

Friday, 28 August 2015

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

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Executive Summary (1 minute read)

Sutherland Shire Council v Major (NSWCA) - damages - respondent injured when railing gave way - Council conceded liability - Council's appeal against assessment of damages allowed

Rossi v Living Choice Australia Ltd (NSWCA) - environment and planning - consents for development - breaches of *Environmental Planning and Assessment Act 1979* (NSW) - first notification of determination of consent invalid - relief - appeal allowed in part

Johnston v Endeavour Energy (NSWSC) - representative proceedings - insurer opt out notices invalid and of no effect - proceedings stood over for final orders

Kennedy v Shire of Campaspe (VSCA) - negligence - tripping incident on concrete pavement - matter remitted for determination whether Shire breached common law duty and whether breach caused incident - appeal allowed

Summaries With Link (Five Minute Read)

Sutherland Shire Council v Major [2015] NSWCA 243

Court of Appeal of New South Wales

McColl, Emmett & Sackville JJA

Damages - respondent injured when railing on which he was sitting gave way - respondent sued Council in negligence for not maintaining the railing - Council ultimately conceded liability -

primary judge assessed damages at \$278,392 - Council appealed against assessment of damages - ss3, 13, 16, 17A *Civil Liability Act 2002* (NSW) - held: primary judge erred in assessment of damages for non-economic loss, future economic loss and future paid care - appeal allowed - verdict and judgment for the plaintiff in the sum of \$136,419.

[Sutherland](#)

[From Benchmark Monday, 24 August 2015]

Rossi v Living Choice Australia Ltd [2015] NSWCA 244

Court of Appeal of New South Wales

Basten, Ward & Emmett JJA

Environment and planning - first respondent obtained development approval (Stage 2 consent) for development - first respondent also obtained another consent (Retaining Walls consent) in relation to development - appellant commenced proceedings against first respondent, second respondent Council and third respondent Planning Panel seeking declarations consents void and of no effect - appellant also claimed orders for demolition of units and remedial orders - primary judge made declaration of invalidity in relation to Retaining Walls consent and made remedial orders - primary judge refused to make an order of invalidity in respect of Stage 2 consent - appellant appealed - second respondent Council cross-appealed - first respondent filed notice of contention supporting orders made by the primary judge and has also sought leave to file a cross-appeal - principal questions concerned relief to be ordered when development consent granted under *Environmental Planning and Assessment Act 1979* (NSW) found invalid and development is carried out without required development consent - held: Council's assessment function was not amenable to judicial review - only determination of Panel was amenable to judicial review - Council and Panel breached s79C - declaration of invalidity in respect of first notification of determination of Stage 2 consent - Stage 2 consent not declared invalid - work to be carried out to obviate adverse consequences for appellant's land from removal of vegetation without appellant's consent and without development consent - appeal allowed in part.

[Rossi](#)

[From Benchmark Tuesday, 25 August 2015]

Johnston v Endeavour Energy [2015] NSWSC 1117

Supreme Court of New South Wales

Garling J

Representative proceedings - insurance - opt out notices - plaintiff commenced representative proceedings against defendant alleging it was negligent and liable for loss and damage arising from bushfire (Johnston proceedings) - second representative action commenced (Insurers proceedings) - validity of opt out notices - whether insurers entitled to remove all of their insureds from participating as group members in Johnston proceedings and then to include insureds as group members in Insurers proceedings without limitation as to sums sought for damages at date of execution and filing of insurer opt out notices and date of commencement of Insurers proceedings - held: for insureds under 'Group 1' policies, Insurers not entitled to remove those insureds as group members of Johnston proceedings - lawyers did not have

authority to execute and file insurer opt out notices - those notices invalid and of no effect to opt out insureds from Johnston proceedings - Insurers not entitled to include in Insurers proceedings any claim over and above money paid to insureds under Group 1 policies - proceedings stood over for final orders.

[Johnston](#)

[From Benchmark Friday, 21 August 2015]

Kennedy v Shire of Campaspe [2015] VSCA 215

Court of Appeal of Victoria

Tate & Osborn JJA; John Dixon AJA

Negligence - statutory duty upon road authorities to inspect, maintain and repair public roads - appellant tripped on lip of footpath created by uneven concrete paving sections - appellant sued Shire - trial judge found appellant may have had arguable case in negligence against Shire but that operation of *Road Management Act 2004* (Vic) prevented her from succeeding - trial judge made no findings as to whether Shire owed appellant duty of care at common law - scope and operation of statutory defences - ss39, 40, 102, 103, 105 & 115 - held: Shire breached statutory duty to inspect, maintain and repair public roads - statutory defences not available to it - however it would not be open to find causal connection between Shire's breach and incident - matter remitted to County Court for further hearing whether Shire owed appellant duty of care at common law if so whether breach was a cause of incident - appeal allowed.

[Kennedy](#)

[From Benchmark Friday, 21 August 2015]



Benchmark

I started Early – Took my Dog – (656)

By Emily Dickinson

I started Early – Took my Dog –
And visited the Sea –
The Mermaids in the Basement
Came out to look at me –

And Frigates – in the Upper Floor
Extended Hempen Hands –
Presuming Me to be a Mouse –
Aground – upon the Sands –

But no Man moved Me – till the Tide
Went past my simple Shoe –
And past my Apron – and my Belt
And past my Boddice – too –

And made as He would eat me up –
As wholly as a Dew
Upon a Dandelion's Sleeve –
And then – I started – too –

And He – He followed – close behind –
I felt His Silver Heel
Upon my Ankle – Then My Shoes
Would overflow with Pearl –

Until We met the Solid Town –
No One He seemed to know –
And bowing – with a Mighty look –

At me – The Sea withdrew –
[Emily Dickinson](#)

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