

# **SUPREME COURT OF VICTORIA**

## **RECENT JUDGMENTS BULLETIN ISSUE NO. 14/2018**

Below is a list of Victorian Supreme Court unreported judgments received in the Library from 23 July to 3 August 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](mailto:sclib@supremecourt.vic.gov.au) or telephone (03) 9603 6282.

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## **COURT OF APPEAL**

ADMINISTRATIVE LAW - Coroner - Refusal by coroner to re-open investigation - Appeal to single judge, pursuant to Coroners Act 2008 s 84, dismissed - Did judge err in failing to find coroner applied wrong test under s 77(3)(b) on whether appropriate to re-open investigation? - Did judge err in failing to find interests of justice supported re-opening of investigation? - Leave to appeal granted - Appeal allowed - *Hecht v Coroners Court of Victoria* [2016] VSC 635 approved - Coroners Act 2008 ss 77, 84, 87 and 87A.

PRACTICE AND PROCEDURE - Application to rely on expert report before coroner but not before judge - Misreporting of conclusion of expert report - Application granted for purposes of accuracy - Supreme Court (General Civil Procedure) Rules 2015 r 64.13(1).

***Mortimer, Stephanie v West, Iain (in his capacity as Deputy State Coroner)***

Tate and McLeish JJA and McDonald AJA

[\[2018\] VSCA 188](#)

2 August 2018

ADMINISTRATIVE LAW - Working with Children Act 2005 - Application for assessment notice 'Category A application' owing to conviction for sexual penetration of a child aged between 10 and 16 years - Secretary required to refuse category A applications - Secretary issued a 'negative notice' - VCAT empowered to decide category A applications - Whether Tribunal conflated 'public interest test' - Whether Tribunal subsumed 'unjustifiable risk test' within the 'reasonable person test' - Working with Children Act 2005 ss 10, 11, 12, 26A(1), 26A(3), 26A(4), 26A(5) - Victorian Civil and Administrative Tribunal Act 1998 s 148.

***Secretary to the Department of Justice and Regulation v O U X (a Pseudonym) and Victorian Civil and Administrative Tribunal***

Priest, Beach and Weinberg JJA

[\[2018\] VSCA 178](#)

27 July 2018

CRIMINAL LAW - Appeal - Conviction - Murder - Joint criminal enterprise - Sustained assault by three applicants - Whether verdicts unsafe and unsatisfactory - Scope of agreement - Agreement to assault conceded - Whether scope of agreement extended to murderous intent - Eyewitness evidence unchallenged - Inference of murderous intent open - Comments by prosecutor about 'increasing number' of drug-related murder cases - Application for discharge of jury refused - Whether substantial miscarriage of justice - Potential unfairness eliminated by jury directions - Leave to appeal refused.

CRIMINAL LAW - Appeal - Sentence - Murder - Applicant sentenced to 24y with non-parole period of 19y - Heavier sentence than two co-offenders - Whether manifestly excessive - Whether principle of parity infringed - Significant prior convictions for violence - Subsequent convictions - Different role following murder - Knowledge of tendency to act violently when under the influence of 'ice' - Poor prospects of rehabilitation - Disparate sentences justified - Leave to appeal refused.

***Hill, Edward v The Queen; Brennan, Matthew v The Queen; Spaliaras, Constantinos George v The Queen***

Maxwell P, Priest JA and Kidd AJA

[\[2018\] VSCA 190](#)

2 August 2018

CRIMINAL LAW - Sentencing - Application for leave to appeal - Proposed grounds specific error and manifest excess - Dealing with proceeds of crime - Seriousness of offending - Method of counting amount - Identify relevant dealings - Attempting to possess a commercial quantity of a border controlled drug - Manifest excess not reasonably arguable - Leave refused - DPP v Thomas (2016) 315 FLR 31 considered - Criminal Code Act 1995 (Cth) ss 400.9(1), 311.14, 11.1.

***Kao, Kai Yang v The Queen***

Whelan JA

[\[2018\] VSCA 189](#)

1 August 2018

CRIMINAL LAW - Appeal - Conviction - Applicant pleaded guilty to cultivating a narcotic plant (cannabis) in a commercial quantity - Whether plea freely made - Whether applicant intended to admit guilt for offence she believed herself to be guilty of - Whether undue pressure from counsel to plead guilty - Leave to appeal refused.

***Gurappaji, Kavitha v The Queen***

Priest, Beach and Weinberg JJA

[\[2018\] VSCA 187](#)

1 August 2018

CRIMINAL LAW - Sentencing - Application for leave to appeal - Proposed grounds specific error and manifest excess - Sex offences using internet - General deterrence - Leave refused - No reasonable prospect of reduction in total effective sentence - DPP v Meharry [2017] VSCA 387 applied - Criminal Procedure Act 2009 (Vic) s 280(1)(b).

***McNiece, Kenneth v The Queen***

Whelan JA

[\[2018\] VSCA 186](#)

1 August 2018

CRIMINAL LAW - Sentence - Leave to appeal - Attempted possession of commercial quantity of border controlled substance reasonably suspected of having been unlawfully imported - Sentence of imprisonment of 9 years with a non-parole period of 6 years - Proposed ground of disparity with co-offenders - Leave granted.

***Shakhanov, Dmitri v The Queen***

Whelan JA

[\[2018\] VSCA 183](#)

27 July 2018

CRIMINAL LAW - Sentence - Leave to appeal - Culpable driving - Excessive speed - Sentence of imprisonment of 11 years with a non-parole period of 7 years - Proposed grounds manifest excess and specific error - Leave granted.

***Guseli, Michael v The Queen***

Whelan JA

[\[2018\] VSCA 182](#)

27 July 2018

CRIMINAL LAW - Sentence - Election to renew application for leave to appeal against sentence pursuant to s 315(2) of the Criminal Procedure Act 2009 - Rape of intellectually disabled daughter of de facto partner - Pregnancy - Plea of guilty - Sentenced to seven years' imprisonment with non-parole period of five years - Whether judge erred in treating offending as an act of commission rather than omission - Whether sentence manifestly excessive - Leave to appeal refused.

***Turner, Jacob (a Pseudonym) v The Queen (No 2)***

Priest and Hargrave JJA

[\[2018\] VSCA 181](#)

26 July 2018

CRIMINAL LAW - Sentence - Application for leave to appeal - Cultivation of commercial quantity of cannabis - Trafficking in drug of dependence - Sentence of 3 years and 9 months' imprisonment with non-parole period of 2 years and 6 months - Whether incongruity between individual sentences - Whether sentence manifestly excessive - Leave to appeal refused.

***Falzon, Romano v The Queen (No 2)***

Whelan, Priest and Beach JJA

[\[2018\] VSCA 179](#)

27 July 2018

CRIMINAL LAW - Appeal - Sentence - Totality - Three sets of similar offending within five months - Present sentence for first set of offending - Present sentence imposed after sentences for latter two sets of offending completely served - Whether totality regarding previously served sentences applicable - Whether consideration required of probable total effective sentence if all offending sentenced together - Whether totality regarding previously served sentences bears on just punishment, rehabilitation and avoidance of crushing sentence - *Mill v The Queen* (1988) 166 CLR 59; *R v Todd* [1982] 2 NSWLR 517 distinguished - *R v Bruce* (1998) 71 SASR 536; *R v Knott* (2007) 169 A Crim R 291; *Wu v The Queen* (2011) 211 A Crim R 88; *Warwick v The Queen* [2016] NSWCCA 183 applied.

CRIMINAL LAW - Appeal - Sentence - Effect of delay - Delay between DNA match linking appellant with offending and charge - Relevance of explanation of delay - Effect of delay on rehabilitation - *R v MWH* [2001] VSCA 196 considered.

CRIMINAL LAW - Appeal - Sentence - Sex Offenders Registration Act 2004 - Sex offender registration order under s 11 - Whether two-stage test in *Bowden v The Queen* (2013) 44 VR 229 correctly applied in making order - Whether appellant posed real risk to sexual safety - Whether order reasonably necessary to give effect to statutory purpose - Balancing exercise between nature and magnitude of risk and serious consequences for offender required - Child-protection purposes of sex offender registration - Identified risk pertains to offending against adults - Sex Offenders Registration Act 2004 ss 11(2A), 11(3) - *Bowden v The Queen* (2013) 44 VR 229 applied.

***Sayer, Paul Nicholas v The Queen***

Whelan and McLeish JJA

[\[2018\] VSCA 177](#)

27 July 2018

DEFAMATION - Publication - Publication of results of internet search engine - Whether owner of internet search engine is a publisher of the results of searches - Google Inc v Duffy (2017) 129 SASR 304 and Trkulja v Google LLC [2018] HCA 25 referred to.

PRACTICE AND PROCEDURE - Application for leave to appeal - Pleadings - Whether judge erred in failing to strike out pleadings denying that search engine proprietor was a publisher of search results - Primary judge's decision correct - Application for leave to appeal refused - Supreme Court (General Civil Procedure) Rules 2015, r 23.02.

***Defteros, George v Google Inc LLC***

Beach, Hargrave JJA and Sifris AJA

[\[2018\] VSCA 176](#)

25 July 2018

CORPORATIONS - Implied prohibition against financial assistance to acquire shares - Meaning of 'financial assistance' - Onus of proof - Funding legal proceedings directed at compelling one shareholder to offer shares to other shareholders held to be provision of financial assistance - Corporations Act 2001 (Cth) s 260A - Charterhouse Investment Trust Ltd v Tempest Diesels Ltd [1986] BCLC 1; Australian Securities and Investments Commission v Adler (2002) 168 FLR 253; Adler v Australian Securities and Investments Commission (2003) 179 FLR 1 applied.

CORPORATIONS - Application for injunction to prevent financial assistance to acquire shares - Onus of proof - Corporations Act 2001 (Cth) s 1342(1B) - Kinarra Pty Ltd v On Q Group Ltd (2008) 216 FLR 89 applied.

PRACTICE AND PROCEDURE - Application for leave to appeal a determination not embodied in an order - Order and reasons to be read together - Supreme Court Act 1986 s 17(2) - Yates Property Corporation Pty Ltd v Boland (1998) 89 FCR 78; Athens v Randwick City Council (2005) 64 NSWLR 58 applied.

***Slea P/L (ACN 106 752 434) and Minerva Financial Group P/L (ACN 124 171 759) v Connective Services P/L (ACN 107 366 496); Connective Osn P/L (ACN 106 761 326); Millsave Holdings P/L (ACN 115 160 097) and Haron, Mark Seamus***

Ferguson CJ, Whelan and McLeish JJA

[\[2018\] VSCA 180](#)

27 July 2018

ESTOPPEL - Issue estoppel - Privity of interest - Whether privity between trustee of discretionary trust and potential beneficiaries - Trustee party to first proceeding - Beneficiaries parties to subsequent proceeding - First proceeding pursued for economic benefit of parties to subsequent proceeding - Trustee in first proceeding controlled by parties to subsequent proceeding - Parties to subsequent proceeding had no legal interest in outcome of first proceeding - *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (in liq) (1993) 43 FCR 510*; *Timbercorp Finance Pty Ltd (in liq) v Collins (2016) 259 CLR 212*; *Tomlinson v Ramsay Food Processing Pty Ltd (2015) 256 CLR 507* considered.

ESTOPPEL - Issue estoppel - Privity of interest - Bare trust over land - Legal title transferred to beneficiaries prior to first proceeding - Whether privity of interest between former trustee and beneficiaries - Former trustee party to first proceeding regarding tax liability incurred in respect of trust land - Former beneficiaries parties to second proceeding - Former trustee had personal right of indemnity against former beneficiaries in respect of land tax liability - Right of indemnity survived distribution of trust property - *Balkin v Peck (1998) 43 NSWLR 706*; *Timbercorp Finance Pty Ltd (in liq) v Collins (2016) 259 CLR 212*; *Tomlinson v Ramsay Food Processing Pty Ltd (2015) 256 CLR 507* considered.

ABUSE OF PROCESS - Relitigation of issue finally determined - Whether administration of justice brought into disrepute - 'Relitigating' parties controlled party to prior proceeding - Relevant issue not determinative of prior proceeding - *Reichel v Magrath (1889) 14 App Cas 665*; *O'Halloran (2000) 159 FLR 260*; *Kermani v Westpac Banking Corporation (2012) 36 VR 130* considered.

ABUSE OF PROCESS - Relitigation of issue finally determined - Whether administration of justice brought into disrepute - Denial of privity based on status as potential beneficiaries of discretionary trust - Substantive tax liability argument based on status as beneficiaries of bare trust - Privity established if beneficiaries of bare trust - Successful challenge to prior findings would establish privity so as to prevent same challenge - *Tomlinson v Ramsay Food Processing Pty Ltd (2015) 256 CLR 507* considered.

ABUSE OF PROCESS - Relitigation of issue finally determined - Whether merits of prior decision to be considered in deciding question of abuse - Abuse doctrine informed by principle of finality - Manifest error in prior decision may be factor in determining abuse in rare cases - *Haines v Australian Broadcasting Corporation (1995) 43 NSWLR 404* considered.

PRACTICE AND PROCEDURE - Appeal on error of law - Whether issue open on appeal - Issue agreed between parties at first instance - Whether expedient in interests of justice to permit raising of issue on appeal - Whether issue could have been met by evidence at first instance - *Secretary to the Department of Justice v Western Suburbs Legal Service Inc (2009) 22 VR 66*; *Medical Practitioners Board of Victoria v Lal (2009) 23 VR 702* considered.

PRACTICE AND PROCEDURE - Appeal - Abuse of process - Finding of abuse in attempting to relitigate issue already finally determined - Whether intermediate appellate court should consider all grounds of appeal - Where determining substantive issues would perpetuate abuse.

***Commissioner of State Revenue v Mondous, Souhail and Mondous, Naila McLeish and Niall JJA and McDonald AJA***

[\[2018\] VSCA 185](#)

1 August 2018

PRACTICE AND PROCEDURE - Application for leave to appeal - Proceeding for judicial review summarily dismissed by associate judge - Appeal dismissed by judge - Proceeding having no real prospect of success - Proceeding correctly dismissed summarily - Order dismissing appeal plainly correct - Application for leave to appeal dismissed - Application for leave to appeal determined to be totally without merit - Supreme Court Act 1986, ss 14C and 14D(3).

*Crowther, Andrew David v Whitehorse City Council*

Beach JA

[\[2018\] VSCA 184](#)

27 July 2018

## COMMERCIAL COURT

BUILDING - Adjudication - Whether an Adjudicator has determined the adjudicated amount in accordance with the Building and Construction Industry Security of Payment Act 2002 (Vic), s 23 - Adequacy of the Adjudicator's Reasons and the basis for the amount decided.

BUILDING - Review Adjudication - Effect of Review Adjudication - Building and Construction Industry Security of Payment Act 2002 (Vic), s 28B and 28I.

***The Nuance Group (Australia) P/L (ACN 068 215 341) v Shape Australia P/L (ACN 003 861 765); Jones, Thomas; Tonkin, Max and Adjudicate Today P/L (ACN 109 605 021)***

Digby J

[\[2018\] VSC 362](#)

29 June 2018

CONSUMER LAW - Misleading or deceptive conduct - Agreement to purchase shares - Representation that creditors of the Company were only those set out in Subscription Agreement - Representation that there was no action or proposed litigation by any person against the Company - Representation as to voting - Representations were made other than by the fourth defendant - Representations were not false - Defendants had no duty to qualify the representations - Conduct was not in all of the circumstances misleading or deceptive - Competition and Consumer Act 2010 (Cth), Sch 2, Australian Consumer Law, s 18 - Corporations Act 2010 (Cth) s 1041H, Australian Securities and Investments Commission Act 2001 (Cth) s 12DA.

***McCrohan Super Investments P/L (ACN 162 030 168) & Ors v Ashdown, Maria Luisa & Ors***

Sifris J

[\[2018\] VSC 422](#)

3 August 2018

CORPORATIONS – Liquidation – Rejection of proof of debt – Application pursuant to s 90-15 of the Insolvency Practice Schedule and Regulation 5.6.54 (2) of the *Corporations Regulations 2001* – Identity of the creditor – Nomination – Rights – Release of debt – Execution of a deed – Foreign company not registered in Australia – *Corporations Act 2001* (Cth), s 127 – Consideration to support an agreement – Promissory estoppel – Duress and undue influence.

***In the matter of ACN 096 281 542 Ltd (in Liquidation) (ACN 096 281 542) (formerly Biotempus Ltd) TransMedia Inc v Glavas, Ivan and Burness, Paul Andrew in their capacities as joint and several liquidators of ACN 096 281 542 Ltd (in liquidation)***

Randall AsJ

[\[2018\] VSC 425](#)

2 August 2018

CORPORATIONS – Oppression – Whether conduct contrary to the interest of members as a whole – Whether conduct unfairly prejudicial to or unfairly discriminatory against member – Whether second defendant should have required its subsidiary to take a licence of first defendant’s intellectual property – Second defendant persistently denied infringement of intellectual property – Second defendant did not represent that it would take a licence – Ongoing discussions but issue never resolved – Conduct was not oppressive – ss 232, 233 *Corporations Act 2001* (Cth).

CORPORATIONS – Oppression – Whether the second defendant’s continued competition with the first defendant constituted oppression – Restrictions on the second defendant’s business were not specifically dealt with or agreed to in discussions or contract – Conduct was not oppressive – ss 232, 233 *Corporations Act 2001* (Cth).

CORPORATIONS – Winding up – Whether winding up on just and equitable ground justified – Breakdown in relationship – No mutual trust or confidence – Deadlock – Company no longer a going concern – Winding up order should be made – ss 461(1)(k), 467(4) *Corporations Act 2001* (Cth).

CONTRACT – Obligation to act in good faith and use reasonable endeavours – Whether the second defendant was obliged to cease competing with the first defendant – Where obligations informed by pre-contractual discussions and conduct – Second defendant asserted throughout discussions that it was entitled to continue competing and was unwavering in its position – Plaintiffs and first defendant were aware that the second defendant would continue competing – Second defendant was entitled to continue competing with plaintiff.

CONTRACT – Obligation to act in good faith and use reasonable endeavours – Where infringement proceedings commenced by plaintiffs in the name of the first defendant against the second defendant and its subsidiary – Second defendant persistently denied infringement of intellectual property – Second defendant applied to invalidate first defendant’s patent – Invalidation was a reasonable step to protect the second defendant’s commercial position.

***Knights Quest P/L (ACN 116 122 939) and SMS Management P/L (ACN 101 453 865) v Barokes P/L (ACN 079 714 579) and Daiwa Can Company***

Sifris J

[\[2018\] VSC 426](#)

3 August 2018

COSTS - Leave to discontinue proceeding - Rule 63.15 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) - No adjudication on merits - Costs starting point on discontinuance - Civil Procedure Act 2010 (Vic).

***Course, Judith Clare v Hannan, Peter John; E Ball Games P/L (Acn 104 658 906); E Ball International Inc; Kew Consulting P/L (ACN 067 226 555) and Sportstrack P/L (ACN 119 816 661)***

Connock J

[\[2018\] VSC 401](#)

20 July 2018

JOINT VENTURE - Nature and extent of agreement - Inability of proposed vendors to perform - Agreement terminated or abandoned - New agreement between purchaser and third party - Whether new or amended agreement between pre-existing parties - No binding agreement.

MISLEADING AND DECEPTIVE CONDUCT - Whether representations made - Whether omission committed - Reliance - Loss - Fair Trading Act 1999 (Vic), s 9.

LEGAL PRACTITIONERS - Sale of property - Joint venture - Solicitor acting for purchaser - Alleged representations - Alleged failure to inform proposed vendors - Whether solicitor liable to proposed vendors - Whether vendors separately represented.

EQUITY - Sale by mortgagee in possession - Registered proprietors provided effective vendor finance for amount of residue - Whether vendor's lien in favour of registered proprietors - Transfer of Land Act 1958 (Vic), s 77(3)(d).

REAL PROPERTY - Sale - Alleged non-disclosure of pre-existing use - Alleged non-disclosure of risk of contamination - Whether misleading or deceptive conduct - Fair Trading Act 1999 (Vic), s 9 - Trade Practices Act 1974 (Cth), s 52.

***Jafari, Kourosch (on his own behalf and as the trustee of the Essence Unit Trust) v 23 Developments P/L (ACN 112 616 976) & Ors***

Elliott J

[\[2018\] VSC 404](#)

30 July 2018

## COMMON LAW DIVISION

COSTS - Proceeding for discovery of documents - Proceeding necessary for proper administration of estate - Where orders made granting relief - Where defendant's compliance in issue - Where cross-examination of defendant ordered - Where no findings of fact or determinations on the merits - Principles as to costs - Scope of discretion - Departure from rule that 'costs follow the event' - Conduct of litigation not reasonable - *Paddy v Borg* (1973) VR 626; *Latoudis v Casey* (1990) 170 CLR 534; *Re The Minister for Immigration and Ethnic Affairs (Cth)*; *Ex Parte Lai Qin* (1997) 186 CLR 622 referred to.

***Rouse, Mary v Diakou, Dimitrios 'Jimmy'***

Zammit J

[\[2018\] VSC 396](#)

23 July 2018

DEFAMATION - Application for assessment of damages - Facebook publications - 'Grapevine effect' - Followed principles in *Wilson v Bauer Media & Anor* [2017] VSC 521 - Defamation severe and consequences substantial - Damages including aggravated damages awarded \$200,000.

***Cables, Maree Ellen v Winchester, Matthew***

Clayton JR

[\[2018\] VSC 392](#)

20 July 2018

EVIDENCE - Where trust deed lost - Where plaintiff seeks declaration for reconstruction of trust deed and orders for trustee to enter and approve past transactions of trustee - Whether all reasonable efforts to locate trust deed were made - Insufficient evidence of contents of trust deed - Application dismissed - Supreme Court (General Civil Procedure) Rules 2015, r 54.02 - *D. R. McKendry Nominees Pty Ltd* [2015] VSC 560 - *Maks v Maks* (1986) 6 NSWLR 34.

***In the matter of an application for judicial advice in respect of the Theo Totos Family Trust and In the matter of an application pursuant to Order 54 of the Supreme Court (General Civil Procedure) Rules 2015. Application by: South Melbourne Continental P/L (ACN 006 258 573) as trustee for the Theo Totos Family Trust***

McMillan J

[\[2018\] VSC 398](#)

20 July 2018

PRACTICE AND PROCEDURE - Application to set aside subpoenas to non-parties - Supreme Court (General Civil Procedure) Rules 2015 r 42A.07 - Whether documents sought relevant to issues in dispute - Whether legitimate forensic purpose in seeking the documents - Volunteer Fire Brigades Victoria v Country Fire Authority [2016] VSC 573 - Webb v Wheatley [2015] VSC 153 - Application to set aside subpoenas partly allowed and partly disallowed.

***Victoria International Container Terminal t/a VICT v Construction, Forestry, Maritime, Mining and Energy Union***

Ierodionou AsJ

[\[2018\] VSC 417](#)

31 July 2018

PRACTICE AND PROCEDURE - Application to summarily dismiss parts of further amended statement of claim - Application to strike out parts of further amended statement of claim - Pleadings embarrassing - Failure to establish sufficient nexus between claims and alleged breaches.

EMPLOYMENT - Whether employer's policies formed part of employment contract - Romero v Farstad Shipping (Indian Pacific) Pty Ltd (2014) 231 FCR 403 - Repudiatory conduct - Whether individually trivial contractual breaches amount to a substantive breach.

***Hine, Carolyn v Macquarie Bank Ltd***

Ierodionou AsJ

[\[2018\] VSC 411](#)

30 July 2018

PRACTICE AND PROCEDURE - Costs - Whether successful determination of the plaintiff's claim on a ground added after the commencement of the proceeding, whilst not proceeding with another ground, is a basis for awarding costs to the defendant for a part of the proceeding or reducing the plaintiff's costs - Plaintiff's costs reduced slightly.

PRACTICE AND PROCEDURE - Interest on judgment sum - Claim by successful plaintiff for an entitlement to be paid interest under the Penalty Interest Rates Act 1983 (Vic) - Supreme Court Act

1986 (Vic), s 58 - Whether 'good cause to the contrary' shown for not awarding interest on the statutory basis - Whether holding disputed sum in solicitor's trust account pursuant to agreement until resolution of the dispute a 'good cause to the contrary' - Not good cause - Whether interest rate should be reduced because disputed sum held in solicitor's trust account and bearing no interest to the parties - Interest rate reduced slightly.

***Sutherland, Marika (by her litigation guardian Gregory John Sutherland) v Globe Real Estate P/L (ACN 146 187 224); The Real Estate Institute of Victoria Ltd (ACN 004 210 897) and Director of Consumer Affairs Victoria***

Derham AsJ

[\[2018\] VSC 408](#)

27 July 2018

PRACTICE AND PROCEDURE - Application for stay until related proceeding determined - Supreme Court (General Civil Procedure) Rules 2015 r 9.12 - Re AWB Limited (No 2) [2009] VSC 70 - Application for summary judgment - Civil Procedure Act 2010 ss 62 and 63 - Legal Profession Uniform Law Application Act 2014 and Legal Profession Uniform Law s 10 - prohibition on unqualified people engaging in legal practice.

OWNERS CORPORATIONS - Conduct of parties - standing to bring proceedings - 'lot owner' – Owners Corporation Act 2006 ss 3, 163, 165(1)(ba) and 167.

VCAT - Leave to appeal VCAT order not allowing reinstatement - Victorian Civil and Administrative

Tribunal Act 1998 s 148 - Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (2013) 42 VR 27.

***Giurina, Ermanno v Deak, Maria; Strata Connect P/L and Owners Corporation Plan No 1579 [2018]VSC 409***

Ierodionou AsJ

[\[2018\] VSC 409](#)

27 July 2018

TRUSTS - Express trust - Resulting trust - Constructive trust - Where party A provides to party B funds to facilitate settlement of property - Where party A and party B subsequently intend for party C to hold the land on trust for party A - Whether party C holds the property on trust for party A - Party C held to have received property on the condition that it held the property on trust - Party C holds the property on constructive trust for the benefit of party A.

REAL PROPERTY - Indefeasibility of title - Exceptions - Right in personam against registered proprietor - Volunteer purchaser.

STATUTES - Operation and Effect - Interpretation - Whether acts of party B during period of temporary dissolution have valid effect - Where effect of revival of party B is subject to party C's rights - Constructive trust not prevented from arising - Ontario Corporations Act (RSO 1990, c C-38) s 317(10).

EVIDENCE - Admissibility of evidence - The opinion rule - Where non-expert witness gives evidence as to satisfaction of conditions in an application form - Whether opinion evidence - Held to be evidence of witness' subjective state of mind; not opinion evidence - Evidence Act 2008, s 76.

ASSOCIATIONS AND CLUBS - Incorporated Associations - Membership - Dispute over current members - Identification of founding members - Whether founding members resigned or abandoned membership - Whether new members appointed in accordance with the association's rules - Whether purported members nominated in writing by President of association - Whether purported signature on nomination forms was actually signed by President or forged - Declaration in respect of composition of current members.

EVIDENCE - Burden of proof - Standard of proof - Alleged forged signature - Proof of handwriting - Whether purported signature of President on application forms for membership were forged - Held to be forged - Evidence Act 2008, s 140.

EVIDENCE - Admissibility and weight of evidence - Expert evidence - Handwriting comparisons - Whether control signatures used for comparison are those of purported signatory - Selective production of materials to expert.

ASSOCIATIONS AND CLUBS - Incorporated Associations - Committee of management - Officers - Dispute over identity of President - Whether alternative purported Presidents were nominated in accordance with association's rules - Neither validly appointed.

ASSOCIATIONS AND CLUBS - Incorporated Associations - Oppressive conduct - Declaration of oppressive conduct is unnecessary to remedy any default or resolve any dispute between the parties - Unnecessary to consider oppression allegation - Associations Incorporation Reform Act 2012, ss 68, 69.

PRACTICE AND PROCEDURE - Removal of parties - Oppression allegation aimed at incorporated association, not managers - No relief directed at managers - Not proper or necessary parties - Supreme Court (General Civil Procedure) Rules 2005, r 9.06(a).

***Imam Ali Islamic Centre (REG NO. 983405) v Imam Ali Islamic Centre Inc (A0035337R). Dirani, Ali; El- Khishin, Said and Fneich, Souhail v Imam Ali Islamic Centre Inc (A0035337R); Bakiry, Ali Al (also known as Ali Sami) and Yatim, Ahmad***

McMillan J

[\[2018\] VSC 413](#)

31 July 2018

PRACTICE AND PROCEDURE - Summary judgment - Whether to grant summary judgment in respect of plaintiff's allegations of negligence by defendant solicitors by reason of past proceedings concerning the retainer - Consideration of discretion - Summary judgment granted - Civil Procedure Act 2010 (Vic) ss 7,8,9,63 and 64 - Supreme Court (General Civil Procedure) Rules 2015 r 23.01.

CONTRACT - Construction of a release - Whether the phrase 'relating to this Magistrates' Court Proceeding?' includes allegations made in the defence - Held yes - Whether release extends to allegation made in general terms in defence and particularised in current proceeding - Held that it does, in the alternative extends to allegations specifically made in earlier defence.

ANSHUN ESTOPPEL - Whether Anshun estoppel applies in respect of allegations not made specifically in defence to earlier proceeding - Held that it does.

ABUSE OF PROCESS - Whether it would be an abuse of process to re-litigate in this proceeding allegations that plaintiff was pressured by her lawyers into settlement that were the subject of previous contested proceedings against a different defendant - Held yes.

COSTS - Whether allegations that defendants breached obligations of costs disclosure may be made in this proceeding when costs have been taxed - Held yes, other than as to quantum of costs.

***O'Keefe, Lorraine v Toop, Patricia Faye; Clark, Gary Robert and Taylor, Gary Douglas***

Lansdowne AsJ

[\[2018\] VSC 421](#)

2 August 2018

SUCCESSION - Construction of will - Whether 'nieces and nephews' includes nephews and nieces by affinity - Where phrase 'nieces and nephews' not open to equivocation - *Fell v Fell* (1922) 31 CLR 268 - *Perrin v Morgan* [1943] AC 399 - *Parry v Haisma* [2012] NSWSC 290 - *Re Staughton; Grant v McMillan* [2017] VSC 359 - Wills Act 1997, s 36.

SUCCESSION - Administration - Whereabouts of nephew unknown - Whether Benjamin order appropriate - Advertisement not required if irresistible inference on facts - Benjamin order not yet appropriate - *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723 - *Gonzales v Claridades* [1956] VLR 535.

***Weston, Douglas Lindsay (as executor of the Estate of Lenin Martin Mas, deceased) v Donaldson, Andrew Robert Charles***

McMillan J

[\[2018\] VSC 405](#)

24 July 2018

WILDLIFE - Authorisation to cull kangaroos - Protected wildlife - Whether the delegate of the Secretary is satisfied that an authorisation is necessary to support a recognised wildlife management plan - Meaning of 'necessary' and 'recognised' wildlife management plan - Panel recommendations - Jurisdictional fact - Whether decision to grant an authorisation is unreasonable, illogical or irrational - Wildlife Act 1975 (Vic) ss 1A, 28A(1)-(2), 28B, 28C, 28F, 43, 47.

***Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning and Secretary, Department of Economic Development, Jobs, Transport and Resources (No 2)***

Garde J

[\[2018\] VSC 407](#)

27 July 2018

WILLS AND ESTATES - Application for revocation of grant of probate - Whether particulars of grounds establish a prima facie case of testamentary incapacity - Re Egan [1963] VR 318 - Re Watson [2017] VSC 322 - Re Gardiner (No 2) [2017] VSC 699.

EVIDENCE - Onus of proof, presumptions, weight and sufficiency of prima facie case - Nicholson v Knaggs [2009] VSC 64.

***Hughes, Lachlan Owen Stuart and Sles, Kerrie Louise (as executors of the will of Douglas William Gardiner, deceased) v Gardiner, James Alexander and others (according to the schedule) (No 3)***

McMillan J

[\[2018\] VSC 414](#)

31 July 2018

## CRIMINAL DIVISION

CRIMINAL LAW - Application for bail - Charges of theft, burglary, aggravated burglary, theft of a motor vehicle, criminal damage, handling stolen goods, dealing with property suspected of being proceeds of crime, possessing cartridge ammunition, prohibited person possessing a firearm, possessing cannabis, using amphetamines, making a false report to police, unlicensed driving, failing to stop vehicle on request, obtaining property by deception, failing to answer bail, committing an indictable offence whilst on bail and contravening a conduct condition of bail - Applicant required to show cause - Whether conditions ameliorate unacceptable risk - Bail refused - Bail Act 1977.

***In the matter of the Bail Act 1977 and In the matter of an Application for Bail by Garou, George***

Champion J

[\[2018\] VSC 418](#)

4 May 2018

CRIMINAL LAW - Sentence - Manslaughter by criminal negligence - Accidental discharge of shotgun - Accused angry at deceased for running over his dog and leaving it for dead - While holding loaded shotgun and approaching deceased's vehicle, accused stumbled, causing barrel of gun to strike driver's side window, causing (defective) gun to discharge without pulling trigger - Resulting shot shattered window and struck deceased in right eye region, killing him - Child sitting next to deceased injured by shattered glass - Second child sitting behind deceased uninjured - Disputed sentencing facts - Whether proper to have regard to following as aggravating features of manslaughter: (a) presence of children; (b) accused's knowledge of their presence; (c) psychological harm to both; (d) physical injury to one child; and (e) endangerment of either or both children - Objective gravity of offence towards lower end of spectrum - Full admissions - Plea of guilty despite arguable defence - Profound remorse - No prior convictions - Outstanding contributions to community - Excellent prospects of rehabilitation - Weight to general deterrence, just punishment, denunciation and rehabilitation but not specific deterrence or protection of community - Non-parole period shorter than usual - Sentence of five years' imprisonment with non-parole period of two-and-a-half years - But for plea of guilty, sentence of seven years' imprisonment with non-parole period of four years - Sentencing Act 1991 (Vic), ss 3, 5, 6, 6AAA & 18; Crimes Act 1958 (Vic), ss 5, 18 & 23.

***The Queen v Russo, Angelo Pat***

Croucher J

[\[2018\] VSC 395](#)

20 July 2018

CRIMINAL LAW - Sentence - Manslaughter - Stabbing - Domestic violence - Accused previously convicted of using a knife to stab a partner during a domestic dispute - Plea of guilty - Genuine remorse - Guarded prospects of rehabilitation.

***The Queen v Jones, Kerry Rachael***

Taylor J

[\[2018\] VSC 415](#)

31 July 2018

CRIMINAL LAW - Sentence - Infanticide - Slashed throat of 13-month-old daughter  
- Guilty plea - History of schizophrenia - Acute worsening of psychotic and  
depressive symptoms post-partum - Received treatment at Thomas Embling Hospital  
while on remand - Crown concession that imprisonment inappropriate -  
Treatment to be co-ordinated by Forensicare, Community Correctional  
Service and area mental health service under Community Correction Order  
- Community Correction Order of 30 months' duration with, inter alia, mental  
health assessment and treatment conditions imposed - Crimes Act 1958 s 6.

***Director of Public Prosecutions [DPP] v U A***

Coghlan JA

[\[2018\] VSC 423](#)

31 July 2018

## **COSTS COURT**

***AIF Lucas & Co, Barristers & Solicitors (a firm) v Alexellis, George***

Wood AsJ

[\[2018\] VSC 419](#)

3 August 2018

COSTS COURT - Practice and Procedure - Failure to comply with order to serve a  
costs estimate - Orders 63.56.2(2), 63.01, 63.07(2).

***Champions Lawyers v Rohrt & Ors***

Gourlay JR

[\[2018\] VSC 400](#)

23 July 2018