

Friday, 31 July 2015

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

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Executive Summary (1 minute read)

Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant) (UKSC) - construction contract - implied term - right to recover payment - restitution - appeal dismissed

Brown Brothers v Pittwater Council (NSWCA) - contempt - bias - arguable defence to criminal charge of contempt - permission to withdraw guilty pleas - appeal allowed

Winky Pop v Mobil (VSC) - damages - petroleum leak - basis for measurement of damages - plaintiffs entitled to sum for costs incurred in investigating leak

Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd (VSCA) - building contract - refusal to provide records to principal - erroneous construction of phrase in side deed - appeal allowed

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2) (VSCA) - contract - reformulated claim not remitted - appeal dismissed - costs orders

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Summaries With Link (Five Minute Read)

Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant) [2015] UKSC 38

Supreme Court of the United Kingdom

Lord Mance, Lord Wilson, Lord Sumption, Lord Reed & Lord Toulson

Construction contract - limitations - respondent contracted with building contractor to carry out asbestos survey and report on blocks of maisonettes which building contractor was considering redeveloping - during redevelopment building contractor allegedly found asbestos containing materials not identified in report - adjudicator concluded respondent in breach of contractual and tortious duties causing loss to building contractor - parties did not agree to treat adjudicator's decision as final - building contractor did not commence proceedings and limitation period expired - respondent commenced proceedings to recover amount it paid to building contractor pursuant to adjudication - respondent contended no sum was due on examination of merits of original dispute - building contractor counterclaimed for balance of claim and interest - High Court rejected respondent's claim on basis there was no implied term for repayment or entitlement to restitution after expiry of limitation period in 2010 or 2011 - Court of Appeal found there was implied term and allowed appeal - effect of adjudication pursuant to provisions implied into construction contract under s108(5) *Housing Grants, Construction and Regeneration Act 1996*, read *Scheme for Construction Contracts (England and Wales) Regulations 1998* (SI 1998 No 649) - held: it was an implied contractual term that respondent would have directly enforceable right to recover payment if on final determination on merits of original dispute, sums shown not to have been due to building contractor - repayment could also be claimed by way of restitution - building contractor was time-barred from pursuing its counterclaim for the balance of its original claim - appeal dismissed

[Aspect](#)

[From Benchmark Monday, 27 July 2015]

Brown Brothers v Pittwater Council [2015] NSWCA 215

Court of Appeal of New South Wales

McCull & Macfarlan JJA; Tobias AJA

Bias - procedural fairness - contempt - appellant operated waste skip business on land zoned Light Industrial 4(b1) under *Pittwater Local Environmental Plan 1993* - in 2011 respondent charged two directors of appellant with contempt of court in respect of alleged activities in business in contravention of consent orders - appellant pleaded guilty to charges - directors each sought to withdraw their guilty pleas - directors contended they were made on basis of incorrect legal advice and that they had a viable defence - primary judge refused appellants leave to withdraw guilty pleas - held: prima facie primary judge ought to have recused herself on basis of adverse findings made in respect of director's credit in earlier proceedings but appellants had waived right to object by failing to object to primary judge continuing to hear withdrawal application - no denial of procedural fairness - appellants had pleaded guilty on basis of incorrect legal advice - it was arguable that on the proper construction consent orders there

was real question about their guilt - appellant's pleas not attributable to a consciousness of guilt - appellants permitted to withdraw pleas of guilt - alternative would to condone a miscarriage of justice - exceptional case where public interest in finality of litigation and avoiding inconsistent decisions could not be permitted to perpetuate potential injustice - appeal allowed.

[Brown](#)

[From Benchmark Tuesday, 28 July 2015]

Winky Pop v Mobil [2015] VSC 348

Supreme Court of Victoria

Digby J

Damages - negligence - nuisance - claim arising from petroleum leak (Mobil leak) which created plume of petroleum hydrocarbon in groundwater underneath plaintiffs' land - plaintiffs claimed against Mobil in negligence, nuisance, and for compensation under s151 *Pipelines Act 2005* (Vic) - plaintiffs also claimed against State in negligence - Mobil admitted it contaminated plaintiffs' land and conceded responsibility for leak and clean up - appropriate form of relief - held: proper basis for measurement of damages was diminution in value of plaintiffs' land - plaintiffs did not establish they had or but for Mobil leak would have had opportunity to develop plaintiffs' land residentially - plaintiffs had not lost opportunity to develop plaintiffs' land because of Mobil leak - opportunity to develop plaintiffs' land residentially had no real prospect of being successfully pursued - Mobil leak would not prevent or impair plaintiffs' ability to develop land for residential purposes - plaintiffs are entitled to be paid sum of \$104,273.93 with interest by Mobil in relation to their costs incurred in investigating the Mobil leak.

[Winky](#)

[From Benchmark Thursday, 23 July 2015]

Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd [2015] VSCA 190

Court of Appeal of Victoria

Santamaria, Kyrou & McLeish JJA

Building contract - trial judge found applicant building contractor breached its obligations to respondents (principals) under a contract for design and construction of building - finding of breach of contract related to applicant's refusal to provide records to principal to enable principal to verify costs actually paid by applicant in completing project - held: trial judge erred in construction of 'actual trade, supplier, consultant or subcontract cost payable ...' in side deed and in accepting implied term that principal was entitled to be provided with records - leave to appeal granted - notice of contention dismissed - appeal allowed.

[Grocon](#)

[From Benchmark Friday, 24 July 2015]

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2) [2015] VSCA 185

Court of Appeal of Victoria

Redlich, Whelan & Santamaria JJA

Contract - costs - appellant failed to establish on appeal that trial judge erred in dismissing

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claims based on 2002 contract and negligence - however Court found trial judge wrong to hold claims made in reliance on 2004 contract statute-barred - trial judge had retired by time of hearing of appeal - Court sought and received further written and oral submissions - whether claim under 2004 contract for damages should be remitted - held: it would be unsatisfactory and inherently unfair to respondent to permit appellant to amend and advance reformulated claim - 2004 contract claim should not be remitted - pleaded case bound to fail - reformulated claim should not be permitted to be advanced - appeal dismissed - costs orders made.

[Brirek](#)

[From Benchmark Friday, 24 July 2015]

Letter from Town: The Almond Tree

By D. H. Lawrence, 1885 - 1930

You promised to send me some violets. Did you forget?
White ones and blue ones from under the orchard hedge?
Sweet dark purple, and white ones mixed for a pledge
Of our early love that hardly has opened yet.

Here there's an almond tree—you have never seen
Such a one in the north—it flowers on the street, and I stand
Every day by the fence to look up for the flowers that
expand
At rest in the blue, and wonder at what they mean.

Under the almond tree, the happy lands
Provence, Japan, and Italy repose,
And passing feet are chatter and clapping of those
Who play around us, country girls clapping their hands.

You, my love, the foremost, in a flowered gown,
All your unbearable tenderness, you with the laughter
Startled upon your eyes now so wide with hereafter,
You with loose hands of abandonment hanging down.

[DHLawrence](#)

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