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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)

LFDB v SM (No 4) (FCA) - costs - interlocutory application for lump sum and release of security - appropriate to make lump sum costs order - release of security refused (I B C G)

New Zealand v Templeton (FCA) - extradition - not unjust or oppressive to surrender respondent to applicant - Acting Magistrate's decision quashed - order for surrender of respondent to applicant made (I B C G)

Re. Group Pty Ltd v Kazal (No 3) (FCA) - contempt - no-case submission partially upheld in relation to one charge - challenge to other charge rejected (I B C G)

Australian Youth & Health Foundation v Perpetual Trustee Company Ltd (No 2) (NSWCA) - judgments and orders - dispute as whether there were unresolved matters requiring further consideration - matter remitted to primary judge (I B C G)

A Ltd v J (No 2) (NSWSC) - succession - statutory will - protective jurisdiction - 'nil capacity' case - order for making of statutory will granted (B)

Application by John William Kellert (NSWSC) - trusts and trustees - executors of deceased's will granted advice concerning will - orders made (B)

IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd (VSCA) - landlord and tenant -

preliminary question - subject premises were retail premises under *Retail Leases Act 2003* (Vic)
- appeal dismissed (I B C G)

Summaries With Link (Five Minute Read)

LFDB v SM (No 4) [2017] FCA 753

Federal Court of Australia

Griffiths J

Costs - lump sum costs order - respondent filed interlocutory application seeking that applicants pay lump sum amount in relation to costs order made by Court and that security which applicants for her provided to her pursuant to Court's orders be released to her - applicants opposed respondent's interlocutory application - s43(3)(d) *Federal Court of Australia Act 1976* (Cth) - r13.01 *Federal Court Rules 2011* (Cth) - principles concerning whether to make lump sum costs order - held: appropriate to make lump sum costs order - inappropriate to release security - orders made.

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

New Zealand v Templeton [2017] FCA 745

Federal Court of Australia

Rangiah J

Extradition - applicant requested that proceedings be conducted under s34(1) *Extradition Act 1988* (Cth) - Acting Magistrate of Magistrates Court of Queensland declined to order respondent to be surrendered to New Zealand, and released respondent pursuant to s34(2) - applicant sought review of Acting Magistrate's decision - whether reliance on irrelevant considerations - whether failure to give adequate reasons - whether surrender would be unjust or oppressive - delay - prejudice - gravity of alleged offences - public interest - held: not unjust or oppressive to surrender respondent - Acting Magistrate's decision quashed - respondent to be surrendered to applicant.

[New Zealand](#) (I B C G)

Re. Group Pty Ltd v Kazal (No 3) [2017] FCA 754

Federal Court of Australia

Perram J

Contempt - applicants charged second respondent with counts of contempt of court - senior counsel for second respondent advanced no-case submission - standard of proof - ss10, 31(1)(b) & 36(1) *Copyright Act 1968* (Cth) - s136 *Evidence Act 1995* (Cth) - whether accused could be lawfully convicted - whether order's requirement was unclear - held: no-case submission accepted to certain extent in relation to one charge - challenge to other charge rejected.

[Re. Group](#) (I B C G)

Australian Youth & Health Foundation v Perpetual Trustee Company Ltd (No 2) [2017]

NSWCA 165

Court of Appeal of New South Wales
Bathurst CJ; Beazley P; Meagher JA

Judgments and orders - Court delivered judgment in appeal - parties did not agree whether Court should make order remitting matter to primary judge for further consideration - parties disputed whether there were further matters which remained unresolved - Trustee submitted there were unresolved matters including whether it was 'obliged immediately to disburse any suspended distributions' and form of any advice to be given taking account of Court's reasons - appellant contended there were no matters remaining to be addressed - held: fact of dispute between Trustee and appellant alone made it appropriate to remit proceeding for further consideration - order made.

[Australian Yarouth & Health Foundation](#) (I B C G)

A Ltd v J (No 2) [2017] NSWSC 896

Supreme Court of New South Wales
Ward CJ in Eq

Succession - statutory will - protective jurisdiction - plaintiff was manager of Child's estate appointed under *Protected Estates (Management) Act 1983* (NSW) - plaintiff sought leave pursuant to s19 *Succession Act 2006* (NSW) to apply for order under s18 *Succession Act* for making of statutory will - matter of urgency arising due to Child's state of health - testamentary capacity - 'nil capacity' case - held: Court granted leave and authorised Registrar to sign and seal will to be prepared in accordance with Court's reasons.

[A Ltd](#) (B)

Application by John William Kellert [2017] NSWSC 897

Supreme Court of New South Wales
Hallen J

Trusts and trustees - judicial advice - plaintiffs were executors of deceased's will - plaintiffs sought pursuant to s63 *Trustee Act 1925* (NSW) advice concerning deceased's will - plaintiffs sought advice whether they would be justified in treating 'mausoleum space' referred to in will on basis it was subject to Family Court orders, justified in selling or realising value of 'mausoleum space', justified in applying any abatement to proceeds of sale 'required to be applied to specific gifts to pay administration and other estate expenses' and justified in dividing balance equally between deceased's five children - held: plaintiffs granted advice sought - orders made.

[John William Kellert](#) (B)

IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178

Court of Appeal of Victoria
Warren CJ; Ferguson & Kaye JJA

Landlord and tenant - preliminary question - applicant landlord leased property to respondent

tenant who operated cool storage business using facilities built on property - respondent sought to recover money paid to applicant on basis it was not payable because leased premises were 'retail premises' under *Retail Leases Act 2003* (Vic) - Victorian Civil & Administrative Tribunal answered preliminary question: "Are the subject premises retail premises under the Retail Leases Act 2003?" - answer turned on whether property used for 'retail provision of services' - Tribunal found property not used for 'retail provision of services' and answered question in negative - trial judge allowed appeal - applicant sought to appeal - ultimate consumer test - type of service provided - whether service generally available for fee - held: nothing to excluded services from being retail services - appeal dismissed.

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

CRIMINAL

Executive Summary

BM v R (NSWCCA) - criminal law - sexual offences against child under 10 years - no error in trial judge's directions - verdicts not unsafe and unsatisfactory - appeal dismissed

R v Savage (QCA) - criminal law - murder - trial judge's remarks concerning indigenous witnesses did not contravene s632(3) *Criminal Code* (Qld), or involve error or irregularity - appeal against conviction dismissed

Summaries With Link

BM v R [2017] NSWCCA 133

Court of Criminal Appeal of New South Wales

Basten JA; Adamson & Campbel JJ

Criminal law - sexual offences against child under 10 years - Director of Public Prosecutions presented indictment against applicant containing count of indecent assault, two counts of acts of indecency and count of sexual intercourse - accused was de facto partner of complainant's aunt - applicant convicted on all counts - applicant appeal against conviction, contending there was misdirection by trial judge as to accused's evidence, misdirection as to reliability of complainant's evidence due to failure to refer to possibility jury might discount complainant's reliability because of aunt's evidence', and that verdicts were "unsafe and [un]satisfactory" - first limb of s6(1) *Criminal Appeal Act 1912* (NSW) - whether verdicts unreasonable and unsupportable on evidence - whether trial judge placed 'an evidentiary onus' on accused - held: trial judge's directions 'could have left the jury in no doubt as to the burden of proof borne by the prosecution' - no error in direction concerning complainant's reliability - open to jury to convict applicant - appeal dismissed.



[BM](#)

R v Savage [2017] QCA 139

Court of Appeal of Queensland

Gotterson & McMurdo JJA; Douglas J

Criminal law - evidence of indigenous witnesses - appellant was convicted of murder - appellant appealed against conviction on ground trial judge erred in directing the jury concerning assessment of evidence of Indigenous witnesses.” - appellant contended that trial judge had suggested, in contravention of s632(3) *Criminal Code* (Qld), that ‘the law regarded indigenous persons as unreliable witnesses’ - appellant also contended that trial judge’s remarks involved ‘error of law or an irregularity which could have affected the outcome’ - held: trial judge’s comments did not contravene s632(3) or involve error or irregularity - appeal dismissed.

[R v Savage](#)



Benchmark

Sonnet I

by [Henry Kendall](#)

I

I purposed once to take my pen and write,
Not songs, like some, tormented and awry
With passion, but a cunning harmony
Of words and music caught from glen and height,
And lucid colours born of woodland light
And shining places where the sea-streams lie.
But this was when the heat of youth glowed white,
And since I've put the faded purpose by,
I have no faultless fruits to offer you
Who read this book; but certain syllables
Herein are borrowed from unfooted dells
And secret hollows dear to noontide dew;
And these at least, though far between and few,
May catch the sense like subtle forest spells.

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