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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)

Wilkie v Brown (NSWCA) - costs - whether solicitor could recover costs of representing himself in proceedings - inappropriate to finally determine issues of principle - applicant had made no submissions and was taken to concede to orders sought - gross sums order (I B C)

Botany Bay City Council v Minister for Local Government (No 2) (NSWCA) - costs - dismissal of proceedings concerning proposed amalgamation of Councils - application that there be no order for costs dismissed (I B C G)

Bright Ceiling Systems Pty Ltd v Merhis Contracting Pty Ltd (NSWSC) - security for costs - contract - defendant granted security for costs against plaintiff but in sum less than sought (B C)

Alroy Tavern Pty Limited v Blacktown City Council (NSWSC) - leases and tenancies - valuer's determination of current market rent was binding on parties - proceedings dismissed (I B C G)

Collins v Djunaedi (SASCFC) - summary judgment - fraud - no reasonable basis to defend claim - no error in summary judgment or non-continuance of stay - appeal dismissed (I B C G)

Eckersley v Eckersley as Executor of the Estate of the Late Eckersley (Dec) (WASC) - succession - family provision - family provision order in favour of deceased's son (B)

Re Magistrate Bromfield; ex parte Caratti (WASC) - judicial review - conviction for failure to

furnish information and produce documents under s264 *Income Tax Assessment Act 1936* (Cth)
- Magistrate exceeded power in making orders - orders set aside (B G)

Summaries With Link (Five Minute Read)

Wilkie v Brown [2016] NSWCA 128

Court of Appeal of New South Wales

Beazley P; McColl & Gleeson JJA

Costs - Court dismissed applicant's summons for judicial review for costs assessment for services provided to her by respondent solicitor - respondent had acted for himself on summons - respondent sought to be paid costs of summons by gross sum - whether a solicitor could recover costs of representing himself - principle in *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872 - *Guss v Veenhuizen (No 2)* [1976] HCA 57 costs regime under *Legal Profession Uniform Law Application Act 2014* (NSW) and *Legal Profession Uniform Law* (NSW) - absence of benefit of submissions by contradictor - held: in circumstances it was inappropriate to finally determine issues of principle - given that applicant had made no submission she could be taken to have conceded to costs orders sought - gross sums costs order appropriate.

[Wilkie](#) (I B C)

Botany Bay City Council v Minister for Local Government (No 2) [2016] NSWCA 127

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Ward JA

Costs - Court dismissed appeal in proceedings concerning proposed amalgamation of Councils - appellant contended there should be no order for costs in proceedings on basis proceedings had concerned matter of public importance, that it had represented ratepayers and constituents, and that appeal had clarified law to respondents' benefit - s98 *Civil Procedure Act 2005* (NSW) - r42.1 *Uniform Civil Procedure Rules 2005* (NSW) - held: proceedings not of such public interest as to disentitle successful respondents to costs - no evidence electors and residents supported appellant in its proposal - Court placed little or no weight on benefit to respondents of clarification of law - application dismissed.

[Botany Bay](#) (I B C G)

Bright Ceiling Systems Pty Ltd v Merhis Contracting Pty Ltd [2016] NSWSC 631

Supreme Court of New South Wales

Button J

Security for costs - plaintiff claimed contract entered by which plaintiff agreed to perform work and supply materials to defendant - plaintiff claimed unpaid money from defendant - defendant sought security for costs against plaintiff pursuant to r42.21(1) *Uniform Civil Procedure Rules 2005* (NSW) and s1335 *Corporations Act 2001* (Cth) - stultification - whether plaintiff's impecuniosity caused by defendant's conduct - strength of plaintiff's case - whether any

personal undertaking made - whether persons standing behind - held: there was undoubted concern about plaintiff's ability to comply with costs order if unsuccessful - plaintiff was engaged in a "war on many fronts" in relation to creditors - on balance of all factors Court considered it appropriate to order security but in amount less than that sought by defendant.

[Bright Ceiling Systems](#) (B C)

Alroy Tavern Pty Limited v Blacktown City Council [2016] NSWSC 644

Supreme Court of New South Wales

Darke J

Leases and tenancies - plaintiff was lessee of land under lease entered with defendant - parties had entered earlier agreement for lease which provided for plaintiff to complete works on land - it was contemplated lease would be entered providing for lessee to use demised premises as tavern when works completed - lease entered contained rent review provisions - valuer nominated to determine current market rental value of demised premises - plaintiff claimed determination not made in accordance with lease's provisions and was not binding - held: not established that valuation failed to comply lease's terms - determination binding - proceedings dismissed.

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

Collins v Djunaedi [2016] SASCFC 48

Full Court of the Supreme Court of South Australia

Kourakis CJ; Stanley & Parker JJ

Summary judgment - respondents alleged they paid defendants money in reliance on misrepresentations which were fraudulent, and breach of warranty and Australian Consumer Law - appellants charged in Magistrate's Court with deception and money laundering in relation to respondents' claim - appellants sought stay of claim pending outcome of criminal proceedings - judge granted interim stay then adjourned application - consent orders made that appellants file defence, which they did - interim stay not renewed - respondents obtained summary judgment - appellants appealed - Sch 2 *Competition and Consumer Act 2010* (Cth) - s31A *Federal Court of Australia Act 1976* (Cth) - s14 *Fair Trading Act 1987* (SA); District Court (Civil) Rules 2006 held: there was no reasonable basis to defend claim - proposed defence was on its face an "audacious attempt to perpetrate on the Court the same fraud perpetrated on the plaintiffs" - no error in summary judgment or non-continuance of stay - appeal dismissed.

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

Eckersley v Eckersley as Executor of the Estate of the Late Eckersley (Dec) [2016] WASC 154

Supreme Court of Western Australia

Chaney J

Succession - family provision - plaintiff son of deceased pursuant to s6 *Family Provision Act 1972* (WA) sought provision from deceased's estate - claim made on basis plaintiff had worked on family farm, was given assurances that farm would be his eventually, and the support that

the farming business had provided to parents after retirement - plaintiff's involvement in farm - plaintiff's financial position - need - size of estate - held: plaintiff established that deceased did not make adequate provision for him in Will - provision order made.

[Eckersley](#) (B)

Re Magistrate Bromfield; ex parte Caratti [2016] WASC 147

Supreme Court of Western Australia

Le Miere J

Judicial review - applicant convicted for failure to furnish information and produce documents under s264 *Income Tax Assessment Act 1936* (Cth) - applicant sought to set aside convictions and dismissal of charges - held: Magistrate was required to find offences proved only if prosecution proved each of offence's elements - Magistrate had found applicant guilty of offences when he had found "it was only equally probable" that an element was established - Magistrate breached limits of power when he fined applicant and ordered him to comply with Notice - applicant established grounds for relief under s36(4) of the Magistrates Court Act - Magistrate's orders fining applicant and ordering compliance with requirement to produce documents described in Notice set aside.

[Bromfield](#) (B G)

CRIMINAL

Executive Summary

Perish, Anthony v R; Perish, Andrew v R; Lawton, Matthew v R (NSWCCA) - criminal law - three appellants convicted for conspiracy to murder - appeals dismissed

Smith, Maltimore v R (NSWCCA) - criminal law - conviction for importation of methamphetamine - no error in trial judge's direction to jury concerning fault element of intention - appeal dismissed

Spence v The Queen (VSCA) - criminal law - conviction for murder - onus of proof - credit - no substantial miscarriage of justice - appeal dismissed

Summaries With Link

Perish, Anthony v R; Perish, Andrew v R; Lawton, Matthew v R [2016] NSWCCA 89

Court of Criminal Appeal of New South Wales

Bathurst CJ, Hoeben CJ at CL & Bellew J

Criminal law - first, second and third appellants (Anthony Perish, Andrew Perish and Matthew

Benchmark

Lawton) convicted of conspiracy to murder Terrence Falconer - whether verdicts unreasonable given unreliability of two witnesses - whether certain statement should not have been admitted and had led to miscarriage of justice - whether miscarriage of justice arising from Andrew Perish being tried together with co-accused - whether Andrew Perish's sentence manifestly excessive - whether misdirection to jury concerning how evidence against co-accused could be used against Matthew Lawton - whether interview with witness ought to have been admitted - hearsay evidence - s424A *Crimes Act 1900* (NSW) - ss5(1) & 6(1) *Criminal Appeal Act 1912* (NSW) - s21 *Criminal Procedure Act 1986* (NSW) - ss 38, 59, 102, 103, 106, 118, 137, 165(1)(a) & 190 *Evidence Act 1995* (NSW) - held: verdicts not unreasonable - evidence not inadmissible - no injustice arising from joint trial - sentence not manifestly unreasonable or plainly unjust - no error in direction to jury - interview admissible - leave to appeal refused in respect of certain grounds - appeals dismissed.

[Perish](#)

Smith, Maltimore v R [2016] NSWCCA 93

Court of Criminal Appeal of New South Wales

Beazley P; Harrison & R A Hulme JJ

Criminal law - appellant convicted of importing commercial quantity of methamphetamine contrary to s307.1(1) *Criminal Code* (Cth) - methamphetamine found in packages secreted inside items in appellant's luggage - appellant's defence was that he did not know there were packages concealed inside the items - appellant sentenced to 10 years imprisonment with 5 year non-parole period - appellant contended trial judge misdirected jury concerning fault element of intention - *Criminal Appeal Act 1912* (NSW) - *Customs Act 1901* (Cth) - *Kural v R* [1987] HCA 16 - whether "Kural line of authority" applied to meaning of intention - consideration of other authorities - whether directions "informed the jury of permissible process of reasoning" - held: no error in trial judge's direction to jury - appeal dismissed.

[Smith](#)

Spence v The Queen [2016] VSCA 113

Court of Appeal of Victoria

Redlich, Priest & Ferguson JJA

Criminal law - murder - appellant convicted of murder and sentenced to 27 years in prison with non-parole period of 22 years - appellant contended there was substantial miscarriage of justice due to reversal onus of proof because of prosecutor's "prejudicial closing arguments" - appellant also contended there was substantial miscarriage of justice because prosecutor sought in closing address to "impermissibly buttress" witness's credit by relying witness's receipt of a 'certificate' under s128 *Evidence Act 2008* (Vic) - principle in *Palmer v The Queen* [1998] HCA 2 - held: prosecutor's address was "well within the bounds of advocacy" - even if address capable of reversing onus of proof any misapprehension in jury's mind would have been dispelled by directions of trial judge - no substantial miscarriage of justice or anything objectionable in what prosecutor told jury concerning witness - it was for jury to assess weight if any to be given to fact that witness was granted certificate - appeal dismissed.

Spence



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The Tides

By Henry Wadsworth Longfellow

I saw the long line of the vacant shore,
The sea-weed and the shells upon the sand,
And the brown rocks left bare on every hand,
As if the ebbing tide would flow no more.
Then heard I, more distinctly than before,
The ocean breathe and its great breast expand,
And hurrying came on the defenceless land
The insurgent waters with tumultuous roar.
All thought and feeling and desire, I said,
Love, laughter, and the exultant joy of song
Have ebbed from me forever! Suddenly o'er me
They swept again from their deep ocean bed,
And in a tumult of delight, and strong
As youth, and beautiful as youth, upbore me.

[Henry Wadsworth Longfellow](#)

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