

Friday, 25 September 2015

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

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Executive Summary (1 minute read)

Hercules St Developments Pty Limited v Ashfield Council (NSWLEC) - planning law - modified development application not substantially the same as original

Deputy Commissioner of Taxation (Superannuation) v Ryan (FCA) - superannuation - trustees of SMSF lent money to themselves – breaches of *Superannuation Industry (Supervision) Act* – pecuniary penalties

Dionisatos (for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd (NSWCA) - negligence - dust diseases - erroneous deduction of compensation under *Workers' Compensation (Dust Diseases) Act 1942* (NSW) from damages awarded under s15B *Civil Liability Act 2002* (NSW) - appeal allowed - cross-appeal dismissed

ERA Polymers Pty Limited v Pacific Urethanes Pty Ltd (NSWCA) - contract - confidential information - no error in construction of deed - summons dismissed

Chow v Chow (No 1) (NSWSC) - trustees for sale - disagreement who should be trustees – factors to be considered by the Court

In the matter of Italian Forum Limited (subject to a deed of company arrangement) (NSWSC) - sale of land - judicial directions to administrator of vendor that he was justified in making certain payments under the contract of sale

Frankel v Paterson (NSWSC) - common property in strata scheme unilaterally appropriated by another unitholder after exchange - rule in *Flight v Booth* - no substantial misdescription of

property - sale to proceed

Agripower Australia Ltd v Queensland Engineering & Electrical Pty Ltd (QSC) - security of payments - contract between parties was illegal - first defendant not entitled to progress payments - adjudicator's decision void

Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd (ACTSC) - service of unsealed copy of application to set aside statutory - service not as required by *Corporations Act* - proceedings dismissed

Summaries With Link (Five Minute Read)

Hercules St Developments Pty Limited v Ashfield Council [2015] NSWLEC 1378

Land and Environment Court of New South Wales

Fakes C

Planning law - Ashfield Council granted consent to a development application for the construction of an eight level mixed use development - the applicant lodged a modification application to replace an area set aside for communal open space on residential level 7 with two apartments, and to move the communal open space and associated structures to the roof – deemed refusal – appeal to Land and Environment Court - s97AA *Environmental Planning and Assessment Act 1979* (NSW) - *Ashfield Local Environmental Plan 2013* - Council contended modification application should be refused as it was not substantially the same as the original development - would increase the number of apartments and the overall height of the building - held: the modified development was not substantially the same as the original development - the Court therefore had no jurisdiction to consider the proposal on its merits - s96(2) *Environmental Planning and Assessment Act 1979* (NSW) - appeal dismissed.

[Hercules](#)

[From Benchmark Tuesday, 22 September 2015]

Deputy Commissioner of Taxation (Superannuation) v Ryan [2015] FCA 1037

Federal Court of Australia

Edelman J

Superannuation - husband and wife were trustees and members of self-managed superannuation fund – they caused the fund to lend money to themselves - s65 *Superannuation Industry (Supervision) Act 1993* (Cth) - contravened sole purpose test - s62 *Superannuation Industry (Supervision) Act 1993* (Cth) - failed to prepare a plan to address the excess in-house assets of the fund - s84 *Superannuation Industry (Supervision) Act 1993* (Cth) - contraventions were *serious contraventions* - s196(4) *Superannuation Industry (Supervision) Act 1993* (Cth) - husband and wife each ordered to pay monetary penalties of \$20,000 to the Commonwealth, in monthly instalments over three years.

[Deputy](#)

[From Benchmark Wednesday, 23 September 2015]

ERA Polymers Pty Limited v Pacific Urethanes Pty Ltd [2015] NSWCA 283

Court of Appeal of New South Wales

Beazley P; Macfarlan & Meagher JJA

Contract - applicant sought declaration it was sole beneficial owner of formulations (confidential information) - applicant alleged respondent used confidential information - applicant sought orders restraining respondent from continuing to use the confidential information - applicant sought leave to appeal from refusal of leave to amend statement of claim and summarily dismissing proceedings - whether primary judge erred in construing deed of settlement and release, and an attached Toll manufacturing deed which was part of the deed of settlement and release - held: primary judge correct in construction of clauses of deed of settlement and release and manufacturing deed - in effect applicant had sought to vindicate rights anterior to deed - primary judge correct to dismiss proceedings - summons dismissed.

[ERA](#)

[From Benchmark Monday, 21 September 2015]

Dionisatos(for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd [2015] NSWCA 281

Court of Appeal of New South Wales

Basten, Macfarlan & Gleeson JJA

Negligence - dust diseases - statutory interpretation - worker employed by first respondent on construction of Sydney Opera House - worker suffered from mesothelioma and died in 2012 - .before death worker brought claim in Dust Diseases Tribunal against employer claiming illness caused by exposure to asbestos dust and fibres and that employer negligent by permitting his exposure - worker also alleged employer breached statutory duties and contractual obligations. - Tribunal upheld estate's claim against employer and awarded damages including component pursuant to s15B *Civil Liability Act 2002* (NSW) for worker's loss of capacity to provide gratuitous domestic services for his wife - Tribunal deducted amount from s15B damages to reflect value of compensation to widow under *Workers' Compensation (Dust Diseases) Act 1942* (NSW) - parties appealed - held: .employer's cross-appeal with respect to liability dismissed - Tribunal erred in deducting from s15B damages compensation paid or payable to widow under Dust Diseases Act - primary judge erred in assessment of s15B damages - matter remitted to Tribunal for determination of damages under s15B.

[Dionisatos](#)

[From Benchmark Monday, 21 September 2015]

Chow v Chow (No 1) [2015] NSWSC 1347

Supreme Court of New South Wales

Young AJA

Trustees for sale - sons became co-owners of real property after death of mother - agreement that trustees be appointed for sale - s66G *Conveyancing Act 1919* (NSW) - disagreement as to who should be trustees - held: when deciding identity of trustees for sale, where the parties do

not agree, the Court considers four factors - the Court tends to prefer the preference of a party with a greater interest in the land - trustees should be independent and as free from conflict of interest as possible - trustees should have appropriate skill, expertise, and experience, particularly where they have more active duties than merely selling a piece of real estate - the Court should endeavour to get the best value for the parties' money, and, as between two otherwise equal proposals, the cheaper is to be preferred - *Arrow Custodians Pty Limited v Pine Forests of Australia Pty Limited*[2006] NSWSC 341 - considering these factors, the trustees favoured by the plaintiff and first defendant should be appointed.

[Chow](#)

[From Benchmark Tuesday, 22 September 2015]

In the matter of Italian Forum Limited (subject to a deed of company arrangement) [2015] NSWSC 1386

Supreme Court of New South Wales

Rein J

Sale of land - administrator appointed to company - company owned Italian Forum property in Leichhardt - company owed debts to Leichhardt Council for unpaid rates - Council holds mortgage over company's property - company contracted to sell land to purchaser with consent of Council - administrator wanted to proceed with sale, and considered that certain payments should be made by the company under administration as vendor under the contract of sale - administrator sought directions from the Court regarding proposed course of action and construction of the contract of sale - s447D *Corporations Act 2001* (Cth) - proceedings expanded to include declarations and order for payment - held: sale was in the interests of company's creditors - the terms of the contract of sale required, as between the vendor and purchaser, that the vendor pay Building Management Committee levies for the relevant periods - administrator was justified in pursuing his proposed course of action.

[Italian Forum](#)

[From Benchmark Wednesday, 23 September 2015]

Frankel v Paterson [2015] NSWSC 1307

Supreme Court of New South Wales

Young AJA

Sale of land - purchasers of strata property were impressed by garden that was part of common property - after exchange, garden was fenced off by another unitholder to be a dog compound - purchaser did not complete - vendors issued notice to complete - purchaser sought declaration that notice to complete was invalid and that the purchaser did not have to complete, and for return of deposit - vendors sought specific performance - held: the fact that the vendors sought specific performance rendered anything to do with the notice to complete otiose - rule in *Flight v Booth* (1834) 1 Bing (NC) 370; (1834) 131 ER 1160 - test is, objectively, whether a reasonable person in the position of the purchasers would take the view that the purchasers were not getting substantially the property they contracted for - the mere fact that a unitholder has unilaterally appropriated part of the common property is not of major concern as the appropriation can be reversed - this may require action either before the Strata Titles

Commissioner or the Court - in the circumstances, there was no substantial misdescription of the property the purchasers were buying – vendors claimed dismissed and order for specific performance to be made.

[Frankel](#)

[From Benchmark Wednesday, 23 September 2015]

Agripower Australia Ltd v Queensland Engineering & Electrical Pty Ltd [2015] QSC 268

Supreme Court of Queensland

Douglas J

Security of payments - applicant sought declaration adjudication decision made under *Building and Construction Industry Payments Act 2004* (Qld void because contract between applicant and first respondent illegal and unenforceable - applicant submitted first respondent contravened s56 *Electrical Safety Act 2002* (Qld) by advertising it performed electrical work when it did not hold electrical contractor's licence - applicant also claimed first respondent and its agents were not practising professional engineers but carrying out professional engineering services contrary to s115(1) *Professional Engineers Act 2002* (Qld) - first respondent accepted that if it were carrying out professional engineering services in breach Professional Engineers Act then its contract illegal and unenforceable - held: first respondent's contract with applicant was illegal for breach of ss56 & 115 - first respondent not entitled to progress payments - application successful - adjudication decision void.

[Agripower](#)

[From Benchmark Thursday, 17 September 2015]

Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd [2015] ACTSC 288

Supreme Court of the Australian Capital Territory

Mossop AsJ

Corporations law - statutory demand served on plaintiff - time limit to apply to set aside statutory demand is 21 days - s459G *Corporations Act 2001* (Cth) - 20 days after service, a solicitor for the plaintiff attended the Supreme Court Registry and filed an application to set aside the statutory demand - despite a request by the solicitor, the Registry would not provide sealed copies of the application straight away, but said that sealed copies would be available in a few days - the solicitor then served an unsealed copy of the application on the defendant - the solicitor served the sealed application several days later, out of time - held: there is no capacity to extend the time to commence proceedings to set aside a statutory demand - *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; 184 CLR 265 - Registry processes did not reasonably accommodate the need for the Court to promptly record the filing of documents and provide sealed service copies to the plaintiff so they could be served within time - nevertheless, plaintiff had not served a copy of the application within the meaning of s 459G(3) - Court did not have jurisdiction - proceedings dismissed.

[Adhesive Pro](#)

[From Benchmark Wednesday, 23 September 2015]



Benchmark

Voices of the Air

By Katherine Mansfield

But then there comes that moment rare
When, for no cause that I can find,
The little voices of the air
Sound above all the sea and wind.

The sea and wind do then obey
And sighing, sighing double notes
Of double basses, content to play
A droning chord for the little throats—

The little throats that sing and rise
Up into the light with lovely ease
And a kind of magical, sweet surprise
To hear and know themselves for these—

For these little voices: the bee, the fly,
The leaf that taps, the pod that breaks,
The breeze on the grass-tops bending by,
The shrill quick sound that the insect makes.

[KatherineMansfield](#)

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