

SUPREME COURT OF VICTORIA

RECENT JUDGMENTS BULLETIN ISSUE NO. 13/2018

Below is a list of Victorian Supreme Court unreported judgments received in the Library from 9 to 20 July 2018. Catchwords are included when provided on the cover sheet of the unreported judgment. Enquiries regarding unreported judgments can be forwarded to the Supreme Court Library at: sclib@supremecourt.vic.gov.au or telephone (03) 9603 6282.

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COURT OF APPEAL

APPEALS - Procedure - Application to adduce fresh evidence - Where allegation that judgment of trial judge and by Court of Appeal procured by fraud - Where applicant seeks to overturn orders as to costs - Application dismissed.

JUDGMENTS - Setting aside for fraud - Nature of proceeding to set aside judgment on ground of fraud - Whether appropriate for Court of Appeal to determine issue of fraud - *Clone Pty Ltd v Players Pty Ltd (in liq) (2018) 353 ALR 24* applied.

Hera Project P/L (ACN 163 685 041) v Bisognin, Gino Andrew and Bisognin, Leah Joan

[\[2018\] VSCA 170](#)

Ferguson CJ, Santamaria JA and Riordan AJA

27 June 2018

CONTRACT - Construction and interpretation - Lease of premises used as service station - Where lessee exercised two five-year options to renew - Where obligation in clause concerning maintenance and repair of premises subject to condition of premises 'as at the date of commencement of the Lease' - Whether 'date of commencement of the Lease' date of commencement of original lease or date of commencement of renewal period - Nature of lease obtained by exercise of option to renew.

CONTRACT - Construction and interpretation - Lease of premises used as service station - Where underground storage tank part of tank system - Where lessee decommissioned tank - Whether lessee under obligation to repair tank - Where clause concerns maintenance and repair of premises - Whether obligation to 'keep and maintain' premises distinct from obligation to 'effect repairs' to premises 'as necessary' - Whether obligation extends to tank system only or also to individual parts of tank system.

APPEALS - Where findings of fact challenged on appeal - Where certain findings based on inference - Whether inference more probable conclusion to be drawn from facts.

WORDS AND PHRASES - 'keep and maintain', 'effect repairs', 'as necessary', 'fair wear and tear', 'reasonable use'.

Agtan P/L (ACN 007 410 077) v Caltex Australia Petroleum P/L (ACN 000 032 128)

[\[2018\] VSCA 169](#)

Santamaria, McLeish and Hargrave JJA

10 July 2018

COSTS - Application for leave to appeal allowed in part - Appeal dismissed - Respondent sought indemnity costs - Conduct of appellate proceedings not sufficient to warrant indemnity costs - Applicant to pay costs on standard basis.

Civil and Allied Technical Construction P/L (ACN 077 924 120) v AI Quality Concrete Tanks P/L (ACN 095 210 683)

[\[2018\] VSCA 167](#)

Whelan, Santamaria and McLeish JJA

29 June 2018

CRIMINAL LAW - Appeal - Sentence - Intentionally causing injury - Applicant suffering from paranoid schizophrenia - Relapse of psychotic illness the result of stress, failure to take medication and drug use - Verdins principles - When community correction order ('CCO') available in addition to term of imprisonment - Whether CCO satisfies punitive and rehabilitative sentencing requirements - Observations on absence of victim impact statement - Appeal allowed - R v Verdins (2007) 16 VR 269; Boulton v The Queen (2014) 46 VR 308 considered - Sentencing Act 1991 s 44(1).

Williams, Luke v The Queen

[\[2018\] VSCA 171](#)

Priest and Hargrave JJA

11 July 2018

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Incest, indecent assault (2) - Representative charges - Sentenced to 4y for incest, 1y for each indecent assault - Total effective sentence 5y, with non-parole period 2y 10m - Whether manifestly inadequate - Victim aged 11-13, offender 35-37 - Breach of trust and abdication of parental responsibility - Offender voluntarily disclosed part of offending - Sentencing discount warranted - Link with offender's experience of childhood sexual abuse - Whether moral culpability reduced - Residual discretion - Whether matter of principle raised - Appeal allowed - Resentenced to 7y 4m with non-parole period of 5y - DPP v Dalglish (a pseudonym) [2016] VSCA 148, DPP v Dalglish (a pseudonym) (2017) 349 ALR 37, R v Doran [2005] VSCA 271 applied - Criminal Procedure Act 2009 s 287.

Director of Public Prosecutions [DPP] v Walsh, Max (a Pseudonym)

[\[2018\] VSCA 172](#)

Maxwell P, McLeish and Ashley JJA

17 July 2018

CRIMINAL LAW - Appeal - Interlocutory appeal - Offences - Elements - Particulars - Course of conduct offences - Indictment specified period of offending - Complainant gave evidence of offending outside specified period - Whether leave to amend should be granted - Whether 'specified period' was element of offence or particulars - Appeal allowed - Leave to amend granted - Criminal Procedure Act 2009 sch 1 cl 4A.

WORDS AND PHRASES - 'specified period'.

Director of Public Prosecutions [DPP] v Jarvis, Jack (a Pseudonym)

[\[2018\] VSCA 173](#)

Maxwell P, Niall and Weinberg JJA

18 July 2018

INTENTIONAL TORTS - Conspiracy by unlawful means to give and procure false evidence - Witness immunity - Whether witness immunity applies to legal practitioners not called as witnesses - Whether witness immunity applies to a conspiracy to induce a witness to give false evidence - Whether witness immunity applies where a judgment is set aside for fraud - *Cabassi v Vila* (1940) 64 CLR 130 applied - Whether witness immunity applies to failure of subpoena recipient to produce a required document - *Giannarelli v Wraith* (1988) 165 CLR 543 considered - Whether witness immunity applies to corporation subpoena recipient - *Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647 followed - Leave to appeal refused.

SUMMARY JUDGMENT - Primary judge summarily dismissed proceeding brought by applicant on basis of witness immunity - Whether primary judge erred in determining issue on summary basis.

PRACTICE AND PROCEDURE - Application to adduce fresh evidence not before primary judge - Where application made late - Where evidence is not fresh - Where evidence not relevant to any proposed ground of appeal - Application refused.

Bodycorp Repairers P/L (ACN 068 589 408) and Murdaca, Antonio v Australian Associated Motor Insurers Ltd (ACN 004 791 744) & Ors

[\[2018\] VSCA 174](#)

Whelan, Niall and Hargrave JJA

20 July 2018

PRACTICE AND PROCEDURE - Recusal application - Apprehended bias - Findings made in prior proceedings - Test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 - Application refused.

Bodycorp Repairers P/L (ACN 068 589 408) and Murdaca, Antonio v Australian Associated Motor Insurers Ltd (ACN 004 791 744) & Ors (No 2)

[\[2018\] VSCA 175](#)

Whelan JA

20 July 2018

COMMERCIAL COURT

CORPORATIONS - External administration - Application for determination of emuneration by former administrator of company pursuant to s449E of Corporations Act 2001 (Cth) - Operation of transitional provisions of Insolvency Law Reform Act 2016 (Cth) - Remuneration determined in amount claimed.

In the matter of Metropolis City Promotions P/L (In Liquidation) (ACN 005 485 692). Vince, Peter Robert in his capacity as former administrator of Metropolis City Promotions P/L (In Liquidation) (ACN 005 485 692)

[\[2018\] VSC 381](#)

Gardiner AsJ

11 July 2018

COSTS - Application for costs against non party - Principles to be applied in a claim against sole director of applicant corporation - Whether director was 'a real party' to the proceeding - Reasonable grounds for allegation of fraud - Application dismissed. EVIDENCE - Claim for production of privileged documents - Whether liquidators of the applicant corporation had objected to production within the meaning of ss 118 and 119 of the Evidence Act 2008 (Vic) - Whether the privileged documents affected a right of a person within the meaning of s 121 of the Evidence Act 2008 (Vic) - Application dismissed.

QBH Commercial Enterprises P/L (ACN 163 992 498) (In Liquidation) v Dalle Projects P/L (ACN

147 573 948); Armour Legal (ACN 613 816 363); Mifsud, Jordan and Burton, Brian

[\[2018\] VSC 383](#)

Riordan J

12 July 2018

LEASES AND TENANCIES - Agreement for Lease part of sale and lease-back arrangement - Construction of termination provisions - Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451 - Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 - Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 - Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104.

WORDS AND PHRASES - Meaning of "and" and "or" - Associated Newspapers Ltd v Wavish (1956) 96 CLR 526 - Re The Licensing Ordinance (1968) 13 FLR 143 - Larwint Pty Ltd v Norwich Union Life Australia Ltd (2007) 15 VR 371 - Able Demolition & Excavations Pty Ltd v Yarra Ranges Shire Council [2008] VSC 294. ***Oxanda Childcare P/L (ACN 166 793 004) ATF The Oxanda Education Services Trust v MAAG Developments P/L (ACN 603 949 891)***

[\[2018\] VSC 370](#)

Croft J

13 July 2018

LIMITATION OF ACTIONS - Adverse possession - Co-ownership - Doe v Bird (1809) 11 East 49; 103 ER 22 - Culley v Doe d Taylerson (1840) 11 Ad & E 1008; 113 ER 697 - Real Property Limitation Act 1833 (Eng) ss 2, 12 - Beaumont v Hochkins (1889) 15 VLR 442 - Real Property Statute 1864 s 28 - Meaning of adverse possession - JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419 - Whittlesea City Council v Abbatangelo (2009) 259 ALR 56 - Limitation of Actions Act 1958 ss 3(1), 8, 14(1), 14(4), 18.

LIMITATION OF ACTIONS - Adverse possession - Co-ownership - "shall be deemed to be adverse possession of the land' under Limitation of Actions Act 1958 s 14(4) - Muller v Dalgety & Co (1909) 9 CLR 693 - Commissioner of Taxation (Cth) v Comber (1986) 10 FCR 88 - Limitation of Actions Act 1958 s 14(4).

LIMITATION OF ACTIONS - Adverse possession - Co-ownership - Aggregation of successive periods - Mulcahy v Curramore Pty Ltd [1974] 2 NSWLR 464 - Doe v Bird (1809) 11 East 49; 103 ER 22 - Culley v Doe d Taylerson (1840) 11 Ad & E 1008; 113 ER 697 - Lai Wai Kuen v Wong Shau Kwong [2004] 4 HKC 528 - Wills v Wills - [2004] 1 P&CR 37; [2003] UKPC 84 - Limitation of Actions Act 1881 (Jamaica) s 14 - Limitation of Actions Act 1958 s 14(4).

LIMITATION OF ACTIONS - Fraudulent concealment requires moral turpitude, wrongdoing or unconscionability - Hamilton v Kaljo (1989) 17 NSWLR 381 - New South Wales v McCloy Hutcherson Pty Ltd (1989) 17 NSWLR 381 - Seymour v Seymour (1996) 40 NSWLR 358 - Limitation of Actions Act 1969 (NSW) s 55(1) - Limitation of Actions Act 1958 s 27(b).

PARTNERSHIPS AND JOINT VENTURES - Partnership relationship is contractual - Duke Group Ltd (in liq) v Pilmer (1998) 144 FLR 1 - Tenancy in common does not create a partnership under general law - French v Styring (1987) 78 ALR 588 - Federal Commissioner of Taxation v McDonald (1987) 78 ALR 588 - Jolley v Commissioner of Taxation (1989) 86 ALR 297 - Co-ownership does not create a partnership at general law - Property Law Act 1958 s28A - Limitation of Actions Act ss 27B, 14(4) - Partnership Act 1958, s 8, s37(1).

PARTNERSHIPS AND JOINT VENTURES - Co-owners are deemed partners for the purposes of the Income Tax Assessment Act 1936 (Cth) - Federal Commissioner of Taxation v McDonald (1987) 78 ALR 588 - Jolley v Commissioner of Taxation (1989) 86 ALR 297 - Income Tax Assessment Act 1936 (Cth) ss 6, 90, 91, 92.

Fourniotis, Angela v Vallianatos, Andrew Gerry and by cross-claim Vallianatos, Andrew Gerry v Fourniotis, Angela and Registrar of Titles

[\[2018\] VSC 369](#)

Croft J

20 July 2018

PARTNERSHIP AND JOINT VENTURES - TRUSTS - Trust duties as between directors of a trust company who are also beneficiaries - Application of trust duties in the context of joint ventures carried out through various trusts - Circumstances in which a holistic settlement between a trustee and a beneficiary may be set aside - Construction of warranties as to the conduct of trustees - *Alati v Kruger* (1955) 94 CLR 216 - *Maguire v Makaronis* (1997) 188 CLR 449 - *Aequitas v AEFC* [2001] NSWSC 14 - Trustee Act 1958 s 48(1).

LIMITATION OF ACTIONS - Nature of fraud exception - Laches and acquiescence - *Levy v Watt* (2014) 308 ALR 748 - *Seymour v Seymour* (1996) 40 NSWLR 358 - *Crawley v Short* (2009) 262 ALR 654 - Limitation of Actions Act 1958 ss 5, 21, 27(b).

EVIDENCE - Expert witnesses - Specialised lay opinion - Utility of expert evidence limited to area of expertise - Admissibility of lay evidence informed by lay witness' expertise - *Matthews v SPI Electricity Pty Ltd* (Ruling No 9) [2012] VSC 340.

PRACTICE AND PROCEDURE - ADMINISTRATIVE LAW - Application for recusal by the trial judge on the basis of the judge's management of the trial - *Webb v The Queen* (1994) 181 CLR 41 - *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 - *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 - *AJH Lawyers Pty Ltd v Careri & ors* (2011) 34 VR 236.

Wilson, William Robert (on his own behalf and as trustee of the Wilson Family Trust) v Waigani P/L (ACN 005 481 818); *Applecross Secretarial Services P/L* (ACN 005 127 524); *Daydeb Nominees P/L* (ACN 005 181 242); *H. G & R. Custodian P/L* (ACN 004 996 712); *T.S. & G. Nominees P/L* (ACN 004 964 514); *H.G. & R. Management P/L* (ACN 005 327 346); *Second Mesial P/L* (ACN 006 199 579); *Second Pera Toka P/L* (ACN 005 751 333); *Purus Nominees P/L* (ACN 005 364 063); *Bradabelle P/L* (ACN 126 282 353); *Oupan Resources P/L* (ACN 005 600 895); *Geer, David Morton (in his own right and as executor of the Will and Estate of Charles Keith Geer)*; *Gorr, Leon*; *May, Anthony Henry*; *Kennedy, Deborah Margaret (as executrix of the Will and Estate of Charles Keith Geer)* and *H. G. & R. Nominees P/L* (ACN 004 462 659)

[\[2018\] VSC 302](#)

Croft J

20 July 2018

SUMMARY JUDGMENT - Where alleged breach of contract does not correspond to a pleaded obligation - Loss of commercial opportunity - Whether loss can be established - Whether damages could only be nominal - Consideration of counterfactuals properly a matter for trial - Civil Procedure Act 2010 (Vic) ss 62, 63 - Whether claim has a real prospect of success - Application dismissed.

PRACTICE AND PROCEDURE - Application to amend pleadings - Rectification claim sought to be raised - Whether the amended pleading discloses a real prospect of success - Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 36.01(1)(a) - Leave granted.

Opti-Pharm P/L (ACN 110 511 629) v *Nature One Dairy P/L* (ACN 602 371 684)

[\[2018\] VSC 397](#)

Elliott J

20 July 2018

COMMON LAW DIVISION

ADMINISTRATIVE LAW - Judicial review - Threshold for recovery of damages for non-economic loss under Part VBA of the Wrongs Act 1958 - Application to quash determination of Medical Panel - Alleged failure to deal with part of a claim made by a party - No such error in fact - Alleged error in Medical Panel's interpretation and application of the AMA Guides and Part VBA of the Wrongs Act 1958 - Injury to plaintiff's spine alleged to have been caused by fault of first defendant - Surgery, including fusions, undertaken to treat that injury - Whether Medical Panel wrong to consider itself precluded from giving an impairment rating to the fusions - Not an error - Proceeding dismissed - Wrongs Act 1958, Part VBA, ss 28LB (definitions of 'medical question' and 'threshold level'), 28LH(1), 28LL(1), 28LT, 28LW(2)(b), 28LWE, 28LZG(5), 28LZG(6), 28LZH - *Mountain Pine Furniture Pty Ltd v Taylor* (2007) 16 VR 659 considered and applied.

Hart, Lynda v Melbourne Underwater World P/L; Gibbons, Associate Professor Peter (Deputy Convenor of Medical Panels) and Medical Panel (constituted by Dr Roy Karna and Mr John Bourke)

[\[2018\] VSC 394](#)

Cavanough J

18 July 2018

APPEAL - Appeal from decision of Associate Judge refusing relief - Whether jurisdictional requirements of r 32.05(a) of the Supreme Court (General Civil Procedure) Rules 2015 correctly applied - Appeal allowed.

PRACTICE AND PROCEDURE - Preliminary discovery - Whether reasonable cause to believe applicant may have a right to relief - Principles to be applied - Application granted.

Alex Fraser P/L (ACN 004 056 204) v Minister for Planning

[\[2018\] VSC 391](#)

Riordan J

17 July 2018

JUDICIAL REVIEW - Plaintiff did not exercise statutory right of appeal from Magistrate's dismissal of charges alleging breach of Occupational Health and Safety Act 2004 - Application for judicial review - No satisfactory explanation for failure to exercise right of appeal - Relief in the nature of certiorari refused on discretionary grounds - Criminal Procedure Act 2009 s 272 - Occupational Health and Safety Act 2004 ss 2, 4, 21, 23 - Occupation Health and Safety Regulations 2007 regs 1.1.1, 1.1.7, 5.1.3, 5.1.5, 5.1.9, 5.1.11 - Supreme Court (General Civil Procedure) Rules 2015 O 56.

Glenister, Mark (Victorian WorkCover Authority) v Wayne Horne Earthmoving P/L (ACN 006 910 283) and Magistrates' Court of Victoria

[\[2018\] VSC 390](#)

McDonald J

18 July 2018

PRACTICE AND PROCEDURE - Appeal against summary judgment for possession and sale of land by a mortgagee - Defendants executors of estate of deceased person - Whether refusal of oral application for adjournment contrary to natural justice and procedural fairness - Whether a fair hearing given in accordance with Charter of Human Rights and Responsibilities Act 2006 (Vic) s 24 - Whether finding that no reasonable prospect of success was error of law and fact - Whether trial should be ordered at Court's discretion, despite prospects, in interest of justice - Whether matter in public interest - No ground of appeal made out - *Khoury v Khoury* [2018] VSC 305 considered - *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 considered - Civil Procedure Act 2010 (Vic) ss 63, 64 considered.

Deputy Commissioner of Taxation for the Commonwealth of Australia and Commonwealth of Australia v Bourke, Kathleen Ellen and Williams, Roberta
[\[2018\] VSC 380](#)

Cameron J
11 July 2018

PRACTICE AND PROCEDURE - Appeal from decision of an Associate Judge - Whether error in granting summary judgment - No real prospect of success - Scope of immunity provision - Whether respondents acted in good faith - Civil Procedure Act 2010 ss 62, 63, 64 - Legal Profession Uniform Law Application Act 2014 and Legal Profession Uniform Law s 467 - Supreme Court Act 1986 s 17(3) - Supreme Court Act (General Civil Procedure) Rules 2015 rr 77.06, 77.06.9 - Appeal dismissed.

Pumpa, Anthony William v Victorian Legal Services Board and McClintock, Eoin
[\[2018\] VSC 385](#)

Champion J
16 July 2018

PRACTICE AND PROCEDURE - Application for leave to amend Statement of Claim to plead breach of Fair Work Act 2009 (Cth) s 50 - Application to transfer proceeding to Federal Court of Australia - Application to strike out proceeding - Application to plead breach of Fair Work Act 2009 (Cth) s 50 dismissed - Application to transfer proceeding to Federal Court dismissed - Application to strike out proceeding dismissed - Fair Work Act 2009 (Cth) ss 12, 50, 539 - Civil Procedure Act 2010 s 7 - Jurisdiction of Courts (Cross-vesting) Act 1987 s 5 - Public Administration Act 2004 ss 8, 20 - Supreme Court (General Civil Procedure) Rules O 36.

Tucker, Tobias John (also known as Toby Tucker) v State of Victoria
[\[2018\] VSC 389](#)

McDonald J
18 July 2018

PRACTICE AND PROCEDURE - Defamation - Applications by first defendant to strike out defamation proceeding under r 23.01 of the Supreme Court (General Civil Procedure) Rules 2015 ('the Rules') on grounds of abuse of process, or alternatively r 23.02 on basis that plaintiff's pleaded imputations could not arise out of the words allegedly used by the first defendant - Whether proceeding offends principle of proportionality and is therefore an abuse of process - *Bleyer v Google Inc* [2014] NSWSC 897, referred to - Relevance of context to question of whether plaintiff's claims are trivial - Application under r 23.01 dismissed - Whether words complained of are capable of conveying a pleaded defamatory imputation - *Trkulja v Google Inc* [2018] HCA 25, referred to - Relevance of context in which statement alleged to be defamatory is made - Finding that question of whether first defendant's words are capable of conveying a pleaded defamatory imputation is a matter for trial - Application under r 23.02 dismissed.

Asmar, David v Fontana, Vince and Laurence, Tim

[\[2018\] VSC 382](#)

Daly AsJ

11 July 2018

PRACTICE AND PROCEDURE – Variation to security for costs – Whether material change of circumstance – Significance of delay in making request for further security – Whether proposed undertakings sufficient – Further security allowed for increase in trial costs, but not for discovery ordered prior to request for further security – Calculation of further security – [Supreme Court \(General Civil Procedure\) Rules 2015](#) r 62.05.

Roo Roofing P/L (ACN 131 182 093) and Matsuh P/L (ACN 105 461 818) v Commonwealth of Australia (No 2)

[\[2018\] VSC 268](#)

Lansdowne AsJ

23 May 2018

PROPERTY - Restrictive covenant - Application for modification of single dwelling covenant to allow subdivision - Whether covenant obsolete - Held not obsolete - Whether modification would occasion substantial injury by reason of precedential effect - Whether past subdivisions and modifications mean that modification would not set a precedent - Restriction to single dwelling to remain on subdivided lots so not a precedent for multi dwellings - Does set a precedent for smaller lot size - Plaintiff not proved that there would be no substantial injury to beneficiaries - Application for modification refused - Property Law Act 1958 (Vic) s 84(1)(a) and s 84(1)(c).

Del Papa, Sandra v Falting, Ashley; Geistendor, Ferdinand; Wang, Li; Zhao, Yuan; Forbes, Mel; Balfe, Ann; Biggins, Ken; Ingram, Darren; Candiloro, Anna; Candiloro, Ralph; Jones, Angela; Jones, Darren; Chau, Dan and City of Boroondara

[\[2018\] VSC 384](#)

Lansdowne AsJ

12 July 2018

SEX OFFENDERS REGISTRATION - Registrable offender - Registrable offence - Possession of child pornography commenced as child and continued as adult - Guilty plea - Finding of Magistrates' Court - Power of Chief Commissioner to serve a notice - Sex offender registration order - Sex Offenders Registration Act 2004 (Vic) ss 1(1), 1(2), 3, 6, 7, 11(1)-(6), 50, 51, 54, 55, 62(1), Class 2 offence, Sch 5, Crimes Act 1958 (Vic) s 70(1) (now repealed), Sentencing Act 1991 (Vic) s 75, Criminal Procedure Act 2009 (Vic) s 3.

Lansell-Kenny, Joshua v Chief Commissioner of Police

[\[2018\] VSC 374](#)

Garde J

11 July 2018

TRUSTS - Discretionary family trust - Defendants are the brothers of the plaintiff and were directors of trust in relevant period - Whether an earlier resolution resulted in an immediate vesting of the trust assets - Later resolution passed at directors' meeting to distribute majority of trust proceeds in equal shares between the two defendants, to the exclusion of the plaintiff - Later resolution recorded in minute - Whether the later resolution constituted a valid distribution of the trust capital and income under the Deed - Whether the trustee exercised its discretion to pay the whole of the trust capital and income to the defendants in good faith, on a real and genuine consideration, and for proper purposes - Consideration of scope and criteria for a challenge to a trustee's exercise of discretion - Attorney-General (Cth) v Breckler (1999) 197 CLR 83, referred to - Karger v Paul [1984] VR 161, referred to - Scope of a trustee's immunity from disclosing reasons for the exercise of discretion - Mandie & Anor v Memart Nominees Pty Ltd (2014) 42 VR 325, referred to - Relevance of evidence of surrounding circumstances and subjective understanding of parties to assessing whether a trustee is acting in bad faith or for an improper purpose - Hindle v John Cotton Ltd (1919) 56 Sc LR 625, referred to - Finding that earlier resolution not effective to vest trust assets for the purposes of the Deed - Finding that later resolution had effect of distributing trust income to defendants with the effect that, in the absence of rectification, the balance of the trust assets ought to have been equally distributed to the parties - Finding that later resolution was made in bad faith and for an improper purpose.

EQUITY - Whether rectification available - Defendants had intended to wind up trust and distribute a specified sum being the trust account balance to themselves as beneficiaries in equal shares - Resolution failed to achieve that result - Defendants sought rectification to give effect to their actual intentions - Consideration of availability of remedy of rectification - Domazet v Jure Investments Pty Ltd [2016] ACTSC 33, referred to - The Club Cape Schanck Resort Co Ltd v Cape Country Club Pty Ltd (2001) 3 VR 526 - Finding that rectification is available to the defendants.

Trani, Patrizia v Trani, Marco and Trani, Luciano

[\[2018\] VSC 274](#)

Daly AsJ

21 June 2018

VALUATION AND COMPENSATION - Amendment to the Melton Planning Scheme - Imposition of Public Acquisition Overlay for Western Grasslands Reserves - Compensation for planning 'blight' - Land-owner died without making a compensation claim - Executors of the estate propose to sell the land and distribute the proceeds to beneficiaries - Executors seek declaratory relief that they are not ineligible to claim compensation for financial loss suffered as a natural, direct and reasonable consequence of the reservation upon on a sale of the land - Availability of declaratory relief - Whether executors are 'owners' of the land affected by the reservation for the purposes of s 98(1) of the Planning and Environment Act 1987 - Halwood Corporation Ltd v Roads Corporation [1998] 2 VR 439 and Halwood Corporation Ltd v Roads Corporation (1995) 89 LGERA 280 followed - Planning and Environment Act 1987 ss 98, 99(b), 101, 106 and 108.

Capela, Maria and Sluka, Anna (as joint executors of the Will of Ana Liptak) v Minister for Energy, Environment and Climate Change

[\[2018\] VSC 360](#)

Emerton J

6 July 2018

WILLS AND ESTATES - Informal will - Application to admit informal will to probate - Where deceased had executed formal will - Where informal will prepared after hospital admission - Whether informal will intended to be last will - Whether informal will intended to revoke formal will - No evidence of cognitive impairment - No suspicious circumstances - Application granted - Briginshaw v Briginshaw (1938) 60 CLR 336 referred to - Fast v Rockman [2013] VSC 18; Re Tang [2017] VSCA 171; Re White [2018] VSC 16 discussed - Wills Act 1997 ss 7, 9.

In the matter of the Estate of Robertson, James (deceased). Henderson, Gloria Jean v Sparks, Deborah Anne

[\[2018\] VSC 373](#)

Zammit J

10 July 2018

Defteros, George v Google Inc LLC (No 3)

[\[2018\] VSC 375](#)

Macaulay J

8 June 2018

CRIMINAL DIVISION

CRIMINAL LAW - Bail - Applicant charged with Schedule 1 drug offences - Need to show exceptional circumstances justifying grant of bail - Whether unacceptable risk of committing an offence while on bail - Bail granted - Bail Act 1977, s 3AAA, s 4, s 4A, s 4C, s 4E.

In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Gloury-Hyde, Zachariah

[\[2018\] VSC 393](#)

Priest JA

17 July 2018

CRIMINAL LAW - Bail - Child aged 16 years - Charges of assisting offender and theft of motor car - Bail refused by Children's Court - Whether unacceptable risk that applicant would commit further offence, endanger person or fail to answer bail - Conditions capable of rendering risks acceptable - Bail granted - Bail Act 1977, s 3AAA, s 4E.

In the matter of the Bail Act 1977 and In the matter of an Application for Bail by F A

[\[2018\] VSC 372](#)

Priest JA

6 July 2018

CRIMINAL LAW - Evidence - Admissibility - Murder - Hearsay - Representations made by child witness in audiovisual recorded interview of admissions made by accused - Where witness later resiled from representations - Application by prosecution to cross-examine witness - Prior inconsistent statements relevant only to credibility - Application refused - Evidence excluded - Evidence Act 2008 s 38, 81, 82 137 - Criminal Procedure Act 2009 s 368.

Director of Public Prosecutions [DPP] v Kamalasanan, Arun; Director of Public Prosecutions [DPP] v Sam, Sofia (Ruling No 3)

[\[2018\] VSC 378](#)

Coghlan JA

10 July 2018

CRIMINAL LAW - Evidence - Admissibility - Murder - Relationship evidence - Whether evidence relevant to facts in issue - Evidence admissible.

Director of Public Prosecutions [DPP] v Kamalasanan, Arun; Director of Public Prosecutions [DPP] v Sam, Sofia (Ruling No 4)

[\[2018\] VSC 379](#)

Coghlan JA

10 July 2018

CRIMINAL LAW - Terrorism offence - Wife of accused seeking to wear a nikab in court during trial - Principle of open justice - Right of religious freedom - Right to participate in public life - Security concerns if spectators in public gallery have their faces covered - Whether a requirement that spectators in the public gallery have their faces uncovered constitutes a reasonable limitation on principle of open justice and rights of religious freedom and participation in public life - *Elzahed v State of New South Wales* [2018] NSWCA 103 - *NS v The Queen* [2012] 3 S.C.R. 726; [2012] SCC 72 - *Police v Razamjoo* [2005] DCR 408 - *R v D* (unreported, Crown Court at Blackfriars, Judge Peter Murphy, 16 September 2013) - Charter of Human Rights and Responsibilities Act 2006, ss 7, 14, 18.

The Queen v Chaarani, Abdullah (Ruling 1)

[\[2018\] VSC 387](#)

Beale J

16 July 2018