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

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

### Executive Summary (1 minute read)

**Shearwood (Trustee), in the matter of Allied Resource Partners Pty Ltd v Allied Resource Partners Pty Ltd** (FCA) - corporations - shareholders agreement - removal of director of company and appointment of director were 'beyond power, invalid and ineffectual' - declarations and orders granted (I B C G)

**Goode v England** (NSWCA) - negligence - recreational activity - appellant professional jockey injured in fall from horse during race - appellant's claim against respondent jockey precluded by s5L *Civil Liability Act 2002* (NSW) - appeal against judgment in respondent's favour dismissed (I B C G)

**Inghams Enterprises Pty Ltd v Belokoski** (NSWCA) - bias - workers compensation - challenge to decision of Deputy President to confirm arbitrator's decision in worker's favour - allegation of reasonable apprehension of bias failed - appeal dismissed (I B C G)

**Habrisko v Palijan** (NSWSC) - wills and estates - succession - family provision - son of deceased refused order for provision from deceased mother's estate - summons dismissed (B)

**Ubertas Funds Management Pty Ltd v PwC (release from implied undertaking)** (VSC) - judgments and orders - *Harman* undertaking - Court satisfied special circumstances justified release from obligation in respect of documents - orders granted (I B C G)

**Mowatt & ors v White Horses Pty Ltd** (QSC) - injunction - corporations - interlocutory injunction to prevent extraordinary general meeting in respect of company's winding up and appointment of directors as liquidators - application dismissed (I B C G)

**Icechest Corp Pty Ltd v Quan** (WASC) - costs - leases and tenancies - plaintiff not wholly or substantially successful in proceedings - plaintiff to pay defendants' costs on indemnity basis (I B C G)

## Summaries With Link (Five Minute Read)

### **Shearwood (Trustee), in the matter of Allied Resource Partners Pty Ltd v Allied Resource Partners Pty Ltd [2017] FCA 1451**

Federal Court of Australia

Markovic J

Corporations - trustee for superannuation fund (Mr Shearwood) and Mr Shearwood were plaintiffs - plaintiffs were shareholders in first defendant company (Allied) - plaintiffs sought declarations and orders concerning composition of Allied's board - whether, under shareholders' agreement, Mr Shearwood was removed as a director of Allied and second defendant appointed as director of Allied by Allied's remaining director - discontinuation of balance of claims - ss1322(2), 1322(4) & 1322(6) *Corporations Act 2001* (Cth) - held: Mr Shearwood's purported removal as director, and appointment of second defendant as director, was 'beyond power, invalid and ineffectual' - declarations and orders granted.

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

### **Goode v England [2017] NSWCA 311**

Court of Appeal of New South Wales

Beazley P; Meagher & Leeming JJA

Negligence - recreational activity - appellant injured in fall while riding in race as professional jockey - respondent was riding horse in same race - appellant sued respondent in negligence or breach of duty - appellant contended the way respondent was riding caused interference with appellant and horse, resulting in the fall and injuries - appellant appealed against trial judge's decision in respondent's favour - whether trial judge made factual error concerning horses' movement - whether erroneous construction of s5L *Civil Liability Act 2002* (NSW) - *Civil Liability (Personal Responsibility) Amendment Bill 2002* (NSW) - whether s5L distinguished between sports participated in for recreational purposes and sports participated in for professional purposes. held: horse racing was recreational activity under s5K of the Act - appellant's claim precluded by s5L - appeal dismissed.

[View Decision](#) (I B C G)

### **Inghams Enterprises Pty Ltd v Belokoski [2017] NSWCA 313**

Court of Appeal of New South Wales

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McColl & Basten JJA; Bellew J

Bias - workers compensation - Deputy President confirmed arbitrator's determination in worker's favour in proceedings - appellant challenged Deputy President's decision, contending there was reasonable apprehension of bias and that President should have disqualified himself - ss353 & 355 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - comment allegedly made by Deputy President as arbitrator in earlier proceeding during telephone conference - contention Deputy President's erroneous refusal to recuse himself was 'was compounded by [his] subsequent conduct of the appeal' - ground of appeal arising from Deputy President's alleged management, as conciliator, of conciliation hearing - held: grounds of appeal not made out - appeal dismissed.

[View Decision](#) (I B C G)

## **Habrisko v Palijan [2017] NSWSC 1695**

Supreme Court of New South Wales

Kunc J

Succession - family provision - plaintiff sought provision from deceased mother's estate pursuant to s59 *Succession Act 2006* (NSW) - deceased left entire estate to defendant, who was plaintiff's sister and daughter of deceased - deceased and husband had financially assisted plaintiff during lifetimes, whereas defendant had not received assistance - deceased had purchased property with defendant under agreement defendant would care for deceased and receive estate - defendant cared for deceased until her death - contingencies or vicissitudes - held: Court not satisfied Will made inadequate provision for plaintiff - even if inadequate provision made, in exercise of discretion Court would refused to make order for additional provision - summons dismissed.

[View Decision](#) (B)

## **Ubertas Funds Management Pty Ltd v PwC (release from implied undertaking) [2017] VSC 735**

Supreme Court of Victoria

Macaulay J

Judgments and orders - *Harman* undertaking - plaintiff and defendant in proceedings sought release from obligation and implied undertaking so that they could use documents which parties had disclosed in prior civil proceeding - s27(1) *Civil Procedure Act 2010* (Vic) - special circumstances - whether to release defendant from obligation - held: Court satisfied that there were special circumstances justifying release from obligation - orders granted.

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

## **Mowatt & ors v White Horses Pty Ltd [2017] QSC 292**

Supreme Court of Queensland

Bond J

Injunction - corporations - respondent home unit company was proposing to hold extraordinary general meeting at which shareholders would put resolutions concerning voluntary winding up of

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company and appointment of company's directors as liquidators - six unit holders sought interlocutory injunction to restrain respondent from proceeding with meeting, considering or passing any resolution for voluntary liquidators' appointment, and selling or taking steps to sell land - *Corporations Act 2001* (Cth) - held: applicants failed to establish serious question to be tried that 'threatened conduct' was unlawful or that their rights would be otherwise infringed - interlocutory application dismissed.

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

## **Icechest Corp Pty Ltd v Quan [2017] WASC 345**

Supreme Court of Western Australia

Le Miere J

Costs - leases and tenancies - plaintiff was lessee of property defendants owned - defendants gave plaintiff default notice for failure to pay rent and outgoings, and to deliver security deposit - plaintiff did not remedy failure to pay amounts in accordance with time limit in default notice - defendants terminated lease - plaintiff claimed damages for lease's wrongful termination - plaintiff claimed that it paid outstanding amounts and sought relief from lease's forfeiture - plaintiff obtained interlocutory injunction which required defendants to give plaintiff possession of premises and restrained them from taking possession - plaintiff withdrew wrongful termination claim - Court discharged interim injunction by consent - Court ordered that plaintiff be relieved from lease's forfeiture - held: plaintiff not wholly or substantially successful in proceedings - plaintiff to pay defendants' costs on indemnity basis, and reimbursement for cost of security guard engaged at time lease terminated.

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

## CRIMINAL

### Executive Summary

**Binns v R** (NSWCCA) - criminal law - sexual intercourse with person under 10 years - open to jury to find applicant guilty - leave to appeal refused

**R v Lazarus** (NSWCCA) - criminal law - sexual intercourse without consent - respondent not guilty - permissible for trial judge to revise judgment due to typographical error - grounds of appeal failed - Crown appeal dismissed

### Summaries With Link

#### **Binns v R [2017] NSWCCA 280**

Court of Criminal Appeal of New South Wales



Basten JA; R A Hulme & Garling JJ

Criminal law - applicant was convicted in 2015 on one count of sexual intercourse with person under 10 years - applicant filed notice of intention to appeal which lapsed in 2016 - applicant sought leave to appeal - ground of appeal concerning absence of direction as to forensic disadvantage due to delay in prosecution - whether trial judge obliged to provide warning - ground of appeal concerning trial judge's alleged failure to direct jury as to complainant's evidence - ground of appeal concerning directions given as to evidence of the applicant's partner, and evidence of the complainant's friend, who was the daughter of the applicant's partner - whether verdict unreasonable - r4 *Criminal Appeal Rules* - s5(1) *Criminal Appeal Act 1912* (NSW) - held: Court of view it was appropriate to extend time to appeal - it was open to jury to find applicant guilty - leave to appeal refused.

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## **R v Lazarus [2017] NSWCCA 279**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Davies & Bellew JJ

Criminal law - sexual intercourse without consent - respondent charged under s61I *Crimes Act 1900* (NSW) with having sexual intercourse with complainant without complainant's consent - respondent found guilty - Court quashed respondent's conviction and ordered retrial - order made that re-trial proceed before judge alone - trial judge found respondent not guilty - Crown appealed - whether trial judge erroneously took respondent's self-induced intoxication into account in determining whether he had no reasonable grounds to believe complainant consented - whether trial judge erroneously failed, in making finding as to respondent's knowledge of consent, to direct herself that she must have regard to any steps taken by respondent to ascertain whether complainant consented - whether amendment which trial judge made to her reasons was beyond permissible scope - held: permissible for trial judge to revise judgment - Crown appeal dismissed.

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## **Of Love, A Sonnet**

**By:** Robert Herrick

How love came in I do not know,  
Whether by the eye, or ear, or no;  
Or whether with the soul it came  
(At first) infused with the same;  
Whether in part 'tis here or there,  
Or, like the soul, whole everywhere,  
This troubles me: but I as well  
As any other this can tell:  
That when from hence she does depart  
The outlet then is from the heart.

[https://en.wikipedia.org/wiki/Robert\\_Herrick\\_\(poet\)](https://en.wikipedia.org/wiki/Robert_Herrick_(poet))

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