

Friday, 13 April 2018

## 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)

**Ku-ring-gai Council v Chan (No 2)** (NSWCA) - costs - indemnity costs - “novel” duty of care - fourth defendant successful in appeal against judgment in plaintiffs’ favour - not unreasonable of plaintiffs to reject Calderbank offer - plaintiffs to pay fourth defendant’s costs of first instance proceeding on ordinary basis (I B C G)

**Baron v Gilmore** (NSWSC) - evidence - privilege - privilege claim upheld with respect to certain documents - defendants otherwise granted access to documents (I B C G)

**1045 Burke Rd Pty Ltd v Bosi & Anor** (VSC) - discovery - caveat - legitimate forensic purpose - two notices to produce ‘too wide and fishing’ - notices to produce set aside (I B C G)

**TPSC v Kingston City Council (Ruling No 1)** (VSC) - judgment and orders - adjournment of ‘VCAT appeal proceedings’ refused - temporary stay of ‘second proceeding’ granted (I B C G)

**Moodie v Perna (Ruling No 1)** (VSC) - discovery - subpoena - release from ‘Harman undertaking’ granted in respect of certain documents (I B C G)

**The Trustee for Allway Unit Trust Trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd & Ors** (SASC) - security of payments - no valid reference date for payment claim - jurisdictional error - adjudicator’s determination quashed (I B C G)

**Corkhill v Commonwealth of Australia (No 3) (ACTSC)** - superannuation - negligence - claim against Commonwealth arising from alleged incorrect advice concerning superannuation scheme given to plaintiff's husband - claim dismissed (I B C G)

## Summaries With Link (Five Minute Read)

### **Ku-ring-gai Council v Chan (No 2) [2018] NSWCA 73**

Court of Appeal of New South Wales

McCull & Meagher JJA; Sackville AJA

Costs - Court allowed fourth defendant Council's appeal from judgment entered in favour of plaintiffs below - primary judge had ordered fourth defendant to pay plaintiffs' costs - Council sought, in place of primary judge's order, an order that plaintiffs pay its costs of proceedings at first instance - Council also sought, on basis of Calderbank offer rejected by plaintiffs, that plaintiffs pay costs from certain date on indemnity basis - claim of "novel" duty of care 'on the principal certifying authority to avoid pure economic loss to a subsequent purchaser' - whether unreasonable for plaintiffs to reject offer - absence of defendants' evidence and opportunity to analyse parties' relationships - held: it was not unreasonable for plaintiffs to reject Council's offer of compromise - plaintiffs to pay Council's costs on ordinary basis.

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

### **Baron v Gilmore [2018] NSWSC 439**

Supreme Court of New South Wales

Ball J

Evidence - privilege - Court, at request of certain defendants, issued subpoena to 'expert accountants' (FCF) which plaintiffs retained, in connection with reports prepared for proceedings' purposes - plaintiffs sought that defendants be prevented from obtaining access to certain documents on grounds of legal professional privilege - five categories of documents - *Evidence Act 1995* (NSW) - held: plaintiffs had 'some success' on motion - defendants granted access to documents with exception of certain documents.

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

### **1045 Burke Rd Pty Ltd v Bosi & Anor [2018] VSC 157**

Supreme Court of Victoria

Derham AsJ

Discovery - caveat - plaintiff sought to set aside two notices to produce which defendants gave under r35.08 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) in two proceedings, each of which was an application by plaintiff for removal of a caveat lodged on defendant's behalf over property - held: notices to produce did not 'specify with reasonable particularity' required documents - notices to produce were 'too wide' and were 'so unconnected' with proceedings' issues that they could not be sustained - defendant did not show legitimate

forensic purpose - notices to produce were 'too wide and fishing' - notices to produce set aside.

[1045 Burke Rd](#) (I B C G)

## **TPSC v Kingston City Council (Ruling No 1) [2018] VSC 160**

Supreme Court of Victoria

Quigley J

Judgments and orders - adjournment - stay - in one application TPSC Pty Ltd, which was seeking to appeal against decision of Victorian Civil and Administrative Tribunal to permit company Bonleaf Pty Ltd to develop its land (VCAT appeal proceeding), sought to adjourn hearing of trial so that it could be heard together with 'second proceeding' - in other application, brought in second proceeding, Bonleaf Pty Ltd sought to stay second proceeding permanently or temporarily - whether the two proceedings raised same issues - r23.01 *Supreme Court (General Civil Procedure) Rules 2015 (Vic) - ss7-9 Civil Procedure Act 2010 (Vic)* - held: Court not prepared to grant adjournment - Court not prepared to grant permanent stay but granted temporary stay until determination of VCAT appeal proceeding.

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

## **Moodie v Perna (Ruling No 1) [2018] VSC 158**

Supreme Court of Victoria

Quigley J

Discovery - subpoena - plaintiff sought to 'produce and rely on copies of emails', discovered in present defamation proceedings, in separate 'judicial review appeal' - plaintiff sought relief from 'Harman undertaking' - whether 'special circumstances' - whether to grant release from Harman undertaking - whether proceedings 'intimately bound up' - sufficiency of overlap - 'a collateral or ulterior purpose' - held: Court satisfied to grant release from Harman undertaking in respect of certain documents.

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

## **The Trustee for Allway Unit Trust Trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd & Ors [2018] SASC 46**

Supreme Court of South Australia

Doyle J

Security of payments - plaintiff sought judicial review of adjudicator's determination under *Building and Construction Industry Security of Payment Act 2009 (SA)* - plaintiff and first defendant entered contract for performance of work - first defendant submitted progress claims - plaintiff paid amount leaving an 'unpaid difference' - first defendant ceased work - status of contract controversial - plaintiff served claim for unpaid difference under the Act - plaintiff denied liability and claimed entitlement to set off resulting in balance in its favour - adjudicator found first defendant entitled to payment of claimed amount - central contention of plaintiff was that adjudicator erred in finding first defendant's payment claim had valid reference date under the Act - status of contract when payment claim made - held: contract came to an end in October

2017 - payment claim did not have valid reference date of 23 December 2017 - earlier reference date could not sustain determination where determination had been 'sought and obtained' on basis of 23 December 2017 reference date - determination quashed.

[The Trustee for Allway Unit Trust](#) (I B C G)

## **Corkhill v Commonwealth of Australia (No 3) [2018] ACTSC 87**

Supreme Court of the Australian Capital Territory

Refshauge J

Superannuation - negligence - plaintiff contended that defendant, by advising her husband incorrectly concerning superannuation scheme, breached duty of care to her - plaintiff sought that defendant compensate her for loss and damage arising from breach - *Superannuation Act 1922* (Cth) - *Superannuation Act 1976* (Cth) - *Superannuation Act 1990* (Cth) - whether negligent misrepresentation - held: plaintiff failed in claim of negligent misstatements - Court not satisfied that plaintiff's husband would have joined Commonwealth superannuation scheme if given correct information - plaintiff could not maintain 'derivative claim' - claim dismissed.

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

## CRIMINAL

### Executive Summary

**Hamzy v R** (NSWCCA) - criminal law - manslaughter - wounding with intent - appeals against convictions and sentences dismissed

**Wells v The Queen** (VSCA) - criminal law - conspiracy to defraud - receiving secret commission - sentence appeal - sentence imposed on conspiracy charge was not manifestly excessive - appeal dismissed

### Summaries With Link

## **Hamzy v R [2018] NSWCCA 53**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL, Simpson JA & McCallum J

Criminal law - manslaughter - wounding with intent - applicant sought to appeal against convictions and sentence in respect of offences of manslaughter and wounding with intent to cause grievous bodily harm - whether verdicts unreasonable and unsupportable by evidence - whether open to jury to find beyond reasonable doubt that appellant's conduct not 'reasonable response' in circumstances as appellant perceived them - whether sentences manifestly excessive - whether error in relation to offences' 'objective seriousness' and applicant's



'moral culpability' - ss18, 24 & 33(1)(a) *Crimes Act 1900* (NSW) - held: appeals against convictions and sentence dismissed.

[View Decision](#)

## **Wells v The Queen [2018] VSCA 79**

Court of Appeal of Victoria

Tate, Beach & Niall JJA

Criminal law - fraud - secret commissions - applicant pleaded guilty to charge of 'conspiracy to defraud' and three charges of 'receiving a secret commission' contrary to s176(1) *Crimes Act 1958* (Vic) - applicant sought to challenge sentence imposed on conspiracy charge, of 7 years and 6 months in prison, on basis it was manifestly excessive - current sentencing practices - guilty plea, assistance and cooperation of applicant - indeterminacy of loss from conspiracy - general deterrence - offending's seriousness - held: judge's sentence was 'very stern' but no outside range of available sentences - leave to appeal granted - appeal dismissed.

[Wells](#)

# Benchmark

## Fragment: Questions

**By:** Percy Bysshe Shelley

Is it that in some brighter sphere  
We part from friends we meet with here?  
Or do we see the Future pass  
Over the Present's dusky glass?  
Or what is that that makes us seem  
To patch up fragments of a dream,  
Part of which comes true, and part  
Beats and trembles in the heart?

[https://en.wikipedia.org/wiki/Percy\\_Bysshe\\_Shelley](https://en.wikipedia.org/wiki/Percy_Bysshe_Shelley)

Percy Bysshe Shelley - Wikipedia  
en.wikipedia.org

Percy Bysshe Shelley (/ ˈ p ɪ r s i ˈ b ɪ ʃ ɪ l i ; 4 August 1792 – 8 July 1822) was one of the major English Romantic poets, and is regarded by some as among the finest lyric poets in the English language, and one of the most influential.

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