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A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) (FCA) - Court approved settlement of class action, gave directions to deed administrators, and allowed certain costs claimed by a litigation funder

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

Tasevski v Westpac Banking Corporation (NSWSC) - Workers compensation Appeal Panel had erred in not concluding that there had been no error in a medical assessment

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

Manca v Teys Australia Beenleigh Pty Ltd (QCA) - primary judge had not erred in dismissing negligence action brought by abattoir worker against employer after he had slipped on stairs in the blooding floor area

Summaries With Link (Five Minute Read)

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) [2024] FCA 386

Federal Court of Australia
Thawley J
Representative proceedings - DASS was a financial services provider within the E&P Group of companies, which, from about 2011, gave advice to its clients to invest in URF, a US-based property investment and development fund focused on residential property, primarily in New York - at the same time, other companies in the E&P Group were being paid fees for managing the URF's assets and renovating its properties - this gave rise to an apparent conflict of interest - the URF did not perform well - applicants began a class action against DASS and deed administrators of DASS applied for directions and orders under s90-15 of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the *Corporations Act 2001* (Cth) - a settlement was agreed in the class action, and the applicants sought the Court's approval - a UK litigation funder applied for approval of part of the legal costs that it paid in relation to a competing class action which was stayed, as a form of common fund order - the deed administrators applied for orders approving their proposed process for the adjudication of claims to be made by DASS' creditors and the distribution of the deed fund once those claims have been assessed - held: the central question regarding settlement approval was whether the settlement was fair and reasonable in the interests of the group members as a whole - the terms of settlement reflected a fair and reasonable compromise of the group member's claims against the respondents - the settlement distribution scheme was fair and reasonable to the claimants - the Court allowed legal costs of a little over 80% of what was claimed for professional fees as recorded in the itemised account, together with full allowance for the 25% uplift - settlement approved - directions should be made in the terms sought by the deed administrators - the return likely to claimants under the settlement were already very small compared to the losses which they have sustained, and, while this was unfortunate, the evidence indicated that this was as much as was ever likely to be recovered - as to the UK litigation funder's claim, there was nothing unjust in funders wearing costs expended in their own pursuit of a commercial gain in circumstances such as the present - there is much which would be unjust in visiting the costs of unsuccessful funders on group members, particularly where there are many unsuccessful funders - there will be circumstances in which it would be "just" to order such costs, an obvious case being where there was a benefit obtained by group members from the funder's activities, particularly where the work was not duplicative and the benefit derived by group members is enduring - the litigation funder bore the onus of establishing that any amount was "just" - the costs of preparing a report that had been of assistance to the group members should be allowed - it was also just to allow certain costs associated with an application for leave to intervene in proceedings brought by ASIC, as this had lead to benefit for group members - other costs were not allowed.
Watson & Co Superannuation Pty Ltd

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 recission 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.
View Decision

Tasevski v Westpac Banking Corporation [2024] NSWSC 401
Supreme Court of New South Wales
Schmidt AJ
Workers compensation - Tasevski was employed for many years by Westpac, most recently as a head teller, when she suffered a psychiatric injury at work which resulted in her seeking lump sum compensation under s66 of the *Workers Compensation Act 1987* (NSW) - a medical assessor found that Tasevski had suffered both PTSD and a major depressive disorder from which she had not recovered and which were now chronic, but that her whole person impairment was only 10%, which was below the 20% statutory thresholds for compensation - an Appeal Panel dismissed Tasevski's appeal - Tasevski applied for judicial review - held: there was no issue that the Panel had misunderstood the legal test which it had to apply on the appeal, but whether the result was that the Panel had failed to exercise its statutory functions in accordance with applicable law and had issued a certificate which did not accord with the statutory scheme remained in issue - the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* specify the method which must be used for assessing psychiatric impairment - behavioural consequences of psychiatric disorders must be assessed

according to six scales that evaluate separate areas of functional impairment: self care and personal hygiene; social and recreational activities; travel; social functioning (relationships); concentration, persistence and pace; and employability - the assessor had concluded that the self and personal hygiene scale fell into Class 2, whereas, on the evidence, the correct classification was Class 3, the impairment being moderate, not mild - on an appeal where the grounds advanced are application of the wrong criteria or making a demonstrable error in the conclusions reached about the severity of the impairment, the Panel has to consider the assessor's conclusion about the correct class of any disputed scale, by confining itself to the conduct relevant to that scale and the requirements of the Guidelines - even if the Panel identifies that the evidence raised matters about which reasonable minds might differ, it cannot resolve what is in issue about a disputed scale by an observation that what arose to be considered concerned matters about which reasonable minds might differ, or by a finding that the assessor's conclusion was open - the Panel must rather consider and determine whether the assessor applied the incorrect criteria in arriving at his or her conclusion, or whether there was a demonstrable error in the conclusion reached about that class assignment - the Panel had erred, and another panel, approaching the appeal in accordance with applicable law, might reach a different conclusion about the grounds of appeal advanced - Appeal Panel's decision set aside, and matter remitted to a differently constituted appeal panel to be considered according to law.
View Decision

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.
View Decision

Manca v Teys Australia Beenleigh Pty Ltd [2024] QCA 60
Court of Appeal of Queensland
Bowskill CJ, Fraser AJA, & Applegarth J
Negligence - the appellant worked on a part of the "kill floor" at Teys' Beenleigh meatworks, where his work was slicing meat to remove fat and using a saw to cut briskets - he was transferred to do different work in a different environment on "the blooding floor" - the slipped while walking down stairs and was injured - he sued Teys in negligence - the primary judge found that Teys had taken reasonable steps to mitigate any risk that a person would slip on the steps, and that the appellant had not proven that he slipped due to any failure by Teys to take reasonable precautions against a risk of slipping, and therefore dismissed the proceeding - the appellant appealed - held: it had been open to the primary judge to conclude that the appellant had not proven that there was blood on the step or steps and that the blood caused him to slip - the appellant had not established that the primary judge erred in his findings that there was no blood on the appellant's boots when he fell - given the course of evidence at trial, the Court was not persuaded that there was a breach of the principles in *Browne v Dunn*, or that the primary judge was not entitled to act upon the evidence of witnesses called in Teys' case about congealed blood and whether blood is slippery or not - the evidence did not prove that any supervisor had seen the appellant carrying his tools in both hands as he descended the stairs on one of the few days that he worked in the blooding floor area before his fall - the primary judge had been correct to conclude in the light of his findings of fact that the precautions he had noted meant the risk of a person being injured by slipping on the steps was insignificant - the primary judge's conclusion that the risk was "not significant" had not been shown to be in error - the primary judge had not been shown to have erred in his assessment of whether, in the circumstances, a reasonable person in Teys' position would have taken the pleaded precautions - the appellant had not shown that the primary judge had erred in concluding that it was not clear what caused the appellant to slip and fall and that, therefore, the appellant had not proved

that he slipped due to any failure by Teys to take reasonable precautions against the risk of slipping - the appellant had failed to prove that any one of the causes that he alleged was the cause of his fall, and he had therefore failed to prove causation - appeal dismissed.
Manca

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