerned construction of provision agreement in respect of payment of royalties by MBM in relation to ore mined from areas of land subject of agreement - Hanwright commenced proceedings against Hamersley Iron and MBM in Supreme Court of New South Wales - Hanwright claimed royalties payable by MBM in respect of iron ore won from two areas (Eastern Range and Channar) - trial judge upheld Hanwright's claim against MBM - Court of Appeal of New South Wales allowed appeal in part - whether Eastern Range and Channar A were within MBM area - if yes then whether ore mined in those parts of MBM area was mined by entities "deriving title through or under" MBM - common ground that if Eastern Range within MBM area then royalty payable - ss48, 50, 53, 276 & 277 *Mining Act 1904* (WA) - held: "MBM area" in 1970 Agreement was physical area indicated on map attached to 1970 Agreement - Ore had been mined in MBM area (which included Eastern Range and

Channar A) by entities deriving title through or under MBM - MBM obliged, under 1970 Agreement to pay Hanwright a royalty on ore being won from MBM area - appeal dismissed.
Mount Bruce
[From Benchmark Friday, 16 October 2015]

Bailey v Director-General, Department of Natural Resources NSW [2015] NSWCA 318
Court of Appeal of New South Wales
Basten, Gleeson & Leeming JJA
Malicious prosecution - planning and environment - appellants owned rural property - first appellant arranged for contractors to clear native vegetation - Director-General, Department of Land and Water Conservation issued summons in Land and Environment alleging breach of s21(2)(a) *Native Vegetation Conservation Act 1997* (NSW) - first appellant contended clearing undertaken to construct "farm dam" which was purpose permitting clearing without development consent - charges dismissed - appellants sought damages from respondents for malicious prosecution, negligent misrepresentation, breach of duty and misfeasance in public office - trial judge dismissed proceedings and subsequently awarded costs in defendants' favour on indemnity basis from date of offer of compromise - dismissal of malicious prosecution action challenged on appeal - held: at trial appellant had failed to establish fundamental propositions necessary to succeed on claim of malicious prosecution - appellant failed to establish any error on part of trial judge or basis for interfering with trial judge's judgment in respect of costs - appeal dismissed.
Bailey
[From Benchmark Thursday, 15 October 2015]

BB Retail Capital Pty Ltd v Alexandria Landfill Pty Ltd [2015] NSWCA 319
Court of Appeal of New South Wales
Bathurst CJ, Beazley P & Macfarlan JA
Contract - appellant (BBRC), first respondent/cross-appellant (ALF) and second respondent/cross-appellant entered deed by which BBRC became holder of $30 million of convertible notes issued by ALF - notes matured and converted into preference shares in ALF - BBRC claimed it was entitled to be issued with number of preference shares dictated by conversion formula in clause of Terms of Issue of convertible notes - respondents accepted that $10 million of BBRC's convertible notes were converted into preference shares at that rate but that remaining $20 million of BBRC's notes converted on a "$1.00 for 1 share" basis - on conversion issue primary judge found in BBRC's favour, also finding documents of correspondence between ALF and BB inadmissible on question of contractual construction - primary judge found in favour of ALF on issue concerning determination of amount of "Organic Debt" in ALF group on conversion date - primary judge found that amount of borrowings by ALF to raise funds to redeem convertible notes was not organic debt - held: borrowings fell within definition of organic debt in Terms of Issue for purposes of formula in clause of contract - appeal allowed - cross-appeal in relation to conversion issue and admissibility of documents dismissed.
BB Retail Capital
[From Benchmark Monday, 19 October 2015]

EPS Constructions Pty Ltd v Mass Holdings Pty Ltd [2015] NSWCA 317
Court of Appeal of New South Wales
Leeming & Simpson JJA; Sackville AJA
Contract - first respondent was one of four members of partnership or joint venture - first appellant (EPS) was company associated with one of the partners - first respondent sued on alleged oral agreement between partners and EPS - primary judge found EPS and partners entered into an oral agreement as alleged by respondent and entered judgment for first respondent - appellants challenged factual findings by primary judge - appellants contended primary judge erred in finding partners and EPS reached binding agreement - appellants contended primary judge did not grapple with evidence showing no consensus reached and that an objective observer could not conclude partners reached final agreement - appellants also contended consensus, if it was reached, did not extend to all essential elements of binding agreement - held: primary judge carefully analysed evidence and resolved conflicts to determine whether parties reached consensus - primary judge did not erroneously overlook material evidence or misuse advantage or make findings glaringly improbably or inconsistent with incontrovertible facts - appeal dismissed.
EPS Constructions
[From Benchmark Monday, 19 October 2015]

Summs of Qld Pty Ltd v Boon [2015] QCA 174
Court of Appeal of Queensland
Fraser JA
Security of costs - negligence - respondent stabbed in hand with Leatherman knife by applicant's employee during lunch break at construction site - respondent employed by company (Globe) which was contracted by another company (Downer) to provide workers at construction site controlled and monitored by Downer - applicant company subcontracted by Downer to remove and replace asphalt at construction site - respondent sued applicant company for breach of duty to take reasonable care not to expose him to a foreseeable risk of injury and/or claimed appellant vicariously liable for employee's negligent acts - primary judge found it was not established applicant's employee was negligent and was not satisfied reasonable employer in position of applicant company would have taken steps argued by respondent to avoid the risk of injury applicant sought security for costs of respondent's appeal - held: respondent had very strong argument on liability on appeal - Court satisfied there was significant risk applicant would not be able to recover costs if successful on appeal - some risk making order for security would stifle appeal - it was very unusual case - no security should be ordered.
Summs
[From Benchmark Monday, 19 October 2015]

Diploma Construction (WA) Pty Ltd v CIMC Modular Building Systems (Australia) Pty Ltd [2015] WASC 384
Supreme Court of Western Australia

Allanson J

Subpoena - plaintiff claimed damages and indemnity for loss, damage and expenses from defendant alleging breach of contract and common law duties - defendant filed defence and counterclaim - insurer obliged by subpoena to produce all policies of insurance maintained under general condition of contract - insurer produced one policy and copy with parts obscured - defendant objected to inspection and copying of policy but not to inspection of redacted copy - masking done to enable reader of redacted copy to see what categories of information deleted - objection based on commercial sensitivity and irrelevance of obscured material - onus - held: no question policy relevant and plaintiff had legitimate forensic purpose - edited information related to identity of party and terms of commercial agreement - no evidence insurer was trade rival of either party to action - no evidence of any prejudice to insurer if inspection permitted - general claim that masked content was commercially sensitive not enough - objection to inspection dismissed.

Diploma

A Complaint
By William Wordsworth

There is a change—and I am poor;
Your love hath been, nor long ago,
A fountain at my fond heart's door,
Whose only business was to flow;
And flow it did; not taking heed
Of its own bounty, or my need.

What happy moments did I count!
Blest was I then all bliss above!
Now, for that consecrated fount
Of murmuring, sparkling, living love,
What have I? shall I dare to tell?
A comfortless and hidden well.

A well of love—it may be deep—
I trust it is,—and never dry:
What matter? if the waters sleep
In silence and obscurity.
—Such change, and at the very door
Of my fond heart, hath made me poor.

William Wordsworth

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