

Friday, 21 December 2018

## Daily Insurance A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Ibrahimi v Commonwealth of Australia** (NSWCA) - negligence - representative proceedings - separate questions - proceedings arising from deaths of 50 people travelling on boat to Australia - appeal against primary judge's determination of 18 separate questions - appeal dismissed

**Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd** (NSWCA) - corporations - statutory demand - applicant sought extension of time to comply with statutory demand until determination of its summons seeking leave to appeal from dismissal its application to set demand aside - extension of time granted

**Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd** (VSC) - contract - caveat - plaintiff had no real prospects of success in establishing Heads of Agreement was 'binding contract' - defendant's application for summary judgment on claim for specific performance granted - defendant's application removal of plaintiff's caveat granted

**Di Stasio Pty Ltd v R & K Services Pty Ltd** (VSCA) - judgments and orders - contract - respondent granted leave to amend pleading, re-open case and adduce evidence - appeal dismissed

**Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd** (WASCA) - planning and development - State Administrative Tribunal granted conditional approval for development under 'Scheme' - erroneous failure to have 'due regard' to 'Scheme Amendment' - appeal allowed - cross-appeal dismissed

**Jordan v Criminal Injuries Compensation Commissioner Neasey (TASFC)** - judicial review - criminal injuries compensation - deduction of amount from compensation - erroneous failure to afford appellant opportunity to be heard - appeal allowed

## Summaries With Link (Five Minute Read)

### **Ibrahimi v Commonwealth of Australia [2018] NSWCA 321**

Court of Appeal of New South Wales

Meagher & Payne JJA; Simpson AJA

Negligence - representative proceedings - separate questions - 50 people travelling on boat to Australia died when boat smashed on rocks - representative proceedings brought on behalf of 'Passenger Claimants', 'Nervous Shock Claimants', 'Compensation to Relatives Claimants', 'Property Damage Claimants' and 'Property Damage Estate Claimants' - primary judge answered 18 separate questions - appellant appealed - whether erroneous findings concerning duty of care - whether erroneous findings concerning causation, and loss or damage - 'established category of duty' - 'novel duty of care' - admissibility of expert report - *Civil Liability Act 2002* (WA) - held: appeal dismissed.

[View Decision](#)

### **Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWCA 336**

Court of Appeal of New South Wales

Beazley P

Corporations - statutory demand - applicant sought extension of time to comply with statutory demand which respondent served on it - applicant sought extension of time until determination of its summons seeking leave to appeal from dismissal of its application to set demand aside - applicant contended primary judge 'failed to grapple' with question concerning 'time at which' offsetting claim 'had to have crystallised' in order for it to be available - applicant also challenged assessment of 'likely damages' - prospects of success - whether, unless extension granted, appeal would be rendered nugatory - prejudice - delay - *Building and Construction Industry Security of Payment Act 1999* (NSW) - ss459C, 459F, 459G & 459H *Corporations Act 2001* (Cth) - held: extension of time granted.

[View Decision](#)

### **Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd [2018] VSC 787**

Supreme Court of Victoria

Mukhtar AsJ

Contract - caveat - proceedings concerned dispute whether there was 'legally enforceable agreement' between defendant landowner and plaintiff property developer for sale of land - plaintiff relied on 'Heads of Agreement' (agreement) which real estate agent furnished to 'a director of the defendant' - plaintiff lodged caveat on land - plaintiff claimed interest as purchaser agreement - plaintiff sought specific performance of agreement by defendant -

defendant sought summary judgement on specific performance claim and removal of caveat - held: Court satisfied to grant defendant's applications - plaintiff did not have 'real prospect of success' of establishing Heads of Agreement was 'binding contract' - Court could not order specific performance - plaintiff had no caveatable interest - caveat to be removed.

[Count On Us](#)

## **Di Stasio Pty Ltd v R & K Services Pty Ltd [2018] VSCA 340**

Court of Appeal of Victoria

Tate, McLeish & Niall JJA

Judgments and orders - contract - appellant owner of restaurant entered 'costs plus' contract with respondent 'building and construction company' for performance of works ('Stage 1 works') - parties entered 'fixed-price contract for works ('Stage 2 works') - respondent brought proceedings against appellant for 'unpaid progress claims' - trial judge upheld some of respondent's claims - primary judge found second progress claim failed because respondent had not served tax invoice on appellant which was 'equal in value to the certificate issued by the architect as the contract required' - before pronouncement and authentication of orders respondent sought to amend pleading, re-open case and adduce evidence of 'new invoice' - judgment given in respondent's favour - whether proper exercise of discretion in permitting respondent to amend pleading, reopen case and adduce evidence - whether appellant established *House v The King* error - whether any error in costs order in respondent's favour - held: appeal dismissed.

[Di Stasio](#)

## **Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd [2018] WASCA 213**

Court of Appeal of Western Australia

Buss P; Murphy & Mitchell JJA

Planning and development - Southern Joint Development Assessment Panel (Panel) refused development approval for development proposed by respondent - respondent sought review - State Administrative Tribunal found, on determination of 'preliminary matter', that respondent's proposed use 'properly classified' under Scheme as 'Convenience Store' not 'Service Station' ('Preliminary Decision') - Tribunal, after Preliminary Decision, heard application for review - a 'Scheme Amendment', which amended 'Service Station' definition 'came into force' after hearing, but before delivery of Tribunal's decision - Tribunal, unaware of Scheme Amendment, gave decision, granting conditional approval under Scheme - appellant appealed - primary judge dismissed appeal - held: Tribunal erroneously failed to have 'due regard' to the Scheme Amendment - appeal allowed - cross-appeal dismissed.

[Presiding Member](#)

## **Jordan v Criminal Injuries Compensation Commissioner Neasey [2018] TASFC 10**

Full Court of the Supreme Court of Tasmania

Geason J, Marshall and Porter AJJ

# Benchmark

Judicial review - criminal injuries compensation - respondent made award of compensation in favour of appellant under *Victims of Crime Assistance Act 1976* (VCA Act) - Commissioner, in exercise of discretion to deduct "pecuniary penalty", deducted amount of fines which appellant owed to Monetary Penalties Enforcement Service - appellant contended she was not given an 'opportunity to be heard' concerning whether respondent should exercise discretion which s6B(1)(a) VCA Act conferred - common ground appellant not given opportunity to be heard concerning deduction - primary judge found that discretion in VCA Act was removed by s117 *Monetary Penalties Enforcement Act 2005* (Tas) and that respondent was required to deduct debt in respect of 'enforcement order' - held: primary judge did not have certain evidence before him when he made decision - portion of deducted sum was not subject of enforcement order - Attorney-General conceded respondent had failed to afford appellant opportunity to be heard in respect of portion of sum - appeal allowed.

[Jordan](#)





# Benchmark

**To Mrs K\_\_\_\_, On Her Sending Me an English  
Christmas Plum-Cake at Paris**

**By:** Helen Maria Williams

What crowding thoughts around me wake,  
What marvels in a Christmas-cake!  
Ah say, what strange enchantment dwells  
Enclosed within its odorous cells?  
Is there no small magician bound  
Encrusted in its snowy round?  
For magic surely lurks in this,  
A cake that tells of vanished bliss;  
A cake that conjures up to view  
The early scenes, when life was new;  
When memory knew no sorrows past,  
And hope believed in joys that last! —  
Mysterious cake, whose folds contain  
Life's calendar of bliss and pain;  
That speaks of friends for ever fled,  
And wakes the tears I love to shed.  
Oft shall I breathe her cherished name  
From whose fair hand the offering came:  
For she recalls the artless smile  
Of nymphs that deck my native isle;  
Of beauty that we love to trace,  
Allied with tender, modest grace;  
Of those who, while abroad they roam,  
Retain each charm that gladdens home,  
And whose dear friendships can impart  
A Christmas banquet for the heart!

[https://en.wikipedia.org/wiki/Helen\\_Maria\\_Williams](https://en.wikipedia.org/wiki/Helen_Maria_Williams)

Helen Maria Williams (17 June 1759 – 15 December 1827) was a British novelist, poet, and translator of French-language works. A religious dissenter, she was a supporter of abolitionism and of the ideals of the French Revolution; she was imprisoned in Paris during the Reign of Terror, but nonetheless spent much of the rest of her life in France.. A controversial figure in her own time, the ..

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