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

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### Executive Summary (1 minute read)

**Szeto v Situ (NSWCA)** - equity - trusts and trustees - evidence - erroneous failure to take into account evidence of appellant's financial contribution to purchase of property - appeal allowed - retrial (I B C G)

**Springfield v Duncombe (NSWCA)** - negligence - appellant injured when she fell and hit head at house owned by sister - sister not liable - no error in trial judge's factual findings - appeal dismissed (I B C G)

**Fairall v Hobbs (No 2) (NSWCA)** - costs - indemnity costs of trial awarded to successful appellants on basis of offer of compromise - indemnity costs in respect of appeal refused (I B C G)

**AGL Energy Limited v Jemena Gas Networks (NSW) Ltd (NSWSC)** - commercial arbitration - referral of action arising from two Reference Service Agreements refused - motion dismissed (I B C G)

**Estate of Beryl Lee Hordern (Deceased); Homersham v Carr (NSWSC)** - wills and estates - deceased did not have testamentary capacity at time of making 2004 will - plaintiff granted administration with will annexed in solemn form in respect of a will deceased made in 2001 (B)

**Braham v ACN 101 482 580 Pty Ltd (VSC)** - discovery - professional negligence - misleading and/or deceptive conduct - first defendant granted orders for further discovery of plaintiff's tax

returns (I B C G)

**Deputy Commissioner of Taxation v Casley** (WASC) - summary judgment - taxation - jurisdiction - 'straw man' argument had no merit - defendants had no defence to claims - summary judgment granted (B)

## Summaries With Link (Five Minute Read)

### **Szeto v Situ [2017] NSWCA 136**

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Leeming JJA

Equity - trusts and trustees - evidence - appellant claimed 50% interest in property of which respondent was registered proprietor - appellant contended that prior to property's purchase she and respondent agreed it would be registered in respondent's name but she would have equal interest in it - appellant contended she paid deposit and shortfall - respondent contended arrangement with appellant was that she would sign loan contract to help him get loan, that he was responsible for property's purchase, and that appellant would have no interest in property - appellant alleged a 'common intention trust' or benefit of resulting trust arising from her contribution to property's acquisition - primary judge dismissed appellant's claim, finding she had no interest in property - appellant appealed - held: primary judge erroneously failed to address evidence of financial contributions appellant made to property's purchase price - retrial ordered.

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

### **Springfield v Duncombe [2017] NSWCA 137**

Court of Appeal of New South Wales

Basten JA, Emmett AJA & Adamson J

Negligence - appellant suffered severe blow to head while returning from sister's apartment to apartment she occupied in house owned by sister - injury occurred when appellant fell and struck head on vehicle parked in garage - appellant contended sister negligent for failure to install balustrade on side of steps facing garage - trial judge dismissed appellant's claim against sister on basis she had not established breach of duty - ss5B, 5D, 5E, 5M & 32 *Civil Liability Act 2002* (NSW) - whether failure to give reasons concerning competing inferences - whether misdirection concerning burden of proof - whether erroneous failure to be satisfied as to mechanism of fall - whether erroneous failure to find door's position in relation to timber stairs created risk of loss of balance, and that there was a defect in stairs - held: no error established in respect of trial judge's factual findings - appeal dismissed.

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

### **Fairall v Hobbs (No 2) [2017] NSWCA 133**

Court of Appeal of New South Wales

McColl, Leeming & Payne JJA

Costs - indemnity costs - offer of compromise - Court gave judgment for applicants in proceedings - applicants sought indemnity costs order on basis of two offers of compromise made in proceedings at first instance - rr36.16, 42.15, 51.47, 51.48 & 51.49 *Uniform Civil Procedure Rules 2005* (NSW) - held: one offer of compromise did not contain necessary element of compromise - second offer had necessary element of compromise and respondent had sufficient information to decide whether or not to accept it - appropriate for r42.15(2) 'to have its ordinary operation' - indemnity costs awarded in respect of trial - indemnity costs in respect of appeal refused.

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

### **AGL Energy Limited v Jemena Gas Networks (NSW) Ltd [2017] NSWSC 765**

Supreme Court of New South Wales

Hammerschlag J

Commercial arbitration - defendant sought order under s8(1) *Commercial Arbitration Act 2010* (NSW) (the Act) for referral of action which plaintiff commenced against it for breach of two Reference Service Agreements - whether Reference Service Agreements were arbitration agreements under s7(1) - whether agreements made 'binding provision for compulsory arbitration' - held: there was no arbitration agreement - motion dismissed.

[AGL Energy](#) (I B C G)

### **Estate of Beryl Lee Hordern (Deceased); Homersham v Carr [2017] NSWSC 753**

Supreme Court of New South Wales

Robb J

Wills and estates - testamentary capacity - proceedings concerned sole issue whether deceased had testamentary capacity when she executed last will (2004 will) - parties agreed that if deceased found to have testamentary capacity, probate of 2004 will should be granted - whether deceased comprehended and appreciated claims on her bounty - whether insane delusion - principles in *Banks v Goodfellow* (1870) LR 5 QB 549 - held: Court not satisfied that 2004 will was 'the will of a free and capable testator' - plaintiff granted administration with will annexed in solemn form in respect of a will deceased made in 2001.

[Estate of Beryl Lee](#) (B)

### **Braham v ACN 101 482 580 Pty Ltd [2017] VSC 340**

Supreme Court of Victoria

Lansdowne AsJ

Discovery - professional negligence - solicitors' duties - plaintiff claimed against defendant for loss arising from negligent advice and/or misleading and deceptive conduct in relation to investment in managed investment scheme for 2006 tax year - defendant sought further discovery of plaintiff's tax returns for 10 years after 2006 - held: returns were 'relevant and discoverable' - documents were within scope of discovery under r29.01.1(3) *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - orders for discovery granted.



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

**Deputy Commissioner of Taxation v Casley [2017] WASC 161**

Supreme Court of Western Australia

Le Miere J

Summary judgment - taxation - two proceedings - Deputy Commissioner of Taxation claimed against two defendants for income tax debts, interest and penalties - defendants each contended that amounts were incorrect and that debts were not due and owing - defendants also contended Court did not have jurisdiction to hear matters because defendants were 'sovereign of, or citizen of, the Hutt River Province which is an independent sovereign state' - defendants also sought to advance 'straw man' argument - held: Court had jurisdiction to hear claims - straw man argument had no merit - defendants had no defence to Deputy Commissioner's claim - summary judgment granted.

[Deputy Commissioner of Taxation](#) (B) (B)

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