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

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### Executive Summary (One Minute Read)

**Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd** (NSWSC) - purchaser was not entitled to rescind contract for sale of a service station on the basis of an environmental report showing some contamination

**Rifai v Woods** (NSWSC) - neighbours who had caused water ingress to land by swimming pool and other construction works were liable in private nuisance

# Benchmark

## Summaries With Link (Five Minute Read)

### **Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd [2024] NSWSC 410**

Supreme Court of New South Wales

Parker J

Contracts - the purchaser under a contract for the sale of land containing a petrol station and an automotive repair workshop claimed to be entitled to terminate the contract under a special condition - the background to the special condition was a concern on the part of the purchaser that the land might be contaminated, having regard to its past and continuing use as a service station - the special condition provided for the parties to obtain an environmental report into the scope and nature of any contamination and that either party might rescind the contract pursuant to the standard rescission clause (that is, with the deposit being refunded) if the environmental report indicated that the property did not fall within the NSW Environment Protection Authority Guidelines in relation to contamination levels in, on or under the property and which permitted the property to be used as a service station - the purchaser claimed the report entitled it to rescind - the vendor sought rectification of the special condition so that either party would be entitled to rescind if the report showed that the property does not fall within the NSW EPA Guidelines in relation to the contamination levels in, on or under, notwithstanding that it permitted the property to be used as a Service Station - held: the *Contaminated Land Management Act 1997* (NSW) contains a general statutory regime which applies to contaminated land in NSW, and empowers the EPA to make management orders binding on the owner of contaminated land - rectification is only available where the evidence that the contract does not reflect the parties' common intention is clear and compelling - the claim for rectification failed - as to interpretation of the contract of sale, it was to be interpreted by reference to its text, context and purpose, and its context included any contract, document or statutory provision referred to in the contract - what the environmental report must do for rescission to be permitted is to "indicate" that the site does not fall within (that is, exceeds) relevant contamination levels - the report did identify some exceedences of investigation levels at the site, but, on the correct construction of the special condition, this was insufficient to give the purchaser a right of rescission - proceedings dismissed.

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### **Rifai v Woods [2024] NSWSC 374**

Supreme Court of New South Wales

Peden J

Nuisance - Rifai complained about water flowing onto their property from their neighbours' property on the high side - they alleged this amounted to a private nuisance justifying orders compelling the neighbours to remedy the water ingress - the neighbours, the Woods, admitted that the water flowed as alleged, but denied that the water was anything more than "natural" water, or water caused by their reasonable use of their property, such that they had no liability for nuisance - the problem began in about 2015, when the Woods had removed two large water tanks that sat on their land on the boundary and built a swimming pool in about the same

location, and then, between 2016 and 2022, had carried out further works to their backyard, including building a half-court basketball court next to the swimming pool and a miniature golf course at the very back of their property - held: the law of private nuisance seeks to balance the interests of one land owner using their land as they see fit, and the interests of another land owner, whose use and enjoyment of their own land is interfered with because of the other's action - a private nuisance is a continuous or recurrent state of affairs - to establish private nuisance, the state of affairs must amount to or involve a material and unreasonable interference with a plaintiff's use and enjoyment of their land, and a material and unreasonable interference can include both physical damage to property and non-physical damage - the question whether an interference is material and unreasonable requires the Court to make a value judgment in the circumstances - in making this judgment, regard must be had to plain, sober and simple notions among ordinary people, as well as to the character of the locality in which the inconvenience is created and the standard of comfort that those in the locality may reasonably expect, and allowances must also be given for a certain amount of "give and take" between neighbours - liability for private nuisance is established if the defendant created, adopted, or continued the state of affairs which constitutes the nuisance unless the defendant's conduct involved no more than the reasonable and convenient use of its own land - the construction of the swimming pool and related works on the Woods' land created a state of affairs in which both stormwater and pool water flowed into the Rifais' land in a manner which substantially and unreasonably interferes with the Rifais' use and enjoyment of their land - in circumstances where the construction of the pool and related works did not incorporate adequate drainage provisions, the Court was not satisfied that these were reasonable or natural uses of the Woods' land - the Woods were responsible for this state of affairs and were liable in nuisance on the basis either that the harm to the Rifais' land was reasonably foreseeable, or that the Woods failed to take steps to abate the nuisances upon learning of them.

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