

Friday, 25 September 2020

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Australian Competition and Consumer Commission v Australian Competition

Tribunal (FCAFC) - costs - 'Glencore Coal Assets' and Australian Competition and Consumer Commission each sought review of Tribunal's decision on re-arbitration of dispute concerning - Court allowed Glencore Coal Assets' application and dismissed Australian Competition and Consumer Commission's application - no order for costs

Davies v Whitehaven Coal Mining Limited (NSWCA) - negligence - appellant employed by respondent - appellant injured when he 'slipped while climbing down from the top of a load haul dump machine' - respondent liable - contributory negligence not established - appeal allowed

Glover v Kaji Australia Pty Limited (NSWCA) - fraudulent conspiracy - loan - mortgage - possession - dismissal of cross-claim alleging fraudulent conspiracy - judgment for respondents on claim for possession and amount owing under loan - appeal dismissed

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Summaries With Link (Five Minute Read)

Australian Competition and Consumer Commission v Australian Competition Tribunal [2020] FCAFC 154

Full Court of the Federal Court of Australia

Allsop CJ, Beach & Colvin JJ

Costs - 'Glencore Coal Assets' and Australian Competition and Consumer Commission each sought review of Australian Competition Tribunal's decision on re-arbitration of dispute concerning 'terms of access' to port - Court allowed Glencore Coal Assets' application and dismissed Australian Competition and Consumer Commission's application - determination of costs - s43 *Federal Court of Australia Act 1976* (Cth) - *Oshlack v Richmond River Council* [1998] HCA 11 - whether costs should follow event - 'limited success' - held: no costs order made.

[Australian Competition and Consumer Commission](#)

[From Benchmark Monday, 21 September 2020]

Davies v Whitehaven Coal Mining Limited [2020] NSWCA 219

Court of Appeal of New South Wales

Macfarlan & McCallum JJA; Simpson AJA

Negligence - appellant employed by respondent - appellant injured when he 'slipped while climbing down from the top of a load haul dump machine' - appellant sued respondent, contending respondent breached duty to him as its employee - primary judge found appellant failed to establish breach of duty - primary also calculated appellant's contributory negligence at 30% - appellant appealed - appellant had suffered 'subsequent injury' before he left employment with respondent - primary judge did not resolve issue of application of *Kempsey District Hospital v Thackham* (1995) 36 NSWLR 492 to proceeding - 'creation of unnecessary risk' - 'failure to carry out a risk assessment' - 'adequate safeguards' - contributory negligence - *Workers Compensation Act 1987* (NSW) - 3B(1)(f) *Civil Liability Act 2002* (NSW) - held: negligence established - contributory negligence not established - appeal allowed - matter remitted for assessment of damages.

[View Decision](#)

[From Benchmark Tuesday, 22 September 2020]

Glover v Kaji Australia Pty Limited [2020] NSWCA 222

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & White JJA

Fraudulent conspiracy - loan - possession - appellant borrowed amount from first and second respondents - loan secured over appellant's home - appellant failed to repay loan - respondents sought possession of appellant's property and judgment for 'amount owing' - appellant, by cross-claim, contended loan agreement and mortgage 'unjust and/or unconscionable' and that a 'fraudulent conspiracy' had caused his entry into loan agreement - primary judge found in respondents' favour and dismissed cross-claim - appellant appealed -



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whether primary judge erred in credit findings - whether credit findings 'contrary to "incontrovertible facts or uncontested testimony", "glaringly improbable" or "contrary to compelling inferences"' - *Fox v Percy* (2003) 214 CLR 118 - *Queensland v Masson* [2020] HCA 28 - held: appeal dismissed.

[View Decision](#)

[From Benchmark Wednesday, 23 September 2020]



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From: Ode to the Moon

By Thomas Hood

I
MOTHER of light! how fairly dost thou go
Over those hoary crests, divinely led!—
Art thou that huntress of the silver bow
Fabled of old? Or rather dost thou tread
Those cloudy summits thence to gaze below, 5
Like the wild Chamois from her Alpine snow,
Where hunter never climb'd,—secure from dread?
How many antique fancies have I read
Of that mild presence! and how many wrought!
 Wondrous and bright, 10
 Upon the silver light,
Chasing fair figures with the artist, Thought!

II
What art thou like? Sometimes I see thee ride
A far-bound galley on its perilous way,
Whilst breezy waves toss up their silvery spray;—
15
 Sometimes behold thee glide,
Cluster'd by all thy family of stars,
Like a lone widow, through the welkin wide,
Whose pallid cheek the midnight sorrow mars;—
Sometimes I watch thee on from steep to steep, 20
Timidly lighted by thy vestal torch,
Till in some Latmian cave I see thee creep,
To catch the young Endymion asleep,—
Leaving thy splendour at the jagged porch!

https://en.wikipedia.org/wiki/Thomas_Hood

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