



Wednesday 5 November 2014

## Insurance, Banking, Construction & Government

# A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark\_Legal

## Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

## Executive Summary (1 minute read)

**The Nominal Defendant v Ross** (NSWCA) - negligence - unidentified minibus collided with pedestrian outside airport terminal - Nominal Defendant liable (I)

**Mhanna v Daoud** (NSWCA) - contract - leave to appeal from dismissal of cross-claim refused (I B)

**Landbridge Transport Pty Ltd v Buckley (No 2)** (NSWSC) - costs - successful plaintiff raised numerous grounds not ultimately pursued - costs followed the event (I)

**Sunshine Coast Regional Council v Earthpro Pty Ltd** (QSC) - security of payments - injunction restraining enforcement of adjudication refused (C)

**Westpac Banking Corporation v Knight Property Investments No. 3 Pty Ltd (No 3)** (QSC) - pleadings - leave to amend defence and counterclaim (I B)

**Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd (No 4)** (WASC) - corporations - payment out of court to successful defendants of sums held as security for costs (I B)

**Kingsfield Holdings Pty Ltd v Sullivan Commercial Pty Ltd [No 2]** (WASC) - defamation - actions arising from conversation and derivative correspondence - application for jury trial granted (I)

## Summaries with links (5 minute read)

### **The Nominal Defendant v Ross [2014] NSWCA 370**

Court of Appeal of New South Wales

Beazley P; Meagher & Hoeben JJA

Negligence - respondent sued Nominal Defendant for damages for injury suffered when unidentified minibus hit him outside Sydney Airport terminal - Nominal Defendant did not dispute collision occurred but denied driver of minibus was negligent - Nominal Defendant also contended respondent failed to comply with his duty of due search and inquiry - primary judge found driver of minibus was negligent - 20% contributory negligence - primary judge found respondent satisfied his duty of due search and inquiry - s34(1) *Motor Accidents Compensation Act 1999* (NSW) - held: appeal on question of negligence and against finding that due search and inquiry took place dismissed - appeal on contributory negligence allowed - liability apportioned at 65% for Nominal Defendant and 35% for respondent - appeal allowed in part - judgment reduced.

[The Nominal Defendant](#) (I)

### **Mhanna v Daoud [2014] NSWCA 376**

Court of Appeal of New South Wales

Meagher & Barrett JJA

Contract - leave to appeal - applicant sought leave to appeal interlocutory order of District Court dismissing a cross-claim for failure to comply with direction - failure undisputed - judge had also referred to District Court's lack of jurisdiction - s91(2) *Civil Procedure Act 2005* (NSW) - applicant contended that, because dismissal was in part predicated on a finding that District Court lacked jurisdiction, there had been a dismissal *following a determination on the merits* - therefore, dismissal prevented applicant from pursuing same cause of action in later proceedings - held: order was made under s61(3) - ample grounds for judge to act under s61(3) - no prospects of success on appeal - summons for leave to appeal dismissed.

[Mhanna](#) (I B)

### **Landbridge Transport Pty Ltd v Buckley (No 2) [2014] NSWSC 1469**

Supreme Court of New South Wales

Bellew J

Costs - Court allowed appeal brought by plaintiff against Local Court decision and remitted matter - plaintiff sought costs on basis it had been totally successful in proceedings - defendant submitted there were numerous grounds of appeal raised in summons, many of which were not ultimately

pursued - defendant contended that, because plaintiff's success was limited to a finding based on two errors of law, defendant should not be ordered to pay plaintiff's costs of appeal - held: although there were other matters which were relied upon, it was obvious that the asserted inadequacy of Magistrate's reasons was the plaintiff's principal complaint - Court unable to accept defendant's submission that there was a separation between issues on which appellant was successful and unsuccessful - plaintiff successful - costs should follow event.

[Landbridge Transport Pty Ltd](#) (I)

## **Sunshine Coast Regional Council v Earthpro Pty Ltd [2014] QSC 271**

Supreme Court of Queensland

P Lyons J

Security of payments - equity - adjudication made in favour of respondent under *Building and Construction Industry Payments Act 2004* (Qld) - applicant challenged validity of adjudication - applicant sought interlocutory injunction to restrain respondent from enforcing adjudication pending outcome of proceedings - prospects of success - balance of convenience - held: policy of the Act that adjudication should have effect unless and until an inconsistent decision made by court of competent jurisdiction outweighed risk that applicant might not be repaid if relief not granted - injunction refused.

[Sunshine Coast Regional Council](#) (C)

## **Westpac Banking Corporation v Knight Property Investments No. 3 Pty Ltd (No 3) [2014] QSC 270**

Supreme Court of Queensland

P Lyons J

Pleadings - limitations - Court struck out second defendant's counterclaim on basis loss claimed was not loss it could claim - second defendant sought leave to amend defence and counterclaim to seek relief on grounds of misleading conduct under *Australian Securities and Investment Commission Act 2001* (Cth) - proposed pleading added new cause of action and otherwise narrowed counterclaim - application opposed on basis amendment would add new causes of action outside limitation period, that there was no sufficient explanation for its lateness, that it caused strain on the other parties, that the claim sought to be raised was weak, and that it caused prejudice - r375 *Uniform Civil Procedure Rules 1999* (Qld) - held: undesirable and unnecessary to decide question about expiry of limitations period on an interlocutory application - proposed pleading arose out substantially the same facts as the causes of action raised by second defendant in counterclaim the subject of earlier ruling - absence of explanation not of great significance - raising of additional matters in proposed pleading did not prevent plaintiff from having a fair trial - leave granted to second defendant to amend defence and counterclaim.

[Westpac Banking Corporation](#) (I B)

**Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd (No 4) [2014]****WASC 405**

Supreme Court of Western Australia

Allanson J

Security for costs - payment out of court - Technomin unsuccessfully sued defendants claiming entitlement to royalties under gross production royalty deed - Technomin appealed - appeal was dismissed - Technomin applied to High Court for special leave to appeal - application not yet heard - Court had earlier ordered Technomin to give security for costs under s1335(1) *Corporations Act 2001* (Cth) - Technomin paid the amount ordered into court - defendants sought payment out of court of the amount ordered as security - held: Court not satisfied that Technomin's case that it retained an interest in the money was sufficiently strong to justify an order that the money not be paid out - Court also took into account that, if Technomin went into liquidation, and liquidator claimed payment was an unfair preference, there was no reason to believe that an order that the money be paid out of court would prejudice a liquidator's action under s588FF - payment out of court to the defendants of sums held as security for costs.

[Technomin Australia Pty Ltd](#) (I B)

**Kingsfield Holdings Pty Ltd v Sullivan Commercial Pty Ltd [No 2] [2014] WASC 408**

Supreme Court of Western Australia

K Martin J

Defamation - three actions arising from conversation and derivative correspondence - plaintiffs sought trial by jury - defendants opposed application - defendants accepted it was their onus to show why there should not be a trial by jury - ss21 & 22 *Defamation Act 2005 (WA)* - s29 *Juries Act 1957 (WA)* - held: plaintiffs were entitled to elect for jury trials provided they complied with the rules of court in terms of formally articulating that election - considerations raised by defendants did not disturb entitlement to elect a jury trial - on review of pleadings, there were no relevant presenting inhibitions against jury trials - application granted.

[Kingsfield Holdings Pty Ltd](#) (I)

**[Click Here to access our Benchmark Search Engine](#)**