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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)

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HABEAS CANEM

At speed



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Summaries With Link (Five Minute Read)

Coal & Allied Operations Pty Ltd v Crossley [2023] NSWCA 182

Court of Appeal of New South Wales

Leeming & Stern JJA, & Simpson AJA

Statutory construction - Crossley sued Coal & Allied in the District Court's compensation jurisdiction - the claim settled by consent, including that Coal & Allied pay Crossley's costs - cl131 of the *Workers Compensation Regulation 2016* (NSW) preserved cl25(2) of the *Legal Profession Uniform Law Application Regulation 2015* (NSW), which provided that fair and reasonable costs were those specified in Schedule 2 - regarding perusal of documents, Schedule 2 provided for the following amounts: "Perusal of court documents (being any document filed in court), per page or part of a page" \$15; "Perusal of other documents, including correspondence, per folio" \$5; and "Where it is not necessary to peruse but it is necessary to scan a document, per page" \$36 - a costs assessor and costs review panel disallowed Crossley's claimed amounts for scanning documents - the District Court allowed an appeal, holding that Crossley was entitled to charge \$36 per page for scanning - Coal & Allied sought judicial review of the District Court's decision, alleging error of law on the face of the record - held: the language of Schedule 2 was clear and unequivocal and readily capable of being applied - however, it was strange that a solicitor's fair and reasonable costs for scanning documents that need not be perused was more than double the costs of perusing court documents - it was also strange that court documents were measured in pages, and non-court documents measured in folios, which were defined to mean "100 words" - it was plain that "\$36" was a typographical mistake and should have been "\$3", based on the amendment history of the predecessor regulations - courts are empowered to correct obvious drafting errors in all legal documents, including primary and delegated legislation - if the strict grammatical sense of the words would lead to an absurdity, the court is entitled to attribute to the provision the meaning which it was obviously intended to have - further, "peruse" and "scan" were undefined - there is a well-established distinction between "perusing", "scanning", and "examining" documents - "perusal" has been used to identify the careful reading of documents since at least the nineteenth century - "scanning" does not refer creating an electronic image of documents (and the use of the word predates that technology by decades), but is rather a category of work remunerated at a lower rate than perusal, for documents which do not require the same level of attention - "examination" is the inspection of a document to establish its general nature but does not involve a detailed consideration - "scanning" for the purpose of costs regulations involves reading a document rapidly, with a view to ascertaining its general content, including identifying those parts which need to be read closely, and is not a mechanical process - the lower rate for "copying" would include scanning in the sense of the creation of an electronic image - however, the face of the record did not show that this misuse of the word "scanning" had occurred here, and this would be a mere error of fact in any event - the District Court had been correct to allow the appeal, but incorrect to apply \$36, as opposed to \$3, per page for each contested amount.

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

Maxworthy v Maxworthy [2023] NSWSC 927

Supreme Court of New South Wales

Richmond J

Trusts - the Maxworthys transferred property at Watsons Creek to their son - they contended that the transfer was made pursuant to an arrangement under which the son would hold the Watsons Creek property on trust for them - the son sold the property - the parents sought various forms of relief regarding the proceeds of sale - held: the arrangement as pleaded constituted a contract to transfer the property to the son on certain terms, including that the son would hold the property on trust for the parents - post-contractual conduct of the parties is admissible on the issue of whether a contract was entered into - when the plaintiffs met a solicitor in 2017, they accepted that the son was entitled to receive and keep the proceeds of sale of the property, and they did not claim any interest in those moneys - they had not established the existence of the arrangement - a transfer by way of gift of Torrens System land will be effective at law and in equity where the donor delivers the instrument of transfer to the donee with the intention of "there and then parting with" the donor's interest in the land, and the transfer is registered - the critical issue in the present case was whether the parents had the necessary intention of "there and then parting with" their interest in the land - on the evidence, they had had that intention - the transfer of land had therefore been a gift to the son - the son did not hold the property on an express trust, given that the existence of an express trust had been negated by communications that were in evidence - a resulting trust arises in essentially two kinds of case: (1) where a settlor has transferred property to a trustee but has not disposed of, or not wholly disposed of, the beneficial interest; and (2) where a purchaser of property directs that it be transferred into the name of another person and there is nothing to indicate an intention that the transferee is to take the property beneficially - the second kind of resulting trust did not apply here because the purchase of the property was completed about six years before the transfer was executed - also, in any event, such a resulting trust was rebutted here because there was an intention that the transferee take the property beneficially in the communications that were in evidence - the first kind of resulting trust was potentially applicable, but failed because the Court had found the transfer was a gift - further, there is authority for the proposition that the presumption of a resulting trust which would otherwise arise from a transfer of Torrens System land without consideration to a third party is precluded by s44 of the *Conveyancing Act 1919* (NSW) - the parents were not entitled to trace the proceeds of sale of the property - claim dismissed.

[View Decision](#) (I B)

Serone v Crawford [2023] NSWSC 930

Supreme Court of New South Wales

Chen J

Compensation to relatives and negligence - Serone was riding his motorcycle in Eltham when he collided with a black cow on the roadway and was killed - police investigations ascertained that the cow was owned by Crawford, whose property was next to the road, and that the fence lines adjacent to the roadway had loose wires and were missing some fence posts - Serone's

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widow sought damages under the *Compensation to Relatives Act 1897* (NSW) on her own behalf, and on behalf of the children of the marriage, and brought proceedings claiming damages for nervous shock on her own behalf and as tutor in for the children - the parties reached agreement to settle both proceedings - the plaintiff sought the Court's approval of these settlements, and to give effect to a proposed apportionment of the damages under the *Compensation to Relatives Act* - held: when the Court is asked to approve a settlement of proceedings commenced by or on behalf of a person under legal incapacity, its function is protective - the ultimate question is whether any compromise entered into is beneficial to the interests of the person and thus in their best interests - it is the Court's responsibility to determine this matter itself, albeit that it will be assisted, but not bound, by the provision of a confidential advice by the person's legal representatives that they consider the settlement to be beneficial to, and in the best interests of, the person - the Court, as part of its assessment, is to consider the advantages and disadvantages of the litigation continuing not only in terms of whether the applicants might secure a more advantageous award from the Court at trial, but also issues such as the prospects of an appeal and the costs and pressures imposed on [the plaintiff if the litigation were to continue - the tutor must also assent to the compromise - having considered the confidential advice of counsel, the Court was well-satisfied that the compromise sum was beneficial to, and in the best interests of, the dependents - an action under the *Compensation to Relatives Act* requires the Court to assess damages based on the reasonable expectation of pecuniary benefit or benefit reducible to money value which the deceased would have applied for the maintenance of his or her family - only one action is permissible, and the Court is required to apportion the quantifiable benefits amongst the dependents - an assessment of damages under the *Compensation to Relatives Act* requires the Court to undertake a three step enquiry: (1) determine the future earnings of, and services provided by, the deceased; (2) determine whether there are any legitimate deductions; and (3) determine the degree of dependency and undertake an apportionment of damages between dependents - guided by the advice of experienced counsel and the solicitor for the plaintiffs, the Court was satisfied that the proposed apportionment was beneficial to, and in the best interests of, each of the defendants - settlement and apportionment approved.

[View Decision](#) (I)

St Hilda's College Ltd & Ors v Uniting Church in Australia Property Trust (Victoria) & Anor [2023] VSC 462

Supreme Court of Victoria

McDonald J

Charitable trusts - the first plaintiff operates St Hilda's College, which is a residential college of the University of Melbourne - the other plaintiffs are the current members of the Council of the College - the defendant is the registered propriety of the land on which the College sits, and holds that land on trust for the purposes of the College, pursuant to a charitable trust established by the *Queen's College Land Act 1962* (Vic) - in 1992 the defendant and the members of the Council executed a trust deed that provided that the Council may give directions to the defendant to deal with the land - in 2021, the Council directed the defendant to

Benchmark

transfer legal title in the land to the first plaintiff so that the first plaintiff would become trustee in lieu of the defendant - the defendant did not comply with the direction - the plaintiffs commenced proceedings - held: under s3(1) of the *Queen's College Land Act*, the defendant, as successor in title to the original trustees, has "full power to mortgage, sell, transfer, convey, lease, exchange or dispose of the whole or any part of the said Land freed and discharged from all trusts, encumbrances, limitations, restrictions and reservations", with the consent of the Governor in Council and subject to any trust, encumbrance, limitation, or restriction validly created after the land was transferred - the only charitable trust under which the land is held for the general purposes of St Hilda's College is the charitable trust created by s2(2) of the *Queen's College Land Act* - as the 1992 trust deed does not create a trust, the only power to transfer the land is that conferred by s3(1) of the *Queen's College Land Act* - the direction was not to transfer legal title to the land freed and discharged from the charitable trust, rather the direction was to transfer legal title to the land subject to the charitable trust - there is no power under the *Queen's College Land Act* to vary the powers conferred on the trustee by s3(1), and a trustee does not have an implied power to vary a trust deed - the powers conferred by s3(1) are not qualified by the 1992 trust deed because the trust deed did not constitute a trust validly created after the transfer of the land - the defendant therefore had no power to transfer legal title in the land to the first plaintiff subject to the charitable trust created by s2(2) of the *Queen's College Land Act*, irrespective of whether the direction was a direction to "deal with" the land within the meaning of the 1992 trust deed - in any event, the direction was not a direction to "deal with" the land within that meaning, as a reasonable person in the position of the parties to the 1992 trust deed would not have understood it to confer upon the Council of St Hilda's College the power to direct the defendant to transfer legal title to the land to a corporation which did not exist in 1992, with the consequence that the defendant would cease to be the trustee of the trust - the reference in s7L(1)(a) of the *Charities Act 1978* (Vic) to "apply the trust fund" is a reference to the trust fund being put to use or employed for further charitable purposes of the trust, and the orders sought by the plaintiffs would not apply the trust fund in that sense - s7L of the *Charities Act* therefore did not assist the plaintiffs - application dismissed.

[St Hilda's College Ltd & Ors \(B I\)](#)

Youth Empowered Towards Independence Incorporated v Commissioner of Queensland Police Service & Anor [2023] QSC 174

Supreme Court of Queensland

Burns J

Habeas corpus - the applicant is a charitable organisation concerned with the welfare of children, including children in custody - the applicant sought an urgent writ of habeas corpus in respect of eight children, who had each been remanded in custody following appearances in the Magistrates Court and were being held in various watchhouses around Queensland under the control of the Commissioner of Queensland Police - the applicant sought to have the children delivered into the custody of youth detention centres - the application was brought pursuant to Part 5 of Chapter 14 of the *Uniform Civil Procedure Rules 1999* (Qld) - held: although applications for the issue of a writ of habeas corpus are comparatively rare, they must be

always treated as an urgent matter, and take precedence over all other business, as the object of the writ is to protect the liberty of the subject by speedy and summary interposition - an application for the issue of a writ of habeas corpus may be made by the person who is under restraint or by another person - although the application must be supported by affidavit, it may be made without notice to another party - at the initial hearing, the court may order the respondent to release the person under restraint, order the issue of a writ of habeas corpus directed to the respondent (and give directions as to the course to be taken under the writ), or dismiss the application - if a writ of habeas corpus is issued, the person to whom the writ is directed must bring the person who is under restraint before the court as directed in the writ - the court may also make an order as to the custody of the person under restraint pending the return of the writ - at the initial hearing, the applicant's counsel advanced an argument that each child was being unlawfully detained - the success of this argument will depend in due course on a construction of specific provisions of the *Youth Justice Act 1992* (Qld) - it was unnecessary to resolve that construction now - by the time the Court came to make orders, only three of the children who had been originally named had not been moved to youth detention centres - regarding these three children, the respondents had not been able to establish that, on the remand, an order was made by the remanding court in accordance with the mandatory requirements of s 56(4) of the *Youth Justice Act* - therefore, the respondents could not discharge their onus to establish the lawfulness of the detention of these children - order made that those three children be delivered into the custody of the Chief Executive pursuant to s56(1) of the *Youth Justice Act*.

[Youth Empowered Towards Independence Incorporated \(I\)](#)

Poem for Friday

Night Scenes of Other Times

A Poem, in Three Parts

By: Joanna Baillie (1762-1851)

PART I.

"THE night winds bellow o'er my head
Dim grows the fading light;
Where shall I find some friendly shed
To screen me from the night?"

"Ah! round me lies a desert vast,
No habitation near;
And dark and pathless is the waste
And fills my mind with fear.

"Thou distant tree, whose lonely top
Has bent to many a storm,
No more canst thou deceive my hope
And take my lover's form;

"For o'er thy head the dark cloud rolls,
Dark as thy blasted pride;
How deep the angry tempest growls
Along the mountain's side.

"Safely within the shaggy brake
Are couched the mountain deer;
A sound unbroken sleep they take;
No haunts of men are near.

"Beneath the fern the moorcock sleeps,
And twisted adders lie;
Back to his rock the night-bird creeps,
Nor gives his wonted cry.

"For angry spirits of the night
Ride on the troubled air,
And to their dens, in strange affright,



The beasts of prey repair.

"But thou, my love! where dost thou rest?
What shelter covers thee?
O may this cold and wintry blast
But only beat on me!

"Some friendly dwelling mayst thou find,
Where sleep may banish care
And thou feel not the chilly wind
That scatters Margaret's hair.

"Ah no! for thou didst give thy word
To meet me on the way:
Nor friendly roof nor social board
Will tempt a lover's stay.

"O raise thy voice if thou art near!
Its weakest sound were bliss;
What other sound my heart can cheer
In such a gloom as this?

"But from the hills with deafening roar
The dashing torrents fall,
And heavy beats the drifted shower,
And mock a lover's call.

"Ha! see, across the dreary waste,
A moving form appears,
It is my love, my cares are past;
How vain were all my fears!"

The form advanced, but sad and slow,
Not with a lover's tread;
And from his cheek the youthful glow
And greeting smile were fled.

Dim sadness sat upon his brow;
Fixed was his beamless eye;
His face was like a moon-light bow
Upon a wintry sky.



And fixed and ghastly to the sight
His strengthened features rose,
And bended was his graceful height,
And bloody were his clothes.

"My Margaret, calm thy troubled breast;
Thy sorrow now is vain;
Thy Edward from his peaceful rest
Shall ne'er return again.

"A treacherous friend has laid me low,
Has fixed my early doom,
And laid my corse with feigned woe
Beneath a vaunted tomb.

"To take thee to my home I swear,
And here we were to meet;
Wilt thou a narrow coffin share,
And part my winding sheet?

"But late the lord of many lands,
And now a grave is all:
My blood is warm upon his hands
Who revels in my hall.

"Yet think, thy father's hoary hair
Is watered with his tears;
He has but thee to soothe his care,
And prop his load of years.

"Remember Edward when he's gone
He only lived for thee;
And when thou art pensive and alone
Dear Margaret, call on me!

"Though deep beneath the mouldering clod
I rest my wounded head,
And terrible that call and loud
Which shall awake the dead!"

"No, Edward; I will follow thee,
And share thy hapless doom;



Companions shall our spirits be,
Though distant is thy tomb.

"O! never to my father's tower
Will I return again;
A bleeding heart has little power
To ease another's pain.

"Upon the wing my spirit flies,
I feel my course is run;
Nor shall these dim and weary eyes
Behold to-morrow's sun."

Like early dew, or hoary frost
Spent with the beaming day,
So shrunk the pale and watery ghost,
And dimly wore away.

No longer Margaret felt the storm,
She bowed her lovely head,
And, with her lover's fleeting form,
Her gentle spirit fled.

PART II.

"LOUD roars the wind that shakes the wall,
It is no common blast;
Deep hollow sounds pass through my hall:
O would the night were past!

"Methinks the demons of the air
Upon the turrets growl,
While down the empty winding stair
Their deepening murmurs roll.

"The glimmering fire cheers not the gloom,
Blue burns the quivering ray,
And, like a taper in a tomb,
But spreads the more dismay.

"Athwart its melancholy light



The lengthened shadow falls;
My grandsires to my troubled sight
Lower on me from these walls.

"Methinks yon angry warrior's head
Doth in its panel frown,
And dart a look, as if it said,
'Where hast thou laid my son?'

"But will these fancies never cease?
O would the night were run!
My troubled soul can find no peace
But with the morning sun,

"Vain hope! the guilty never rest;
Dismay is always near;
There is a midnight in the breast
No morn shall ever cheer.

"Now soundly sleeps the weary hind,
Though lowly lies his head;
An easy lair the guiltless find
Upon the hardest bed.

"The beggar, in his wretched haunt,
May now a monarch be;
Forget his woe, forget his want,
For all can sleep but me.

"I've dared whate'er the boldest can,
Then why this childish dread?
I never feared a living man,
And shall I fear the dead?

"No; whistling blasts may shake my tower,
And passing spirits scream:
Their shadowy arms are void of power,
And but a gloomy dream.

"But, lo! a form advancing slow
Across the dusky hall,
Art thou a friend? — art thou a foe?



Benchmark

O answer to my call!"

Still nearer to the glimmering light
The stately figure strode,
Till full, and horrid to the sight,
The murdered Edward stood.

A broken shaft his right hand swayed,
Like Time's dark, threatening dart,
And pointed to a rugged blade
That quivered in his heart.

The blood still trickled from his head,
And clotted was his hair;
His severed vesture stained and red;
His mangled breast was bare.

His face was like a muddy sky
Before the coming snow;
And dark and dreadful was his eye,
And cloudy was his brow.

Pale Conrad shrunk, but drew his sword —
Fear thrilled in every vein;
His quivering lips gave out no word;
He paused, and shrunk again.

Then utterance came — "At this dread hour
Why dost thou haunt the night?
Has the deep gloomy vault no power
To keep thee from my sight?"

"Why dost thou glare and slowly wave
That fatal shaft of strife?
The deed is done, and from the grave
Who can recall to life?"

"Why roll thine eyes beneath thy brow
Dark as the midnight storm?
What dost thou want? O let me know,
But hide thy dreadful form.



"I'd give the life-blood from my heart
To wash my crime away:
If thou a spirit art, depart,
Nor haunt a wretch of clay!

"Say, dost thou with the blessed dwell? —
Return and blessed be!
Or comest thou from the lowest hell? —
I am more cursed than thee."

The form advanced with solemn steps
As if it meant to speak,
And seemed to move its pallid lips,
But silence did not break.

Then sternly stalked with heavy pace
Which shook the floor and wall,
And turned away its fearful face,
And vanished from the hall.

Transfixed and powerless, Conrad stood;
Ears ring, and eyeballs swell;
Back to his heart runs the cold blood;
Into a trance he fell.

Night fled, and through the windows 'gan
The early light to play;
But on a more unhappy man
Ne'er shone the dawning day.

The gladsome sun all nature cheers,
But cannot charm his cares;
Still dwells his mind with gloomy fears,
And murdered Edward glares.

PART III.

"No rest nor comfort can I find:
I watch the midnight hour;
I sit and listen to the wind
That beats upon my tower.



"Methinks low voices from the ground
Break mournful on my ear,
And through these empty chambers sound
So dismal and so drear!

"The ghost of some departed friend
Doth in my sorrows share;
Or is it but the rushing wind
That mocketh my despair?

"Sad through the hall the pale lamp gleams
Upon my father's arms;
My soul is filled with gloomy dreams,
I fear unknown alarms.

"O, I have known this lonely place
With every blessing stored,
And many a friend with cheerful face
Sit smiling at my board!

"While round the hearth, in early bloom,
My harmless children played,
Who now within the narrow tomb
Are with their mother laid.

"Now sadly bends my wretched head,
And those I loved are gone:
My friends, my family, all are fled,
And I am left alone.

"Oft as the cheerless fire declines,
In it I sadly trace,
As lone I sit, the half-formed lines
Of many a much-loved face.

"But chiefly, Margaret, to my mind,
Thy lovely features rise;
I strive to think thee less unkind,
And wipe my streaming eyes.

"For only thee I had to vaunt,



Thou wert thy mother's pride;
She left thee like a shooting plant,
To screen my widowed side.

"But thou forsakest me, weak, forlorn,
And chilled with age's frost,
To count my weary days and mourn
The comforts I have lost.

"Unkindly child! why didst thou go?
O, had I known the truth!
Though Edward's father was my foe,
I would have blessed the youth.

"Could I but see that face again,
Whose smile calmed every strife,
And hear that voice which soothed my pain,
And made me wish for life!

"Thy harp hangs silent by the wall:
My nights are sad and long,
And thou art in a distant hall,
Where strangers raise the song.

"Ha! some delusion of the mind
My senses doth confound!
It is the harp, and not the wind,
That did so sweetly sound."

Old Arno rose all wan as death,
And turned his eager ear,
And checked the while his quickened breath
The sound again to hear.

When like a full, but distant choir,
The swelling notes returned;
And with the softly trembling wire
Surrounding echoes mourned;

Then softly whispered o'er the song
That Margaret loved to play,
Its well-known measure lingered long,



And faintly died away.

His dim-worn eyes to heaven he cast,
Where all his griefs were known,
And smote upon his troubled breast,
And heaved a heavy groan.

"I know it is my daughter's hand,
But 'tis no hand of clay;
And here a lonely wretch I stand,
All childless, bent, and grey.

"And art thou low, my lovely child,
And hast thou met thy doom,
And has thy flattering morning smiled,
To lead but to the tomb?

"O let me see thee ere we part,
For souls like thine are blest;
O let me fold thee to my heart,
If aught of form thou hast!

"This passing mist conceals thy shape,
But it is shrunk or flown;
Why dost thou from mine arms escape,
Art thou not still mine own?

"Thou'rt fled like the low evening breath,
That sighs upon the hill:
O stay! though in thy weeds of death, —
Thou art my daughter still."

Loud waked the sound, then fainter grew,
And long and sadly mourned,
And softly sighed a long adieu,
And never more returned.

Old Arno stretched him on the ground;
Thick as the gloom of night,
Death's misty shadows gathered round,
And swam before his sight.

He heaved a deep and deadly groan,
That rent his labouring breast,
And long before the morning shone,
His spirit was at rest.

Joanna Baillie was born on 11 September 1762 in Bothwell, Scotland. Her twin died at the time of her birth. Her father was a Presbyterian minister. Her uncles on her mother's side were the Scottish physicians William and John Hunter. She was the niece of the poet Anne Home Hunter. She learned to read only from age 10, when she attended Miss McDonald's boarding school. She was talented in mathematics and the arts. Her father died when she was 16 and the family's financial position became critical. Her first publication was "*Poems: Wherein it is Attempted to Describe Certain Views of Nature and of Rustic Manners*" in 1790. She managed her brother's household until 1791 when he married. She and her sister, who also never married, lived together for over 50 years. She wrote and published 27 plays and many poems, during her career. Once her identity as a writer became known in about 1800 she was introduced by her aunt to the London literary set. Joanne Baillie died on 23 February 1851 at Hampstead, in London.

<https://www.poetryfoundation.org/poets/joanna-baillie>

"Witchcraft" by Joanna Baillie, produced as an online production by the Bay Area Women's Theatre Festival, 15 March 2022 (during covid)

["Witchcraft"](#)

"Sweet Power of Song", a poem by Joanna Baillie, performed to the Traditional Irish Air arranged by Beethoven, Julian Stocker (Tenor) and Gwion Thomas (Baritone), in an online performance 2022

<https://www.youtube.com/watch?v=AbyJGYbAQXA> and performed in full on SoundCloud
<https://soundcloud.com/electricvoicetheatre/sweet-power-of-song-ludwig-van-beethoven-joanna-baillie>

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