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## Daily Civil Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

#### Executive Summary (1 minute read)

**Szepesvary v Weston (Trustee), in the matter of Szepesvary (Bankrupt)** (FCA) - trusts and trustees - bankruptcy - Sherriff's Office authorised to take possession of property - there should not be inquiry under s179 *Bankruptcy Act 1966* (Cth) - applicants' claims dismissed except in relation to one matter (B)

**Bookarelli Pty Ltd v Katanga Developments Pty Ltd** (NSWCA) - judicial review - construction of Consent Costs Order - 'rule of thumb' - amended summons dismissed (I B C G)

**Julia Wedding ATF The Julia Wedding Super Fund v Attorney General for NSW on behalf of State of NSW Government** (NSWCA) - summary dismissal - claims against State for negligence by public authorities - leave to appeal against dismissal of proceedings refused (I B)

**Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Limited** (NSWCA) - insurance - brothel damaged by fire and ceased trading - insurer not entitled to deny liability on basis of non-disclosure - appeal allowed (I B C G)

**Carolan v Fairfax Media Publications Pty Ltd (No 7)** (NSWSC) - defamation - plaintiff wholly successful in proceedings - permanent injunctions in respect of defamatory material refused (I)

**Skyworks v 32 Drummoyne Road** (NSWSC) - freezing order - contract - claim by builder for amounts owing under contract with developer and pursuant to side-deed - freezing order

granted (I B C G)

**Fitz Jersey v Atlas Construction Group** (NSWSC) - pleadings - discovery - security of payments - plaintiff granted leave to amend - defendant ordered to give discovery (I B C G)

## Summaries With Link (Five Minute Read)

### **Szepesvary v Weston (Trustee), in the matter of Szepesvary (Bankrupt) [2017] FCA 344**

Federal Court of Australia

Moshinsky J

Trusts and trustees - bankruptcy - first applicant and second applicant declared bankrupt - first and second respondents were trustees in bankruptcy - Federal Circuit Court declared applicants' property vested in Trustees in Bankruptcy and subsequently issued warrant of possession to Sheriff - applicants contended Sherriff's Office representatives did not serve Warrant of Possession but Seven Day Notice - applicants contended that taking of possession of Property unlawful, and that Trustees in Bankruptcy responsible - held: Sherriff's Office authorised to take possession of property - separate question whether there should be an inquiry under s179 *Bankruptcy Act 1966* (Cth) answered in the negative - applicants' claims based on s178 *Bankruptcy Act* and ss37M & 37N *Federal Court of Australia Act* dismissed, except in relation to one matter concerning provision of information and documents by first respondent.

[Szepesvary](#) (B)

### **Bookarelli Pty Ltd v Katanga Developments Pty Ltd [2017] NSWCA 69**

Court of Appeal of New South Wales

Macfarlan & Payne JJA; Sackville AJA

Judicial review - applicant sought review of Costs Assessor's quantification of costs payable pursuant to Consent Costs Order - Costs Review Panel varied Costs Assessor's determination to extent of substituting \$101,769.91 for \$103,653.41 - primary judge allowed appeal to 'very limited extent' - applicant appealed - ss367A, 373, 374, 375 & 384 *Legal Profession Act 2004* (NSW) - *Legal Profession Uniform Law* (NSW) - *Legal Profession Uniform Law Application Act 2014* (NSW) - whether primary judge misconstrued Consent Costs Order - whether erroneous application of 'rule of thumb' - held: Court did not accept applicant's construction of Consent Costs Order - amended summons dismissed.

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

### **Julia Wedding ATF The Julia Wedding Super Fund v Attorney General for NSW on behalf of State of NSW Government [2017] NSWCA 70**

Court of Appeal of New South Wales

McColl JA & Sackville AJA

Summary dismissal - applicant in capacity as trustee for The Julia Wedding Super Fund sought

to appeal against summary dismissal of proceedings against respondent State for public authorities' negligent conduct - proceedings had been summarily dismissed on basis of failure to disclose a reasonable cause of action - whether any principle, question of public importance or substantial injustice identified by applicant - whether applicant identified duty of care - held: no basis to grant leave to appeal - leave to appeal refused.

[Julia Wedding](#) (I B)

## **Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Limited [2017] NSWCA 71**

Court of Appeal of New South Wales

Meagher & Ward JJA; Sackville AJA

Insurance - appellant company owned and operated brothel - brothel's premises insured for fire and business interruption under policy renewed by respondent insurer - fire damaged premises and resulted in brothel ceasing to trade - insurer denied liability under policy on basis appellant failed to comply with disclosure obligations under *Insurance Contracts Act 1984* (Cth) concerning association with bkie gang and lapse of business registration - primary judge found respondent entitled to reduce its liability under the policy to nil on basis of non-disclosure - s5D(3)(b) *Civil Liability Act 2002* (NSW) - ss11(9)(b), 21, 28 & 57 *Insurance Contracts Act 1984* (Cth) - Sch 4, Pt 1 *Insurance Contracts Amendment Act 2013* (Cth) - ss8, 11 & 13 *Prostitution Act 1992* (ACT) - held: not established that reasonable person could be expected to know association relevant to underwriting decision, or that insurer would not have renewed policy if disclosure of association made - insured aware of lapsed registration - not established insurer would not have renewed or otherwise insured premises at time of fire if lapsed registration disclosed - appeal allowed - judgment for appellant in sum of \$500,000.

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

## **Carolan v Fairfax Media Publications Pty Ltd (No 7) [2017] NSWSC 351**

Supreme Court of New South Wales

McCallum J

Defamation - plaintiff wholly successful in defamation action arising from publication of articles in newspaper - plaintiff obtained \$300,000 in damages - plaintiff sought permanent injunctive relief requiring defamatory material to be removed from websites and archives which defendants controlled, and restraining material's publication - ss23 & 26 *Defamation Act 2005* (NSW) - held: defendants had made no overt threat to repeat defamation and did not assert entitlement to publish imputations - there was 'small risk' of 'inadvertent repetition' of imputations but Court satisfied defendants 'would react responsibly in that event' - Court not persuaded permanent injunctions should 'ordinarily follow success' in defamation action - permanent injunctions refused.

[Carolan](#) (I)

## **Skyworks v 32 Drummoyne Road [2017] NSWSC 343**

Supreme Court of New South Wales

McDougall J

Freezing orders - plaintiff agreed to construct development for first defendant - project completed - plaintiff claimed entitlement to delay costs, early completion bonus and refund of 50% of retention under contract - amounts claimed from first defendant under building contract - plaintiff claimed same amounts from second and third defendants, who were first defendant's directors, pursuant to 'Side Deed' - plaintiff sought freezing order pursuant to r25 *Uniform Civil Procedure Rules 2005* (NSW) - onus - whether danger of assets' dissipation - whether good arguable case - whether danger that prospective judgment would be unsatisfied - held: freezing order granted in form sought.

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

## **Fitz Jersey v Atlas Construction Group [2017] NSWSC 340**

Supreme Court of New South Wales

McDougall J

Pleadings - discovery - security of payments - two applications by plaintiff developer: application for discovery of documents from defendant builder and application for leave to amend summons and list statement - whether open to plaintiff to make amendment attempting to prove adjudicator lacked jurisdiction to determine application and amendment on basis of settlement agreement - held: plaintiff granted leave to amend - defendant ordered to give discovery.

[Fitz Jersey](#) (I B C G)

## CRIMINAL

### Executive Summary

**R v Fang (No. 4) (NSWSC)** - murder - offender and victim under the influence of Ice - offender sentenced to 19 years in prison with non-parole period of 14 years

**McGarvey v Mulino (NSWSC)** - criminal law - refusal to permit blood sample to be taken under *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* - appellant convicted under incorrect section of the Act - appeal allowed - conviction set aside

### Summaries With Link

## **R v Fang (No. 4) [2017] NSWSC 323**

Supreme Court of New South Wales

Johnson J

Criminal law - offender found guilty of murder - offender and victim under influence of methylamphetamine (Ice) when offender stabbed victim to death - imposition of sentence -



necessity that Court's view of facts for sentencing purposes be consistent with jury's verdict - relevance of offender's intoxication - role of addiction and drug induced psychosis - confession - contrition - remorse - facilitation of course of justice - held: offender sentenced to 19 years in prison with non-parole period of 14 years - sentence to date from 4 October 2014.

[R v Fang](#)

## **McGarvey v Mulino [2017] ACTSCFC 1**

Full Court of the Supreme Court of the Australian Capital Territory

Murrell CJ; Elkaim & Rangiah JJ

Criminal law - statutory interpretation - nurse requested that appellant permit blood sample to be taken under s15AA *Road Transport (Alcohol and Drugs) Act 1977* (ACT) - appellant refused - appellant pleaded guilty to offence under s23(1) and was convicted - whether appellant convicted under incorrect section - ss15, 15AA & 23 *Road Transport (Alcohol and Drugs) Act 1977* (ACT) - s196 *Legislation Act 2001* (ACT) - poor drafting - held: appellant committed an offence against s23(2) not s23(1) - appellant wrongly convicted - appeal allowed - conviction set aside.

[McGarvey](#)

# Benchmark

## ***II Thompson's Lunch Room—Grand Central Station Study in Whites***

By [Amy Lowell](#)

Wax-white—  
Floor, ceiling, walls.  
Ivory shadows  
Over the pavement  
Polished to cream surfaces  
By constant sweeping.  
The big room is coloured like the petals  
Of a great magnolia,  
And has a patina  
Of flower bloom  
Which makes it shine dimly  
Under the electric lamps.  
Chairs are ranged in rows  
Like sepia seeds  
Waiting fulfilment.  
The chalk-white spot of a cook's cap  
Moves un glossily against the vaguely bright wall—  
Dull chalk-white striking the retina like a blow  
Through the wavering uncertainty of steam.  
Vitreous-white of glasses with green reflections,  
Ice-green carboys, shifting—greener, bluer—with the jar of  
moving water.  
Jagged green-white bowls of pressed glass  
Rearing snow-peaks of chipped sugar  
Above the lighthouse-shaped castors  
Of grey pepper and grey-white salt.  
Grey-white placards: "Oyster Stew, Cornbeef Hash,  
Frankfurters":  
Marble slabs veined with words in meandering lines.  
Dropping on the white counter like horn notes  
Through a web of violins,  
The flat yellow lights of oranges,  
The cube-red splashes of apples,  
In high plated *épergnes*.  
The electric clock jerks every half-minute:  
"Coming!—Past!"  
"Three beef-steaks and a chicken-pie,"  
Bawled through a slide while the clock jerks heavily.



# Benchmark

A man carries a china mug of coffee to a distant chair.  
Two rice puddings and a salmon salad  
Are pushed over the counter;  
The unfulfilled chairs open to receive them.  
A spoon falls upon the floor with the impact of metal striking  
stone,  
And the sound throws across the room  
Sharp, invisible zigzags  
Of silver.

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