



Thursday, 6 February 2025

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

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Executive Summary (One Minute Read)

Birketu Pty Ltd v Atanaskovic (HCA) - solicitors can recover awarded costs of litigation for work done by their employed solicitors

Naaman v Jaken Properties Australia Pty Limited (HCA) - a successor trustee does not owe a fiduciary duty to a former trustee in respect of the former trustee's right of indemnity out of trust assets

DTZ Worldwide Limited v AIG Australia Limited (NSWSC) - breach of warranty established, but case against insurers dismissed as any damages would be less than the excess provided for in the relevant policies

Terramin Exploration Pty Ltd & Anor v State of South Australia (SASC) - applicant refused mining lease for gold mine failed in application for judicial review

Summaries With Link (Five Minute Read)

Birketu Pty Ltd v Atanaskovic [2025] HCA 2

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Costs - unincorporated solicitors partnership successfully sued client and was awarded costs - NSW Supreme Court held firm not entitled to costs of employed solicitors, in accordance with Victorian authority - Court of Appeal allowed firm's appeal by majority - client granted special

leave to appeal to High Court - held (by Gageler CJ, Gordon, Edelman, Gleeson, & Beech-Jones JJ; Steward J & Jagot J dissenting): critical question was not construction of NSW statutory language, but clarification of common law principle giving meaning to the term 'costs payable' in definition of 'costs' of proceedings in *Civil Procedure Act 2005* (NSW) - common law principle is costs are only for indemnity (or partial indemnity) for professional legal costs actually incurred in conduct of litigation - High Court confirmed in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 self-represented solicitor cannot recover for legal work done on his or her own behalf - Court emphasised this did not disturb rule that litigant who employs a lawyer can recover for that lawyer's legal work - this is an application of, not an exception to, general common law principle - like any other litigant, solicitor or firm cannot recover for own legal work - also like any other litigant, solicitor or firm can recover for employees' legal work - salaries and overheads for employees' legal work are professional legal costs actually incurred - contrary Victorian authority overruled - traditional approach to quantification is to assess costs that would have been incurred and allowed had independent solicitor been engaged - this is no more than an assumption of fact, and a costs respondent may show this would result in recovery greater than indemnity - unnecessary to consider this further - appeal dismissed (by majority).

[Birketu Pty Ltd](#)

Naaman v Jaken Properties Australia Pty Limited [2025] HCA 1

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Fiduciary duty - Naaman successfully sued JPG, a trustee, and was subrogated to JPG's entitlement to indemnity out of trust assets for liabilities properly incurred - Jaken replaced JPG as trustee, and transferred trust assets to third parties to frustrate Naaman - NSW Supreme Court found Jaken owed JPG a fiduciary duty regarding JPG's right of indemnification, which it had dishonestly and fraudulently breached with the knowing assistance of six other entities - Court of Appeal, by majority, allowed Jaken's appeal - Naaman granted special leave to appeal to High Court - held (by Gageler CJ, Gleeson, Jagot, & Beech-Jones JJ; Gordon, Edelman, & Steward JJ dissenting): a court of equity can protect a former trustee's right of indemnity without the successor trustee owing any obligation to the former trustee - a fiduciary relationship should not be imposed on another legal or equitable relationship merely to overcome perceived shortcomings in remedies available to protect that other relationship - Jaken owed JPG no fiduciary duty - held (by Gordon, Edelman, & Steward JJ, dissenting): Jaken had an obligation not to deal with trust assets so as intentionally to destroy, diminish, or jeopardise JPG's entitlement to be indemnified - Jaken had assumed a responsibility to JPG such that JPG could reasonably expect Jaken would act regarding trust assets in the interests of JPG to the exclusion of its own or third parties' interests - Jaken had an obligation not to allow its personal interests to conflict with its objectively assumed duty of loyalty to JPG when dealing with assets to which JPG had an equitable proprietary right - this conflict principle was the irreducible core of the fiduciary obligation - appeal dismissed (by majority).

[Naaman](#)

DTZ Worldwide Limited v AIG Australia Limited [2025] NSWSC 12

Supreme Court of New South Wales

Ball J

Insurance - DTZ agreed to buy a group of companies operating an international property services business from the United Group - one of the companies had entered into a facilities management contract in Singapore - DTZ claimed the United Group breached several warranties in the sale agreement concerning this Singapore contract, by incorrectly accounting for certain payments, wrongly capitalising mobilisation costs, and failing to recognise the contract as onerous and make provision for it in their accounts - as required by the sale agreement, DTZ both obtained warranty and indemnity insurance, and claimed against the insurers rather than against the United Group - held: the accounting treatment of the payments was correct - the treatment of mobilisation costs was correct - no breach of warranty arising from failure to classify contract as onerous - however, United Group's failure to disclose the costs of cleaning were substantially more than budgeted this meant, contrary to expectations, the contract was likely to be loss-making for at least the first two years, was misleading, and involved a breach of sale agreement warranties - reasonable damages would be the difference between the profits originally forecast to the end of the relevant period and the profit or loss during that period that included the increased cleaning costs - DTZ had not calculated this difference, and the Court could not readily calculate it without expert evidence - however, it was clear it would be substantially less than the excess in the relevant policy, so no damages would be recoverable against the insurers in any event - proceedings dismissed.

[View Decision](#)

Terramin Exploration Pty Ltd & Anor v State of South Australia [2025] SASC 3

Supreme Court of South Australia

Kourakis CJ

Administrative law - applicant proposed a gold mine on certain land - SA Minister for Energy and Mining refused mining lease and miscellaneous purposes (MP) licence, and SA Governor reserved land from the operation of the *Mining Act 1971* (SA) - applicant sought judicial review - held: Minister did not misapprehend nature and source of statutory power - mistaken reference to a statutory provision was slip with no material effect on exercise of power - Minister entitled to refuse mining lease due to residual risk environmental outcomes might not be achieved - environmental outcomes did not include the adverse commercial effects on other land uses - applicant had not shown Minister found environmental outcomes could not be achieved - Minister entitled to take a different view that that expressed in an assessment report - Minister had not taken irrelevant considerations into account - adverse effects on investments by other local businesses was a relevant consideration - Minister took all relevant considerations into account, including the way the applicant proposed to address environmental risks and significant economic benefits the gold mine would bring to SA - time for making submissions to Governor was sufficient - applicant had not shown Governor failed to take relevant considerations into account, or that Governor's decision was pre-determined - decision to reserve the land involved high government policy, and it was difficult to see how a court could



find unreasonable a decision of Governor and Ministers based on confidential ministerial correspondence - applicant's complaint that Governor's decision was motivated by political considerations was meaningless in this context - proceedings dismissed.

[Terramin Exploration Pty Ltd & Anor](#)

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