



Wednesday, 3 February 2016

Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm) (FCAFC) - pleadings - refusal in part of permission to amend pleadings in separate proceedings - appeal dismissed (I B C)

Soden v Croker (No 2) (FCA) - vexatious proceedings order - respondent prohibited from instituting proceedings without prior leave of Court (I B)

Nightingale v Blacktown City Council (NSWCA) - negligence - appellant injured when he stepped into depression in footpath - Council not liable - appeal dismissed (I B C)

Re: Application of the Anglican Property Trust Diocese of Bathurst (NSWSC) - judicial advice - trusts and trustees - judicial advice granted (B)

Wales v Wales (No 2) (VSCA) - costs - applicant to pay respondents' costs of unsuccessful applications for leave to appeal against costs orders - direction in respect of senior counsel's fees refused (B)

Zwiersen v Field & Hall Pty Ltd (VSC) - negligence - contribution proceedings - apportionment of liability between employer and manufacturers/suppliers for contraction of mesothelioma in course of employment (I B C)

Milburn Lake Pty Ltd v Andritz Pty Ltd (VSC) - security of payments - injunction granted in relation to determination of adjudication application (C)

Summaries With Link (Five Minute Read)

Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2

Full Court of the Federal Court of Australia

Gilmour, Perram & Beachy JJ

Pleadings - corporations - appellants appealed against refusal in part of applications to amend pleadings in separate proceedings - appellants contended exercise of primary judge's discretion miscarried, that primary judge failed to accord procedural fairness and that primary judge erred in finding that claim under s1041E *Corporations Act 2001* (Cth) liable to be struck out - ss37M & 37N *Federal Court of Australia Act 1976* (Cth) - rr8.21(1) & 16.53 *Federal Court Rules 2011* (Cth) - held: primary judge erred in finding appellant failed to explain importance of amendments but this was a minor error not material to outcome - even if Court obliged to exercise discretion it would not have done so differently - primary judge plainly correct in conclusions - appeal dismissed.

[Tamaya](#) (I B C)

Soden v Croker (No 2) [2016] FCA 15

Federal Court of Australia

Perry J

Vexatious proceedings - applicant sought pursuant to 37AO *Federal Court of Australia Act 1976* (Cth) order precluding respondent from instituting proceedings without leave, and staying or dismissing all pending proceedings - evidence of very substantial number of proceedings which respondent had instituted or conducted from 1997 - standing under s37AO(3)(b) - held: case for vexatious proceedings order overwhelming - respondent prohibited from instituting proceedings without prior leave - Registrar granted opportunity to inform Court whether orders staying current proceedings still pressed.

[Soden](#) (I B)

Nightingale v Blacktown City Council [2015] NSWCA 423

Court of Appeal of New South Wales

Beazley P; Basten, Macfarlan, Meagher & Simpson JJA

Negligence - appellant injured when he stepped into depression in footpath - appellant sued Council in negligence - trial judge dismissed claim on basis appellant failed to prove Council as "roads authority", had "actual knowledge of "particular risk the materialisation of which resulted in the harm" - provision in s45 *Civil Liability Act 2002* (NSW) that roads authority "not liable" if the harm arose from "a failure of the authority to carry out road work, or to consider carrying out road work" - "actual knowledge" - whether majority view in *North Sydney Council v Roman* [2007] NSWCA 27 correct - whether Council liable because it conducted inspections negligently - principle of restraint in relation to departure from previous authority - held: *Roman* should remain binding - no basis for inference that Council's officers about whom evidence was led

and with relevant knowledge for purposes of test in *Roman* had “actual knowledge” of relevant risk - immunity in s45 applied because failure to repair footpath caused injury - appeal dismissed.

[Nightingale](#) (I B C)

Re: Application of the Anglican Property Trust Diocese of Bathurst [2016] NSWSC 13

Supreme Court of New South Wales

Slattery J

Judicial advice - trusts and trustees - plaintiff responsible entity of trust sought judicial advice pursuant to s63 *Trustee Act 1925* (NSW) - whether plaintiff justified to defend proceedings, justified to use Trust’s resources of Trust to defend proceedings and justified not to commence proceedings against insurance company in event it denied or did not admit liability under policy - *Anglican Church of Australia Constitution Act 1961* (NSW) - *Anglican Church of Australia Constitution Act 1902* (NSW) - *Australian Securities and Investments Commission Act 2001* (Cth) - *Contracts Review Act 1980* (NSW) - *Fair Trading Act 1987* (NSW) - held: plaintiff justified in defending proceedings, having recourse to trust assets for that purpose and justified in not commencing proceedings against insurance company.

[Anglican Property Trust](#) (B)

Wales v Wales (No 2) [2015] VSCA 365

Court of Appeal of Victoria

Kyrou & McLeish JJA; Ginnane AJA

Costs - trusts and trustees - Court dismissed two applications for leave to appeal against costs orders in respect of discontinued proceedings - respondents sought that applicants pay costs of application for leave and that Costs Court allow senior counsel’s fees in excess of scale - applicants conceded they should pay respondents’ costs but opposed direction for senior counsel’s costs - costs of negotiating summary of facts - costs of amending written case - r19 *Supreme Court (Chapter 1 Scale of Costs Appendices A and B Amendment) Rules 2014* (Vic) - whether Court should allow greater flexibility than that allowed by maximum fee - held: applicant to pay respondents’ costs of each application - no circumstances to justify direction in respect of senior counsel’s costs - direction refused.

[Wales](#) (B)

Zwiersen v Field & Hall Pty Ltd [2016] VSC 16

Supreme Court of Victoria

Rush J

Negligence - contribution proceedings - joint tortfeasors - plaintiff electrician claimed damages for contraction of mesothelioma in course of employment due to negligent exposure to asbestos - defendants conceded breach of duty of care - plaintiff settled claim against first., second and fourth defendants - first, third and fourth defendants sought contribution against each other pursuant to Pt IV *Wrongs Act 1958* (Vic) - parties’ respective responsibilities - apportionment between first defendant employer, and third and fourth defendant manufacturers/suppliers - contribution - held: in relation to culpability, third and fourth defendants, as compared to first



defendant, should share more significant contribution on apportionment - first, third and fourth defendants liable for contraction of mesothelioma - liability apportioned in amounts of 20% for first defendant, 40% for third defendant and 40% for fourth defendant.

[Zwiarsen](#) (I B C)

Milburn Lake Pty Ltd v Andritz Pty Ltd [2016] VSC 3

Supreme Court of Victoria

J Forrest J

Injunction - security of payments - parties in dispute over construction of mill - two payment claims made by plaintiff under *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act') - plaintiff sought injunction in relation to second adjudication determination - plaintiff contended adjudicator erred in determination and sought to prevent enforcement of determination - Div 2B, ss3 & 28 - ability of defendant to obtain adjudication certificate under s28Q which would enable enforcement of judgment - held: Court satisfied there was serious question to be tried - balance of convenience favoured granting to injunction on terms that money be paid into Court or agreed managed fund.

[Milburn](#) (C)

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