

Monday 10 March 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**In the matter of National Buildplan Group Pty Ltd (subject to deed of company arrangement)** (NSWSC) - corporations - voluntary administration - distribution of funds held in bank account maintained by company - directions to notify interested parties (B C G)

**Kelly v Fairfax Media Publications Pty Ltd (No 2)** (NSWSC) - pleadings - defamation - contextual truth - *plead back* - leave to file amended defence (I)

**Love v Roads Corporation** (VSCA) - compulsory acquisition of land - valuation and compensation - land owner's appeal dismissed (B C G)

**Hook v Public Transport Authority (WA)** (VSC) - cross-vesting - work injury damages - proceedings transferred to Supreme Court of Western Australia (I G)

**Sanrus Pty Ltd v Monto Coal 2 Pty Ltd** (QSC) - pleadings - joint venture - leave to deliver amended statement of claim (B C)

**Warren v Lawton** (WASC) - pleadings - caveats - sale of land - amendments rendering pleading defective disallowed (B)



**Aikman v Howard** (ACTSC) - damages - motor vehicle collision - motorcyclist injured - damages assessed (I)

*From the United Kingdom*

**Stott v Thomas Cook Tour Operators Ltd** (UKSC) - disability rights - international aviation law - passenger's claim for compensation for injured feelings precluded by Montreal Convention (I G)

## Summaries with links (5 minute read)

### **In the matter of National Buildplan Group Pty Ltd (subject to deed of company arrangement) [2014] NSWSC 146**

Supreme Court of New South Wales

Black J

Corporations - voluntary administration - deed of company arrangement - deed administrators sought directions under s447D *Corporations Act 2001* (Cth) and s63 *Trustee Act 1925* (NSW) as to proper distribution of funds held in bank account maintained by company (retention account) - scope of statutory provisions - held: appropriate legislation is *Corporations Act* - money was held in retention account was held on trust for retention creditors in respect of NSW government contracts - direction made for plaintiff to distribute funds - orders made for relevant costs to be paid from retention account - notification to be given to creditors identified as claimants or potential claimants in respect of retention funds - liberty reserved for interested creditors to apply to vary or revoke directions.

[National Buildplan Group Pty Ltd](#) (B C G)

### **Kelly v Fairfax Media Publications Pty Ltd (No 2) [2014] NSWSC 166**

Supreme Court of New South Wales

McCallum J

Pleadings - defamation - defences - contextual truth - publication of articles in newspaper's print and internet editions - plaintiff objected to pleading of defence of contextual truth - whether, on proper construction of s26 *Defamation Act 2005* (NSW), it was open to a defendant to *plead back* as a contextual imputation, an imputation relied upon by plaintiff only as *fallback* or alternative imputation - objections as to form of defendants' contextual imputations - held: determination of *plead back* issue depended on whether alternative imputation relied on by plaintiff met requirements of a contextual imputation under s26 of the Act, namely that it be an *other* imputation conveyed by matter complained of *in addition to* plaintiff's primary imputations - plaintiff's alternative imputations not capable of meeting those requirements - defendants refused leave to include certain imputations - defendant granted leave to file an amended defence in accordance with reasons.



[Kelly](#) (I)

## **Love v Roads Corporation [2014] VSCA 30**

Court of Appeal of Victoria

Maxwell P; Whelan & Santamaria JJA

Compulsory acquisition of land - appellant owned land used for grazing cattle but it had potential for quarry - part of land compulsorily acquired by Roads Corporation in 2002 for construction of freeway - dispute arose concerning amount of compensation payable under *Land Acquisition Compensation Act 1986* (Vic) (LACA) - owner claimed that but for freeway he would have obtained planning permit and that an operating quarry would have been established before acquisition date - Roads Corporation argued market value should be assessed on basis that highest and best use of acquired land was as industrial land - primary judge found substantially in favour of Roads Corporation - ss43(1)(a) & 89(2) LACA - ss76 & 79 *Evidence Act 2008* (Vic) - *Pointe Gourde* principle - held: no failure to accord owner procedural fairness - owner failed to establish factual basis for claim - no basis on evidence to find quarry would have been in operation as at February 2002 - no unreasonableness in *Wednesbury* or any other sense - appeal dismissed.

[Love](#) (B C G)

## **Hook v Public Transport Authority (WA) [2014] VSC 69**

Supreme Court of Victoria

Kyrou J

Cross-vesting - engineer who worked on ships alleged he was exposed to asbestos in course of employment due to defendants' negligence and contracted mesothelioma - defendants each sought order for transfer of proceeding to Supreme Court of Western Australia under s5(2) *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) - held: having regard to connecting factors to Supreme Court of Western Australia, Court clearly of view that it was the natural and most appropriate forum - it was in interests of justice that proceeding be determined by Supreme Court of Western Australia - cross-vesting order made.

[Hook](#) (I G)

## **Sanrus Pty Ltd v Monto Coal 2 Pty Ltd [2014] QSC 23**

Supreme Court of Queensland

Boddice J

Pleadings - contract - plaintiffs claimed damages for breach of written joint venture agreement concerning coal exploration and mining development - defendants sought orders that plaintiffs be refused leave to file proposed amended consolidated statement of claim (pleading), that certain paragraphs of pleading be struck out, and that plaintiffs be prohibited from repleading any positive allegation of economic viability without Court's leave - necessity to plead material facts to establish causal nexus between breach and loss and damage - reinstatement of positive allegation after short hiatus - lack of explanation for change of position - held: balancing all relevant factors Court satisfied it was appropriate that plaintiffs be given leave to deliver pleading - it could not be said



that pleading disclosed no reasonable cause of action - plaintiffs' allegations raised real questions to be determined, resolution of which would involve findings of fact in respect of matters in dispute - paragraphs not struck out - application dismissed.

[Sanrus Pty Ltd](#) (B C)

### **Warren v Lawton [2014] WASC 59**

Supreme Court of Western Australia

Le Miere J

Pleadings - real property - caveats - contract for sale of land - plaintiff sought order dismissing defendant's application under s138B *Transfer of Land Act 1893* (WA) for removal of caveat and order that he had caveatable interest in land - plaintiff sought that amendments to defendant's defence and counterclaim be disallowed - held: Court would not give leave to amend pleading into a defective form - amended defence was confusing and failed to disclose case - some of pleading untenable - amendments disallowed - leave to file and serve proposed amended defence and counterclaim and to move to amend defence and counterclaim in terms of that minute.

[Warren](#) (B)

### **Aikman v Howard [2014] ACTSC 35**

Supreme Court of the Australian Capital Territory

Master Harper

Damages - motor vehicle collision - motorcyclist injured right leg in collision with motor vehicle - liability admitted - assessment of damages - credit - medical evidence - held: accident had prevented plaintiff from pursuing chosen career as geologist - injuries had severely restricted his ability to engage in physical activities which he enjoyed - plaintiff had suffered serious diminution in enjoyment of life - plaintiff would be left with degree of pain for rest of his life and injuries had caused impairment to his earning capacity - damages assessed at \$1,232,000.

[Aikman](#) (I)

*From the United Kingdom*

### **Stott v Thomas Cook Tour Operators Ltd [2014] UKSC 15**

Supreme Court of the United Kingdom

Lord Neuberger P, Lady Hale DP; Reed, Hughes & Toulson LJJ

Disability rights - carriage by air - UK Disability Regulations - international aviation law - disabled passenger booked flights with air tour operator and was assured he and his wife would be seated together - on return journey they were not - passenger alleged air tour operator breached duty under *European Parliament and Council Disability Regulation* (implemented by UK Disability Regulations) by failing to make all reasonable efforts to seat his wife next to him - passenger claimed damages including aggravated damages for injury to feelings - whether court can award damages for claimant's discomfort and injury to feelings caused by a breach of UK Disability Regulations - Courts below had concluded any such award was precluded by *Montreal*



*Convention* for international carriage by air as adopted in the EU by *Montreal Regulation* - principle of exclusivity - held: embarrassment and humiliation felt by passenger were exactly what Disability Regulations were intended to prevent – claim precluded by Article 29 of Montreal Convention which limits rights to matters in article - Court shared regret of lower courts that damages were not available as recompense for ill treatment but agreed with them that damages were precluded by Montreal Convention - appeal dismissed.

[Stott \(I G\)](#)

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