

Friday, 26 February 2016

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

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Executive Summary (1 minute read)

Elachi v Council of the City of Shoalhaven (NSWCA) - environment and planning- appellant's vegetation clearing work breached *Environmental Planning and Assessment Act 1979* (NSW) - appeal dismissed

United Petroleum Pty Ltd v Pentaco Oil (Aust) Pty Ltd (FCA) - contract - estoppel - trade practices - correspondence did not constitute agreement for lease of sites - estoppel case succeeded - misleading and deceptive conduct case succeeded

Manning v Matsen (No. 2) (NSWSC) - costs - indemnity costs - unsuccessful plaintiff unreasonably rejected Calderbank offer - defendant granted indemnity costs

Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (WASC) - arbitration - dispute resolution clause - parties referred to arbitration - proceedings stayed

JMT Builders Pty Ltd v. Ryan (NTSC) - abuse of process - building contract - writ filed pursuant to deed of settlement - issuing proceedings in absence of genuine dispute was abuse of process - proceedings dismissed

Summaries With Link (Five Minute Read)

Elachi v Council of the City of Shoalhaven [2016] NSWCA 15
Court of Appeal of New South Wales

Basten & Ward JJA; Sackville AJA

Environment and planning - respondent sought declaration in Land and Environment Court that appellant's vegetation clearing work contravened s76A(1) *Environmental Planning and Assessment Act 1979* (NSW) - respondent also sought to restrain appellant from undertaking clearing and that appellant restore property - primary judge granted declaration and restraining order - rectification order made by consent - appellant appealed - s109 Constitution - Divs 1, 2 & 6, Pt 4 & Pt 5, ss4, 5, 13, 18, 21, 26, 33A, 74, 74C, 76A, 76B *Environmental Planning and Assessment Act 1979* (NSW) - Pt 3, Divs 2, 3 & 4, ss11, 12, 16, 19, 20, 21 & 22 *Native Vegetation Act 2003* (NSW) - relationship between cl 5.2.3 *Shoalhaven Development Control Plan 2014* and cl 5.9(8) & (9A) *Shoalhaven Local Environmental Plan 2014* - held: trial judge correct to determine there was breach of s76A(1) - appeal dismissed.

[Elachi](#)

[From Benchmark Friday, 19 February 2016]

United Petroleum Pty Ltd v Pentaco Oil (Aust) Pty Ltd [2016] FCA 118

Federal Court of Australia

Moshinsky J

Contract - estoppel - trade practices - applicant contended correspondence with respondents constituted agreement to lease sites - applicant sought specific performance of agreement - if Court found no agreement applicant contended it would be unconscionable to resile from representations and respondents were estopped from resiling - applicant also contended in alternative that respondents engaged in misleading and deceptive conduct contravening s18 *Australian Consumer Law* - Sch 2, ss2(2), 18(1), 131(1) & 232(1) *Competition and Consumer Act 2010* (Cth) - *Australian Consumer Law, Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic) - s126 *Instruments Act 1958* (Vic) - s52 *Trade Practices Act 1974* (Cth) - held: correspondence did not constitute agreement to lease - estoppel case succeeded - misleading and deceptive conduct case succeeded - injunctions granted.

[United Petroleum](#)

[From Benchmark Wednesday, 24 February 2016]

Manning v Matsen (No. 2) [2016] NSWSC 70

Supreme Court of New South Wales

Slattery J

Indemnity costs - Court declined to make family provision order in plaintiff's favour - defendant sought indemnity costs on basis of two Calderbank letters - plaintiff argued rejection of Calderbank offers was not unreasonable - plaintiff contended there was difficult point of law at stake, that neither offer was a genuine offer of compromise; and that it was not unreasonable for plaintiff to reject offers given state of evidence at the time offers were sent - public interest - held: plaintiff unreasonably rejected one of the Calderbank offers - indemnity costs order granted to defendant.

[Manning](#)

[From Benchmark Thursday, 18 February 2016]

Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2016]

WASC 52

Supreme Court of Western Australia

Mitchell J

Arbitration - parties entered agreement for design, supply and installation of navigation aids - parties executed supplemental agreement - plaintiff sought declaration supplemental agreement released it from obligations to defendant under agreement - defendant sought to stay action for plaintiff's failure to comply with agreement's dispute resolution clause - s8 *Commercial Arbitration Act 2012* (WA) - O58 r10 *Rules of the Supreme Court 1971* (WA) - art 8 *UNCITRAL Model Law on International Commercial Arbitration* - held: requirements of s8 satisfied - Court referred parties to arbitration - proceedings stayed until the process provided for in clause of agreement engaged and completed.

[Australian Maritime Systems](#)

[From Benchmark Tuesday, 23 February 2016]

JMT Builders Pty Ltd v. Ryan [2016] NTSC 6

Supreme Court of the Northern Territory

Master Luppino

Abuse of process - building contract - plaintiff sued defendant for breach of building contract - plaintiff's solicitors advised writ had been filed pursuant to deed of settlement entered between parties which fully settled claim - deed did not permit plaintiff to sue on initial dispute - whether proceedings were abuse of process - held: categories of abuse of process not closed - deed provided for dispute's final resolution - proceedings were an 'enforcement backup' in event of default by defendants - there was no genuine dispute - issuing proceedings in absence of genuine dispute was abuse of process - proceedings were abuse of process.

[JMT](#)

[From Benchmark Tuesday, 23 February 2016]



Benchmark

The Plain Sense of Things

BY WALLACE STEVENS

After the leaves have fallen, we return
To a plain sense of things. It is as if
We had come to an end of the imagination,
Inanimate in an inert savoir.

It is difficult even to choose the adjective
For this blank cold, this sadness without cause.
The great structure has become a minor house.
No turban walks across the lessened floors.

The greenhouse never so badly needed paint.
The chimney is fifty years old and slants to one side.
A fantastic effort has failed, a repetition
In a repetitiousness of men and flies.

Yet the absence of the imagination had
Itself to be imagined. The great pond,
The plain sense of it, without reflections, leaves,
Mud, water like dirty glass, expressing silence

Of a sort, silence of a rat come out to see,
The great pond and its waste of the lilies, all this
Had to be imagined as an inevitable knowledge,
Required, as a necessity requires.

[BY WALLACE STEVENS](#)

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