

# **SUPREME COURT OF VICTORIA**

## **RECENT JUDGMENTS BULLETIN ISSUE NO. 24/2017**

Below is a list of Victorian Supreme Court unreported judgments received in the Library from 11 to 22 December 2017. 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

ACCIDENT COMPENSATION - Transport accident - Application for leave to appeal against order refusing applicant leave to commence proceedings for common law damages - Judge's reasons conceded to be inadequate - Credibility of applicant's evidence in issue - Consent orders filed granting leave to appeal, allowing appeal and remitting matter for rehearing by different judge - Whether consent orders appropriate - Orders made - Transport Accident Act 1986, s93.

PRACTICE AND PROCEDURE - Consent orders allowing appeal and remitting proceeding for rehearing - Relevant considerations for whether consent order remitting proceeding for rehearing should be made - Disposition having resource implications for administration of justice - Need to identify error - Need to ensure error made at first instance not replicated on rehearing - Consent orders made - Matter remitted for rehearing by different judge.

***Alegria, Irma v Transport Accident Commission***

Osborn and Beach JJA

[\[2017\] VSCA 379](#)

18/12/2017

ACCIDENT COMPENSATION - Transport accident - Serious injury application - Psychiatric injury - Applicant suffered a severe long-term mental disorder - Whether applicant suffered severe long-term mental or severe long-term behavioural disturbance or disorder as a result of transport accident - Causation - Test to be applied - Other traumas suffered by applicant - Judge not satisfied that applicant suffered serious injury as a result of transport accident - Whether judge applied incorrect test - Whether judge failed to consider evidence - Whether judge's conclusion against the weight of the evidence - Whether judge's reasons inadequate - No error made by judge - Judge's conclusion not against weight of evidence - No inadequacy in judge's reasons - No real prospect of success in proposed appeal - Application for leave to appeal refused - Transport Accident Act 1986, s93.

***Rowe, Anthony v Transport Accident Commission***

Osborn, Priest, and Beach JJA

[\[2017\] VSCA 377](#)

18/12/2017

ADMINISTRATIVE LAW - Application for leave to appeal from a decision of the Trial Division upon an appeal on questions of law from the Planning Division of the Victorian Civil and Administrative Tribunal - Whether rights conferred upon respondent as holder of licence under Water Act 1989 to take and use groundwater for commercial operation expressly limited by any provision of the Planning and Environment Act 1987 or any planning scheme made thereunder - Application for leave to appeal refused - Water Act 1989 s8(4), s8(6), s51, s55, s67, s69; Planning and Environment Act 1987 s6(2)(b).

***Stanley Rural Community Inc v Stanley Pastoral P/L***

Osborn, Santamaria, and Ashley JJA

[\[2017\] VSCA 385](#)

20/12/2017

APPEAL - Appellate review of findings of fact - Finding that parties lacked credibility - Inferences drawn from established facts - Whether test in Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679 applies to inferences - Advance of monies to purchase unit - Newly commenced intimate relationship - Whether monies advanced as loan or gift - Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679; Fox v Percy (2003) 214 CLR 118 considered - Appeal dismissed.

***Jovanovic, Jelena v Magri, Kevin***

Whelan, Priest, and McLeish JJA

[\[2017\] VSCA 373](#)

14/12/2017

BUILDING CONTRACT - Appeal - Respondent seeking recourse in respect of claim for unliquidated damages for breach of contract - Refusal to grant interlocutory injunction to restrain respondent from exercising recourse to a commercial guarantee - Construction of contract - Whether trial judge erred in construing that contract did not contain restriction on right to have recourse to the guarantee - Whether money due and payable under the contract - Appeal allowed - Contract precludes recourse to guarantee - RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd (rec and mgr appt) (in liq) [2016] QCA 214 applied - Bachmann Pty Ltd v BHP Power New Zealand Limited [1999] 1 VR 420 distinguished - Fletcher Construction Australia Limited v Varnsdorf [1998] 3 VR 812 - distinguished.

***Dedert Corporation (US Tax Identification Number 36-2657918) v United Dalby Bio-Refinery P/L as trustee for the Power Feed Unit Trust (ACN 163 072 544)***

Whelan, Priest, and Kaye JJA

[\[2017\] VSCA 368](#)

12/12/2017

CONTRACT - Management agreement - Claim for unpaid management fees - Estoppel by convention - Common assumption between the parties - Detriment - Leave to appeal granted - Appeal allowed - Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226, Equuscorp Pty Ltd v Wilmoth Field Warne (2007) 18 VR 250, referred to - Thompson v Palmer (1933) 49 CLR 507, Grundt v Great Boulder Gold Mines Pty Ltd (1937) 59 CLR 641, applied.

***LCY P/L (ACN 157 713 178) v Ma, Dong Yan***

Tate, Osborn, and Ashley JJA

[\[2017\] VSCA 383](#)

20/12/2017

CONTRACT - Purchase of goods - Repudiation - Damages - Damages claimed for repudiation of a contract - Both parties to a contract held an incorrect interpretation of the contract - No entitlement to damages where there was no evidence before the trial judge that the applicant was willing to perform the contract - No damages established. PROCEDURE - Whether judge erred in determining the case on the pleadings - Final submissions went beyond pleadings.

***AU Future Health P/L (ACN 163 007 832) v Ecmoho (Hong Kong Ltd) (a company incorporated in Hong Kong)***

Whelan and Ashley JJA, Robson AJA

[\[2017\] VSCA 380](#)

20/12/2017

CONTRACT - Sale of land - Standard form contract of sale - Liability to pay GST - Insertion of the words 'GST' rather than 'plus GST' into the relevant box in the contract - Whether judge erred in finding that failure to use correct term meant mechanism for departure from the default position had not been triggered - *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, *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, *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95, applied - *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715, *Duoedge Pty Ltd v Leong* [2013] VSC 36, discussed - Leave to appeal granted - Appeal allowed - Estate Agents (Contracts) Regulations 2008 sch 1, Forms 1 and 2.

***A & A Property Developers P/L (ABN 153 624 910) v MCCA Asset Management Ltd (ABN 18 113 728 706) and Sandhurst Trustees Ltd (ABN 16 004 030 737) as Trustee for the MCCA Property Fund***

Tate, Osborn, and Kaye JJA

[\[2017\] VSCA 365](#)

12/12/2017

CRIMINAL LAW - Appeal - Conviction - Obtaining financial advantage by deception - Applications for bank finance - False statements about amounts receivable - Documents prepared by finance manager - Whether applicants knew of falsehoods - Whether finance manager's evidence credible - Reasonably open to jury to convict - Applications refused.

CRIMINAL LAW - Appeal - Conviction - Attempt to obtain financial advantage by deception - Application for bank finance - False statements about amounts receivable - Bank detected anomaly in financial statements - Finance manager gave false explanation - No further information provided - Whether conduct merely preparatory - Application refused - *R v Andreola* (2002) 131 A Crim R 259 followed.

CRIMINAL LAW - Appeal - Sentence - Attempt to obtain financial advantage by deception - Sentenced after trial to 5 years' imprisonment - Sentenced as continuing criminal enterprise offender - Applicable maximum penalty doubled to 10 years - Amount applied for was \$53 million - Applicant was owner and controller of corporate group - Sentence reasonably open - Application refused - Sentencing Act 1991 pt 2B.

***Iliopoulos, Steve v The Queen; Bariamis, Vasilis v The Queen***

Maxwell P, Weinberg and Priest JJA

[\[2017\] VSCA 384](#)

20/12/2017

CRIMINAL LAW - Conviction - Appeal - Culpable driving - Evidence - Incriminating conduct - Leaving scene and concealing motor vehicle - Judge's charge - Directions to jury about incriminating conduct - Whether directions inadequate - Directions not inadequate - Jury Directions Act 2015, s18, s21, s22 and s23.

CRIMINAL LAW - Conviction - Appeal - Evidence - Record of interview - 'No comment' answers in record of interview - Judge's charge - Whether judge's charge about 'no comment' answers inadequate - No inadequacy in judge's charge - Evidence Act 2008, s89(1)(a).

CRIMINAL LAW - Conviction - Appeal - Application to add new grounds of appeal - Whether judge impermissibly directed jury as to order of deliberations - No impermissible direction given - Whether jury impermissibly directed when told they needed to find conduct 'fell so far short that it deserves criminal punishment' - Jury direction read in context - When read in context, no misdirection - No substantial miscarriage of justice - Application for leave to add new grounds refused - *Bouch v The Queen* (2017) 80 MVR 85.

CRIMINAL LAW - Sentence - Appeal - Culpable driving, failing to stop after accident and failing to render assistance - Sentence of 9 years' imprisonment for culpable driving - Total effective sentence of 11 years, with non-parole period of 8 years and 6 months - Whether sentence manifestly excessive - Whether judge erred in finding likelihood of appellant reoffending was 'likely' - Sentence not manifestly excessive - Judge erred in finding of likelihood of reoffending - Appeal allowed - Sentences of imprisonment set aside - Appellant resentenced to 7 years and 6 months on culpable driving - Appellant resentenced to total effective sentence of 9 years and 6 months, with non-parole period of 7 years.

***Maier, Stephanie Joy v The Queen***

Beach, McLeish, and Coghlan JJA

[\[2017\] VSCA 381](#)

20/12/2017

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Commonwealth and State offences - Appeals by Commonwealth and State Directors - Multiple child sex offences - Online grooming, online sexual activity, producing child pornography - Contact sexual offences - Sexual penetration of a child under 16, persistent sexual abuse - 22 female victims aged between 11 and 17 - Offending extended over almost nine years - Sentenced to 12 years' imprisonment, with non-parole period of 10 years - Whether manifestly inadequate - Use of threats and coercion - Procuring victims to engage in degrading acts - Profound long-term harm to victims - General deterrence - Prevalence of this type of offending - Specific deterrence - Respondent had relevant prior convictions - Offended while on suspended sentence - Offended while under police investigation - Appeals allowed - Resentenced to 22 years' imprisonment, with non-parole period of 18 years - Criminal Code Act 1995 (Cth) s474.27, s474.25A, Crimes Act 1958 s38A, s45, s47, s47A, s49B, s58, s68, s70, Sentencing Act 1991 s6E.

***Director of Public Prosecutions [DPP] and Director of Public Prosecutions [DPP] (Cth) v Meharry, Fabian Roy***

Maxwell P, Priest and Kyrou JJA

[\[2017\] VSCA 387](#)

21/12/2017

COSTS - Application for leave to appeal order that defendants pay plaintiff's costs on County Court Scale - Proceeding in County Court - Claim for damages for personal injury - Offer by defendants of \$25,000 plus costs and disbursements to settle proceeding - Offer accepted - Dispute as to what costs were payable - Judge asked to adjudicate as to costs, not to decide meaning of offer which had been accepted - Whether the correct question for decision - Whether, if so, r63A.24 of County Court Civil Procedure Rules 2008 engaged - New arguments raised by defendants on application for leave to appeal - Whether, if r63A.24 engaged, meaning of defendants' offer, election by defendants for trial by jury, probable reduction of offer by reason of plaintiff's contributory negligence and late loss by plaintiff of right to recover damages for non-economic loss were irrelevant considerations - Discretion to refuse leave to appeal under s14C Supreme Court Act 1986 - Leave to appeal refused - Supreme Court Act 1986 s14C - County Court Civil Procedure Rules 2008 r63A.24.

***Burgoyne Real Estate P/L (ACN 070 951 834); Crestway Investments P/L (ACN 077 184 528) and Delmun Investments P/L (ACN 141 842 480) v Dutt, Sheila Wendy***

Beach and Ashley JJA

[\[2017\] VSCA 372](#)

14/12/2017

CRIMINAL LAW - Appeal - Conviction - Evidence - Admissibility - Other misconduct evidence - Possessing substances, materials and equipment for trafficking - Trafficking in commercial quantity of drug of dependence - Evidence of earlier discovery of similar equipment and materials - Evidence used to rebut defence of innocent association - Whether probative value outweighed danger of unfair prejudice - Jury warned against misusing evidence - Evidence correctly admitted - Appeal dismissed - *Harriman v The Queen* (1989) 167 CLR 590 applied - Drugs, Poisons and Controlled Substances Act 1981 s71AA, s71A, s73; Evidence Act 2008 s137.

CRIMINAL LAW - Appeal - Conviction - Possessing precursor chemical - Joint criminal enterprise - Integrated directions - Discussion between trial judge and defence counsel - Text of jury questions agreed with counsel - No exception to judge's charge - Whether judge obliged to give further directions - Whether 'substantial and compelling reasons' - No further direction necessary - Appeal dismissed - Jury Directions Act 2015 s1, s5, s11, s12, s14, s15, s16, s65, s67.

CRIMINAL LAW - Appeal - Sentence - Possessing precursor chemical - Trafficking in drug of dependence - Total effective sentence 4 years and 3 months' imprisonment, non-parole period 2 years and 3 months - Parity - Same criminal enterprise - Co-accused received lower sentences for more serious offences - Whether disparity of sentences justified - Crown concession of sentencing error - Appeal allowed - Resentenced Total effective sentence 2 years and 9 months' imprisonment, non-parole period 18 months Drugs, Poisons and Controlled Substances Act 1981 s71AC, s71D.

***Dunn, Howard (a Pseudonym) v The Queen; Watts, Allan (a Pseudonym) v The Queen***

Maxwell P, Beach and McLeish JJAa

[\[2017\] VSCA 371](#)

13/12/2017



CRIMINAL LAW - Appeal - Interlocutory appeal - Review of refusal to certify - Course of conduct charges - Sexual penetration of child under 16 - Whether charges sufficiently particularised - Judge refused stay application - No error - Application refused - Criminal Procedure Act 2009 ss295-6, sch 1 cl 4A, Crimes Act 1958 s45(1).

***Frazier, Martin (a Pseudonym) v The Queen***

Maxwell P and Kyrrou JA

[\[2017\] VSCA 370](#)

14/12/2017

CRIMINAL LAW - Appeal - Sentence - Aggravated burglary - Common law assault - Applicant instigator of grievance-driven confrontation - Head-butting and punching - Total effective sentence of 3 years and 11 months' imprisonment - Non-parole period of 2 years and 4 months - Whether manifestly excessive - Whether proper weight given to utilitarian value of early guilty plea after application to withdraw plea - Whether judge erred in assessment of gravity of offence - Whether personal mitigating factors properly taken into account - No error - Application for leave to appeal refused - Director of Public Prosecutions v Meyers (2014) 44 VR 486 considered.

***Karoumi, Akram v The Queen***

Maxwell P, Tate JA, and Beale AJA

[\[2017\] VSCA 375](#)

15/12/2017

CRIMINAL LAW - Appeal - Sentence - Rape - Digital penetration - Six years' imprisonment with non-parole period of four years - Whether irrelevant consideration taken into account - Sentencing judge expressed dissatisfaction with current sentencing practice - Remarks had no bearing on sentencing task - All relevant features of offending addressed - Whether manifestly excessive - No remorse - Aggravating features - Premeditation - Violence - Vulnerability of victim - Risk of re-offending - Upper mid-level category - Not manifestly excessive - Appeal dismissed - Sentencing Act 1991 s5(2)(b).

CRIMINAL LAW - Sentencing - Current sentencing practice - Rape - Digital penetration - Whether sentencing practice for upper mid-level category is adequate - Need for sentencing practice to be adjusted upward - DPP v Dalglish (a pseudonym) (2017) 91 ALJR 1063 considered - Crimes Act 1958 s38; Sentencing Act 1991 s5(2)(b).

***Shrestha, Anjan v The Queen***

Maxwell P, Weinberg and Whelan JJA

[\[2017\] VSCA 364](#)

11/12/2017

CRIMINAL LAW - Crown Appeal - Sentence - Rape - Respondent sentenced to community correction order with conditions - Whether sentence manifestly inadequate - Whether sentence with custodial component should have been imposed - Whether residual discretion should be exercised - Appeal dismissed.

***Director of Public Prosecutions [DPP] v McInnes, Jacob Kerr Thomas***

Whelan, Priest, and Beach JJA

[\[2017\] VSCA 374](#)

13/12/2017

CRIMINAL LAW - Interlocutory decision on admissibility of evidence - Application for review of decision of judge to refuse to certify to enable application for leave to appeal to be made - 59 charges of theft - Judge ruled that CCTV footage was admissible and refused to exclude it under s137 of the Evidence Act 2008 - Judge permitted prosecution to introduce new evidence and rejected application for him to recuse himself made on the basis that remarks about sentence gave rise to apprehended bias - Application for review refused - Application for leave to appeal against refusal of judge to recuse himself refused.

***Gild, Michael v The Queen***

Kyrou and Coghlan JJA

[\[2017\] VSCA 367](#)

12/12/2017

CRIMINAL LAW - Sentence - Crown appeal - Multiple offences - Firearms offences - Originally convicted of making explosive substance with intent to endanger life or cause really serious injury to property, knowingly possessing explosive substances for unlawful object, possessing drug of dependence, prohibited person possessing firearm (eight charges), prohibited person possessing silencer, and possessing ammunition without licence and storing insecurely - Provided petrol to Hells Angel motor cycle gang for use in construction of improvised explosive devices and had firearms in place of residence and car some loaded - Prior convictions for violent offences and armed robbery - Fair prospects of rehabilitation - Sentenced to total effective sentence 23 months' imprisonment in combination with 12 month CCO - Effect of sentence was respondent released from prison immediately following sentence due to time served - Crown appeal against sentence in respect of firearms offending on ground of manifest inadequacy allowed, resentenced by Court of Appeal to increase CCO to 4 years duration.

CRIMINAL LAW - Offender committed further offences including possessing a firearm whilst a prohibited person (four charges) in breach of CCO less than a month after resentence and in breach of CCO - Sentenced to total effective sentence in respect of original firearms offending and further offending to 2 years and 4 months' imprisonment with a non-parole period of 1 year and 6 months - Further Crown appeal - Whether sentences on original firearms charges and further offending manifestly inadequate - Gravity of offending - Possession of firearms for purpose of criminal activity - *Berichon v The Queen* (2013) 40 VR 419 considered - Appeal allowed - Resentenced to total effective sentence of five years and six months' imprisonment with a non-parole period of 3 years and 8 months - Firearms Act 1996, s5(1).

***Director of Public Prosecutions [DPP] v Basic, Dennis***

Weinberg, Osborn, and Priest JJA

[\[2017\] VSCA 376](#)

15/12/2017



INSURANCE - Construction of terms of professional indemnity policy - Management consultant insured liable for insolvent trading incurred as director of client - Whether liability incurred in conduct of insured's provision of 'professional services' as defined - Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 applied.

INSURANCE - Non-disclosure and misrepresentation - Failure to disclose appointment of insured as director of client company - Insurance Contracts Act 1984 (Cth) s21, s26. INSURANCE - Whether deed of settlement between insured and liquidators of client company had effect of limiting loss recoverable under policy - CGU Insurance Ltd v One.Tel Ltd (in liq) (2010) 242 CLR 174 applied.

CORPORATIONS - Whether management consulting company was 'shadow' or 'de facto' director - Corporations Act 2001 (Cth) s9.

INSURANCE - Construction of exclusion in policy concerning liability for claim arising from any act, error or omission of director while acting in that capacity.

INSURANCE - Standing - Whether liquidators making insolvent trading claim against director have standing to seek declaration against director's insurer - CGU Insurance Ltd v Blakeley (2016) 259 CLR 339 applied.

***Blakeley, Ross; Ryan, Michael; Olde, Quentin (as joint and several liquidators of Akron Roads P/L (in liquidation) and Akron Roads P/L (in liquidation) v CGU Insurance Limited (ACN 004 478 371); Crewe, Trevor Paul and Crewe Sharp P/L (ACN 066 670 013); CGU Insurance Ltd (ACN 004 478 371) v Blakeley, Ross; Ryan, Michael; Olde, Quentin (as joint and several liquidators of Akron Roads P/L (in liquidation) and Akron Roads P/L (in liquidation)); Crewe, Trevor Paul and Crewe Sharp P/L (ACN 066 670)***

Ferguson CJ, Whelan and McLeish JJA

[\[2017\] VSCA 378](#)

18/12/2017

JUDICIAL REVIEW - Summary offence of resisting arrest - Whether judge sitting alone hearing appeal on summary charges required to deal with any defence raised on the evidence - Whether self-defence raised on the evidence - Whether finding that accused's fear was unreasonable open on the evidence - Pemble v The Queen (1971) 124 CLR 107 distinguished - Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 applied - Summary Offences Act 1966, s52(1) - Leave to appeal granted - Appeal dismissed.

***Kok, Augustinus v Lomax, Darren John and County Court of Victoria***

Tate, McLeish, and Ashley JJA

[\[2017\] VSCA 366](#)

12/12/2017

PARTNERSHIP - Nature of partner's interest in partnership property - Whether partner has proprietary interest in assets of partnership - Lord Sudeley v Attorney-General [1897] AC 11, Livingston v Commissioner of Stamp Duties (Qld) (1960) 107 CLR 411, Commissioner of Stamp Duties (Qld) v Livingston [1965] AC 694, Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321, Federal Commissioner of Taxation v Everett (1980) 143 CLR 440, United Builders Pty Ltd v Mutual Acceptance Limited (1980) 144 CLR 673, Watson v Ralph (1982) 148 CLR 646, Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd (2010) 242 CLR 508 and CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic) (2005) 224 CLR 98 discussed.

TAXES AND DUTIES - Stamp duty - Purchase of units in partnership - Where partnership owns land - Whether transfer of dutiable property - Whether partner's interest in partnership property an 'interest in an estate in fee simple' - Duties Act 2000 s3, s7 and s10 - Appeal dismissed.

WORDS AND PHRASES - 'interest of partner in partnership property' - 'interest in an estate in fee simple' - 'beneficial interest' - 'equitable interest' - 'equitable chose in action'.

***Commissioner of State Revenue v Danvest P/L (ACN 096 067 006) and Bullhusq P/L (ACN 166 777 644)***

Tate, Santamaria, and McLeish JJA

[\[2017\] VSCA 382](#)

20/12/2017

PRACTICE - Costs - Appeal on question of law - Rules of Racing - Appeal against dismissal of charges - Appeal allowed in part - Compensatory nature of costs - Each party put to expense of contesting appeal - Proportionately greater success on part of respondents - Appellant to pay one-third of respondents' costs.

***Racing Victoria Ltd v Kavanagh, Mark and O'Brien, Danny (No 2)***

Maxwell P, McLeish JA, and Cavanough AJA

[\[2017\] VSCA 369](#)

12/12/2017

## COMMERCIAL COURT

APPEAL - Appeal from associate judge under Supreme Court (General Civil Procedure) Rules 2015 (Vic) r77.06 - Determination of liquidators' remuneration pursuant to Corporations Act 2001 (Cth) s504 - Leave sought to file appeal out of time - Extension of time granted - Whether error in finding of facts - No error - Whether error in applying principle of proportionality - No error - Appeal dismissed.

***Atwell, Morag (a bankrupt) v Turner, Dennis Anthony; Targett, Luke Christopher (in their capacities as joint and several liquidators of Atwell & Co P/L (ACN 106 264 055) (in liquidation) and Atwell & Co P/L (ACN 106 264 055) (in liquidation)***

Kennedy J

[\[2017\] VSC 683](#)

12/12/2017

APPEAL - Privilege - Ruling of an Associate Judge - Waiver of client legal privilege - Lamers & Anor v Lamers [2017] VSC 165.

PRACTICE AND PROCEDURE - Privilege - Evidence Act 2008 (Vic) s117, s118, s119 - Privileged documents - Evidence Act 2008 (Vic) s122 - Loss of client legal privilege - Issue waiver - Inconsistency - Whether or not a positive case or positive assertion pleaded in defence - Representations made by solicitor alleged in statement of claim - Whether waiver by disclosure of parts of a will - Essential character of documents - Dominant purpose test - Express or implied obligation not to disclose contents of documents.

***Lamers, Johannes Antonius & Anor v Lamers, Andrew John***

Almond J

[\[2017\] VSC 760](#)

13/12/2017

BUILDING AND CONSTRUCTION - Building and Construction Industry Security of Payment Act 2002 (Vic) - Application for judicial review of a determination of an adjudicator - Application for writ of certiorari to quash a decision of an adjudicator - Jurisdictional error - Calculation of due date for payment of a progress payment - Application of s12(1) of the Building and Construction Industry Security of Payment Act 2002 (Vic).

ADMINISTRATIVE LAW - Judicial review - Determination of an adjudicator appointed under the Building and Construction Industry Security of Payment Act 2002 (Vic) - Whether certiorari should be granted to quash the decision.

***Raw Build P/L (ACN 159 255 142) v JBK Industries P/L (ACN 106 713 115) and Hapgood, Richard (in his capacity as adjudicator in an adjudication under the Building and Construction Industry Security of Payment Act 2002 (Vic))***

Vickery J

[\[2017\] VSC 766](#)

07/12/2017

CONTEMPT OF COURT - Civil contempt - Breach of freezing order - Exceptions to order - Onus of proving exceptions - Whether expenses in ordinary and proper course of business - Application allowed - *Witham v Holloway* (1995) 193 CLR 525; *ASIC v Sigalla (No 4)* (2011) 80 NSWLR 113; *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 discussed - *CC Containers Pty Ltd v Lee (No 8)* [2015] VSC 478 distinguished - *R (on the application of the Chief Examiner) v DA (a Pseudonym)* [2016] VSCA 325 followed - Supreme Court (General Civil Procedure) Rules 2015 r75.06.

***Fortune Holding Group P/L (ACN 141 953 773); Fortune Holding Developments P/L (ACN 142 122 852); Fortune Homes P/L (ACN 143 589 388) and Quan, Yi Jun v Zhang, Ian Yan***

Zammit J

[\[2017\] VSC 738](#)

11/12/2017

CORPORATIONS - Application by liquidators of managed investment schemes for further directions pursuant to s511 of the Corporations Act 2001 (Cth) for entitlement to remuneration, costs and expenses including those that are expected to be incurred prior to conclusion of liquidation - Directions sought under s50 of the Evidence Act 2008 (Vic) that evidence be given in summary form.

***In the matter of Gunns Ltd (Administrators Appointed) (Receivers & Managers Appointed) (ACN 091 232 209) in its capacity as the responsible entity of the managed investment schemes listed in Schedule 1. Bryant, Daniel Mathew; Carson, Ian Menzies and Crosbie, Craig David in their capacities as joint and several Voluntary Administrators of Gunns Ltd (Administrators Appointed) (Receivers & Managers Appointed) (ACN 091 232 209) (No 3)***

Gardiner AsJ

[\[2017\] VSC 777](#)

19/12/2017

CORPORATIONS - Duties of director of corporate trustee - Whether director breached fiduciary duties to corporate trustee - Director breached his duty by failing to exercise his relevant powers for a proper purpose and failing to act in good faith in the best interests of the relevant companies - Directors of trust company failed to act honestly - Directors ought not be excused pursuant to s1318 Corporations Act 2001 (Cth) - Knowing assistance and involvement in contraventions under s79 Corporations Act - Elements considered.

EQUITY - Defaulting fiduciary - Whether allowance should be made for fiduciary's work in managing the business of trusts - Principles in *Robert Deutsch & Ors v Erwin Deutsch & Ors* [2012] VSC 227 at [170] applied - Whether under a trust a director of the trustee breached the No Conflict Rule by purporting to appoint himself to the office of appointor - No breach on this basis found - Equitable jurisdiction as to entitlement to fair and reasonable remuneration for management services irrespective of breaches of duty by claimant parties.

REAL PROPERTY - Section 42 of the Transfer of Land Act 1958 (Vic) - Whether proprietary relief available - Meaning of 'fraud' in s42 considered - Fraud under s42 found - Indefeasibility of title not established - Constructive trusts to be declared.

TRUSTS - Duties of trustee - Whether fiduciaries breached duties - Possessing the power to do something enables a power to be exercised by a trustee - Existence of power does not of itself legitimise the exercise of that power if done improperly - Breach of trust arising from entry into an asset sale and distribution programme of trust assets - Whether persons in breach entitled to fair and reasonable remuneration for management services irrespective of breaches of duty by claimant parties - Duties of appointer under a trust in exercising power of appointment - Breach of duty in appointment of new trustee - Appointment of new trustee invalid and should be set aside - Considerations as to sources of the power of the Court to remove a trustee and appoint a new trustee - Principles as to whether to remove a trustee and appoint a new trustee - Expedient for an independent trustee of the relevant trust to be appointed.

***Ying Mui P/L (ACN 009 992 449) & Ors; Amore Corporation P/L (ACN 097 964 175); Hoh, Kiang Po (also known as George Hoh); Hoh, Han Keyet; and Sharikat Ying Mui SDN BHD v Hoh, Frank Kiang Ngan; Hoh, Pooi Yoke Lim; Hoh, Lynn Yook Lien; Hoh, Ian Han Lok; Lokit Investments P/L (ACN 006 855 741); Lumarkye P/L (ACN 131 575 785); Frosthollow P/L (ACN 151 816 401); Olrey P/L (ACN 140 494 319) (No 6)***

Vickery J

[\[2017\] VSC 730](#)

15/12/2017

CORPORATIONS - Scheme of arrangement - Whether appropriate to approve Scheme - Amendment to the Scheme - Procedural irregularities - Adequacy of disclosure - Final disclosure in many cases less than 10 days before meeting - Low voter turnout - All conditions precedent fulfilled - Scheme approved - s411 Corporations Act 2001 (Cth).

***In the matter of Tatts Group Ltd (ACN 108 686 040) (No 2)***

Sifris J

[\[2017\] VSC 770](#)

20/12/2017

CORPORATIONS ACT 2001 (Cth) - s459C(2) - Winding up application - Statutory demand - Where non-compliance with statutory demand occurs after filing of winding up application - Whether presumption of insolvency applies.

CORPORATIONS ACT 2001 (Cth) - s459Q, s467, s467A - Winding up application - Requirements to set out particulars of failure to comply with statutory demand - Where non-compliance with statutory demand has not yet occurred - Whether defect or irregularity - Whether application can be amended to comply with requirements.

***Wex Australia P/L (ACN 005 970 570) v DG Haulage P/L (ACN 600 893 990)***

Hetyey JR

[\[2017\] VSC 780](#)

21/12/2017



INSURANCE - Builder's liability insurance - Combined cover provided for products and public liability - Insured entered into contract for design and construction of house - House sustained damage arising from the Insured's defective design and workmanship - Insured claimed indemnity from Insurer for rectification costs, legal costs and settlement sum paid to home owners - Insurer denied liability on the basis that damage arose out of the Insured's contractual breaches and not out of 'damage to property' of third parties as required by insuring clause - Whether 'damage to property' of third parties included house - James Longley & Co Ltd v Forest Giles Ltd [2001] EWCA Civ 1242 distinguished - Held: Damage to property included damage to house and insuring clause applied.

INSURANCE - Builder's liability insurance - Exclusion clauses - Professional services exclusion - Whether Insured rendered a professional service - Meaning of professional service in exclusion - Insured's responsibility for design included engineering design of concrete slab and roof trusses - Insured rendered design services through professional subcontractors - Design deficiencies were a principal cause of damage to property - Definition of Insured included subcontractors - Held: Professional services exclusion applied - Held: Claim dismissed on this basis - Chubb Insurance Company of Australia Ltd v Robinson (2016) 239 FCR 300; Speno Rail Maintenance Australia Pty Ltd v Hammersley Iron Pty Ltd (2000) 23 WAR 291 applied.

INSURANCE - Exclusion clauses - Inconsistency and overlap between applicable exclusions - Insurer contended that each exclusion clause operated independently of other exclusion clauses and should be construed in isolation - Inconsistency between overlapping exclusion clauses resolved by applying ordinary contractual interpretation principles - Held (by obiter dicta): Applicable exclusions can be given congruent operation when read as a whole - Statements in D K Derrington and R S Ashton, The Law of Liability Insurance (LexisNexis Butterworths, 3rd ed, 2013) vol 2, 1834 [10-7] not accepted - Result reached by applying ordinary contractual interpretation principles - Re Media Entertainment & Arts Alliance; ex parte Hoyts Corp Pty Ltd (1993) 178 CLR 379, 386-7; Tsolon Investments Pty Ltd v Waffle Pod Footing Systems NSW Pty Ltd [2002] NSWCA 302 [36]; Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500, 507-11 applied.

INSURANCE - Builder's liability insurance - Products liability - Policy defined 'Insured's Products' - Whether house constructed by builder fell within definition - Exclusion clause relating to 'Insured's Products' - Held: house fell within ordinary meaning of definition.

***Metricon Homes P/L v Great Lakes Insurance SE (ABN 8 964 580 576)***

Hargrave J

[\[2017\] VSC 749](#)

12/12/2017

PRACTICE AND PROCEDURE - Summary judgment - Whether execution ought to be stayed - Discretion - Principles to be applied in granting stay - Taxpayers' application for stay of summary judgment refused in circumstances where court unable to be satisfied of adequate disclosure by the taxpayers.

PRACTICE AND PROCEDURE - Freezing order - Application for variation of freezing order enabling defendants to encumber property as security for loan to pay legal fees - Application refused absent adequate disclosure.

***Deputy Commissioner of Taxation v Arico, Antonio and Arico, Antonia (No 2)***

Kennedy J

[\[2017\] VSC 746](#)

12/12/2017

PRACTICE AND PROCEDURE - Taxation liability - Adjournment - Whether an absence of records available to challenge an assessment is grounds for an adjournment - Summary Judgment - Applicable test - Civil Procedure Act 2010 (Vic), s61; Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158; Mandie v Memart Nominees Pty Ltd [2016] VSCA 4.

TAXATION AND REVENUE - Recovery proceedings in State Court - Notices of assessment conclusive evidence of taxation debt - Defendant taxpayers cannot impugn validity of notices in recovery proceedings - Taxation Administration Act 1953 (Cth), s350-10(1) - Income Tax Assessment Act 1936 (Cth), s175 - Federal Commissioner of Taxation v Futuris Corp Ltd (2008) 237 CLR 146; Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473; Anglo American Investments Pty Ltd v Deputy Commissioner of Taxation [2017] NSWCA 17.

***Deputy Commissioner of Taxation v Murray, Michael; Deputy Commissioner of Taxation v Pitman, Debbie***

Derham AsJ

[\[2017\] VSC 785](#)

20/12/2017

TAXATION - Director penalty liabilities - Superannuation guarantee charge - Division 269 of Schedule 1 to the Taxation Administration Act 1953 - Director penalty notice - Director's liability for penalty amounts - Defence to claim for indemnity if good reason or illness exists for non-participation in management of company - Superannuation Guarantee Act 1992 (Cth) - Corporations Act 2001 - Taxation Administration Regulations 1976 (Cth) - Service of director penalty notice - Acts Interpretation Act 1901 (Cth) - Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113.

***Deputy Commissioner of Taxation v Lawson, Samuel Peregrine***

Croft J

[\[2017\] VSC 789](#)

21/12/2017

## COMMON LAW DIVISION

ADMINISTRATIVE LAW - Application for leave to appeal to Supreme Court from the Victorian Civil and Administrative Tribunal ('VCAT') - Hearing of application for leave and the appeal, if leave granted, at the same time - Validity of rules preventing construction of a second storey on owner's lot without the consent of the members of the Owners Corporation - Whether a rule prohibiting construction of a second storey on owner's lot a prohibition of a matter to be regulated - Application for leave granted and appeal dismissed - Owners Corporation PS 501391P v Balcombe [2016] VSC 384 applied and followed.

STATUTORY INTERPRETATION - Owners Corporation's power under Owners Corporation Act 2006, s138 - Determination of the validity of subordinate rules made by Owners' Corporation.

***Owners Corporation RP 3454 v Ainley, Belinda***

Derham AsJ

[\[2017\] VSC 790](#)

21/12/2017

ADMINISTRATIVE LAW - Judicial review - Appeal - Question of law - Determination by Victorian Civil and Administrative Tribunal that solicitor was guilty of unsatisfactory professional conduct in writing letters to other solicitor in employment dispute - Finding that solicitor did not write letters in pursuit of client's interests made without taking into account finding that solicitor had honest basis for doing so - Whether error of law - Rule requiring solicitors to take all reasonable care to maintain integrity and reputation of legal profession by ensuring courteous communications and avoiding offensive or provocative language - Purpose of rule not to ensure courtesy as such but public confidence in administration of justice - Whether VCAT properly applied and interpreted rule in light of that purpose - Human right to freedom of expression - Scope of that right - Relevance and importance of that right to lawyers and to independence of legal profession, judiciary and legal system - Application and interpretation of rule taking the right into account - Balancing the exercise of freedom of expression by lawyers with their professional obligations - Distinguishing between scope and limitation of human rights - Reconciling general and specific limitation provisions - Legal Profession Act 2004 (Vic) s4.4.4(a), Professional Conduct and Practice Rules 2005 (Vic) r21, Charter of Human Rights and Responsibilities Act 2006 (Vic) s7(2), s15(2)-(3), s32(1).

***McDonald, Alan James v Legal Services Commissioner***

Bell J

[\[2017\] VSC 89](#)

14/12/2017

ADMINISTRATIVE LAW - Judicial review - Order 56 Supreme Court (General Civil Procedure) Rules 2015 - Workplace Injury Rehabilitation and Compensation Act 2013 - Review of Medical Panel opinion - Procedural fairness - No challenge to plaintiff's credit - Medical Panel formed adverse view of plaintiff's credit - Plaintiff entitled to notice that her credit may be in issue - Opinion quashed.

***Jankulovska, Letka v Hayman, Dr Brendan & Ors***

Judd J

[\[2017\] VSC 752](#)

14/12/2017

ADMINISTRATIVE LAW – Judicial Review and Appeals – Supreme Court (General Civil Procedure) Rules 2015, order 56 – Medical panel – Jurisdictional error – Procedural fairness – Whether the Panel took account of irrelevant matters or failed to consider relevant matters – Whether Panel reached conclusions that were not open to it – Whether plaintiff's injuries are consistent with an injury of a psychogenic nature.

***Nestorovic, Ljiljana v Rowe, Professor Leanne; Brand, Dr Caroline; Bourke, Mr John; Malios, Dr John and Multicultural Aged Care Services P/L***

Keogh J

[\[2017\] VSC 787](#)

20/12/2017

ADVERSE POSSESSION - Claimant fencing and occupying rural land for 29 years - Exclusive physical control of land - Animus possidendi established - Performance of works - Payment of rates - Adverse possessory rights upheld.

***Spiteri, Stephen Francis v Fibreglass Industrial Products P/L (ACN 006 217 590) (de-registered) and The Registrar of Titles***

Garde J

[\[2017\] VSC 768](#)

19/12/2017

BANKRUPTCY - Appeal from Magistrates' Court - Whether undischarged bankrupt can sue in his or her own name for personal income derived during the course of the bankruptcy - Appeal allowed - Magistrate's order set aside - Magistrates' Court Act 1989 (Vic) s109 - Bankruptcy Act 1966 (Cth) s5, s58, s60, s166.

***Davey, John Patrick (trading as Herm Legal & Migration Services) v Dessco P/L for the Dessmann Family Trust (ACN 072 755 590) (trading as Vogue Signs) and Dessmann, Peter Patrick (Bankruptcy)***

J Forrest J

[\[2017\] VSC 744](#)

15/12/2017

CAVEATS - Application for removal of caveat - Caveat lodged pursuant to claim of estate in fee simple over whole of land prior to subdivision - Sale of portion of land - Whether any caveatable interest maintained over portion of land not subject to contract of sale following subdivision - Whether caveat has effect of securing performance of obligations under contract of sale extending beyond transfer of legal interest in land - Serious question to be tried not established - No equitable interest in land outside scope of contract of sale following subdivision - Order for removal of caveat made - Costs reserved - Transfer of Land Act (1958) s90(3) - *Lintel Pty Ltd v Nixon* [1991] 1 VR 287, 291, applied.

CONSTRUCTIVE TRUST - Plaintiffs contractually obliged to undertake works required by third parties on property - Payment of bonds by first defendant to third parties - Whether payments to third parties for purpose of securing performance of contractual obligations for benefit of a property give rise to a resulting or constructive trust in respect of that property - No resulting or constructive trust.

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

Daly AsJ

[\[2017\] VSC 783](#)

15/12/2017

CONTEMPT OF COURT - Civil contempt - Solicitor failing to comply with undertaking and order of the Court - Minor contempt - Relevant principles - Supreme Court (General Civil Procedure) Rules 2015 (Vic), Order 75 - No penalty imposed.

***Davey, John Patrick (trading as Herm Legal & Migration Services) v Dessco P/L for the Dessmann Family Trust (ACN 072 755 590) (trading as Vogue Signs) and Dessmann, Peter Patrick (Contempt)***

J Forrest J

[\[2017\] VSC 743](#)

15/12/2017

CONTEMPT OF COURT - Practice and procedure - Non-compliance with order to attend for oral examination under Order - Order not endorsed pursuant to r.66.10(3) Supreme Court (General Civil Procedure) Rules 2015 - Significance of non-endorsement of Order - Necessary that formalities associated with order be strictly satisfied - Whether non-compliance with r66.10(3) should be dispensed with - No dispensation - Whether and if so what penalty should be imposed for admitted contempt - Clifford v Middleton [1974] VR 737 739; CFMEU v Grocon (2014) VR 527; Miller v Eurovox Pty Ltd [2004] VSCA 211; Primelife Corporation Ltd v Andrejic [2003] VSC 106, referred to.

***Alpass, Alan Dudley (in his capacity as receiver of the law practice known as 'Hardy's Lawyers') v Hession, Robert Anthony Brendon***

Derham AsJ

[\[2017\] VSC 748](#)

11/12/2017

COSTS - Family provision claim by plaintiff - Where plaintiff awarded further provision that was marginally less than defendant's offer of compromise - Supreme Court (General Civil Procedure) Rules 2015, r26.08(3) - Where effect of r26.08(3) operates harshly on both plaintiff and defendant - Whether plaintiff's costs are reasonable and proportionate to the issue in dispute - Content of overarching obligations - Where investigation of plaintiff's costs necessary - Civil Procedure Act 2010, s24, s29.

***In the matter of Part IV of the Administration and Probate Act 1958 (Vic) and In the matter of the Will of Williams, Margaret Mary, deceased. Smith, Elizabeth Ruth v Thwaites, Alan Keith (Executor of the Will and Trustee of the Estate of Margaret Mary Williams deceased)***

McMillan J

[\[2017\] VSC 771](#)

19/12/2017

COSTS - Originating Motion sought orders quashing exclusion orders made under Racing Act 1958 and Casino Control Act 1991 - Defendant revoked the exclusion orders and then immediately made new exclusion orders - Application to file amended originating motion seeking relief in respect of new exclusion orders dismissed - Plaintiff entitled to costs in respect of proceedings from date of filing originating motion until revocation of orders - Defendant entitled to costs from date of new orders until date of hearing of Plaintiff's application to file amended originating motion.

***Madafferi, Antonio v Chief Commissioner of Police (No 2)***

McDonald J

[\[2017\] VSC 769](#)

18/12/2017

COSTS - Taxation of solicitor's costs - Applicant not appearing - Application to set aside Associate Justice's taxation order - Application refused - Appeal - Appellant not appearing on appeal - Consideration of grounds of appeal - Whether appellant notified of taxation hearing - Whether any point in requiring rehearing - No error in Associate Justice's refusal to set aside taxation order - Supreme Court (General Civil Procedure) Rules 2015, Order 46.08, 49.02, and 77.06.9(2)(a).

***Karam, Akram v Lennon Mazzeo***

Ginnane J

[\[2017\] VSC 756](#)

12/12/2017

COSTS - Whether special circumstances exist justifying an order for indemnity costs - Costs order made in favour of the Respondent in related proceedings to be set off against costs to be paid by the Applicant.

***Mako'ochieng, Bernard Otieno v Kirk, Susan Elizabeth (No 2)***

McDonald J

[\[2017\] VSC 747](#)

12/12/2017

CRIMINAL LAW - Theft - Proof of dishonesty - Presence as passenger in stolen motor car - No direct evidence of knowledge that car was stolen - Circumstantial evidence - Evidence of driving escapade involving fleeing from scene of collision and dangerous driving and trespass and ultimate abandonment of car - Whether sufficient evidence to found an inference of passenger's knowledge that car was stolen.

EVIDENCE - Proof of knowledge - Dependence on proof by circumstantial evidence - Inferences of knowledge to be drawn from established facts - Necessity for inference to be the most probable deduction to be reasonably drawn to find a basis for a positive inference of knowledge from established facts - Necessity to exclude alternative hypothesis consistent with innocence and not rationally excludable.

APPEAL - Appeal from Magistrates' Court on a question of law - Findings made on inference from established facts - Challenge to sufficiency of evidence to make finding - No error of law unless inference or finding not open - Criminal Procedure Act 2009 (Vic), s272.

***Watson, Benjamin v Director of Public Prosecutions [DPP] (on behalf of Detective Senior Constable Philip Wilkinson)***

Mukhtar AsJ

[\[2017\] VSC 757](#)

13/12/2017

DOMESTIC BUILDING - Owner's claim against builder for damages for breach of contract - Appeal on questions of law from VCAT - Identification of defect - Identification of defects released under terms of settlement - Whether owner knew or ought reasonably have known of defect when he signed terms of settlement - Domestic Building Contracts Act 1995 s3, s8.

ADMINISTRATIVE LAW - VCAT - Duty to give reasons - Whether reasons adequate - Victorian Civil and Administrative Tribunal Act 1998 s117.

***P & JM De Leo P/L v Alphonso, Ralph***

Ginnane J

[\[2017\] VSC 786](#)

19/12/2017



EQUITY - Proprietary estoppel - Constructive trust - Representation by directors and shareholders of corporate landowner that if their son worked an orchard farm he would inherit the land - Detrimental reliance - Control of land passed to other sibling and sold to third parties - Son gained control of landowner company and refused to complete contracts for sale - *Donis v Donis* (2007) 19 VR 577, *McNab v Graham* [2017] VSCA 352, *Accurate Financial Consultants Pty Ltd & anor v Koko Black Pty Ltd & Ors* [2008] VSCA 86 applied.

EQUITY - Priority of competing equitable interests in land - Purchasers on notice of a claimed equitable interest arising from constructive trust when entering contracts for sale - *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 applied.

EQUITY - Specific Performance - Contracts for sale of land - Hardship - *Suttor v Gundowda* (1950) 81 CLR 418 applied.

ESTOPPEL - Issue estoppel - Claim for equitable interest in land arising from constructive trust - Court previously ordered removal of caveat over land asserting same equitable interest - Claimant settled related proceedings involving similar claims to land - *Piroshenko v Grojsman* (2010) 27 VR 489, *Hall v Nominal Defendant* (1966) 117 CLR 423 applied.

***Mould, Benjamin v Canale, Mario & Ors; Canale, Mario & Anor v G W & R Mould P/L; McMillan, Salahudin & Ors v G W & R Mould P/L***

Macaulay J

[\[2017\] VSC 793](#)

21/12/2017

ELECTIONS – Duty and powers of Victorian Electoral Commission – Commission’s powers and responsibilities – Register of electors – Objections to enrolment – Principal place of residence – Electoral Act 2002 (Vic) s21, s22(1), s23, s26, s27, s38(4), s42(1), s138.

LOCAL GOVERNMENT – Local government elections – Residency entitlement to stand for election as a councillor – Whether candidate can only nominate in the ward in which the candidate resides – Entitlement to vote in municipal elections – Conclusivity of register of electors – Objection not sustained – Local Government Act 1989 (Vic) s11-15, s28(1), s28(1AA), s45, sch 2 cl 6(3A).

JUDICIAL REVIEW – Appeal on questions of law from decision of Victorian Civil and Administrative Tribunal on appeal from Municipal Electoral Tribunal – Victorian Civil and Administrative Tribunal Act 1998 (Vic) s148.

***Victorian Electoral Commission v Municipal Electoral Tribunal***

Garde J

[\[2017\] VSC 791](#)

21/12/2017

FAMILY PROVISION - Where deceased made no provision for estranged husband - Where deceased owed limited moral responsibility to plaintiff - Provision made for plaintiff by way of an extended life interest in property owned by plaintiff and deceased as tenants in common in equal shares - Administration and Probate Act 1958, s91.

***In the matter of Part IV of the Administration and Probate Act 1958 (Vic) and In the matter of the Will and Estate of Saric, Danka deceased. Saric, Grgo v Vukasovic, Tanja (who is sued as the executrix of the will of the abovenamed deceased)***

McMillan J

[\[2017\] VSC 759](#)

14/12/2017

FAMILY PROVISION — Where testator made limited provision for widow and no provision for adult daughter — Where further provision ordered for widow on interim basis — Adequate provision for proper maintenance and support — Where widow and adult daughter dutiful and exemplary — Whether adult daughter adequately provided for during testator’s life — Administration and Probate Act 1958, s90, s91, s91A and s97

***In the matter of Part IV of the Administration and Probate Act 1958 and In the matter of the estate of McKenzie, David Cyril, deceased. Between McKenzie, Aileen Moira and Harris, Faye Ada v McKenzie, David Gordon and McKenzie, Lynton Henry (as executors of the will of David Cyril McKenzie, deceased)***

McMillan J

[\[2017\] VSC 792](#)

21/12/2017

INJUNCTION - Representative Order - Whether Defendant (Mr Hilakari) had the same interest as individuals engaging in picketing activities - Representative Order made - Supreme Court (General Civil Procedure) Rules 2015 r18.03, r18.04.

***Victoria International Container Terminal Ltd t/a VICT (ACN 164 915 655) v Maritime Union of Australia and Construction, Forestry, Mining and Energy Union; And between: Victoria International Container Terminal Ltd t/a VICT (ACN 164 915 655) v Hilakari, Mr Luke***

McDonald J

[\[2017\] VSC 762](#)

12/12/2017

JUDICIAL REVIEW - Committal proceeding - Orders for prohibition against informant - Accrediting agency as prosecuting agency - Abuse of process - Denial of procedural fairness - Conflict of interest - Prosecutorial duty - Fragmentation of criminal proceedings - Whether exceptional or special circumstances justifying fragmentation.

***Metro Trains Melbourne P/L v Paciocco, Paul (Transport Safety Victoria) and The Safety Director (Transport Safety Victoria)***

Niall JA

[\[2017\] VSC 778](#)

19/12/2017

JUDICIAL REVIEW — Dispute between building owners and architect — Owners' damages claim and architect's fees counterclaim in Magistrates' Court — Owners' application for stay of Magistrates' Court proceeding on basis that VCAT had jurisdiction to determine domestic building dispute — Stay application dismissed — Whether jurisdictional error — Whether error of law on face of record — Whether judicial review remedies should be refused in exercise of discretion — Domestic Building Contracts Act 1995 s1, s4, s5, s6, s54, s57, s57A.

STATUTES — Interpretation — Use of endnotes — Whether 'must' imperative — Domestic Building Contracts Act 1995 s6, s57.

***Radojevic, Dragan and Radojevic, Ivana v JDA Design Group P/L (trading as JDA Architects) (ACN 129 609 008) and Magistrates' Court of Victoria (No 2)***

Ginnane J

[\[2017\] VSC 796](#)

21/12/2017

JUDICIAL REVIEW AND APPEALS - Appeal from Victorian Civil and Administrative Tribunal - Whether Tribunal's reasons insufficient - Whether Tribunal erred in finding material fact where no evidence to support that finding - Whether Tribunal erred in failing to grant relief sought where material fact precondition to grant of relief found - Appeal dismissed - Victorian Civil and Administrative Tribunal Act 1998 s117, s148 - Australian Consumer Law and Fair Trading Act 2012 s6, s7, s8 - Australian Consumer Law (Victoria) s60, s61, s62, s267, s268, s269, s270.

STATUTES - Statutory rights and remedies - Whether Tribunal erred in failing to grant relief sought where material fact precondition to grant of relief found - Australian Consumer Law and Fair Trading Act 2012 s6, s7, s8 - Australian Consumer Law (Victoria) s60, s61, s62, s267, s268, s269, s270.

***Coliban Heights P/L v Citisolar Vic P/L***

John Dixon J

[\[2017\] VSC 751](#)

14/12/2017

JUDICIAL REVIEW AND APPEALS - Appeal under s109 of the Magistrates' Court Act 1989 - Appeal against indemnity costs order in a fixed sum - House v R (1936) 35 CLR 499 referred to - Whether discretion improperly exercised - Colgate-Palmolive Co v Cussons Pty Ltd (1993) 118 ALR 248 considered - Whether excessive costs awarded - Whether learned Magistrate considered or was required to consider the scale of costs under Appendix A Magistrates' Court General Civil Procedure Rules 2010 - Adequacy of reasons - Appeal dismissed.

***Surf Coast Smash Repairs P/L (ACN 161 159 208) and Fast Car Hire P/L (ACN 153 627 582) v Dandy Flooring Centre (Vic) P/L (ACN 164 148 056)***

Daly AsJ

[\[2017\] VSC 754](#)

20/12/2017

JUDICIAL REVIEW AND APPEALS - Application for leave to appeal from VCAT - Finding of professional misconduct under s4.4.3(1)(a) of the Legal Profession Act 2004 - Whether question of law - Whether real or significant argument that Tribunal in error - Correspondence sent directly to judicial officer - No errors of law - Leave refused - Victorian Civil and Administrative Tribunal Act 1998 (Vic) s148; Professional Conduct and Practice Rules 2005 r18.5, r18.6.

***Gullquist, Michael v Victorian Legal Services Commissioner***

John Dixon J

[\[2017\] VSC 763](#)

14/12/2017

JUDICIAL REVIEW AND APPEALS - Application for leave to appeal from Victorian Civil and Administrative Tribunal - Whether Tribunal erred in failing to dismiss proceeding - Whether submission made that proceeding should be dismissed - No submission made - Leave to appeal refused - Residential Tenancies Act 1997 s331 - Victorian Civil and Administrative Tribunal Act 1998 s148.

STATUTE - Interpretation of statute - Whether further arrears accrued - Residential Tenancies Act 1997, s331.

***Knight, Michael v Jarvis, Sharna***

John Dixon J

[\[2017\] VSC 758](#)

04/12/2017

JUDICIAL REVIEW - Medical Panel - Whether panel failed to take into account relevant considerations - Failure of the medical panel to refer to chronic pain syndrome in its reasons - Ryan v The Grange at Wodonga Pty Ltd [2015] VSCA 17 applied, Omerasevic v Kotzman [2016] VSC 383 and Tan v Kotzman [2016] VSC 482 referred to - Adequacy of reasons - Wingfoot Australia Partners Pty Ltd v Kocak (2013) 303 ALR 64 referred to.

***Khan, Bismillah v Romas, Associate Professor Evange; Watson, Dr Marcus; Bourke, Mr John; Cronin, Dr John; Neill, Dr Diane and Visy Paper P/L***

Daly AsJ

[\[2017\] VSC 731](#)

13/12/2017

JUDICIAL REVIEW - Victorian Equal Opportunity and Human Rights Commission - Request by Government for review of Metropolitan Fire Brigade and Country Fire Authority - Nature and prevalence of discrimination, sexual harassment and victimisation - Whether review validly constituted - Whether Review was into matters that the Commission did not have power to investigate - Whether online survey conducted as part of the Review so fundamentally flawed that no authority acting reasonably could take account of it - Relevance of delay - Proceeding dismissed - Victorian Charter of Human Rights and Responsibilities Act 2006 s4, s41(c); Equal Opportunity Act 2010 s1, s3, s6, s151, s152, s157.

EQUAL OPPORTUNITY AND DISCRIMINATION - Powers of Victorian Equal Opportunity and Human Rights Commission to review public authorities' programs and practices to determine compatibility with human rights - Public authority - Right of Victorian Government to make request - Victorian Charter of Human Rights and Responsibilities Act 2006 s4, s41(c).

HUMAN RIGHTS - Powers of Victorian Equal Opportunity and Human Rights Commission to review programs and practices of person requesting review - Who may request review - Conduct of review - Victorian Charter of Human Rights and Responsibilities Act 2006 s4, s41(c); Equal Opportunity Act 2010 s1, s3, s6, s151, s152, s157.

***United Firefighters' Union of Australia v Victorian Equal Opportunity and Human Rights Commission and Secretary to the Department of Justice and Regulation***

Ginnane J

[\[2017\] VSC 773](#)

15/12/2017

NEGLIGENCE - Personal injury - Plaintiff injured when his foot was run over by a Manitou telehandler driven by Defendant - Breach - Identification of risk of harm - Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330 applied - Causation - Contributory negligence - Civil Liability Act 2002 (NSW) s5B, s5D and s5R.

***Griffiths, Adam v Steele, Paul***

Keogh J

[\[2017\] VSC 795](#)

20/12/2017

NEGLIGENCE - Workplace injury - Loading tyres in rear of truck operated by third party - Whether third party owed duty of care - Whether third party breached duty of care - Apportionment between defendants - Reduction of damages for economic loss for vicissitudes of life - Wrongs Act 1985 (Vic), Part IV.

***Meli, Ugo v Ceva Logistics (Australia) P/L and HRX TPT P/L***

McDonald J

[\[2017\] VSC 739](#)

12/12/2017

PRACTICE AND PROCEDURE - Application by the defendants for summary judgment - Failure to comply with previous orders regarding pleading - Whether proceeding should be dismissed by reason of plaintiff's failure to properly articulate claim - Whether abuse of process arises out of plaintiff's statement of claim - Application of Civil Procedure Act 2010 (Vic), s62, s63 and Supreme Court (General Civil Procedure) Rules 2015, Order 23 - Summary judgment granted in respect of some claims on the basis that they are an abuse of process, or have no prospects of success.

***Taseska, Silvana v Carus, Henry Joseph and Henry Carus & Associates (The Trustee for HCA Trust ABN 97 872 505 795)***

Daly AsJ

[\[2017\] VSC 707](#)

24/11/2017

PRACTICE AND PROCEDURE - Application for stay of common law proceedings where Defendant subject to criminal prosecution by WorkSafe - Whether real risk of prejudice to Defendant if stay not granted - Zhao & Anor v Commissioner of the Australian Federal Police (2014) 43 VR 187 referred to - McMahon v Gould (1982) 7 ACLR 202 referred to - Jury Directions Act 2015 (Vic) s41 and s42 - Application granted in part.

***Wallace, Damien Maxwell v Heavy Mechanics P/L (ACN 137 483 124) and Get Off Road P/L; Transport Accident Commission v Heavy Mechanics P/L (ACN 137 483 124)***

Clayton JR

[\[2017\] VSC 772](#)

16/12/2017

PRACTICE AND PROCEDURE - Application for summary judgment by the defendants - Whether the substance of a proposed originating process is relevant for the purposes of applying r27.06(3) of the Supreme Court (General Civil Procedure) Rules 2015 - Application of r23.01 of the Supreme Court (General Civil Procedure) Rules 2015 and s63 of the Civil Procedure Act 2010 (Vic) - Whether doctrines of estoppel and abuse of process are inapplicable to a re-litigated claim solely on the basis that the first instance decision was made by a tribunal rather than a court - Sgarretta v Hayes [2016] VSC 150 [61] referred to - Plaintiff's claims in this proceeding previously made in a proceeding at VCAT - Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507 applied - Summary judgment granted on the basis that the claims were an abuse of process and otherwise have no real prospects of success.

***Etta, Sunder v Pearce, Ron and RCT Lawyers***

Daly AsJ

[\[2017\] VSC 737](#)

07/12/2017



PRACTICE AND PROCEDURE - Subpoena objection - Child abuse material - Whether production of material to Prothonotary constitutes distribution or access to it - Whether production of material would be an offence - Whether production of material is in connection with the administration of the criminal justice system - Whether any exception applies to provision of material - Whether production of material interferes with forfeiture order - Subpoena within interests of justice - Subpoena objection dismissed - Crimes Act 1958 (Vic) s51A, s51C, s51D, s51H and s51J - Interpretation of Legislation Act 1984 (Vic) s35 - Sentencing Act 1991 (Vic) s85B - Confiscation Act 1997 (Vic) s34 and s44(1) - Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 42AA.

***C D (By her Litigation Guardian E F) v Hamence, Peter John; G H (By her Litigation Guardian IJ) v Hamence, Peter John***

Clayton JR

[\[2017\] VSC 753](#)

14/12/2017

REAL PROPERTY - Adverse possession - Claimed land consists of two portions - The owner of one portion joined as a defendant - The current representative of that owner traced and does not object to the application - The other portion of the claimed land consists of 'excess land' being land in a Crown grant not included in a subsequent subdivision - No identification or joinder of the current owner of the excess land - No application to dispense with joinder of that owner and service on him or her - On current evidence adverse possession in excess of 15 years established - Application for declaration to that effect adjourned pending joinder of owner of excess land, or dispensation of that requirement - Limitation of Actions Act 1958 (Vic) s8, s9, s14, s16, s18.

***Gibson, Benjamin John and Hansen, Aaron Glenn v The Estate of Allard, James and Registrar of Titles***

Lansdowne AsJ

[\[2017\] VSC 788](#)

20/12/2017

REAL PROPERTY – Caveats – Application for removal of caveat – Transfer of Land Act 1958 s90(3) – No caveatable interest – Application by caveator for freezing order – Whether evidence to support application – Whether application made to provide security for potential claim – Application dismissed – Deputy Commissioner of Taxation v AES Services (Aust) Pty Ltd [2009] VSC 418 applied.

***Tieri, Silvana v Ferguson, Dean John and Registrar of Titles***

Keogh J

[\[2017\] VSC 799](#)

20/12/2017

REAL PROPERTY - Caveats - Application for removal of caveat - Transfer of Land Act 1958 s90(3) - Plaintiff seeking refinance of property - Contract of sale between Plaintiff and first Defendant terminated - Whether first Defendant has purchaser's lien for repayment of deposit - Whether prima facie case of sufficient probability to justify maintenance of caveat - Balance of convenience.

***Six Bruce P/L (ACN 604 847 770) v Milatos, Andrew; National Commercial Finance P/L (ACN 620 255 905) and Registrar of Titles***

Keogh J

[\[2017\] VSC 784](#)

19/12/2017

REAL PROPERTY - Restrictive covenant - Application for a declaration that land not affected by any purported restriction in the covenant - Whether appropriate to proceed ex parte - Whether benefit of the covenant is annexed to land - Whether covenant part of a building scheme - Whether sufficient notice of such a building scheme appears on the Register of Titles - Held: the covenant does not identify any benefited land and so its benefit was personal to the transferor and his executor, both now deceased - Unlikely that the covenant was part of a building scheme, but in any event no sufficient notice of such a building scheme appears on the Register and so the successor in title to the original covenantor cannot be bound - Declaration made that land not affected by the covenant - Property Law Act 1958 (Vic), s84(2) - Re Dennerstein [1963] VR 688 - Fitt v Luxury Developments Pty Ltd [2000] VSC 258 - Vrakas v Mills [2006] VSC 463 - Westfield Management Limited v Perpetual Trustee Co Limited (2007) 233 CLR 528 - Beman Pty Ltd v Boroondara City Council [2017] VSC 207 considered.

***In the matter of an application by Hunt, Nicole Elizabeth***

Lansdowne AsJ

[\[2017\] VSC 779](#)

18/12/2017

VALUATION AND COMPENSATION - Amendment to the Melton and Wyndham Planning Schemes - Public Acquisition Overlays imposed on property - Financial loss - Loss on resale - Increased compensation for a residence for intangible and non-financial disadvantages - Owner not occupying residence - Interest payable on loss on sale compensation - Claim for penalty interest - Relevant principles - Planning and Environment Act 1987 (Vic) s3, s4(1), s4(2), s98(1), s98AA, s100, s101, s101(2), s104-106, s108; Land Acquisition and Compensation Act 1986 (Vic) s44, s51-53, s55 and s56; Supreme Court Act 1986 (Vic) s60(1), s101(1).

***Minister for Energy, Environment and Climate Change v Megson, Patricia Suzanne and Morton, David Alex (as joint executors of the will of John Alex Morton)***

Garde J

[\[2017\] VSC 774](#)

19/12/2017

## CRIMINAL DIVISION

CRIMINAL LAW - Murder - Accused stabbed father repeatedly, killing him - Accused acted on delusions when he stabbed deceased - Defence of mental impairment - Consent mental impairment hearing before judge alone - Two psychiatrists opined accused could not reason with moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong - Verdict of not guilty by reason of mental impairment directed - Accused declared liable to supervision - Matter adjourned so that necessary further examination, report and certificate of available services might be obtained - Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s20, s21, s24, s41 & s47.

***The Queen v Blow, Andrew***

Croucher J

[\[2017\] VSC 767](#)

13/12/2017

CRIMINAL LAW - Pre-trial rulings - Six men charged jointly with offence of engaging in conduct preparatory to offence of entering a foreign country with intention of engaging in a hostile activity in that country - Ruling

***The Queen v Cerantonio, Robert Edward; Dacre, Paul James; Granata, Antonino Alfio; Thorne, Shayden Jamil; Kaya, Kadir and Kaya, Murat (Rulings 1-11)***

Croucher J

[\[2017\] VSC 725](#)

12/12/2017

CRIMINAL LAW - Sentence - Manslaughter - Accused and another confronted victim knowing loaded .22 calibre gun would be presented to reinforce demand of victim over drug debt or transfer of car - As victim moved forwards, gun discharged and projectile struck his shoulder, killing him - Accused thereby assisted or encouraged another in commission of unlawful and dangerous act - Victim was accused's cousin - Director accepts accused to be sentenced as assisting or encouraging offence because unable to prove who was holding gun when discharged - Offence committed while on bail, albeit for comparatively minor matter - Plea of guilty - Remorse - Limited criminal history - Evidence of positively good character - Imprisonment more burdensome for accused knowing (a) killed own cousin and (b) cannot care for his (unwell) wife and family - Accused relatively young (aged 25 at time of offence; 27 now) - Very strong prospects of rehabilitation - Additional punishment in forfeiture of vehicle used in connection with offence - Appropriate case for shorter non-parole period - Sentence of nine years' imprisonment with non-parole period of five years - But for plea of guilty, sentence of eleven years' imprisonment with non-parole period of seven-and-a-half years - Crimes Act 1958 (Vic), s323, s324 & s324B; Sentencing Act 1991 (Vic), s5, s6AAA & s18; Confiscation Act 1997 (Vic), s3, s32 & s33.

***The Queen v Cicekdag, Omer***

Croucher J

[\[2017\] VSC 781](#)

21/12/2017

CRIMINAL LAW - Sentence - Murder - Fatal stab to chest with knife - Unpremeditated - Victim's body set on fire - Lengthy criminal history - Poor prospects of rehabilitation - Sentenced to a term of imprisonment of 24 years with a non-parole period of 19 years.

***Director of Public Prosecutions [DPP] v Musso, Robert***

Hollingworth J

[\[2017\] VSC 732](#)

13/12/2017

CRIMINAL LAW - Sentence - Murder - First named offender pleaded guilty to murder - Second named offender convicted after trial - Unknown whether deceased died from beating inflicted by first named offender or shooting inflicted by second named offender - Severe and protracted violence - Destruction of corpse treated as aggravating factor - Uncharged conduct of first named offender seeking to influence witnesses not treated as aggravating the charge of murder pursuant to R v De Simoni (1981) 147 CLR 383 - Aggravating circumstance that conduct of accused borne of motive to punish deceased for informing to police about family violence - Consideration of parity between offenders by reference to R v Lowe (1984) 154 CLR 606 - Prospects of rehabilitation - First named offender sentenced to 26 years imprisonment with 22 years non-parole period - Second named offender sentenced to 24 years imprisonment with 20 years non-parole period.

***Director of Public Prosecutions [DPP] v Neil, Brendan and Marmo, Wayne***

Jane Dixon J

[\[2017\] VSC 761](#)

14/12/2017

CRIMINAL LAW - Sentencing - Murder by husband of wife - Guilty verdict of jury after plea of not guilty - Family violence - Gender-based violence - Many aggravating considerations - Two adult sons left orphaned - Murder preceded by pattern of coercive control by accused of victim - Breach of intervention order - Profound impact upon victims - Evolution of sentencing practices for crimes of family violence - General deterrence, denunciation and just punishment - Particular nature and gravity of the offending where man has killed a woman in family violence context - Need for strong condemnation and condign punishment - Vindicating fundamental value of respect for women as an aspect of just punishment - Sentencing Act 1991 (Vic).

***Director of Public Prosecutions [DPP] v Paulino, Fernando Manuel (Sentence)***

Bell J

[\[2017\] VSC 794](#)

21/12/2017

CRIMINAL LAW – Sentence – Murder - Rape - Pleas of Guilty – Victim a child chosen at random - Offending occurred in 1984 – Prisoner now aged 75 years – Denial of involvement - Claimed absence of memory of offences - Absence of – Custodial conditions – Prisoner attacked and injured in custody – Extra curial punishment – Denunciation – Just punishment – General deterrence – Specific deterrence less significant - Sentence of life imprisonment - Non-parole period fixed – Considerations in fixing – Mercy.

***The Queen v Davies, Gregory Keith***

[\[2017\] VSC 800](#)

Lasry J

21/12/2017

PUBLIC LAW - Application for a detention order - Respondent accepts he is an unacceptable risk of committing a 'relevant offence' if a detention order or supervision order is not made - Whether appropriate order is a supervision order or a detention order - Whether the risk of the respondent committing a relevant offence would be unacceptable unless a detention order was made - Consideration of the risk presented by the respondent - Port Phillip Prison - Marlborough Unit - Hopkins Correctional Centre - Greenhill Unit - Corella Place - Detention order made for a period of one year.

***In the matter of the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) and In the matter of an application for a detention order. The Director of Public Prosecutions [DPP] v D J D***

Riordan J

[\[2017\] VSC 776](#)

15/12/2017