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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)

**Kimberley Diamonds Ltd v Arnautovic** (FCAFC) - corporations - primary judge erred in setting aside examination summons for abuse of process and in setting aside order for production - appeal allowed (I B C G)

**Aquagenics Pty Limited (in liquidation) v Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663** (FCA) - insurance - professional indemnity insurance policy - applicant entitled to be indemnified by respondents in respect of amount awarded to Council by Arbitrator (I B C G)

**Cam & Bear Pty Ltd v McGoldrick** (NSWSC) - negligence - trade practices - misleading or deceptive conduct - breach of duty by defendant auditor was not 'necessary condition to the occurrence of harm' - judgment for defendant (I B C G)

**Baker-Crooks v Separovich** (NSWSC) - real property - mortgage - breach of obligation to provide certificate to title to enable registration of mortgage - plaintiff entitled to exercise power of sale and to possession of property (I B C G)

**Shi v Benhamou Designs Pty Ltd** (NSWSC) - security for costs - application for security for costs of defending cross-claim dismissed - orders for production granted in more limited scope than sought (I B C G)

**Williams v Coles Supermarkets Aust Pty Ltd (VSC)** - judicial review - retrospective operation of new thresholds inserted in the *Wrongs Act 1958 (Vic)* - Medical Panel applied incorrect test for non-economic loss - consent orders made (I B C G)

**ASIC v Managed Investments Ltd and Ors (No 10) (QSC)** - judgments and orders - penalty decision - corporations - managed investment scheme - directors' duties - supplementary factual findings - declarations and orders (I B C G)

## Summaries With Link (Five Minute Read)

### **Kimberley Diamonds Ltd v Arnautovic [2017] FCAFC 91**

Full Court of the Federal Court of Australia

Foster, Wigney & Markovic JJ

Corporations - applicant placed into voluntary administration - administrators appointed - respondent was liquidator - Australian Securities and Investments Commission (ASIC) authorised applicant to apply under s596A *Corporations Act 2001 (Cth)* for summons to examine respondent about sales process - Registrar issued summons and order for production addressed to respondent - respondent sought discharge of summons for abuse of process, contending it 'placed an unnecessary imposition on the liquidator in circumstances where there was no realistic prospect of the examination having any utility' - primary judge granted permanent stay of examination summons for abuse of process and set aside order for production - whether error by primary judge in permanently staying examination summons on basis of abuse of process - whether misconstruction of statutory scheme in Pt 5.9 Corporations Act causing primary judge to take into account irrelevant considerations or reverse onus of proof - held: applicant made out main grounds of appeal - appeal allowed - orders set aside.

[Kimberley Diamonds](#) (I B C G)

### **Aquagenics Pty Limited (in liquidation) v Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663 [2017] FCA 634**

Federal Court of Australia

Davies J

Insurance contract - respondents were applicant's professional indemnity insurers - insurers under policy agreed to pay all sums applicant became 'legally obliged to pay ... as a result of any claim first made against the company ... and notified to [the insurers] during the period of the policy arising out of any wrongful act committed by [the company] in the course of [its] professional activities' - dispute arose between applicant and Council concerning work applicant was performing for Council under agreement - Arbitrator awarded Council damages interest, legal costs and fees - applicant claimed Council made claim against it during the period of policy and that it was entitled to indemnity for amount awarded to Council - s57 *Insurance Contracts Act 1984 (Cth)* - held: applicant entitled to be indemnified by insurers for claimed amounts - judgment for applicant.

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

**Cam & Bear Pty Ltd v McGoldrick [2016] NSWSC 1894**

Supreme Court of New South Wales

Rothman J

Negligence - trade practices - misleading or deceptive conduct - plaintiff was corporate trustee of fund of which defendant was auditor - plaintiff sued defendant in negligence and/or for breach of duty of care, contending audit “misrepresented the nature of certain ‘assets’”, with result plaintiff relied on liquidity of fund and losses were incurred - s12GF *Australian Securities and Investments Commission Act 2001* (Cth) - s68 *Fair Trading Act 1987* (NSW) - s236 *Australian Consumer Law* (NSW) - held: defendant breached duty of care but Court not satisfied that defendant’s breach was ‘a necessary condition to the occurrence of harm that may have been caused’ - judgment for defendant.

[Cam & Bear](#) (I B C G)

**Baker-Crooks v Separovich [2017] NSWSC 708**

Supreme Court of New South Wales

Davies J

Real property - mortgage - plaintiff sought judgment for possession or declaration of entitlement to exercise power of sale, and orders for specific performance of Deed of loan and mortgage - mortgage not registered due to defendant’s failure to provide certificate of title as required under parties’ arrangement - no defence filed - plaintiff sought default judgment under r16.10 *Uniform Civil Procedure Rules 2005* (NSW) - plaintiff was not registered mortgagee so default judgment for possession could not be given in usual way - held: defendant breached obligation to provide certificate of title to enable registration of mortgage - plaintiff entitled to exercise power of sale provided in mortgage and to possession of property - declarations and order made.

[Baker-Crooks](#) (I B C G)

**Shi v Benhamou Designs Pty Ltd [2017] NSWSC 735**

Supreme Court of New South Wales

Ward CJ in Eq

Security for costs - plaintiff/cross-defendant sought that cross-claimant provide security for costs of defending cross-claim, and also sought production of documents in notice to produce, or discovery of categories of documents - s1335 *Corporations Act 2001* (Cth) - r42.21(1) *Uniform Civil Procedure Rules 2005* (NSW) - held: plaintiff/cross-defendant did not establish reason to believe cross-claimant would be unable to pay litigations’ costs if unsuccessful - application for security for costs dismissed - orders made for production of documents in more limited scope than sought.

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

**Williams v Coles Supermarkets Aust Pty Ltd [2017] VSC 318**

# Benchmark

Supreme Court of Victoria

Ginnane J

Judicial review - plaintiff sued first and fourth defendants including for non-economic loss, which was subject to Pt VBA *Wrongs Act 1958* (Vic) - fourth defendant referred plaintiff to Medical Panel for determination whether plaintiff met threshold for claiming damages for non-economic loss - Medical Panel determined threshold under Pt VBA not met - plaintiff sought judicial review of Medical Panel's determination - Court of Appeal in *Mitchell v Latrobe Regional Hospital* [2016] VSCA 342 found new thresholds inserted into s28LB had retrospective effect - parties sought orders enabling plaintiff to be re-examined by Medical Panel - held: Panel had applied incorrect test for non-economic loss - Court satisfied it should make orders sought subject to one qualification.

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

## **ASIC v Managed Investments Ltd and Ors (No 10) [2017] QSC 96**

Supreme Court of Queensland

Douglas J

Judgments and orders - penalty decision - corporations - managed investment scheme - directors' duties - supplementary factual findings - proceeding concerned conduct relating to money held on trust under Pt 5C *Corporations Act 2001* (Cth) - money totalling \$147.5 million paid from Premium Income Fund for which company (MFSIM) was responsible entity - money drawn down for improper purposes - Court found five defendants engaged in dishonest conduct in breach of provisions of Corporations Act or were knowingly involved in contraventions by MFSIM - ASIC sought supplementary factual findings clarifying reasons for making declarations of contraventions - need for community protection - deterrence - whether to make penalty orders and compensation orders - applicable periods of disqualification - held: declarations and orders made.

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

## CRIMINAL

### Executive Summary

**R v Collins** (QCA) - criminal law - sexual offences - evidence - prior inconsistent statement - misdirection by trial judge to jury but no substantial miscarriage of justice - appeal dismissed

### Summaries With Link

#### **R v Collins [2017] QCA 113**

Court of Appeal of Queensland





Gotterson & Morrison JJA; Burns J

Criminal law - sexual offences - evidence - prior inconsistent statement - appellant convicted of sexual offences - after incident said to have occurred, complainant had telephoned her mother about it - at committal hearing and trial mother asked to give account of conversation with complainant and to recall the words complainant had spoken - account which complainant's mother gave in evidence in chief was different to account she gave at committal hearing - appellant contended there had been a 'miscarriage of justice occurred by reason of the way in which the learned trial judge directed the jury as to the use that could be made' of account of complainant's mother at committal hearing - held: there had been a misdirection in relation to prior inconsistent statement but no substantial miscarriage of justice had occurred - appellant's guilty had been proved beyond reasonable doubt - appeal dismissed.

[Collins](#)

# Benchmark

**When that I was and a little tiny boy (With hey, ho, the wind and the rain)**

*(from Twelfth Night)*

By [William Shakespeare](#)

When that I was and a little tiny boy,  
With hey, ho, the wind and the rain,  
A foolish thing was but a toy,  
For the rain it raineth every day.

But when I came to man's estate,  
With hey, ho, the wind and the rain,  
'Gainst knaves and thieves men shut their gate,  
For the rain it raineth every day.

But when I came, alas! to wive,  
With hey, ho, the wind and the rain,  
By swaggering could I never thrive,  
For the rain it raineth every day.

But when I came unto my beds,  
With hey, ho, the wind and the rain,  
With toss-pots still had drunken heads,  
For the rain it raineth every day.

A great while ago the world begun,  
With hey, ho, the wind and the rain,  
But that's all one, our play is done,  
And we'll strive to please you every day.

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