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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)

CMP Manufacturing Pty Ltd v Barbieri (FCA) - industrial law - employment contract - applicant entitled to retrenchment payment or, if not entitled to retrenchment payment, entitled to 'payment in lieu of notice' - appeal dismissed (I B C G)

Cai v Tsang (NSWSC) - summary disposal - loan agreement - 'prevention principle' - plaintiff did not establish defendant had no arguable case - summary judgment refused (I B C G)

Sandersons Eastern Suburbs v Mercedes-Benz Australia/Pacific (No. 2) (NSWSC) - costs - plaintiff to pay defendant's costs of successful application for summary dismissal - no order for costs made in respect of costs preceding vacation of hearing (I B C G)

Re Flavel; Application by Lipshut (VSC) - wills and estates - family provision - application to be discharged as executor of will and removed as trustee of deceased's estate granted (B)

Mavridis v Andronescu (VSC) - wills and estates - terms of settlement entered under mistake - application for approval of compromise adjourned (I B C G)

Hung & Anor v Hung & Anor (QCA) - summary judgment - loan - appeal allowed in respect of respondent's claim for compound interest - judgment reduced (I B C G)

Golding v Primavera Holdings Pty Ltd (ACTSC) - trusts and trustees - plaintiffs entitled to

declaration of express trust and orders that first defendant perform obligations under trust (I B C G)

Summaries With Link (Five Minute Read)

CMP Manufacturing Pty Ltd v Barbieri [2018] FCA 622

Federal Court of Australia

Bromberg J

Industrial law - contract - employment contract - respondent was appellant's former employee - respondent unsuccessfully claimed appellant dismissed him in breach of ss340 & 352 *Fair Work Act 2009* (Cth) (Fair Work Act) - appellant was successful in contractual claim of entitlement to retrenchment payment - primary judge held that if he was wrong concerning entitlement to retrenchment payment, then applicant would have succeeded on entitlement to payment of amount 'in lieu of notice' - whether erroneous that finding respondent's position redundant and respondent contractually entitled to retrenchment payment - whether erroneous finding that retrenchment was not excluded as applicant not offered "alternative position" under contract - whether erroneous finding that respondent, if not entitled to the retrenchment pay under contract, would have been entitled to money in lieu of notice under s117 Fair Work Act - held: grounds of appeal failed - appeal dismissed.

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

Cai v Tsang [2018] NSWSC 625

Supreme Court of New South Wales

R A Hulme J

Summary disposal - loan agreement - plaintiff sought judgment for amount against defendant of sum allegedly owed under loan agreement (second loan agreement) - under the second loan agreement, defendant was guarantor of loan to company of which defendant was director and shareholder - plaintiff sought summary judgment - whether guarantee enforceable - defence on basis of *Contracts Review Act 1980* (NSW) - prevention principle - whether plaintiff was 'in some respect at fault' for failure to ensure company able to meet obligations under second loan agreement and for allowing Company to enter second loan agreement when plaintiff should have known it could not meet obligations - held: plaintiff failed to establish there was no arguable case on issue raised by defendant concerning the 'prevention principle' - summary judgment refused - notice of motion dismissed.

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

Sandersons Eastern Suburbs v Mercedes-Benz Australia/Pacific (No. 2) [2018] NSWSC 631

Supreme Court of New South Wales

McDougall J

Costs - Court granted defendant's application to dismiss plaintiff's claim on 6 February 2018 -

plaintiff had commenced proceedings against defendant concerning 'dealer agreement' between them - matter was fixed for hearing 18 July 2016 - hearing was vacated because 'remaining issues' were 'hypothetical' - determination of costs - plaintiff accepted defendant's costs of motion for summary dismissal should follow its success - parties disputed costs up to 15 July 2016 - held: : each party had contributed to 'waste of time, effort and money' - no basis to allocate 'individual responsibility' - Court made no order for costs up to 15 July 2016 - plaintiff to pay defendant's costs of summary dismissal.

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

Re Flavel; Application by Lipshut [2018] VSC 228

Supreme Court of Victoria

McMillan J

Wills and estates - plaintiff sought to be discharged as will's executor and removed as trustee of deceased's estate and incidental orders - plaintiff deposed there would be no prejudice to any third party, that he would not seek commission, and did not seek payment of legal costs from deceased's estate - s34(1)(b) *Administration and Probate Act 1958* (Vic) - ss48(1) & 51 *Trustee Act 1958* (Vic) - held: plaintiff to be discharged as will's executor and removed as trustee of deceased's estate - property and assets of deceased's estate to vest in remaining executor and trustee of deceased's estate - orders made.

[Re Flavel](#) (B)

Mavridis v Andronescu [2018] VSC 227

Supreme Court of Victoria

Derham AsJ

Wills and estates - defendant sought approval of compromise of plaintiff's claim under Pt IV *Administration and Probate Act 1958* (Vic) - compromise concerned proceeds of sale of estate's 'principal asset' - plaintiff was undischarged bankrupt, but plaintiff had entered compromise believing she was discharged from bankruptcy - plaintiff informed Court she wished to make application to set aside the terms of settlement for mistake - plaintiff sought adjournment of defendant's application - held: advice of defendant's counsel concerning compromise was insufficient to purpose - plaintiff, and likely defendant also, had entered compromise under mistake - plaintiff or defendant may be able to set terms of settlement aside - there was prospect of further claim on deceased's estate - approval of compromise would make it more difficult to pursue further claim - application adjourned.

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

Hung & Anor v Hung & Anor [2018] QCA 87

Court of Appeal of Queensland

Fraser & Morrison JJA; Bond J

Summary disposal - loan - respondents were granted summary judgment for amounts outstanding on loans - appellants appealed - whether primary judge erred in concluding appellants had no real prospects of success in defending claim for compound interest, and that

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there was no need for trial on concerning compound interest - whether real question to be tried whether appellants were liable for compound interest - held: Court not satisfied requirements of r292(2) *Uniform Civil Procedure Rules 1999* (Qld) were fulfilled concerning claim for compound interest - parties had agreed that if appellants succeeded judgment should be reduced to amount of principal and simple interest - appeal allowed - judgment reduced.

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

Golding v Primavera Holdings Pty Ltd [2018] ACTSC 118

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Trusts and trustees - express trust - plaintiffs previously owned land which they sold to first defendant - plaintiff claimed that express trust was created by trust deed over portion of land when contract for sale executed - plaintiff contended they were beneficiaries in equal shares - plaintiffs sought to enforce a condition of trust deed requiring transfer of unit to them for \$1 - plaintiffs sought declaration of express trust, declaration of first defendant's breach of the trust, and order that first defendant perform obligations under trust - held: plaintiffs entitled to declaration of express trust - plaintiff entitled to orders compelling first defendant's performance of obligations under trust - declaration and orders made.

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

CRIMINAL

Executive Summary

Paul Campbell v R (NSWCCA) - criminal law - sentence appeal - 13 year old found guilty of sexual offences against person under 10 and person under 16 - appeal allowed - proceedings remitted

R v CCA (QCA) - criminal law - drug offences - sentence appeal - further evidence admitted concerning applicant's rape while in custody and its impacts - Court varied sentence by bringing forward parole eligibility date by four months - appeal allowed

Summaries With Link

Paul Campbell v R [2018] NSWCCA 87

Court of Criminal Appeal of New South Wales

Bathurst CJ; Schmidt & Hamill JJ

Criminal law

Criminal law - sexual offences - applicant was 13 year old child who pleaded guilty to two

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offences of sexual intercourse with child under 10 and one offence of indecent assault on a person under 16 - applicant sought to appeal against 16 month aggregate sentence with 8 month aggregate non-parole period - held: respondent conceded sentencing proceedings miscarried because, by taking into account an offence which carried life imprisonment, sentencing judge had taken a course prohibited by s33(4)(b) *Crimes (Sentencing Procedure) Act 1999* (NSW) - sentencing judge also erred in assessment of offence's seriousness, in finding applicant 'used his position as a trusted family member' to commit offences, in finding 'wrong in sentencing principle' Crown's concession that sentence 'other than full-time custody was within range', and in failing to consider alternatives to full-time custody - appeal allowed - proceedings remitted.

[View Decision](#)

R v CCA [2018] QCA 82

Court of Appeal of Queensland

Gotterson & Philippides JJA; Mullins J

Criminal law - drug offences - applicant pleaded guilty to four offences including trafficking in dangerous drugs (count 1) - other offences comprised two offences of unlawful possession of dangerous drug (counts 2 and 3), and possession of 'equipment and vehicles' used 'in connection with the trafficking' (count 4) - applicant sentenced to six years in prison for count 1, concurrent sentences of two years for counts 2 and 3 and one year for Count 4 - applicant sought to appeal on basis sentence was manifestly excessive - applicant also sought to adduce further evidence of rape he suffered in custody, the 'immediate physical impacts' of the rape, and the reasons why he had not disclosed the rape - held: Court satisfied that the further evidence should be admitted - rape and its immediate physical impacts were 'moderating sentencing factors' - Court varied sentence by bringing parole eligibility date forward by four months - appeal allowed.

[CCA](#)

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Moments of Vision

By: Thomas Hardy

That mirror
Which makes of men a transparency,
Who holds that mirror
And bids us such a breast-bared spectacle to see
Of you and me?

That mirror
Whose magic penetrates like a dart,
Who lifts that mirror
And throws our mind back on us, and our heart,
Until we start?

That mirror
Works well in these night hours of ache;
Why in that mirror
Are tincts we never see ourselves once take
When the world is awake?

That mirror
Can test each mortal when unaware;
Yea, that strange mirror
May catch his last thoughts, whole life foul or fair,
Reflecting it—where?

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

Thomas Hardy - Wikipedia

en.wikipedia.org

Thomas Hardy OM (2 June 1840 – 11 January 1928) was an English novelist and poet. A Victorian realist in the tradition of George Eliot, he was influenced both in his novels and in his poetry by Romanticism, especially William Wordsworth.

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