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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Council of the City of Ryde v Sally Haddad executor of the estate of the late Dr Jim Haddad (NSWCA) - environment and planning - conditional development consent to use premises as business premises - erroneous construction of "business premises" in *Standard Instrument (Local Environmental Plans) Order 2006* - appeal allowed (I B C G)

Stewart v Chee (NSWSC) - medical negligence - interim payment - defendant to pay plaintiff \$100,000 as interim payment of damages sought to be recovered (I B C G)

McDonald v Ellis (NSWSC) - land law - costs - appointment of trustee of sale of property and costs orders granted (I B C G)

Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd (NSWSC) - security of payments - failure to give reasons concerning decision on amount to allowed for liquidated damages - adjudication void - declaration made (I B C G)

Cargill Aust Ltd & Ors v Viterra Malt Pty Ltd & Ors (No 7) (VSC) - legal professional privilege - waiver - no error in dismissal of application for production of documents - appeal dismissed (I B C G)

Bentley v Hocking (QSC) - equity - contract - request by majority of horse's co-owners to sell horse - no utility in convening meeting to vote on sale of horse - co-owner refused injunction to

restrain horse's sale (I B C G)

Doedens & Ors v Owen (No 2) (SASC) - costs - interest - succession - family provision - settlement of claims - determination of outstanding matters - orders made (I B C G)

Summaries With Link (Five Minute Read)

Council of the City of Ryde v Sally Haddad executor of the estate of the late Dr Jim Haddad [2018] NSWCA 35

Court of Appeal of New South Wales

McCull & Gleeson JJA; Sackville AJA

Environment and planning - Dr Haddad sought Council's consent to use premises as business premises, having previously use premises as doctor's surgery - Council rejected development application - Council found that use of the premises as business premises was not permitted under *Ryde Local Environmental Plan 2014* (Ryde LEP 2014) - Dr Haddad appealed in reliance on cl 41(1)(e) *Environmental Planning and Assessment Regulation 2000* (NSW) (Regulation) - Commissioner upheld appeal and granted conditional development consent - applicant sought to appeal against primary judge's dismissal of its appeal against Commissioner's decision - proper construction of "business premises" in *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) - held: primary Judge erred in upholding Commissioner's construction of "business premises" in (Standard Instrument) - leave to appeal granted - appeal allowed.

[View Decision](#) (I B C G W WI WB WC WG)) (I B C G)

Stewart v Chee [2018] NSWSC 263

Supreme Court of New South Wales

Davies J

Medical negligence - interim payment - plaintiff brought proceedings against renal surgeon for damages arising from surgery - s82 not in issue that conditions in s82 *Civil Procedure Act 2005* (NSW) established - issue concerned form of order as to interim payment - held: plaintiff had demonstrated need for interim payment for purposes of dialysis - s82 did not require condition to be imposed - not appropriate to impose condition - defendant to pay plaintiff \$100,000 as interim payment of damages which plaintiff was seeking to recover.

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

McDonald v Ellis [2018] NSWSC 278

Supreme Court of New South Wales

Darke J

Land law - trusts and trustees - costs - plaintiff owned quarter share in property - first defendant owned half share - second defendant owned quarter share - plaintiff sought appointment of trustee for sale of property under s66G *Conveyancing Act 1919* (NSW) - parties unable to agree

on form of orders - first defendant sought adjournment to seek taxation rulings - held: Court not satisfied to grant adjournment - orders granted.

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

Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSC 264

Supreme Court of New South Wales

Ball J

Security of payments - judicial review - plaintiff head contractor entered subcontract with first defendant for works - first defendant served payment claim - plaintiff sought declaration that adjudication determination under *Building and Construction Industry Security of Payment Act 1999* (NSW) was void - whether adjudicator failed to perform statutory function - whether adjudicator advanced reason which could not 'rationally support' conclusion that claim for preliminaries was to be 'valued on a time basis' - whether adjudicator failed to comply with s22(3)(b) of the Act - consideration of plaintiff's claim for liquidated damages in payment schedule - held: adjudicator failed to give reasons 'for a critical part of her decision' concerning amount to be allowed for liquidated damages - determination was void - declaration made.

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

Cargill Aust Ltd & Ors v Viterra Malt Pty Ltd & Ors (No 7) [2018] VSC 99

Supreme Court of Victoria

Macaulay J

Legal professional privilege - waiver - implied waiver - claim concerned alleged breach of warranties or misleading and deceptive conduct by defendants (Viterra parties) in sale of business to 'Cargill parties' - associate judge dismissed application by Viterra Parties that Cargill parties produce documents over which legal professional privilege. was claimed - Viterra Parties appealed - whether to grant permission to Viterra parties to admit fresh evidence - *Evidence Act 2008* (Vic) - held: Court not persuaded that new evidence should be admitted - no error in decision of associate judge - appeal dismissed.

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

Bentley v Hocking [2018] QSC 43

Supreme Court of Queensland

Atkinson J

Equity - contract - applicant was one of a number co-owners of horse - applicant sought injunction to restrain respondent from selling horse - horse's ownership governed by standard co-owner agreement which Racing Australia provided - majority of owners had requested horse be sold - applicant contended meeting was required in respect of giving of majority of consent - whether meeting required - whether notice given to applicant - requirements of co-owner agreement concerning sale of horse - held: applicant had been given notice that horse would be sold according to request of majority consent - no utility to convene meeting in relation to vote - request of majority owners for sale satisfied the co-owner agreement - injunction refused.

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

Doedens & Ors v Owen (No 2) [2018] SASC 23

Supreme Court of South Australia
Nicholson J

Costs - succession - interest - family provision - three plaintiffs sought provision from deceased's estate pursuant to ss6 & 7 *Inheritance (Family Provision) Act 1972 (SA)* - plaintiffs' claims settled - determination of outstanding matters - costs of second and third plaintiffs - claim for interest on basis of defendant's alleged late payment of first plaintiff's settlement sum - costs of litigation guardian appointed on third plaintiff's behalf - held: costs orders made - order for payment of interest amount made.

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

CRIMINAL

Executive Summary

Packard (a Pseudonym) v The Queen (VSCA) - criminal law - tendency evidence - application convicted of five counts of incest - appeal dismissed

Walters v The Queen (ACTCA) - criminal law - 'conspiracy to traffic in a controlled drug other than cannabis' - appeal against conviction and sentence - there was doubt that appellant was guilty of conspiracy charge - appeal upheld - conviction set aside

Summaries With Link

Packard (a Pseudonym) v The Queen [2018] VSCA 45

Court of Appeal of Victoria
Priest & Beach JJA; Beale AJA

Criminal law - incest - tendency evidence - applicant found guilty of five incest charges perpetrated against applicant's step-daughter - applicant sought to appeal against conviction - applicant contended there had been wrong admission and/or direction on tendency evidence, that use of the word 'rape' had created prejudice to applicant resulting in unfair trial, that trial judge 'unfairly bolstered complainant's credibility' by directions on complainant's VARE and that applicant was deprived of alibi due to trial judge directing defence counsel's cross-examination - ss55, 56, 97(1) & 101(2) *Evidence Act 2008 (Vic)* - held: leave to appeal granted on grounds of appeal concerning tendency evidence and use of word 'rape' - appeal dismissed.

[Packard](#)



Walters v The Queen [2018] ACTCA 1

Court of Appeal of the Australian Capital Territory

Elkaim, Mossop & Wigney JJ

Criminal law - drug offences - trial conducted by judge alone - single judge of ACT Supreme Court convicted appellant of 'conspiracy to traffic in a controlled drug other than cannabis', and sentenced appellant to 30 months in prison with 15 month non parole period - appellant challenged conviction and sentence - whether evidence permitted finding beyond reasonable doubt that appellant conspired with co-offender - parity - whether sentence manifestly excessive - held: Court satisfied that 'there must have been a doubt' that appellant was guilty of conspiracy charge - appeal upheld - conviction set aside.

[Walters](#)



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That Bright Chimeric Beast

By: Countee Cullen

That bright chimeric beast
Conceived yet never born,
Save in the poet's breast,
The white-flanked unicorn,
Never may be shaken
From his solitude;
Never may be taken
In any earthly wood.
That bird forever feathered,
Of its new self the sire,
After aeons weathered,
Reincarnate by fire,
Falcon may not nor eagle
Swerve from his eyrie,
Nor any crumb inveigle
Down to an earthly tree.

That fish of the dread regime
Invented to become
The fable and the dream
Of the Lord's aquarium,
Leviathan, the jointed
Harpoon was never wrought
By which the Lord's anointed
Will suffer to be caught.

Bird of the deathless breast,
Fish of the frantic fin,
That bright chimeric beast
Flashing the argent skin, –
If beasts like these you'd harry,
Plumb then the poet's dream;
Make it your aviary,
Make it your wood and stream.

There only shall the swish
Be heard of the regal fish;
There like a golden knife
Dart the feet of the unicorn,



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And there, death brought to life,
The dead bird be reborn.

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

Countee Cullen - Wikipedia

en.wikipedia.org

Early life Childhood. Countee Cullen was born on May 30, 1903, but due to a lack of records of his early childhood, it has been difficult to pinpoint his city of birth.

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