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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)

Britax Childcare Pty Ltd, in the matter of Infa Products Pty Ltd v Infa Products Pty Ltd (Administrators Appointed) (FCA) - corporations - plaintiff failed to establish deed of company arrangement should not have been entered or administrator incorrect to exercise casting vote in deed's favour - application dismissed (I B C G)

James v Douglas (NSWCA) - wills and estates - costs - first appellant did not have power to remove trustees of trust and appoint other trustees in their place - appeal against declaratory orders dismissed - appeal against costs orders dismissed (I B C G)

Anderson v Westpac Banking Corporation (VSCA) - real property - possession - bank's application for leave to appeal against 'debts decision' and 'counterclaim decision' refused - defendant's application to appeal against judgment for possession adjourned (I B C G)

Jarvis v The Salvation Army Southern Territory (VSCA) - accident compensation - refusal to reinstate weekly payments - erroneous approach to task by Magistrate - proceedings remitted (I B C G)

Abbott v Qld All Codes Racing Industry Board (QSC) - judicial review - apprehended bias - one of two decisions of panel of stewards quashed (I B C G)

Martincic v Marusco (WASCA) - judgments and orders - refusal to vacate trial dates and grant

orders - primary judge's discretion did not miscarry - leave to appeal refused (I B C G)

The Owners - Units Plan No 1917 v Koundouris (No 3) (ACTSC) - costs - not appropriate to apportion costs on basis of plaintiff's lack of success on some issues - no unreasonable failure to accept offer of settlement (I B C G)

Summaries With Link (Five Minute Read)

Britax Childcare Pty Ltd, in the matter of Infa Products Pty Ltd v Infa Products Pty Ltd (Administrators Appointed) [2016] FCA 848

Federal Court of Australia

Burley J

Corporations - plaintiff and first defendant competed in market for production of baby products - plaintiff succeeded in suing defendant for patent infringement - defendant appointed administrators to decide whether it should be wound up or enter Deed of Company Arrangement - administrators recommended entry to deed - at creditors' meeting one administrator cast vote as chairman of meeting in favour of deed's execution - plaintiff contended deed should not have been entered and administrator wrongly exercised casting vote - plaintiff sought to set aside deed and appointment of liquidators - whether realistic prospect there may be better return to creditors on winding up than under deed if defendant's director pursued for breach of directors' duties concerning certain transactions - held: Court not persuaded of realistic prospect that case against defendant's director would succeed - administrator not incorrect to exercise casting vote in deed's favour - application dismissed.

[Britax Childcare](#) (I B C G)

James v Douglas [2016] NSWCA 178

Court of Appeal of New South Wales

Meagher, Leeming & Simpson JJA

Wills and estates - costs - proceedings concerned complex testamentary trusts created by deceased's Will - issue was whether first appellant as "Appointor" for "Capital Protected Trust" (CPT) had power to remove and appoint trustees of CPT - primary judge found first appellant did not have power to remove trustees and appoint others in their place - primary judge refused rectification of Will and found respondents entitled to declaratory relief - first appellant appealed against the declaratory orders - appellants also appealed against costs orders - s21 *Administration of Justice Act 1982* (UK) - s31 *Conveyancing Act 1881* (UK) - ss27 & 32 *Succession Act 2006* (NSW) - s101(2)(r) *Supreme Court Act 1970* (NSW) - ss63 & 70(1) *Trustee Act 1925* (NSW) - rr42.1 & 42.25 *Uniform Civil Procedure Rules 2005* (NSW) - s12B *Wills Act 1968* (ACT) - 'probate exception' - 'relevant delinquency' - held: no error in construction of Will - appeal from declaratory orders dismissed - costs appeal dismissed.

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

Anderson v Westpac Banking Corporation [2016] VSCA 172

Court of Appeal of Victoria

Whelan & McLeish JJA; Cavanough AJA

Real property - possession - summary judgment - bank made loans to defendant secured by a mortgage over property - defendant stopped making payments on loans - bank sought possession of property - bank unsuccessfully sought summary judgement due to dispute in relation to plaintiff's counterclaim of wrongful debiting of sum - bank reversed debit and interest charged on sum - bank made second application for summary judgment for possession and sums allegedly due - Court awarded judgment for possession but refused to give judgment for debts or to summarily dismiss counterclaim - defendant sought to appeal from judgment for possession - bank sought to appeal from Court's order otherwise dismissing its summary judgment application - s17A(6) *Supreme Court Act 1986* (Vic) - s74 *County Court Act 1958* (Vic) - held: leave to appeal from 'debts decision' and from 'counterclaim decision' refused - Court of tentative view that s17A(6) *Supreme Court Act* was bar to proposed appeal but that in any case leave to appeal should be refused - defendant's submissions raised issues which were subject of trial - judgment for possession already stayed by consent order - Court should not attempt to analyse issues to be determined in trial - application for leave to appeal against judgment for possession adjourned.

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

Jarvis v The Salvation Army Southern Territory [2016] VSCA 175

Court of Appeal of Victoria

Whelan, Beach & Ferguson JJA

Accident compensation - applicant injured knee in course of employment - claim for weekly payments pursuant to *Accident Compensation Act 1985* (Vic) accepted by Allianz - following return to work respondent terminated applicant's employment for 'serious misconduct' - Allianz refused reinstatement of weekly payments - respondent challenged Magistrate's order setting aside Allianz's written notice - trial judge allowed respondent's appeal - applicant sought leave to appeal - held: parties conceded Magistrate erred in approaching task as if it was application for judicial review of Allianz's refusal to reinstate weekly payments - interests of justice required proceeding to be reheard and redetermined in Magistrates' Court - appeal allowed.

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

Abbott v Qld All Codes Racing Industry Board [2016] QSC 162

Supreme Court of Queensland

Jackson J

Judicial review - procedural fairness - applicant sought review of two decisions of panel of stewards made in relation to incident between applicant two stewards at stables - panel decided that applicant was to be disqualified for two years for breaching r231(1) Australian Harness Racing Rules and for three months for breaching r231(2) - whether chief steward should be disqualified from panel due to apprehended bias - held: Court found in respect of first decision

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that 'fair minded lay observer might reasonably apprehend a lack of impartiality' concerning decision to be made by chief steward due to his 'undisclosed involvement' in certain telephone conversations - first decision quashed - second decision not quashed.

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

Martincic v Marusco [2016] WASCA 133

Court of Appeal of Western Australia

Buss P & Mitchell JA

Judgments and orders - proceedings in which plaintiffs claimed defendants misappropriated funds from bank account of company of which first plaintiff was director - defendants sought to appeal against primary judge's refusal to vacate trial dates and make certain orders - defendants contended primary judge's discretion miscarried - grounds of appeal in relation to alleged denial of full access to company's records, defendants' financial position, comments made by primary judge and incompetence of their solicitor - O1 r4A, O1 r4B & O34 r4 *Rules of the Supreme Court 1971* (WA) - held: Court not convinced defendants deprived of sufficient opportunity to prepare defence - Court not satisfied primary judge's discretion miscarried - open to primary judge to be satisfied interests of justice best served by refusing adjournment - leave to appeal refused.

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

The Owners – Units Plan No 1917 v Koundouris (No 3) [2016] ACTSC 184

Supreme Court of the Australian Capital Territory

Mossop AsJ

Costs - Court gave judgment for plaintiff in proceedings - plaintiff sought that first defendant pay its costs of proceedings on a party and party basis and that there should be no order for costs against second defendant - defendants submitted Court should apportion costs between trial's issues in light of success on some issues and settlement offer, or that plaintiff should pay the defendants' costs after expiry of offer on indemnity basis - s5A *Court Procedures Act 2004* (ACT) - rr1002 & 1721 *Court Procedures Rules 2006* (ACT) - held: no apportionment was appropriate - plaintiff not unreasonable to fail to accept offer - proposed order or payment as to costs not 'equivalent or more favourable' to party and party costs order to which plaintiff otherwise entitled - offer was not certain - first defendant ordered to pay plaintiff's costs on party and party basis.

[The Owners](#) (I B C G)

CRIMINAL

Executive Summary

Erazo v The Queen (NSWCCA) - criminal law - severity appeal - multiple sexual offences upon step daughter - last offence resulted in pregnancy which was terminated - aggregate sentence

imposed 14 years, NPP of 10 years - whether sentence manifestly excessive - sentencing judge erred in finding family home constituted an aggravating factor - authorities should be revisited - appeal dismissed

Bayley v The Queen (VSCA) - criminal law - conviction appeal - identification evidence - appellant identified from Facebook and by photo board - appellant, already serving life sentence for murder of Gillian Meagher, sentenced of 18 years with non-parole period of 43 years after 3 further trials - whether verdicts unsafe and unsatisfactory - conviction based upon identification evidence quashed - *IMM v The Queen* applied - new non-parole period of 40 years imposed

Summaries With Link

Erazo v The Queen [2016] NSWCCA 139

New South Wales Court of Criminal Appeal

Ward JA, Davies J, R S Hulme AJ

Criminal law - severity appeal - multiple sexual offences upon step daughter - 6 counts of aggravated sexual intercourse without consent, 6 other offences taken into account on a From 1 - offences committed between 2000 and 2005 - last offence resulted in pregnancy which was then terminated - aggregate sentence imposed 14 years, NPP of 10 years - whether sentence manifestly excessive - whether applicant's good character prior to offending relevant on sentence - whether offences occurring in the family home constituted an aggravating factor - appeal lodge out of time - application for extension of time to appeal - application opposed by Crown - held: the prospects of success on an appeal are relevant on an application to extend time (*Kentwell v The Queen* (2014) 252 CLR 601) - here the explanation for the delay was inadequate - the factual findings were amply open to the sentencing judge - psychological and emotional damage to children from sexual abused can be assumed (*R v Tuala* [2015] NSWCCA 8; *R v Gavel* (2014) 239 A Crim R 469; *R v MJB* [2014] NSWCCA 195) - on the present state of the law in NSW (*R v Comert* [2004] NSWCCA 125; *Ingham v R* [2010] NSWCCA 88) the sentencing judge's finding that it was an aggravating factor that the offence took place in the family home constituted error - the authorities should be revisited - the way good character is employed in sentencing considered - (*Ryan v The Queen* 206 CLR 267) applied - here the applicant's prior good character should have been a mitigating factor to a "small extent" - here the offending was very serious and no lesser sentence that that imposed by the sentencing judge was appropriate - extension of time granted, leave to appeal granted, appeal dismissed.

[Erazo](#)

Bayley v The Queen [2016] VSCA 160

Victorian Court of Appeal

Warren CJ, Weinberg & Priest JJA

Criminal law - conviction appeal - identification evidence - appellant identified from Facebook

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and by photo board (the first trial) - admissibility of telephone and CCTV records (the third trial) - whether verdicts unsafe and unsatisfactory - application for leave to appeal sentence - whether non-parole period manifestly excessive - applicant had been sentenced to life imprisonment for the rape and murder of Gillian Meagher (NPP 35 years) and subsequently faced 3 further trials for offences perpetrated against 3 other complainants - appellant convicted in each trial and sentenced to 18 years with new non-parole period of 43 years-appellant appealed verdicts of guilt and argued non-parole period manifestly excessive - held: (*IMM v The Queen* (2016) 330 ALR 382) identifies the correct approach to the admissibility of the identification evidence - in assessing the probative value of the evidence the trial judge must assume the jury will accept the evidence and no question arises as to credibility or reliability - here the Facebook identification by the complainant was made from a single photograph, 12 years after the attack - the photo was taken 11 years later and the complainant knew that the individual in it had been charged with rape and murder - the problematic aspects of identification evidence, including the "displacement effect", considered - authorities considered at length - here the identification was no better than a "dock identification" - the photo board identification was even less worthy of credence as it was made after the Facebook identification - no matter what directions were given, the danger of unfair prejudice was substantial - the evidence should have been excluded - the convictions sustained in the first trial quashed and verdicts of acquittal entered - leave to appeal convictions in third trial granted, appeals dismissed - a new non-parole period of 40 years set.

[Bayley](#)



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Piano

by [D.H. Lawrence](#)

Softly, in the dusk, a woman is singing to me;
Taking me back down the vista of years, till I see
A child sitting under the piano, in the boom of the tingling
strings
And pressing the small, poised feet of a mother who smiles
as she sings.

In spite of myself, the insidious mastery of song
Betrays me back, till the heart of me weeps to belong
To the old Sunday evenings at home, with winter outside
And hymns in the cosy parlour, the tinkling piano our guide.

So now it is vain for the singer to burst into clamour
With the great black piano appassionato. The glamour
Of childish days is upon me, my manhood is cast
Down in the flood of remembrance, I weep like a child for
the past.

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