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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)

**Royal v El Ali** (FCA) - bankruptcy - voidable transactions - declarations granted to trustee of bankrupt estate and bankrupt's creditors (I B C G)

**Supercharge Batteries Pty Ltd v Ozkirci** (NSWSC) - motor vehicle accident - Local Court Appeal - Magistrates reasons finding in favour of plaintiff on liability were adequate - leave to appeal on mixed question of law and fact refused - appeal dismissed (I B C G)

**RHG Mortgage Corporation Limited v Saunders** (NSWSC) - default judgment - possession - no bona fide defence or explanation for delay - not in interests of justice to set aside default judgment - notice of motion dismissed (I B C G)

**Revell v Revell** (NSWSC) - succession - family provision - legacy left to plaintiff in testator's Will was adequate - summons dismissed (I B C G)

**Mackinlay v Corlett** (VSC) - judicial review - Panel should have concluded plaintiff sustained a compensable injury - opinion quashed (I B C G)

**Clare v Bedelis** (VSC) - property law - restrictive covenant - determination of preliminary question: 'does the building that is being constructed on the defendant's property breach the covenant' (I B C G)

**Rogers v Rogers Young** (WASC) - wills and estates - executor granted directions concerning proper construction of home-made will (B)

## Summaries With Link (Five Minute Read)

### **Royal v El Ali [2016] FCA 782**

Federal Court of Australia

Davies J

Bankruptcy - voidable transactions - trustee of bankrupt estate and creditors of bankrupt sought declarations various transactions were void pursuant to s37A *Conveyancing Act 1919* (NSW) and/or s121 *Bankruptcy Act 1966* (Cth) - s54(3) *Duties Act 1997* (NSW) - s172 *Property Law Act 1958* (Vic) - *Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 1996* (Cth) - held: bankrupt had procured transfers in knowledge of creditors' proceedings against him and of freezing orders - bankrupt was controlling mind of companies which held properties which were transferred - bankrupt had procured impugned transactions to safeguard assets from creditors 'by placing them with friendly third parties' - applicants entitled to relief sought.

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

### **Supercharge Batteries Pty Ltd v Ozkirci [2016] NSWSC 928**

Supreme Court of New South Wales

Harrison AsJ

Motor vehicle accident - Local Court appeal - parties had agreed on quantum in proceedings - Magistrate found in favour of plaintiff on liability - first and second defendants contended Magistrate failed to give adequate reasons for decision on liability and for decision not to find contributory negligence - first and second defendants also sought to appeal on a mixed question of law and fact, contending Magistrate's findings not supported by evidence - held: Magistrate's reasons were adequate - leave to appeal refused on the mixed question of law and fact - appeal dismissed.

[Supercharge Batteries](#) (I B C G)

### **RHG Mortgage Corporation Limited v Saunders [2016] NSWSC 929**

Supreme Court of New South Wales

Harrison AsJ

Default judgment - real property - possession - plaintiff sought possession of property - defendant mortgaged property to plaintiff as security under loan agreement - defendant did not comply with default notice - plaintiff obtained default judgment for possession - defendant sought orders setting aside judgment and order that defendant file defence - r35.16 *Uniform Civil Procedure Rules 2005* (NSW) - *Consumer Credit (New South Wales) Code* (NSW) - *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) - *National Consumer Credit Protection Act 2009* (Cth) - *National Credit Code* (Cth) - held no bona fide defence - no adequate explanation for defendant's delay - no in interests of justice

to set aside default judgment - notice of motion dismissed.

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

## **Revell v Revell [2016] NSWSC 947**

Supreme Court of New South Wales

Pembroke J

Succession - 60 year old son sought provision from deceased father's estate pursuant to *Succession Act 2006* (NSW) - by Will testator had given 1.5 million dollar legacy to plaintiff and daughter and left residue of estate to wife - plaintiff not satisfied with legacy and sought 3 million dollars as appropriate legacy - testator's statement under s100 *Succession Act 2006* (NSW) - 'freedom of testamentary disposition' - held: plaintiff's legacy was adequate for plaintiff's proper maintenance and advancement in life - summons dismissed.

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

## **Mackinlay v Corlett [2016] VSC 376**

Supreme Court of Victoria

J Forrest J

Judicial review - plaintiff sought judicial review of decision of Medical Panel that injuries not related to employment - plaintiff sought to quash decision on basis of jurisdictional error and denial of procedural fairness - *O56 Supreme Court (General Civil Procedure) Rules 2015* (Vic) - whether 'no injury' conclusion open on evidence - reliance on DVD - held: Panel should have concluded plaintiff sustained compensable injury - jurisdictional error established - opinion quashed.

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

## **Clare v Bedelis [2016] VSC 381**

Supreme Court of Victoria

Derham AsJ

Property law - restrictive covenant - determination of preliminary question - plaintiffs were owners of land who claimed benefit of covenant burdening defendant's land - covenant restricted owner of land from erecting dwelling house other with walls of brick or stone and from being more than one storey - plaintiff claimed defendant breached covenant and sought permanent injunction, orders for demolition of house and damages - preliminary question was: 'does the building that is being constructed on the defendant's property breach the covenant' - held: Court found house under construction not more than one storey and was not satisfied house was dwelling house other than with walls of brick or stone.

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

## **Rogers v Rogers Young [2016] WASC 208**

Supreme Court of Western Australia

Master Sanderson

Wills and estates - plaintiff executor sought Court's directions pursuant to s45 *Administration Act*

# Benchmark

1903 (WA) and s92 *Trustees Act 1962* (WA) proper interpretation of homemade will - whether first defendant acquired 'absolute vested and indefeasible interest upon reaching the age of 18 years, or upon reaching the age of 25 years' - meaning of 'any minor beneficiary/ies' - *Administration Act 1903* (WA) - *Trustees Act 1962* (WA) - *Wills Act 1970* (WA) - held: directions given.

[Rogers](#) (B)

## CRIMINAL

### Executive Summary

**Siafakas v R** (NSWCCA) - Criminal law - conviction appeal - mental element - duty to give reasons - whether verdicts unreasonable - 2 counts of knowingly take part in manufacture of prohibited drug (s24(2) *Drug Misuse and Trafficking Act 1985* (NSW) (DMTA)), one count of possessing precursor intended for use in manufacture of prohibited drug (s24A(1) DMTA) - appellant knowingly took part in the manufacture of a precursor - unknown to the appellant the precursor was also a prohibited drug - Crown argued that the mental element for the offence under s24(2) DMTA was established where accused knew what he was doing was unlawful - test applied by primary judge erroneous - knowledge that drug being manufactured was prohibited (or knowledge of actual precursor being manufactured) was required - trial judge's reasons inadequate - appeal allowed in part - appellant resentenced

**R v Blackmore** (QCA) - Criminal law - jury misconduct - juror experiencing distress and pressure - after separation - juror communicated with his wife and she contacted registry staff - whether contravention in breach of ss50, 53, 54 *Jury Act 1995* (Qld) - jury reconvened with distressed juror - jury unable to agree and trial judge gave a majority verdict direction - half an hour later the juror applied to be discharged - juror discharged and jury continued deliberating with reduced number (s57 *Jury Act 1995*) - appellant convicted - communications did not constitute an irregularity - circumstances in which discretion to permit jury to continue with reduced number considered - authorities examined - conviction appeal dismissed

### Summaries With Link

#### **Siafakas v R [2016] NSWCCA 100**

Court of Criminal Appeal New South Wales

Leeming JA, Harrison & Schmidt JJ

Criminal law - conviction appeal - mental element - duty to give reasons - whether verdicts unreasonable - 2 counts of knowingly take part in manufacture of prohibited drug (s24(2) *Drug Misuse and Trafficking Act 1985* (NSW) (DMTA)), one count of possessing precursor intended



# Benchmark

for use in manufacture of prohibited drug (s24A(1) DMTA) - appellant knowingly took part in the manufacture of a precursor - unknown to the appellant the precursor was also a prohibited drug - Crown argued that the mental element for the offence under s24(2) DMTA was established where accused knew what he was doing was unlawful - identification of the legislative intent as to the elements of the s24(2) DMTA offence - analysis of Sheller JA in *R v CWW* (1993) 32 NSWLR 348 approved - intention required is to manufacture a substance which is a prohibited drug as opposed to manufacturing some substance which turns out to be a prohibited drug - *R v Van Xuan Bui* [2005] VSCA 300; *Yousef Jidah v R* [2014] NSWCCA 270 approved - duty to give reasons requires an exposure of the reasoning process - s132(2) *Criminal Procedure Act 1986* (NSW) considered - *Fleming v The Queen* 197 CLR 250 applied - held: primary judge applied erroneous test - knowledge that drug being manufactured was a prohibited drug, or was an identified precursor, was required - mere knowledge that the appellant was engaged in an unlawful activity was insufficient - the reasons provided by the trial judge failed to link the finding as to his state of mind with the evidence supporting that conclusion constituted error - conviction on count 1 set aside - otherwise verdicts not unreasonable - leave to appeal granted - appeal granted in part - appellant resentenced.

[Saiafakas](#)

## **R v Blackmore [2016] QCA 181**

Queensland Court of Appeal

Margaret McMurdo P, Mullins & Douglas JJ

Criminal law - jury misconduct - juror experiencing distress and pressure and after separation juror communicated with his wife and she contacted registry staff - whether contravention in breach of ss50, 53, 54 *Jury Act 1995* (Qld) - jury reconvened with distressed juror and continued deliberations - jury unable to agree and trial judge gave a majority verdict direction - half an hour later the distressed juror applied to be discharged - juror discharge and jury continued deliberating with reduced number - grounds of appeal alleged the juror's communication with his wife and her communication with the registry were in breach of ss50, 53, 54 *Jury Act* and that the judge erred in applying s57 *Jury Act* and permitting the jury to continue with a reduced number - principles relevant to the exercise of the discretion permitting a trial to continue with a reduced number of jurors considered - authorities examined (*Wu v The Queen* (1999) 199 CLR 99; *BG v R* A Crim R 215; *R v Roberts* [2005] 1 Qd R 408) - held: the communications did not constitute an irregularity as the judge had permitted the jury to separate under s53 - judge correctly applied the two steps to determine whether the juror should be discharged and, secondly, whether the trial should continue with the reduced number - however it should not be assumed that because a juror is discharged the trial should automatically continue - if there is evidence that the discharged juror is a dissenting juror the trial should not continue - in the absence of evidence here that the discharged juror was dissenting, there was no miscarriage of justice - appeal dismissed.

[Blackmore](#)



## Robin Hood

By [John Keats](#)

### TO A FRIEND

No! those days are gone away  
And their hours are old and gray,  
And their minutes buried all  
Under the down-trodden pall  
Of the leaves of many years:  
Many times have winter's shears,  
Frozen North, and chilling East,  
Sounded tempests to the feast  
Of the forest's whispering fleeces,  
Since men knew nor rent nor leases.

No, the bugle sounds no more,  
And the twanging bow no more;  
Silent is the ivory shrill  
Past the heath and up the hill;  
There is no mid-forest laugh,  
Where lone Echo gives the half  
To some wight, amaz'd to hear  
Jesting, deep in forest drear.

On the fairest time of June  
You may go, with sun or moon,  
Or the seven stars to light you,  
Or the polar ray to right you;  
But you never may behold  
Little John, or Robin bold;  
Never one, of all the clan,  
Thrumming on an empty can  
Some old hunting ditty, while  
He doth his green way beguile  
To fair hostess Merriment,  
Down beside the pasture Trent;  
For he left the merry tale  
Messenger for spicy ale.

Gone, the merry morris din;  
Gone, the song of Gamelyn;



# Benchmark

Gone, the tough-belted outlaw  
Idling in the "grenè shawe";  
All are gone away and past!  
And if Robin should be cast  
Sudden from his turfed grave,  
And if Marian should have  
Once again her forest days,  
She would weep, and he would craze:  
He would swear, for all his oaks,  
Fall'n beneath the dockyard strokes,  
Have rotted on the briny seas;  
She would weep that her wild bees  
Sang not to her—strange! that honey  
Can't be got without hard money!

So it is: yet let us sing,  
Honour to the old bow-string!  
Honour to the bugle-horn!  
Honour to the woods unshorn!  
Honour to the Lincoln green!  
Honour to the archer keen!  
Honour to tight little John,  
And the horse he rode upon!  
Honour to bold Robin Hood,  
Sleeping in the underwood!  
Honour to maid Marian,  
And to all the Sherwood-clan!  
Though their days have hurried by  
Let us two a burden try.

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