

SUPREME COURT OF VICTORIA

RECENT JUDGMENTS BULLETIN ISSUE NO. 17/2018

Below is a list of Victorian Supreme Court unreported judgments received in the Library from 3 to 14 September 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

CONTRACTS - Construction - Loan agreements between appellant and bank secured by mortgage over real property - Appellant failed to pay amounts to owners corporation - Bank paid owners corporation and debited amounts from loan account - Whether bank entitled to debit amounts before asking appellant for payment - Whether appellant was in default of loan agreements and mortgage by reason of failure to pay owners corporation.

UNCONSCIONABLE CONDUCT - Bank received demand from owners corporation for unpaid amounts in respect of secured property owned by appellant - Bank paid owners corporation and debited amounts from appellant's loan account without notice - Whether bank's conduct inconsistent with conduct in similar transactions - Whether breach of Code of Banking Practice 2013 - Whether bank failed to properly investigate appellant's complaint - Whether bank acted unfairly in proceedings for debt and possession - Australian Securities and Investments Commission Act 2001 (Cth) s 12CB.

PRACTICE AND PROCEDURE - Leave to appeal - Where points in proposed grounds of appeal not raised before trial judge - Where success on proposed grounds would not impugn orders made by trial judge.

Anderson, Lena Annika v Westpac Banking Corporation (ABN 33 007 457 141);

Anderson, Lena Annika v Westpac Banking Corporation (ABN 33 007 457 141)

McLeish, Niall and Ashley JJA

[\[2018\] VSCA 226](#)

5 September 2018

CORPORATIONS LAW - Application for leave to appeal and appeal - Grant of leave to bring derivative proceeding - Proposed proceeding to allege breach of directors' duties by transactions circumventing shareholder pre-emptive rights in company constitutions - Whether proposed proceeding in good faith and in best interests of company - Whether serious question to be tried - Relevance of delay - Relevance of relief sought in proposed proceeding - Leave to appeal granted - Appeal dismissed - Swansson v R A Pratt (2002) 42 ACSR 313, Chahwan v Euphoric Pty Ltd (2008) 227 FLR 43 applied - Corporations Act 2001 (Cth) s 237.

PRACTICE AND PROCEDURE - Application for leave to appeal - Dismissal of reopening application - Whether evidence 'new' - Reid v Brett [2005] VSC 18, Spotlight Pty Ltd v NCON Australia Ltd (2012) 46 VR 1 applied - Refusal to review exercise of discretion on matter of practice and procedure - Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc (1981) 148 CLR 170 applied – Application for leave to appeal refused.

Connective Services P/L v Sleat P/L

Ferguson CJ, Whelan and McLeish JJA

[\[2018\] VSCA 229](#)

10 September 2018

CRIMINAL LAW - Appeal - Conviction - Armed robbery and intentionally causing injury – Three offenders - Shop proprietor struck with dumbbell by one offender - Applicant's fingerprints and DNA subsequently detected on dumbbell - Whether evidence sufficient to establish that applicant was one of the offenders - Whether verdicts are unsafe and unsatisfactory - Leave to appeal refused.

CRIMINAL LAW - Appeal - Conviction - Prosecutor's closing address - Comments tending to reverse the onus of proof - Reflections based on prosecutor's personal experience - References to matters not the subject of evidence - Statements which were allegedly inflammatory or prejudicial - Comments which belittled or ridiculed the applicant's case - No substantial miscarriage of justice - Leave to appeal refused.

Finn, Jason Craig v The Queen

Priest, Beach and Weinberg JJA

[\[2018\] VSCA 228](#)

7 September 2018

CRIMINAL LAW - Appeal against sentence - Manifest excess - Aggravated burglary - Offenders armed with weapons and wearing motorcycle club clothing - Appellant a participant and had organising role - Appellant acquitted of manslaughter after three trials - Serious instance of aggravated burglary - Reduced weight to appellant's youth - Sentence not manifestly excessive – Appeal dismissed - Hogarth v The Queen (2012) 37 VR 658, DPP v Lawrence (2004) 10 VR 125 applied.

Fisher, Jamie v The Queen

Whelan, Beach and Kaye JJA

[\[2018\] VSCA 222](#)

3 September 2018

CRIMINAL LAW - Application for leave to appeal against sentence - Two charges of negligently causing serious injury by driving - Two children of applicant seriously injured - Offences arose from the same conduct - Plea of guilty - Remorse - Good prospects of rehabilitation - Sentenced to a total effective sentence of six years' imprisonment with a non-parole period of three years and nine months - Manifest excess - Leave to appeal granted.

Walsh, Anthony John v The Queen

Tate AP

[\[2018\] VSCA 233](#)

12 September 2018

CRIMINAL LAW - Conviction - Appeal - Incest - Indecent act with child under 16 - Course of conduct charges - Whether convictions unsafe and unsatisfactory - Whether evidence 'so vague and nebulous' as to deprive the accused 'of trial fairness' - Level of particularity of incidents required for course of conduct charges - Whether evidence must be capable of being distilled into separate incidents - Proposed ground of appeal not reasonably arguable - Application for leave to appeal against conviction refused - Clause 4A of Schedule 1 of the Criminal Procedure Act 2009.

CRIMINAL LAW - Sentence - Appeal - Multiple charges including multiple charges of incest and committing an indecent act with a child under 16 - Course of conduct charges - Total effective sentence of 21 years, with non-parole period of 15 years - Serious examples of serious offences - No remorse - Aggravating circumstances - Totality - Manifest excess - No totality error - Sentence not manifestly excessive - Appeal dismissed - Sentencing Act 1991, ss 5(2)(b), 5(2F), 6B and 6E.

Harlow, Oliver (a Pseudonym) v The Queen

Priest, Beach and Weinberg JJA

[\[2018\] VSCA 234](#)

14/09/2018

CRIMINAL LAW - Conviction - Application for leave to appeal - Brutal continuing assault by prisoners on prison officers - Jury directions - Case put against applicant that he assaulted complainant and assisted and encouraged co-offender - Whether unanimity direction required as to factual basis upon which jury might find guilt - Unanimity direction now contended for not sought by trial counsel - In context of continuous assault, not reasonably arguable that direction now contended for required to be given.

CRIMINAL LAW - Conviction - Judge's erroneous direction that admission of one accused may be taken into account in case against co-accused - Erroneous direction given concerning issue not in dispute at trial - No exception taken by trial counsel to erroneous direction - Not reasonably arguable that any miscarriage of justice occasioned by giving of erroneous direction concerning issue not in dispute.

CRIMINAL LAW - Conviction - Charge that accused and co-accused intentionally caused serious injury - Co-accused pleaded guilty to charge - Charge proceeded with against accused on limited basis of that accused's own assaults - Whether convicted of different crime from that charged – Not reasonably arguable that any substantial miscarriage of justice occasioned by the pursuit of more limited case against accused - Application for leave to appeal refused.

CRIMINAL LAW - Sentence - Applications for leave to appeal - Brutal, cowardly, continuing attacks by prisoners against prison officers - Not reasonably arguable that total effective sentences of 10 years and 8 years' imprisonment with respective non-parole periods of 7 years and 5 years manifestly excessive - Totality complaint not reasonably arguable - Relevance of deprived backgrounds - Appalling prior criminal records - Aggravating circumstance of prisoners assaulting prison officers performing their duties - Errors contended for by applicants not reasonably arguable - *R v De Simoni* (1981) 147 CLR 383 referred to - *Bugmy v The Queen* (2013) 249 CLR 571 referred to - Applications for leave to appeal refused.

Hope, Daniel v The Queen; Pua, Rangi v The Queen

Priest, Beach and Kaye JJA

[\[2018\] VSCA 230](#)

11 September 2018

CRIMINAL LAW - Interlocutory appeal - Sexual offending against child complainants – Tendency evidence - Whether error in admitting tendency evidence - Evidence Act 2008 ss 97(1)(b) and 101(2) - Hughes v The Queen (2017) 344 ALR 187; IMM v The Queen (2016) 257 CLR 300 discussed.

Danny, Carl (a Pseudonym) v The Queen

Whelan, Priest and Kaye JJA

[\[2018\] VSCA 223](#)

4 September 2018

CRIMINAL LAW - Sentence - Guilty plea - Two charges of trafficking large commercial quantity of drug of dependence - Charge of knowingly dealing with proceeds of crime - Whether judge erred in treating charge of trafficking two substances as rolled-up charge - Cumulation of sentences - Applicant a serious offender under s 6E of Sentencing Act 1991 - Form of sentence - Sentence of 15 years' imprisonment trafficking charge involving 4.2 kgs of substances - Total effective sentence 19 years 6 months - Whether manifestly excessive.

Djordjic, Vladimir v The Queen

Whelan, Beach and Kaye JJA

[\[2018\] VSCA 227](#)

6 September 2018

CRIMINAL PROCEDURE - Extension of time for application for leave to appeal against sentence - Applicant pleaded guilty to 5 charges of obtain financial advantage by deception and one charge of attempt - Fraud on employer over 4-year period - Delay long - Explanation inadequate - Proposed grounds of appeal lacking merit - Application refused.

Barber, Dale v The Queen

Kyrou and Kaye JJA

[\[2018\] VSCA 232](#)

14 September 2018

PRACTICE AND PROCEDURE - Application for extension of time to file application for leave to appeal - Original proceeding commenced naming deregistered company as plaintiff – Judgment given against plaintiff - Deregistration discovered after judgment entered - Correct plaintiff argued original proceeding was nullity and opposed reinstatement of named plaintiff on advice of counsel - Deregistered company reinstated - Correct plaintiff substituted - Whether adequate explanation for delay - Whether prejudice to respondent - Application granted.

PCCEF P/L (ACN 130 656 147) v Geelong Football Club Ltd (ACN 005 150 818)

McLeish JA

[\[2018\] VSCA 225](#)

5 September 2018

PRACTICE AND PROCEDURE – Application for leave to appeal out of time – Delay of one year – Application previously refused by Judicial Registrar – Proposed appeal totally without merit – Futile to grant extension of time.

Ganesh, Anandavalli and Radhakrishnan, Ganesh v National Australia Bank Ltd (ACN

004 044 937)

Hargrave JA

[\[2018\] VSCA 224](#)

5 September 2018

RESTITUTION - Building contract - Whether quantum meruit award available to builder who accepts owners' repudiation of contract - *Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510* applied.

RESTITUTION - Building contract - Owners' repudiation accepted by builder - Claim in quantum meruit - Whether regard must be had to builder's actual costs in assessing amount payable - Whether Victorian Civil and Administrative Tribunal erred in assessing amount payable on basis of quantity surveyor's evidence rather than actual costs - Appeal dismissed - *Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510* followed.

BUILDING AND CONSTRUCTION - Building contract - Owners' repudiation accepted by builder - Whether Domestic Building Contracts Act 1995 s 38 precludes recovery on quantum meruit basis for orally agreed variations - Appeal dismissed.

Mann, Peter and Mann, Angela v Paterson Constructions P/L (ACN 135 579 770)

Kyrou, McLeish and Hargrave JJA

[\[2018\] VSCA 231](#)

12 September 2018

COMMERCIAL COURT

CONTRACT - Plaintiff a minority interest holder in a café business - Agreement by the defendant to buy out minority interest holder at market valuation under the terms of a dispute resolution agreement - Dispute as to construction of the agreement - Orders sought on the construction of the agreement and for performance of the dispute resolution agreement - Specific performance - Whether Court had power to appoint a valuer that required agreement of both parties and where parties could not agree.

In the matter of Venture Capital Group P/L (ACN 111 119 914) (in its own right and trustee of the VCG Trust). Alphater Consulting Engineers P/L (ACN 107 954 629) v

Rozman, Miles and Ors (No 3)

Robson J

[\[2018\] VSC 513](#)

12 September 2018

CORPORATIONS - External administration - Application by liquidators for determination of remuneration pursuant to s 473(3)(b)(ii) of the Corporations Act 2001 (Cth) - Consideration of transitional provisions in respect of the new Insolvency Practice Schedule (Corporations) as Schedule 2 to the Corporations Act 2001 (Cth) - Remuneration approved.

Commissioner of State Revenue v Tuscan Property Development P/L (ACN 101 425 558)

Matthews JR

[\[2018\] VSC 511](#)

7 September 2018

CORPORATIONS – Statutory derivative action – Application for leave to bring proceedings – Sections 236 and 237 of the Corporations Act 2001 (Cth) – General principles – Good faith – Best interests of the company – Serious question to be tried – No need for fresh proceeding – Deadlocked company – Notice requirement.

Li, Yi v Dao, Hue Hin and Yang, Tao

Connock J

[\[2018\] VSC 530](#)

14 September 2018

COSTS - Application for indemnity costs - Plaintiff is the litigation funder of a group proceeding - Group proceeding compromised - Plaintiff sought and obtained court approval of compromise - Defendant, a group member, sought leave to appeal the court approval - Plaintiff in this proceeding sought unsuccessfully to enjoin defendant from seeking leave to appeal in the group proceeding - Plaintiff in part motivated in bringing the injunction proceeding to induce defendant to discontinue her application for leave to appeal in the group proceeding - Held improper purpose not the dominant purpose of the plaintiff in bringing the injunction proceedings – Dominant purpose of plaintiff was to vindicate its legal rights - Costs ordered to be paid on the standard basis - Application for costs to be paid on an indemnity basis declined.

Australian Funding Partners Ltd v Botsman, Wendy Diane (No 3)

Robson J

[\[2018\] VSC 507](#)

6 September 2018

COSTS - Where applications are fully heard but rendered inutile by a supervening event prior to final determination - Where action of one party caused the supervening event - Whether the merits of the applications should be considered - Whether costs order should be made.

CORPORATIONS - Winding Up - Disclaimer of contract and lease of land by liquidators – Whether disclaimers should be set aside - Whether leave of Court was required by liquidators to disclaim the contract - Whether purportedly disclaimed contract was unprofitable - Whether party had standing to seek order setting aside disclaimer of lease of land - Consideration of prejudice in respect of disclaimer of lease of land - Corporations Act 2001 (Cth), ss 568(1A), 568(8), 568B, 568C, 568D.
Re Bonnie View Petroleum Pty Ltd (in liq)

Randall AsJ

[\[2018\] VSC 489](#)

31 August 2018

PRACTICE AND PROCEDURE - Non party's request to obtain transcript - Hearing in interlocutory hearing - Evidence by affidavit - Transcript of argument only - Matters to be considered

PRACTICE AND PROCEDURE - Orders for confidentiality of filed documents - Court's inherent jurisdiction - Application for pre-action discovery of documents - Respondents' apprehension that grounds of application insinuate scandalous or seriously improper conduct - Whether confidentiality order over all Court documents ought be made - No application for confidentiality throughout hearing - Application after judgment reserved - Application refused - Supreme Court (General Civil Procedure Rules) 2015, r 28.05.

Bougainville Copper Limited v RTG Mining Inc; Central Exploration P/L

Mukhtar AsJ

[\[2018\] VSC 499](#)

3 September 2018

PRACTICE AND PROCEDURE - Witnesses - Application by plaintiff to call witness - Witness statement filed for witness by defendants - Plaintiff's case still open - Witnesses already called by defendants - Application granted.

Cargill Australia Ltd (ACN 004 684 173) v Viterra Malt P/L (ACN 096 519 658) & Ors and

Cargill, Incorporated & Ors (No 15)

Elliott J

[\[2018\] VSC 523](#)

10 September 2018

COMMON LAW DIVISION

ADMINISTRATIVE LAW - Appeal - Victorian Civil and Administrative Tribunal - Secretary revoked respondent's assessment notice under Working with Children Act 2005 - Respondent pleaded guilty to offensive behaviour in a public place under Summary Offences Act 1966 s 17(1)(d), arising from his presence in female public toilet - Decision of Tribunal to direct Secretary to give assessment notice to respondent - Tribunal found that respondent entered female toilet by mistake, with no ill intent - Whether Tribunal impugned finding of guilt - Whether Tribunal's findings inconsistent with essential factual elements of offence - Elements of offence of offensive behaviour in a public place - Tribunal's findings not inconsistent with essential factual elements of offence – Appeal dismissed - Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 148 - Working with Children Act 2005 (Vic), ss 14(3) and 26C - Summary Offences Act 1966 (Vic), s 17(1)(d).

Secretary to the Department of Justice and Regulation v Bhatia, Kulvinder

Richards J

[\[2018\] VSC 500](#)

4 September 2018

ADMINISTRATIVE LAW - Application for leave to appeal decision of the Victorian Civil and Administrative Tribunal - Secretary to the Department of Premier and Cabinet v Hulls (1999) 3 VR 331 - Victorian Civil and Administrative Tribunal Act 1998, ss 98, 148 - Health Records Act 2001, ss 5, 25, 34 - Leave to appeal granted on limited grounds.

Michos, Con v Eastbrooke Medical Centre P/L

Ierodionou AsJ

[\[2018\] VSC 517](#)

6 September 2018

BUILDING AND PLANNING - Appeal from Magistrates' Court - Builder found guilty of undertaking building works beyond scope of building and planning permits - Whether building and planning permits impliedly authorised works - Works claimed to be necessary for structural integrity - Interpretation of permits - Implied authority - Building Act 1993 s 61 - Planning and Environment Act 1987 s 126(1).

Pegasus Building P/L (ACN 140 292 422) v Curlis, Daniel Leigh

Cameron J

[\[2018\] VSC 484](#)

29 August 2018

EQUITY - Constructive or resulting trust - Estate assets transferred by trustees to a beneficiary - Remaining beneficiaries claim the assets are held on trust for them - Whether power in the will to sell trust assets - Whether trust arises from involuntary transfer of assets - *Black v S Freedman & Co* (1910) 12 CLR 105 - *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 - *Sze Tu v Lowe* (2014) 89 NSWLR 317 - Whether beneficiary took transfer of estate assets in breach of fiduciary duty owed as de facto trustee - *Nolan v Nolan* [2004] VSCA 109 (10 June 2004) - *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 - *Parkview Qld Pty Ltd v Commonwealth Bank of Australia* [2013] NSWCA 422 (11 December 2013) - Whether consideration for transfer of estate assets false - Whether assets received by beneficiaries for less than full value - Allegations of unconscionability and fraudulent concealment - Whether estate property later transferred to volunteers held on trust by them - Evidence Act 2008 (Vic) s 140 - *Briginshaw v Briginshaw* (1938) 60 CLR 336 - *NOM v DPP & Ors* (2012) 38 VR 618 - Where release entered by parties - Whether release effective to defeat the plaintiffs' claim - Where relevant document destroyed or discovered after release - *The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Limited and Ors (No 2)* [2012] NSWSC 322 (5 April 2012) - *MCT Dairies Inc v Probiotec Ltd* [2009] FCA 1385 - *Katsilis v Broken Hill Pty Co Ltd* (1977) 18 ALR 181.

LIMITATION OF ACTIONS - Trustee liabilities - Allegations of fraud and unconscionable conduct - Laches and acquiescence - Delay - Knowledge of wronging - Limitation of Actions Act 1958 (Vic) ss 21, 27 - *Reader & Ors v Fried & Ors* [2001] VSC 495 (19 December 2001) - *Orr v Ford* (1989) 167 CLR 316.

ADMINISTRATION & PROBATE - Where no evidence of distribution of estate - Plaintiff beneficiaries seek order appointing trustee to investigate and administer estate - Where only estate asset sold in 1979 - Delay by plaintiffs - Lack of utility of orders sought.

Linke, Graeme David; Baensch, Agnes Marie; Linke, Peter Michael and Cornish, Andrew v Linke, Victor Harold; Linke, Judith Ann; Linke, Colin Michael; Linke, Maria Grace; Linke, Glenis Walter and Linke, Ian David

Keogh J

[\[2018\] VSC 505](#)

4 September 2018

EVIDENCE - Video evidence - Video evidence sought to be adduced in personal injuries litigation - Objection to evidence - Whether evidence admissible - Whether jury should be discharged - Evidence of significant probative value - Whether probative value substantially outweighed by unfair prejudice - Whether prejudice can be cured by directions - *Svajcer v Woolworths Ltd* [2015] VSC 543 distinguished - Evidence Act 2008 s 135; Supreme Court (General Civil Procedure) Rules 2015 r 47.02(3).

Romanoski, Aleksandar v Clean Solutions P/L

Zammit J

[\[2018\] VSC 526](#)

12 September 2018

INJUNCTIONS - Application for injunction to restrain certain picketing activities - Whether there was a continuing threat of disruption of access - Whether the defendant and representees should be enjoined from being within a specified distance from entrances - Form of order considered.

PRACTICE AND PROCEDURE - Representative Order - Whether the defendant was suitable to be appointed as a representative - Whether the representees had a common interest as individuals engaging in picketing activities - Supreme Court (General Civil Procedure) Rules 2015 (Vic) rr 18.03, 18.04.

Laverton Cold Storage P/L v National Union of Workers

Riordan J

[\[2018\] VSC 503](#)

3 July 2018

INJUNCTIONS - Interlocutory injunction - Proceedings for breach of contractual undertakings including as to confidentiality and for defamation - Publication ongoing on Facebook – Publication causing harassment of the plaintiff and others - Whether exceptional circumstances – Whether damages adequate remedy - Where balance of convenience lies - Whether defences of qualified privilege and honest opinion reasonably arguable - Where alleged defamation occurred in context of ongoing dispute and in alleged breach of undertakings - Interlocutory injunction granted - Defamation Act 2005 (Vic) ss 30 and 31.

The School of Excellence P/L (ACN 066 955 128) v Trendy Rhino P/L (ACN 623 293 952); Franklyn, Charlie; Fonseka, Himasha and Jayakody, Shanaka

John Dixon J

[\[2018\] VSC 514](#)

6 September 2018

JUDICIAL REVIEW AND APPEALS - Application by tenant under s 148 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) ('VCAT Act') for leave to appeal and appeal from VCAT decision to make possession order - Landlord issued tenant with notice to vacate premises within 60 days pursuant to s 258 of Residential Tenancies Act 1997 (Vic) - Tenant disputed landlord's entitlement to evict her - VCAT Member made possession order on basis that landlord was entitled to evict tenant - Whether Member erred in law by failing to take into account mandatory relevant considerations or misconstruing the terms of the relevant statutory provision - Whether VCAT had jurisdiction to make a possession order and, if so, whether the Member erred in law in making the possession order - Whether any failure to afford procedural fairness - *Smith v Director of Housing* [2005] VSC 46 ('Smith'), applied - Consideration of application of *Smith* to notices to vacate - Failure to take into account mandatory relevant considerations - *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59, applied - *Lang v Carron Investments Pty Ltd & Anor* [2016] VSC 165, referred to - Residential Tenancies Act 1997 (Vic) ss 258(1), 319(d) and 330(1) - Application for leave granted - Two out of six grounds of appeal allowed.

Jafarpourasr, Mitra v Tancevski, Ivan

Daly AsJ

[\[2018\] VSC 497](#)

4 September 2018

JUDICIAL REVIEW - Motor vehicle speeding offence - Magistrates' Court - Charge proved - Appeal to County Court - Whether insufficient evidence to prove charge - Whether fair hearing – No jurisdictional error or error of law on the face of the record established - Road Safety Act 1986 s 83 - Road Safety (General Regulations) 2009 reg 52 - Road Safety Rules 2009 r 20.

Ali, Bilal v Allan, Patrick (Victoria Police) and County Court of Victoria

Ginnane J

[\[2018\] VSC 515](#)

3 September 2018

PRACTICE AND PROCEDURE - Application for summary judgment on basis that defences to breach of fiduciary duty by an attorney have no real prospect of success - Defences not fanciful – Summary judgment refused - In the alternative, in the exercise of discretion the case should go to trial – Civil Procedure Act 2010 (Vic) ss 63 and 64.

ENDURING POWER OF ATTORNEY - Attorney executed transfer of deceased's home into the name of the deceased jointly with their son - Surplus proceeds of sale of deceased's prior home largely distributed to attorney and their son - Attorney and son allege that the deceased gave oral instructions for these transactions - Not alleged by the plaintiff that the deceased lacked capacity to do so - Plaintiff claims that the attorney acted in breach of her fiduciary duty to the deceased - Various defences alleging that the transactions fell outside the scope of the duty or the deceased gave informed consent - Held that defences not fanciful - Powers of Attorney Act 2014 (Vic) ss 1, 42, 63, 64, 65.

Singer, Margo (who sues on behalf of the estate of Thomas Spiewak, deceased) v Spiewak, Grazyna and Spiewak, Marcin

Lansdowne AsJ

[\[2018\] VSC 521](#)

10 September 2018

PRACTICE AND PROCEDURE - Discovery - Order for particular discovery - Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 29.08(2).

Mustica Holdings Pty Ltd v Coghlan de Luca Pty Ltd & Ors; West Grove Project Pty Ltd & Ors v Coghlan de Luca Pty Ltd & Ors

Clayton JR

[\[2018\] VSC 509](#)

5 September 2018

PRACTICE AND PROCEDURE - Discovery - Whether document relevant to the issues in dispute - Supreme Court (General Civil Procedure) Rules 2015 (Vic), O 29 - Discovery granted.

Case, Lesley Margaret Mary; Case, Robert Leslie; Case, Michael James; Case, Jacqueline Louise; Bell, Elizabeth Anne; Case, Christopher and Case, Bernard John v

Commonwealth Of Australia

Clayton JR

[\[2018\] VSC 504](#)

4 September 2018

PROCEDURE - Costs - Departing from general rule - Conduct of parties - Security for costs not provided as ordered - Applications for dismissal of action ultimately dismissed - Whether plaintiff's conduct cause of costs - Applications for dismissal of action dismissed insofar as founded on alleged breach by plaintiff of discovery order - Whether costs order should reflect loss by defendants on this issue - Whether costs should be ordered on ordinary or indemnity basis.

PROCEDURE - Civil proceedings in state and territory courts - Costs - Interlocutory proceedings - Whether costs should be taxed forthwith - Whether costs should be fixed in lump sum or taxed.

ACN 115 918 959 P/L (formerly known as Pearl Hill P/L) v Hoeys Lawyers P/L (ACN 102

409 263); Oliver, Kenneth and Digby, Geoffrey John (Costs Ruling)

Blue AJ

[\[2018\] VSC 508](#)

5 September 2018

WILLS AND ESTATES - Informal will - Will not seen or executed by testator - Testator given an opportunity to execute informal will but declined to do so - Whether testator intended that document to be her will - Wills Act 1997, ss 7 and 9.

In the matter of the estate of Elzow, Nina (deceased) and In the matter of section 9 of the Wills Act 1997. Between: Bolgarow, Valentina and Marchment, Robin v Sultanova, Tatyana

Lyons J

[\[2018\] VSC 498](#)

5 September 2018

COSTS COURT

Waybecca P/L v Vella, Joseph and Giza, Richard

Wood AsJ

[\[2018\] VSC 492](#)

10 September 2018

CRIMINAL DIVISION

CRIMINAL LAW - Bail - Application for revocation of bail - Applicant charged with Schedule 1 drug offences - Applicant established exceptional circumstances justifying grant of bail – Applicant breached a conduct condition of bail following release - Breach of conduct condition is a Schedule 2 offence - Need to show that a compelling reason exists justifying the grant of bail – Whether unacceptable risk of committing an offence while on bail - Application for revocation refused – Bail granted on charge of breaching a condition of bail - Bail Act 1977, s 3, s 3AAA, s 4, s 4A, s 4C, s 4E, s 5AAA, s 18, s 18AE, s 18AF, s 24(3), s 30A.

In the matter of the Bail Act 1977 and In the matter of an Application for Revocation of

Bail in the matter of Gloury-Hyde, Zachariah and In the matter of an Application for

Bail by Gloury-Hyde, Zachariah (No 2)

Priest JA

[\[2018\] VSC 520](#)

7 September 2018

CRIMINAL LAW - Application for bail - Charges of trafficking in a drug of dependence, possessing equipment for trafficking, possessing precursor chemical, possessing a drug of dependence, resisting police, possessing prohibited weapon without exemption, possessing ammunition without licence, arson, reckless conduct endangering serious injury - Exceptional circumstances – Bail refused - Bail Act 1977.

In the matter of the Bail Act 1977 and In the matter of an application by McNally, Luke

Champion J

[\[2018\] VSC 522](#)

16 August 2018

CRIMINAL LAW - Contempt of the Chief Examiner - Sentencing - Whether Court has power to make youth justice centre order in sentencing offender for contempt - Where offender pleaded guilty - Where offender aged 18 and has limited prior convictions - Rich v Attorney-General (Vic) (1999) 103 A Crim R 261, DPP v Johnson (2002) 6 VR 235 and R v The Herald and Weekly Times Pty Ltd [2008] VSC 251 discussed - Major Crime (Investigative Powers) Act 2004 s 49(1) - Sentencing Act 1991 s 32.

The Queen (on the application of the Acting Chief Examiner) v Ford, Max (a Pseudonym)

Tinney J

[\[2018\] VSC 491](#)

20 August 2018

CRIMINAL LAW - Sentence - Child homicide - Not guilty plea - Death of three-month-old baby byshaking - Accused father of deceased - Isolated incident - Accused otherwise devoted parent – No prior criminal history - Excellent prospects for rehabilitation - No signs of remorse - Delay – General deterrence - Denunciation - Punishment - Sentenced to 9 years' imprisonment with non-parole period of 6 years - 484 days pre-sentence detention.

The Queen v Rowe, Joby

T Forrest JA

[\[2018\] VSC 490](#)

31 August 2018

CRIMINAL LAW - Sentence - Contempt of the Chief Examiner - Plea of guilty - Refusal to take oath or make affirmation - Contempt in respect of examination into series of crimes - Where contempt contumacious - Youthful offender - No relevant prior convictions - Sentence of five months' detention in youth justice centre - Major Crime (Investigative Powers) Act 2004 ss 36, 49.

The Queen (on the application of the Acting Chief Examiner) v Ford, Max (a Pseudonym)

Tinney J

[\[2018\] VSC 494](#)

31 August 2018

CRIMINAL LAW - Sentence - Manslaughter by an unlawful and dangerous act - Mid-range seriousness of offending - Stabbed victim with sharpened screwdriver multiple times - Dynamic physical fight - Moral culpability - Plea of guilty - Prior history of violence - Weight to general deterrence, denunciation, specific deterrence and community protection - Gap between head sentence and non-parole period - Sentence of ten years' imprisonment with non-parole period of seven years - But for plea of guilty, sentence of twelve years' imprisonment with non-parole period of nine years - Sentencing Act 1991 - Crimes Act 1958.

The Queen v O'Connor, Gary Sean

Champion J

[\[2018\] VSC 516](#)

4 September 2018

CRIMINAL LAW - Sentence - Manslaughter by unlawful and dangerous act - Accused in ongoing, genuine and reasonable fear - Plea of guilty - Remorse - Good prospects for rehabilitation – General deterrence and denunciation - Sentence of 5 years' imprisonment with non-parole period of 3 years - 782 days served as pre-sentence detention.

The Queen v Yucel, Kamil

Taylor J

[\[2018\] VSC 506](#)

5 September 2018

PRACTICE COURT

COURTS AND JUDGES - Parens patriae jurisdiction - Pregnant teenage child - Declaration sought by hospital authorising doctors to administer blood products to a Jehovah's Witness child to save her life or prevent serious injury during child birth - Whether order should be made in opposition to the wishes of the child and her mother - Mature minor - Adherence to religious convictions - Vulnerability - Best interests of child - Relevant factors - Interaction between the Court's parens patriae jurisdiction and the Human Tissue Act 1982 - Medical Treatment Planning and Decisions Act 2016, considered - Minister for Health v AS (2004) 33 Fam LR 223, considered - X v Sydney Children's Hospital Network (2013) 85 NSWLR 294, considered - Declaration made in exercise of jurisdiction.

PRACTICE AND PROCEDURE - Open justice principle - Application by hospital for orders protecting the identities of the defendants from being made public - Whether order necessary to prevent a real and substantial risk of prejudice to the proper administration of justice - Parens patriae jurisdiction - Scott v Scott [1913] AC 417, considered - Pseudonym order made – Interim suppression order made - Open Courts Act 2013, s 20.

PRACTICE AND PROCEDURE - Requirement in Order 15 of the Supreme Court (General Civil Procedure) Rules 2015 that the child defendant defend the proceeding through a litigation guardian - Urgent proceeding - Child directly represented by counsel and instructing solicitor - Compliance with requirement dispensed with - Supreme Court (General Civil Procedure) Rules 2015, r 2.04.

Mercy Hospitals Victoria v D1 and D2

Macaulay J

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31 August 2018