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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)

BB Australia Pty Ltd v Danset Pty Ltd (NSWCA) - contract - equity - misleading or deceptive conduct - claims by franchisor against franchisee arising from sale of its business assets to company - - appeal dismissed (B C I G)

Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance (NSWCA) - insurance - 'broadform liability policy' - respondent not obliged to indemnify appellant for amount paid to 'Phil Gold' under cap and collar' agreement, or costs of defending arbitration proceedings which Phil Gold brought against it - appeal and cross-appeal dismissed (B C I G)

Yosef Yitzchak Feldman v Nationwide News Pty Limited & Ors (No 4) (NSWSC) - bias - defamation - application for recusal of judge for apprehended bias refused (B C I G)

Winter v Nemeth (NSWSC) - contract - action for breach of contract by defendant to purchase, or provide funds for purchase, of house for plaintiff - no contract between parties - judgment for defendant (B C I G)

Telstra Corporation Ltd v Singtel Optus Pty Ltd (VSC) - injunction - consumer law - plaintiff granted injunction restraining display of advertisement by defendant (I B C G)

Pulling v Yarra Ranges Shire Council (VSC) - workers compensation - refusal of compensation for injury - erroneous application of ss39(1) & 40(1)(a) *Workplace Injury*

Rehabilitation and Compensation Act 2013 (Vic) - appeal allowed (I B C G)

Contact 121 Pty Ltd v Boden (SASC) - pleadings - loan - employment contract - permission to file ninth draft of third statement of claim refused (I B C G)

Summaries With Link (Five Minute Read)

BB Australia Pty Ltd v Danset Pty Ltd [2018] NSWCA 101

Court of Appeal of New South Wales

Meagher JA; Barrett & Simpson AJJA

Contract - equity - appellant operated video franchise - first respondent entered franchise agreement with appellant - appellant had rights under franchise agreement to purchase franchise's business assets when agreement terminated or expired or on first respondent's earlier decision to sell business - term of agreement was that first respondent was not to transfer franchise without appellant's consent - first respondent sold its business assets to company (Tresblue) without appellant's 'knowledge or consent' - appellant terminated franchise agreement with first respondent - appellant sued first respondent for breach of contract, misleading or deceptive conduct, and breach of trust - appellant contended that first respondent's directors were knowingly involved in first respondent's breach of trust - appellant also sued first respondent under agreement's provisions requiring it to 'indemnify or reimburse' appellant for expenses - appellant also sued Tresblue and its controller for inducing first respondent's breach of contract, and for being knowingly involved in first respondent's breach of trust - first respondent and its directors conceded breach of contract and misleading or deceptive conduct - primary found appellant could not recover for concessions because no loss was proved, and that assets were not held on trust - primary judge did not express 'final view' on entitlement to indemnity and reimbursement - held: appeal dismissed.

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

Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance [2018] NSWCA 100

Court of Appeal of New South Wales

Meagher & White JJA; Barrett AJA

Insurance - 'broadform liability policy' - appellant contended respondent, pursuant to indemnity insurance policy, was bound to indemnify it for amount it paid to 'Phil Gold' under 'cap and collar' agreement, and costs of defending arbitration proceedings which Phil Gold brought against it - primary judge dismissed claim - primary judge found policy's conditions not satisfied that there had been an "occurrence" resulting in "Property Damage", that appellant's costs of arbitration proceedings were not within policy, that policy's exclusion for 'professional services' would have defeated appellant's entitlement to indemnity or costs, and that cap and collar agreement was not a 'settlement or compromise' establishing 'existence and quantum' of liability - held: appeal and cross-appeal dismissed.

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

Yosef Yitzchak Feldman v Nationwide News Pty Limited & Ors (No 4) [2018] NSWSC 682

Supreme Court of New South Wales

Campbell J>

Bias - defamation - application for recusal of judge on basis of apprehended bias - application made in reliance on three grounds: 'a raised voice'; 'the translation of the glossary of Hebrew and Yiddish expression', and "'the heated exchange'" - s70 *Civil Procedure Act 2005* (NSW) - s6DD *Royal Commissions Act 1982* (Cth) - *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 - held: judge not satisfied to recuse himself - application refused.

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

Winter v Nemeth [2018] NSWSC 644

Supreme Court of New South Wales

Campbell J

Contract - plaintiff contended that defendant promised to purchase or provide funds for her purchase of a house in return for performance of clerical services to assist defendant in Family Court proceedings - plaintiff sued defendant for breach of contract - defendant denied contract - defendant alternatively contended that if there was an arrangement with plaintiff it arose from 'close personal friendship', and that Court would not impute intention to enter contractual relations - whether parties entered contract - work performed by, and promises relied on, by plaintiff - whether there was written promise - whether there was oral promise - held: Court not satisfied there was a contract between parties - plaintiff's case failed - judgment for defendant

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

Telstra Corporation Ltd v Singtel Optus Pty Ltd [2018] VSC 247

Supreme Court of Victoria

Robson J

Injunction - consumer law - plaintiff alleged advertisement displayed by defendant was misleading and deceptive - plaintiff sought interlocutory injunction to restrain 'public display' of advertisement - whether serious question to be tried concerning misleading and deceptive conduct in breach Australian Consumer Law - whether plaintiff established that, without injunction, it would suffer 'irreparable injury' - whether damages would be 'adequate compensation' for irreparable injury - balance of convenience - *Competition and Consumer Act 2010* (Cth) - held: Court satisfied to grant interlocutory injunction sought.

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

Pulling v Yarra Ranges Shire Council [2018] VSC 248

Supreme Court of Victoria

Bell J

Workers compensation - appellant employed by respondent - appellant contended she suffered 'migraine headaches and chest pains' as symptoms of 'work-related stress injury' - appellant contended the symptoms cause her to stop work - respondent refused appellant's claim for

weekly payments and expenses - magistrate dismissed appellant's claim, finding symptoms not work-related - magistrate found in the alternative that injury caused by respondent's 'management action' and not compensable - appellant appealed - ss39(1) & 40(1)(a) *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - relevance and admissibility of 'historical evidence' medical reports - whether failure to take evidence into account - whether proper consideration of appellant's entire employment and all incidents - held: magistrate erred in applying ss39(1) & 40(1)(a) of the Act - appeal allowed - proceeding remitted.

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

Contact 121 Pty Ltd v Boden [2018] SASC 61

Supreme Court of South Australia

Parker J

Pleadings - loan - employment contract - respondent was appellant's ex-director and former employee - respondent sought to recover money paid to appellant - Master refused respondent's application to file ninth draft of third statement of claim - held: proposed pleading failed to comply with *Supreme Court Civil Rules 2006* (SA) - there was failure to properly plead loan agreement, 'alleged indemnity' and term of employment contract - there were also discretionary considerations in support of refusal to permit filing of proposed pleading, including inadequate explanation for changes to appellant's case and delay - permission to file ninth draft of third statement of claim refused.

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

CRIMINAL

Executive Summary

R v Britten (SASCFC) - criminal law - possessing prescribed firearm - not established beyond reasonable doubt appellant had custody of firearm or 'exercised access' to it - appeal allowed - conviction set aside

D v Commonwealth Director of Public Prosecutions for the State of South Australia (SASCFC) - criminal law - suppression orders - terrorism - erroneous refusal to make suppression orders sought - appeal allowed

Summaries With Link

R v Britten [2018] SASCFC 36

Full Court of the Supreme Court of South Australia

Kourakis CJ; Bampton & Parker JJ

Criminal law - possessing prescribed firearm - appellant convicted of possessing prescribed firearm following trial by judge alone - another judge, before whom appellant had previously pleaded guilty, refused to accept the guilty plea following 'disputed fact hearing' - information listed for trial - information alleged appellant had rifle in his possession which police found in foot well of vehicle in which appellant was passenger - trial judge found appellant had custody of rifle even though prosecution had relied on "exercise access" limb of possession's extended definition in s5(14) *Firearms Act 1977* (SA) - whether erroneous factual finding appellant knew rifle was in foot well - if no error in finding appellant knew rifle in foot well, whether appellant's possession of firearm was established on either limb of definition in s5(14) *Firearms Act* - held: no error in trial judge's finding that appellant knew rifle was in foot well - not established beyond reasonable doubt appellant had custody of firearm or 'exercised access' to it - appeal allowed - conviction set aside.

[Britten](#)

D v Commonwealth Director of Public Prosecutions for the State of South Australia [2018] SASCFC 33

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Doyle JJ

Criminal law - suppression orders - terrorism - appellant charged by respondent with advocating terrorism - respondent sought order under s69A *Evidence Act 1929* (SA) to suppress publications of four videos subject of charges, and other videos appellant allegedly made - appellant sought order to suppress publication of his name, his children's names, or material 'tending to identify' him or his children - parties supported each other's applications - judge declined to grant balance of sought orders - judge suppressed publication of names or material tending to identify names of applicants children - appellant appealed - principle of open justice - interests of justice - whether prejudice to 'potential jurors' arising from videos' publication - whether failure by judge to address required questions - public interest principle - held: appeal allowed - suppression order made.

[D v Commonwealth Director of Public Prosecutions](#)



Benchmark

To Winter

By: William Blake

O Winter! bar thine adamantine doors:
The north is thine; there hast thou built thy dark
Deep-founded habitation. Shake not thy roofs
Nor bend thy pillars with thine iron car.
He hears me not, but o'er the yawning deep
Rides heavy; his storms are unchain'd, sheathed
In ribbed steel; I dare not lift mine eyes;
For he hath rear'd his scepter o'er the world.
Lo! now the direful monster, whose skin clings
To his strong bones, strides o'er the groaning rocks:
He withers all in silence, and in his hand
Unclothes the earth, and freezes up frail life.
He takes his seat upon the cliffs, the mariner
Cries in vain. Poor little wretch! that deal'st
With storms; till heaven smiles, and the monster
Is driven yelling to his caves beneath Mount Hecla.

https://en.wikipedia.org/wiki/William_Blake

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