



Wednesday, 3 February 2016

Daily Construction 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)

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

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)

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)

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.

[Zwiersen](#) (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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