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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)

Turner v MyBudget Pty Limited (FCA) - representative proceeding - contract - consumer law - 'standard form service agreements' - interest provision - claim dismissed (I B C G)

Elskaf v GIO General Limited (NSWCA) - security for costs - insurance - respondent sought security for costs of appeal - application granted (B C I G)

Downing v MNSBJ Pty Ltd & Ors (QCA) - summary judgment - contract - appeal against judgment in respondents' favour for specific performance of deed - appeal allowed (I B C G)

Behan v Stonehouse [No 3] (WASC) - judgments and orders - defamation - application to vacate trial dates for health reasons - application refused (I B C G)

Corkhill v Commonwealth of Australia (No 4) (ACTSC) - judgments and orders - costs - slip in costs order's articulation - plaintiff to pay defendant's costs - order made (I B C G)

PM v Childrens Court of the Australian Capital Territory & Ors (ACTSC) - judicial review - plaintiff born on 29 February 2000, a leap year - plaintiff allegedly committed criminal offences on 28 February 2018, a non-leap year - plaintiff was child, not adult, at time of alleged offences - declaration made - proceedings remitted to Children's Court (I B C G)

Kusa v Vong (trading as Allen Vong & Associates) (ACTSC) - discovery - application for

preliminary discovery - no basis to grant application - application dismissed (B C I G)

Summaries With Link (Five Minute Read)

Turner v MyBudget Pty Limited [2018] FCA 1407

Federal Court of Australia

Lee J

Representative proceeding - contract - consumer law - respondent provided 'budget management services' - proceeding concerned 'standard form service agreements' which included 'Interest Provision' - applicant contended that respondent, by using interest earned on his funds for its own purposes, acted in breach of trust and of fiduciary not to 'obtain unauthorised profit' - alternatively applicant contended there had been unconscionable conduct by respondent, or that Interest Provision was void for being unfair - construction of Interest Provision - held: Court did not accept applicant's construction of Interest Provision - Court not satisfied Interest Provision caused 'significant imbalance' in parties' rights and obligations under contract - respondent established Interest Provision was 'reasonably necessary' - Court not satisfied Interest Provision caused 'overall detriment' - claim dismissed.

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

Elskaf v GIO General Limited [2018] NSWCA 207

Court of Appeal of New South Wales

Sackville AJA

Security for costs - insurance - appellant claimed sum from respondent under insurance policy - primary judge found in respondent's favour - respondent sought security for costs of appeal - whether 'special circumstances' established - r51.50 *Uniform Civil Procedure Rules 2005* (NSW) - prospects of success on appeal - impecuniosity - held: Court satisfied to grant order for security for costs.

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

Downing v MNSBJ Pty Ltd & Ors [2018] QCA 223

Court of Appeal of Queensland

Sofronoff P; Douglas & Flanagan JJ

Summary judgment - contract - parties entered 'share sale and purchase deed' (deed) - primary judge granted summary judgment in respondents' favour for specific performance of the deed - appellant contended primary judge failed to 'adequately investigate certain factual issues' - respondent contended factual issues adequately investigated - respondent contended that even if factual issues weren't adequately investigated, they did not have bearing on matter's resolution - held: appellant had raised 'at least three answers' to respondents' claim: misleading and deceptive conduct, a collateral contract's existence, and breach of fiduciary duty - appeal allowed.

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

Behan v Stonehouse [No 3] [2018] WASC 287

Supreme Court of Western Australia
Kenneth Martin J

Judgments and orders - defamation - defendant sought vacation of trial dates for health reasons - whether application supported by evidence - whether 'lack of real insight' on part of medical practitioners concerning 'required participation' of defendant at trial - whether 'unreasonable level of risk' to defendant's health - whether in interests of justice to adjourn trial - 'mitigating process arrangements' - O34 r4 *Rules of the Supreme Court 1992 (WA)* - held: Court not satisfied to grant application - it was noted that action settled two hours after delivery of reasons.

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

Corkhill v Commonwealth of Australia (No 4) [2018] ACTSC 255

Supreme Court of the Australian Capital Territory
Refshauge J

Judgments and orders - costs - Court dismissed plaintiff's claim in proceedings - Court ordered defendant to pay plaintiff's costs - defendant sought that plaintiff pay its costs - approach to amendment of orders under slip rule - whether 'simpler power' available - whether Court's requirement that defendant pay plaintiff's costs was a slip - rr1721 & 6906 *Court Procedures Rules 2006 (ACT)* - held: Court satisfied there was a slip in order's articulation - 'wrong party' ordered to pay other party's costs - Court satisfied to 'simply make' order that plaintiff pay defendant's costs.

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

PM v Childrens Court of the Australian Capital Territory & Ors [2018] ACTSC 258

Supreme Court of the Australian Capital Territory
McWilliam AsJ

Judicial review - statutory construction - plaintiff born in leap year on 29 February 2000 - plaintiff charged with criminal offences on 28 February of 2018, a non-leap year - whether plaintiff, when she allegedly committed the offences, was 17 and thus a 'child at law', or 18 and thus an adult - proper construction of s149 *Legislation Act 2001 (ACT)* - held: Court satisfied plaintiff was not yet 'at least 18 years old' at time of alleged offences because plaintiff 'had not yet reached the beginning of the anniversary of her birth' - plaintiff became 'at least' 18 on 1 March 2018 - plaintiff was child at time of alleged offences - declaration made - proceedings remitted to ACT Children's Court.

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

Kusa v Vong (trading as Allen Vong & Associates) [2018] ACTSC 254

Supreme Court of the Australian Capital Territory
Refshauge J

Preliminary discovery - plaintiff claimed he paid amount to payee - plaintiff claimed funds subject

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to express or constructive trust - plaintiff concerned trust sum or part of it might have been transferred to others and used for their benefit - plaintiff wished to recover any transferred funds but did not know which if any of 'named persons' funds had been transferred to - plaintiff sought preliminary discovery - r650 *Court Procedures Rules 2006* (ACT) - whether cause of action specified - held: Court not satisfied there was basis to make order sought - application dismissed.

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

CRIMINAL

Executive Summary

Summaries With Link

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Drifting Flowers of the Sea

By: Sadakichi Hartmann

Sadakichi Hartmann

Across the dunes, in the waning light,
The rising moon pours her amber rays,
Through the slumbrous air of the dim, brown night
The pungent smell of the seaweed strays—
From vast and trackless spaces
Where wind and water meet,
White flowers, that rise from the sleepless deep,
Come drifting to my feet.
They flutter the shore in a drowsy tune,
Unfurl their bloom to the lightlorn sky,
Allow a caress to the rising moon,
Then fall to slumber, and fade, and die.

White flowers, a-bloom on the vagrant deep,
Like dreams of love, rising out of sleep,
You are the songs, I dreamt but never sung,
Pale hopes my thoughts alone have known,
Vain words ne'er uttered, though on the tongue,
That winds to the sibilant seas have blown.
In you, I see the everlasting drift of years
That will endure all sorrows, smiles and tears;
For when the bell of time will ring the doom
To all the follies of the human race,
You still will rise in fugitive bloom
And garland the shores of ruined space.

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

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