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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Cassimatis v Australian Securities and Investments Commission (FCA) - costs - pleadings - constitutional law - not all applicants' costs were "thrown away" - matter remitted to Registrar (I B)

A1 Chemicals Pty Ltd v Loremo Pty Ltd (NSWCA) - contract - breach of deed of settlement and release - appeal allowed in relation to mistake in calculation of damages - appeal otherwise dismissed (I B C)

Australia and New Zealand Banking Group Limited v James (NSWSC) - stay - guarantees - stay of judgment in bank's favour against defendant refused (B)

Sokol Rukaj v Commonwealth Insurance Ltd (VSCA) - insurance - dismissal of claim under policy covering malicious damage by a tenant to property - application for adjournment on medical grounds refused - application for leave to appeal dismissed (I)

Yu v Yu (QSC) - wills and estates - succession - amount paid as death benefit pursuant to life insurance policy under superannuation plan was not "cash" in deceased's Will (B)

Financial Ombudsman Services Ltd v Utopia Financial Services Pty Ltd (WASC) - contract - breach of contract for payment of compensation pursuant to Panel's determination - defendant ordered to specifically perform contract - judgment for plaintiff (I B)

R v Canberra Contractors Pty Ltd (ACTSC) - occupational health and safety - fatal work accident - offence under s31(1) *Work Safety Act 2008* (ACT) - fine imposed (I B C)

Summaries With Link (Five Minute Read)

Cassimatis v Australian Securities and Investments Commission [2016] FCA 131

Federal Court of Australia

Edelman J

Costs - pleadings - constitutional law - dispute arose from order of Full Court that ASIC amend pleadings and pay applicants' costs including costs thrown away - applicants sought review of Registrar's taxation of costs under r40.34(1) *Federal Court Rules 2011* (Cth) - Registrar had found costs incurred by applicants in relation to ASIC's removal of paragraphs concerning 31 "Investors" were not costs "thrown away" - power to review costs - Ch III Constitution - r40.34 *Federal Court Rules 1979* (Cth) - "de novo review" - held: Court concluded there was some costs thrown away due to applicants' work in perusing Investor files - however not all costs of perusal were thrown away - impossible assess extent of costs thrown away when files were not before Court - matter remitted to Registrar.

[Cassimatis](#) (I B)

A1 Chemicals Pty Ltd v Loremo Pty Ltd [2016] NSWCA 19

Court of Appeal of New South Wales

Leeming & Simpson JJA; Sackville AJA

Contract - Deed of Settlement and Release - respondent contended appellant breached Deed of Settlement and release by engaging company as distributor without its consent - primary judge found in respondent's favour - factual findings - restraint of trade - finding that company party to distribution agreement - argument presented for first time on appeal - damages - quantum - s101 *Civil Procedure Act 2005* (NSW) - held: appeal allowed in relation to mistake in calculation of damages - appeal otherwise dismissed.

[A1 Chemicals](#) (I B C)

Australia and New Zealand Banking Group Limited v James [2016] NSWSC 108

Supreme Court of New South Wales

Ball J

Stay - guarantees - defendant sought stay of judgment against him in respect of ANZ's claim under guarantees given by defendant to ANZ of debts owed by companies he controlled - s135 *Civil Procedure Act 2005* (NSW) - interests of justice - prejudice - stultification - delay - held: Court not persuaded to stay judgment - application dismissed.

[ANZ](#) (B)

Sokol Rukaj v Commonwealth Insurance Ltd [2016] VSCA 20

Court of Appeal of Victoria
Whelan & Ferguson JJA

Adjournment - insurer refused claim under policy covering tenant's malicious damage to property on basis of exclusion arising from lack of signed tenancy agreement - primary judge dismissed claim - applicant filed application for leave to appeal - application fixed for hearing - applicant sought adjournment on medical grounds - held: application for adjournment refused - it was second time application made on medical grounds - Court did not have affidavit material before it concerning medical condition of applicant - not appropriate, given earlier adjournment, to adjourn proceedings on basis of affidavit now filed - adjournment refused - application for leave to appeal dismissed.

[Sokol Rukaj \(I\)](#)

Yu v Yu [2015] QSC 373

Supreme Court of Queensland
A Lyons J

Wills and estates - succession - probate of "Electronic copy of the Will" of deceased granted to brother as executor - executor sought directions on how estate's funds should be administered - whether amount paid as death benefit pursuant to life insurance policy under superannuation plan was "cash" as described in deceased's Will - proper construction of Will - s96 *Trusts Act 1973* (Qld) - s6 *Succession Act 1981* (Qld) - held: Court not satisfied, except for a small amount paid from employer as wage after death, that superannuation, life insurance or employment benefits were "cash" - directions given.

[Yu \(B\)](#)

Financial Ombudsman Services Ltd v Utopia Financial Services Pty Ltd [2016] WASC 55

Supreme Court of Western Australia
Le Miere J

Contracts - plaintiff sought specific performance of contract with defendant for payment of compensation to second defendant or to account in superannuation fund in accordance with Panel's determinations - defendant contended plaintiff had not made a determination within meaning of implied term of contract - *Wednesbury* unreasonableness - *Corporations Act 2001* (Cth) - s109 *Superannuation Industry (Supervision) Act 1993* (Cth) - held: defendant breached contract with plaintiff by failing to pay second defendant compensation as ordered pursuant to determinations - defendant ordered to specifically perform contract - judgment for plaintiff - counterclaim dismissed.

[Financial Ombudsman Services Ltd \(I B\)](#)

R v Canberra Contractors Pty Ltd [2016] ACTSC 13

Supreme Court of the Australian Capital Territory
Burns J

Occupational health and safety - fatal accident in which defendant's employee killed when struck by reversing road grader - defendant pleaded guilty to offence under s31(1) *Work Safety Act 2008* (ACT) - early guilty plea - held: Court satisfied defendant took its responsibilities for

providing safe workplace seriously - sentence imposed should make clear that negligent failure to comply with safety duty would have real consequences - fine reduced by 25 per cent to reflect guilty plea - defendant fined \$82,500.

[Canberra Contractors](#) (I B C)

CRIMINAL

Executive Summary

Jogee and Ruddock v The Queen (Jamaica) (UKSC) - criminal law - murder - *Chan Wing-Siu* principle could not be supported - principles re-stated - appeal allowed

R v W, PK (SASCFC) - criminal law - sexual exploitation of a child - failure by judge to give adequate directions on forensic disadvantage - miscarriage of justice - matter remitted - appeal allowed

Summaries With Link

Jogee and Ruddock v The Queen (Jamaica) [2016] UKSC 8

United Kingdom Supreme Court

Lord Neuberger, President, Lady Hale, Deputy President, Lord Hughes, Lord Toulson & Lord Thomas

Criminal law - appellants convicted of murder - trial judges in their directions to jury sought to apply principle deriving from *Chan Wing-Siu* - on appeals Court reviewed doctrine of parasitic accessory liability - appellants contended doctrine based on "flawed reading of earlier authorities and questionable policy arguments" - respondents disputed propositions and contended legislatures should decide whether to make changes - "joint enterprise" liability - held: Court concluded *Chan Wing-Siu* principle was based on reading of previous case law which was incomplete and in some respects erroneous, together with generalised, questionable policy arguments - restatement of principles made - appeal allowed.

[Jogee and Ruddock](#)

R v W, PK [2016] SASCFC 5

Full Court of the Supreme Court of South Australia

Kourakis CJ; Kelly & Nicholson JJ

Criminal law - appellant sought to appeal conviction for persistent sexual exploitation of a child under 17 between 1977 and 1982 - ss34M & 34CB *Evidence Act 1929* (SA) - held: judge did not give adequate directions on forensic disadvantage specific to appellant's case - there had been miscarriage of justice - conviction set aside - matter remitted to District Court for trial - appeal

allowed.
[R v W, PK](#)



Benchmark

The Plain Sense of Things

BY WALLACE STEVENS

After the leaves have fallen, we return
To a plain sense of things. It is as if
We had come to an end of the imagination,
Inanimate in an inert savoir.

It is difficult even to choose the adjective
For this blank cold, this sadness without cause.
The great structure has become a minor house.
No turban walks across the lessened floors.

The greenhouse never so badly needed paint.
The chimney is fifty years old and slants to one side.
A fantastic effort has failed, a repetition
In a repetitiousness of men and flies.

Yet the absence of the imagination had
Itself to be imagined. The great pond,
The plain sense of it, without reflections, leaves,
Mud, water like dirty glass, expressing silence

Of a sort, silence of a rat come out to see,
The great pond and its waste of the lilies, all this
Had to be imagined as an inevitable knowledge,
Required, as a necessity requires.

[BY WALLACE STEVENS](#)

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