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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Chen v Monash University (No 2) (FCAFC) - costs - lump sum costs order and payment of amount of security for costs granted to successful respondent (I B C G)

Lodestar Anstalt v Campari America LLC (FCAFC) - trademarks - statutory interpretation - delegate correct to grant application for removal of trademarks for nonuse - appeal allowed (I B C G)

Averkin v Insurance Australia Ltd (No 2) (NSWCA) - costs - indemnity costs - pre-judgment interest - appellant successful in proceedings - determination of amount of judgment and costs orders in respect of proceedings of first instance and on appeal (I B C G)

Pi v Zhou (NSWCA) - security for costs - costs - Court satisfied applicant should pay security for costs of application for leave to appeal - proceedings stayed until security for costs and costs of other proceedings paid (I B C G)

Citadel Property Group (Rockdale No 1) Pty Ltd v Capital Financial Australia Ltd (NSWSC) - stay - pleadings - proceedings dormant for five years - breaches of Court orders - failure to litigate - prejudice - lift of stay refused - proceedings dismissed (I B C G)

Marriner v Australian Super Developments Pty Ltd (No 2) (VSCA) - costs - unreasonable failure to accept offer of compromise - indemnity costs ordered against unsuccessful appellants

(I B C G)

Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Limited (VSCA) - corporations - winding up order made in respect of registered foreign company while proceedings under Title 11 of the United States Code on foot - appeal dismissed (I B C G)

Summaries With Link (Five Minute Read)

Chen v Monash University (No 2) [2016] FCAFC 93

Full Court of the Federal Court of Australia

Barker, Davies & Markovic JJ

Costs - Court dismissed applicants application to reinstate appeal from primary judge's decision - respondent sought lump sum costs order and that amount paid into Court by applicant as security for costs be paid to first respondent - applicant sought refund of amount of security and payment of amount to her by respondent for legal costs and 'stress, humiliation, emotional and psychological damage to her' - r40.02 *Federal Court Rules 2011* (Cth) - s37M *Federal Court of Australia Act 1976* (Cth) - held: orders sought by respondent were appropriate in the circumstances - orders granted.

[Chen](#) (I B C G)

Lodestar Anstalt v Campari America LLC [2016] FCAFC 92

Full Court of the Federal Court of Australia

Allsop CJ; Greenwood, Besanko, Nicholas & Katzmann JJ

Trademarks - statutory interpretation - delegate granted application for removal of two trade marks for nonuse under Pt 9 *Trade Marks Act 1995* (Cth) - primary judge set delegate's orders aside, finding there had been a use by registered owner of the two trade marks during relevant period - 'authorised use provisions' contained in s8 - 'under the control of' - 'connection in the course of trade' - whether s8(3) satisfied by clause of Licence agreement - ss7, 8, 17, 20, 21, 26, 92, 100, 101, 195, Pts 3, 9, 12 & 13 *Trade Marks Act* - held: use was not an authorised use under s8 - appeal allowed.

[Lodestar](#) (I B C G)

Averkin v Insurance Australia Ltd (No 2) [2016] NSWCA 150

Court of Appeal of New South Wales

McColl, Basten & Leeming JJA

Costs - Court allowed appellant's appeal - determination of amount of judgment and costs - entitlement to pre-judgment interest - whether r42.35 *Uniform Civil Procedure Rules 2005* (NSW) applied to costs at first instance - offers of compromise - ss56, 60 & 100 *Civil Procedure Act 2005* (NSW) - s69 *Evidence Act 1995* (NSW) - rr20.26, 36.4, 42.1, 42.2, 42.14, 42.35 & 51 *Uniform Civil Procedure Rules* - held: judgment entered in appellant's favour in amount of

\$42,239.70 - appellant entitled to costs orders in respect of costs at first instance and on appeal - costs assessed on indemnity basis for period following offers of compromise - orders made.

[Averkin](#) (I B C G)

Pi v Zhou [2016] NSWCA 148

Supreme Court of New South Wales

Gleeson JA

Security for costs - respondents sought order that applicant seeking leave to appeal provide security for costs of summons filed 8 March 2016 - respondents also sought that proceedings be stayed until costs of the earlier proceedings involving same parties paid - special circumstances ss67 & 96 *Civil Procedure Act 2005* (NSW) - rr12.4, 13.4, 42.1, 42.21(1)(b) & 51.50 *Uniform Civil Procedure Rules 2005* (NSW) - stultification - prospects of success on leave application - financial burden for respondents of costs of leave application - whether proposed grounds of appeal 'fairly arguable' - held: there were 'weighty considerations' in favour of making order for security for costs - Court satisfied applicant should pay security for costs - proceedings stayed until applicant had paid costs of proceedings and security for costs.

[Pi](#) (I B C G)

Citadel Property Group (Rockdale No 1) Pty Ltd v Capital Financial Australia Ltd [2016] NSWSC 890

Supreme Court of New South Wales

Bergin CJ in Eq

Stay - pleadings - plaintiffs sought that stay of proceedings be lifted and leave to further amend pleadings - defendants sought dismissal of proceedings for want of due despatch under r12.7(1) *Uniform Civil Procedure Rules 2005* (NSW) - proceedings dormant for five years - 'unexplained and inexcusable breaches' of Court order - prejudice - held: explanation why plaintiffs left proceedings 'in abeyance' should have been made - breaches of court orders and failure to litigate had caused 'irreparable and unfair prejudice' - proceedings dismissed.

[Citadel](#) (I B C G)

Marriner v Australian Super Developments Pty Ltd (No 2) [2016] VSCA 150

Court of Appeal of Victoria

Tate, Kyrou & Ferguson JJA

Costs - indemnity costs - appellant unsuccessful in proceedings - determination of costs - offer of compromise - r26.12 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - held: offer of compromise was not unclear - offer complied with r26.12 - even if necessary to read offer in conjunction with covering letter, inconsistency in documents' language was of no consequence - Marriner parties unreasonably rejected offer of compromise - indemnity costs ordered.

[Marriner](#) (I B C G)

Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Limited [2016] VSCA 151

Court of Appeal of Victoria

Whelan, Beach & Ferguson JJA

Corporations - winding up - appellant registered foreign company wound up under s583 *Corporations Act 2001* (Cth) by associate judge's order - before winding up order made appellant filed a voluntary bankruptcy petition in the United States under Title 11 of the United States Code (Chapter 11) - whether the winding up order could be made when the Chapter 11 proceeding on foot - *Cross-Border Insolvency Act 2008* (Cth) - held: s581(2) *Corporations Act* did not oblige Court to refrain from making winding up order - it was for Court to weigh relevant matters in determining whether winding up order should be made when Chapter 11 proceeding on foot - no error made by associate judge to vitiate winding up order - appeal dismissed.

[Legend](#) (I B C G)

CRIMINAL

Executive Summary

Barber v R; Zraika v R (NSWCCA) - Criminal law - jury discharge - lengthy trial - jury reduced to 9 members - 4 accused persons - jury returned verdict for one accused but was unable to reach a verdict in respect of a second accused - judge discharged jury before directing on the cases for the remaining accuseds - discharge over objection by accused - judge refused application for stay - jury dispersed for 24 hours - application for leave to appeal discharge by remaining accuseds (s5G *Criminal Appeal Act 1912* (NSW))

L v The State of Western Australia (WASCA) - Criminal law - joint criminal enterprise - conviction appeal - joint possession of methylamphetamine with intent to sell (s6(1)(a) *Misuse of Drugs Act 1981* (MDA) (WA)) - relevance of common law doctrine of joint criminal enterprise to ss7-9 *Criminal Code 1913* (WA) - trial judge directed jury in accordance with common law doctrine - direction constituted error - appeal allowed, convictions set aside, new trial ordered

Summaries With Link

Barber v R; Zraika v R [2016] NSWCCA 125

Court of Criminal Appeal New South Wales

Bathurst CJ, Basten JA, Button J

Criminal law - jury discharge - lengthy trial - jury reduced to 9 members - unanimous verdicts required (s55F *Jury Act 1977* (NSW)) - 4 accused persons - jury returned verdict for one accused but was unable to reach a verdict in respect of a second accused - judge discharged jury before directing on the cases for the remaining accuseds - discharge over objection by accused - judge refused application for stay - jury dispersed for 24 hours before being contacted

by Sheriff - application by remaining accuseds for leave to appeal order discharging jury (s5G Criminal Appeal Act 1912 (NSW)) - appeal - nature of s5G appeal considered - nature of relief available - US authorities considered *Remmer v United States* [1954] USSC 17 - desirability of staying discharge order when stay requested to permit appeal considered - held: applicant required to establish *House v The King* (1936 55 CLR 499) error - nothing to suggest that trial judge's approach in separating the accuseds for the purpose of the jury considering their verdicts constituted error - error in discharging jury over objection - jury having dispersed it was not appropriate to intervene - leave granted, appeal dismissed.

[Barber](#)

L v The State of Western Australia [2016] WASCA 101

Court of Appeal of Western Australia

Martin CJ, Mazza JA & Mitchell J

Criminal law - joint criminal enterprise - conviction appeal - joint possession of methylamphetamine with intent to sell (s6(1) *Misuse of Drugs Act 1981* (MDA) (WA)) - relevance of common law doctrine of joint criminal enterprise to ss7-9 *Criminal Code 1913* (WA) - trial judge directed jury in accordance with common law doctrine - direction that liability under s6 MDA was established if jury satisfied appellants participated in a joint criminal enterprise of dealing in drugs constituted error - common law doctrine considered - High Court authorities referred to - position under criminal codes considered - construction of WA Code considered - held: appellant's criminal responsibility was to be determined by reference to ss7-9 *Criminal Code* (WA) and not otherwise - s7 differs from common law doctrine requiring the accused to have done at least one act in a series of acts which constitutes the offence - mere participation by the accused in an agreement or understanding is insufficient - *R v Palmer* [2005] QCA 2 approved - the trial judge's direction incorrectly invited the jury to return a verdict of guilty even if they were not satisfied that the appellants were jointly in possession of drugs - elements establishing liability under the Code identified - appeal allowed, convictions set aside, new trial ordered.

[L v State of Western Australia](#)



Benchmark

A Red, Red Rose by Robert Burns

By [Robert Burns](#)

O my Luve's like a red, red rose,
That's newly sprung in June:
O my Luve's like the melodie,
That's sweetly play'd in tune.

As fair art thou, my bonie lass,
So deep in luve am I;
And I will luve thee still, my dear,
Till a' the seas gang dry.

Till a' the seas gang dry, my dear,
And the rocks melt wi' the sun;
And I will luve thee still, my dear,
While the sands o' life shall run.

And fare-thee-weel, my only Luve!
And fare-thee-weel, a while!
And I will come again, my Luve,
Tho' 'twere ten thousand mile!

[The Sydney Male Choir](#)

The Sydney Male Choir formed in 1913. Each year, since 1930, the Choir has led the singing at the ANZAC Day Dawn Service at the Cenotaph in Martin Place Sydney. In 2013, the choir's Centenary Year, it sung at the ANZAC Day service in Villers-Bretonneux, France and took part in the Cornwall International Male Voice Choral Festival.

www.sydneymalechoir.com.au

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