

Friday, 7 March 2025

Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

Lusty (Examiner) v ITT24 (FCA) - respondent sentenced to two concurrent terms of 12 months imprisonment for contempt of the Australian Criminal Intelligence Commission, after refusing to take an oath or affirmation and refusing to answer a question (I B)

Crescent Capital Partners Management Pty Limited v Crescent Wealth Investments Australasia Pty Ltd (FCA) - respondents to trade mark claim rebranded to avoid trade mark issue - applicant discontinued case - respondents had not capitulated or surrendered so as to make it appropriate for them to have to pay applicant's costs (I B)

Sinanovic v Bone (NSWSC) - Court refused leave to tenant's ex-wife to represent tenant in a dispute with former landlord (I B C)

Prime Capital Securities Pty Ltd v Pypy (NSWSC) - guarantor/mortgagor failed in contention that deed of settlement, on its proper construction, provided that no further interest would be charged during a period of agreed payment by instalments (I B)

Filmalter v Swenson (QSC) - plaintiff failed to establish breach of duty of care by doctor who had prescribed an antibiotic, and also failed to establish causation regarding the major alleged consequences of taking that antibiotic (I)

HABEAS CANEM

Charming Cane Corso with her adoring Cattle Collie



Summaries With Link (Five Minute Read)

Lusty (Examiner) v ITT24 [2025] FCA 141

Federal Court of Australia

Vandongen J

Contempt - respondent was a witness at an examination under the *Australian Crime Commission Act 2002* (Cth) - charged with two counts of contempt of the Australian Criminal Intelligence Commission: (1) refusing to take an oath or affirmation as required by s28; and (2) refusing to answer a question the examiner required him to answer, contrary to s34A(a)(ii) - respondent pled guilty - held: no mandatory types of sentences prescribed for a contempt of the ACIC, and no minimum or maximum penalties - available penalties include (1) indefinite imprisonment; (2) a fine (3) a daily fine; (4) sequestration of assets; and (5) sentence of imprisonment suspended on conditions - power to conduct examination an important tool available to the ACIC to obtain information necessary for the proper discharge of its functions - an evident purpose of the Act was to provide the ACIC with an efficient means by which to compel people, including people who would otherwise be unlikely to cooperate with law enforcement agencies, to provide relevant information - purposes of punishment for contempt constituted by a refusal to answer questions in a court or commission of enquiry are retribution, coercion, and deterrence of others - fixed terms of imprisonment appropriate in this case - sentence on both charges of 12 months imprisonment, both to commence immediately - respondent to have liberty to apply if he decided to purge his contempt before December 2025 - respondent was currently on remand facing trial for two serious offences, and Court noted that, if convicted, it would be a matter for the future sentencing court whether to exclude from its calculations the time served under the sentences now being imposed.

[Lusty \(Examiner\) \(I B\)](#)

Crescent Capital Partners Management Pty Limited v Crescent Wealth Investments Australasia Pty Ltd [2025] FCA 133

Federal Court of Australia

Goodman J

Costs in trade mark cases - applicant claimed respondents had infringed its CRESCENT trademarks and engaged in misleading or deceptive conduct - sought declarations, injunctions, corrective advertising, and damages or account of profits - respondents rebranded their business of offering Sharia-compliant superannuation products from 'Crescent' to 'Salaam' - after further interlocutory skirmishing, applicant sought leave to discontinue and said it should be awarded costs because the respondents had capitulated or surrendered by their rebranding, and had behaved unreasonably - held: typically, costs follow the event, but different considerations apply where Court has not determined merits of case - FCR r26.12 provides that, unless the Court otherwise orders, a party who files a notice of discontinuance is liable to pay the costs of the other parties - evidence did not support contention respondents had capitulated or surrendered in any relevant sense - respondents had stated, despite rebranding, they intended to continue to defend proceedings - respondents had given no undertakings and

agreed to no orders that would prevent them from using 'Crescent' and it remained open to them to do so - whether respondent's actions have fulfilled applicant's purpose in bringing proceedings is to be considered, not by subjective assessments, but by reference to purpose as manifested in originating application - applicant had achieved none of the relief it sought, either in form or in substance - respondents' conduct with respect to disclosure of rebranding was not unreasonable behaviour - corporate respondents not updating their rebranded names on Court file was regrettable, but not sufficiently unreasonable to warrant adverse costs order - proceedings dismissed with costs against the applicant.

[Crescent Capital Partners Management Pty Limited](#) (I B)

Sinanovic v Bone [2025] NSWSC 144

Supreme Court of New South Wales

Faulker J

Civil procedure - landlord sued tenant in Local Court for unpaid rent and occupation fee that accrued after the lease came to an end while the tenant remained in possession, plus costs to make good the apartment - tenant disputed claim, largely on basis of a claim for an abatement of rent for water damage - Local Court rejected abatement claim and gave judgment for landlord - tenant appealed to Supreme Court - tenant's ex-wife sought leave to represent him at the hearing - held: an important aspect of having a tutor appointed to represent a person under a legal incapacity is that the tutor is formally a party to the proceedings and is potentially liable for the costs of the proceedings like any other party - there was no application that the ex-wife be appointed as tutor - her evidence was that the tenant needed assistance to conduct the proceedings - no suggestion the tenant could not afford a solicitor - underlying dispute was for non-payment of rent for a harbour-side apartment which was leased for \$1,500 per week - the make good claim arose from damage to walls that allegedly occurred when the tenant removed his art collection at the end of the tenancy - ex-wife said tenant had had bad experience with lawyers and had no faith in them - Court will only grant for a lay advocate to appear in exceptional circumstances - lawyers play an important role in the administration of justice through their assistance to the Court to resolve the issues in the case - solicitors are officers of the Court, and solicitors and barristers owe their highest duty to the Court, and are subject to high ethical standards enforced by professional associations - lawyers also bring objectivity, which is important both for the protection of the client and assistance to the Court - ex-wife had not shown exceptional circumstances - application dismissed.

[View Decision](#) (I B C)

Prime Capital Securities Pty Ltd v Pypy [2025] NSWSC 132

Supreme Court of New South Wales

Wright J

Contracts - Prime lent money to Pypy and her company Cemerleng pursuant to a security and guarantee deed, and Pypy also mortgaged her property - Cemerleng defaulted, and Prime commenced proceedings seeking possession of Pypy's property - default judgment entered and set aside by consent - the parties then settled, and entered into a deed of settlement and

forbearance - Prime forbore from enforcing the mortgage and Pypy and others were to pay the secured money in instalments, wherein time was of the essence - Pypy failed to make the final payment due a dispute as to the amount of interest to be included, and declined to sign consent orders consenting to judgment as required by the deed - Pypy filed a notice of motion seeking an order under s73 of the *Civil Procedure Act 2005* (NSW) that, on the proper construction of the deed, further interest did not accrue while the deed was on foot - held: whether or not Pypy's proposed construction of the deed were correct, there had been an event of default when Pypy failed to make any payment on the fourth instalment date - therefore, Pypy had consented in the deed to judgment being entered against her with costs on a full indemnity basis, and Prime was entitled to file the sign consent order in the form set out in the deed - in any event, the Court did not accept Pypy's proposed construction of the deed - the deed did not refer to interest, and did not state that no further interest would be charged, or that interest would accrue at any lower rate - order for possession of mortgaged land made in favour of Prime.

[View Decision](#) (I B)

Filmalter v Swenson [2025] QSC 32

Supreme Court of Queensland

Crow J

Medical negligence - plaintiff sued doctor for negligence, breach of contract, and breach of s60 and s61 of the *Australian Consumer Law* (guarantee of due care and skill and guarantee of fitness for purpose) - plaintiff contended doctor inappropriately advised her and treated her with the prescription of the antibiotic norfloxacin, causing allergic reaction which led to extreme photosensitivity which had persisted for over a decade, and which was a cause of cerebral vasculitis and a stroke - doctor denied negligence and breach of s60 or s61, and denied the plaintiff had suffered an allergic reaction or been rendered photosensitive, and said that the plaintiff's stroke was not related to norfloxacin - held: s22 of the *Civil Liability Act 2003* (Qld) provides that a professional does not breach a duty if he or she acts in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice - the effect of s22 is to alter the standard of care, rather than to operate as a defence to an anterior breach of duty of care - in this case, even if s22 were not engaged, the plaintiff had not proved a breach of duty of care by the doctor, or breach of contractual duty - s22 is also available as a defence to a claim under s60 of the *Australian Consumer Law* - reference to 'due care and skill' in s60 is to a common law negligence standard, so s60 claim must also fail - s61 had no application as plaintiff's pleading did not attempt to particularise services provided, nor any particular purpose for which services were sought, nor how that particular purpose was made known to doctor - plaintiff had shown she suffered from a minor allergic reaction to the ingestion of two tablets of norfloxacin, but had not shown those tablets caused any type of photosensitive illness, nor her stroke - damages would have been about \$3,500 - judgment for the defendant.

[Filmalter](#) (I)



Poem for Friday

To Autumn

By John Keats (1795-1821)

Season of mists and mellow fruitfulness,
Close bosom-friend of the maturing sun;
Conspiring with him how to load and bless
With fruit the vines that round the thatch-eves run;
To bend with apples the moss'd cottage-trees,
And fill all fruit with ripeness to the core;
To swell the gourd, and plump the hazel shells
With a sweet kernel; to set budding more,
And still more, later flowers for the bees,
Until they think warm days will never cease,
For summer has o'er-brimm'd their clammy cells.

Who hath not seen thee oft amid thy store?
Sometimes whoever seeks abroad may find
Thee sitting careless on a granary floor,
Thy hair soft-lifted by the winnowing wind;
Or on a half-reap'd furrow sound asleep,
Drows'd with the fume of poppies, while thy hook
Spares the next swath and all its twined flowers:
And sometimes like a gleaner thou dost keep
Steady thy laden head across a brook;
Or by a cyder-press, with patient look,
Thou watchest the last oozings hours by hours.

Where are the songs of spring? Ay, Where are they?
Think not of them, thou hast thy music too,—
While barred clouds bloom the soft-dying day,
And touch the stubble-plains with rosy hue;
Then in a wailful choir the small gnats mourn
Among the river shallows, borne aloft
Or sinking as the light wind lives or dies;
And full-grown lambs loud bleat from hilly bourn;
Hedge-cricket sing; and now with treble soft
The red-breast whistles from a garden-croft;
And gathering swallows twitter in the skies.



Ode to Autumn by John Keats, read by Tom O'Bedlam

<https://www.youtube.com/watch?v=IZwSqndKwDw>

John Keats, an English poet, was born 31 October 1795, in Moorgate, London, and died of tuberculosis, at the age of 25 on 23 February 1821 in Rome, Papal States (Italy). His father died in 1804 after an accident when his horse faltered and he fell suffering a head injury. His mother died of tuberculosis when Keats was only 14. His brother also died of tuberculosis. After his father's death the family lost most of its inheritance to the actions of a trustee, who only after Keats's death, came to a settlement with his sister Fanny. Keats trained to be a surgeon. He was considered later to have been a poet of the later Romantic period. He only published 54 poems. His most famous were the Odes, including *Ode on a Grecian Urn*. *Ode to a Nightingale* represents the cycle of nature and death. The poem was written by Keats in only a couple of hours. He was subject to criticism by some of his contemporaries for his style of writing, and perhaps due to his background. Of his death, his friend Joseph Severn, an English painter, who remained by his side wrote: *"He told me not to tremble for he did not think he would be convulsed – he said. Did you see anyone die ? no ? well then I pity you poor Severn ? what trouble you have got into for me. Now you must be firm for it will not last long ? I shall soon be laid in a quiet grave."*

https://en.wikipedia.org/wiki/John_Keats

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