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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 (One Minute Read)

Vehicle Monitoring Systems Pty Limited v SARB Management Group Pty Ltd trading as Database Consultants Australia (No 8) (FCA) - patent for an invention that identifies the overstay of a vehicle in a parking space upheld, and infringement established (B I)

Nahata v Robertson (NSWSC) - Court refused to grant easement, as plaintiffs had not provided an instrument in registrable form with the details of the easement so as to allow the Court to assess whether it was reasonably necessary, and not had made all reasonable attempts to obtain an easement having the same effect (B C I)

Re Thomas (VSC) - deceased had marked a previously executed will in such a way that the Court was satisfied he had intended to revoke it (I B)

Giurina v Greater Geelong City Council (VSCA) - stay of orders for removal of caveat refused, as the applicant's contention that only those with an interest in the land had standing to apply for removal of a caveat was not reasonably arguable (I B C)

LM Investment Management Ltd (in liquidation) & Ors v Whyte (QSC) - receiver of managed investment fund who had commenced litigation and agreed to pay adverse costs orders out of the fund failed in an attempt to strike out pleadings alleging he had no power to do so (B I)

Re Section 22 of the *Human Tissue and Transplant Act 1982* (WA); Ex parte P (WASC) - orders made allowing the removal and storage of spermatozoa and associated tissue from the body of the applicant's husband (I B)

HABEAS CANEM

After a winter bath

Summaries With Link (Five Minute Read)

Vehicle Monitoring Systems Pty Limited v SARB Management Group Pty Ltd trading as Database Consultants Australia (No 8) [2023] FCA 182
Federal Court of Australia
Besanko J
Patents - Vehicle Monitoring Systems was the registered owner of two patents for ab invention that identified the overstay of a vehicle in a parking space - the invention involved a battery-powered subterraneous detection apparatus (DA) to detect the presence of a vehicle in a parking space, the storage of data in the DA, and the wireless transmission of that data to a data collection apparatus (DCA), and the indication by the DCA to an operator of overstaying vehicles - Vehicle Monitoring Systems sued SARB, who supplied a similar system, for infringement of the patents - SARB cross claimed seeking revocation of the patents - held: the proper construction of a specification is a matter of law - a patent specification should be given a purposive, not a purely literal, construction, and it is not to be read in the abstract but is to be construed in the light of the common general knowledge and the art before the priority date - the words used in a specification are to be given the meaning which the normal person skilled in the art would attach to them, having regard to his or her own general knowledge and to what is disclosed in the body of the specification - it is for the Court, not for any witness, however expert, to construe the specification - on the proper construction of the term "wake-up signal", SARB had infringed a number of claims in the patent - on their proper construction, the claims made in the first patent included a method or system where the determination of vehicle overstay was made by the DCA rather than the DA - Vehicle Monitoring Systems' claim based on authorisation of local councils to use SARB's systems failed - Vehicle Monitoring Systems' claim for additional damages under s122(1A) of the *Patents Act 1990* (Cth) based on flagrant infringement failed - flagrancy may be established by conduct which might otherwise be described as glaring, notorious or scandalous - Vehicle Monitoring Systems had not identified any conduct by SARB which can be properly described as reprehensible, scandalous, glaring, or notorious - as to SARB's claims of invalidity, Vehicle Monitoring Systems had not failed to describe the best method of performing the invention - the specification provided sufficient information to enable the person skilled in the relevant art to perform the invention - SARB had not established that a particular person was an inventor of the invention disclosed in the patents - that person had made no claim to be an inventor for over 15 years and SARB had also not established that it would be just and equitable to revoke the patents even if an entitlement in that person had been otherwise established - lack of fair basis and lack of inventive step objections rejected - the claim that the patents had been obtained by false suggestions and misrepresentations rejected - objections based on lack of clarity and lack of definition rejected - SARB's cross-claim dismissed - Vehicle Monitoring Systems to bring in draft minutes of order reflecting the Court's conclusions.
Vehicle Monitoring Systems Pty Limited (B I)

Nahata v Robertson [2023] NSWSC 642

Supreme Court of New South Wales
Peden J
Easements - the plaintiffs purchased a property in Dundas Valley - the plaintiffs wished to build a duplex on the property, but, to comply with the conditions for development, they required an easement for drainage of stormwater burdening the defendants' property next door - held: s88K of the *Conveyancing Act 1919* (NSW) empowers the Court to make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of the land having the benefit of the easement. - this power is contingent on the satisfaction of the requirements in s88K(2) (not inconsistent with the public interest, owner of land burdened can be adequately compensated, and all reasonable attempts had been made to obtain the easement or one to the same effect), and a residual discretion not to grant relief - further, the court lacks power to make an order imposing an easement unless the terms of the easement are specified in the order itself - the issues to be determined were whether the proposed easement was reasonably necessary for the effective use or development of the plaintiffs' land, and whether the plaintiffs had made all reasonable attempts to obtain the easement or an easement having the same effect - the determination of the question whether an easement is reasonably necessary for the use or development of land involves consideration of any alternative methods by which such use or development could be achieved - the plaintiffs had not provided the defendants or the Court with an instrument in registrable form with the details of the easement that complied with the development consent - the only evidence of the easement sought in the amended statement of claim was a "concept plan" - it was therefore not possible for the Court to determine whether the easement sought is "reasonably necessary" - further, the Court was not satisfied on the evidence that the plaintiffs had made all reasonable attempts to obtain the easement or an easement having the same effect - this was a question of degree - generally, a court will be satisfied if, viewed objectively, the applicant's negotiations for an easement have proved fruitless and it is "extremely unlikely" that future negotiations will produce a consensus - in this regard, it is open to consider facts at the time of hearing, including facts arising after the commencement of proceedings - the Court did not accept that the defendants unreasonably refused to agree to an easement - application dismissed.
View Decision (B C I)

Re Thomas [2023] VSC 344
Supreme Court of Victoria
Moore J
Succession - the deceased died, leaving a purported will he had executed 10 years before, which had not been formally revoked or revoked by operation of law - his only known living relatives at the date of his death were six cousins - the deceased had left an estate with a gross value of about $4.5 million - the purported will gifted the residue of the estate to his friends Mr and Mrs Nightingale - the original purported executed will was found in a pile of dirty papers on the kitchen table in the deceased's home - the names of Mr and Mrs Nightingale, appearing in the clause providing for the appointment of executors, and in the clause providing for the distribution of the deceased's estate, were largely blanked out by black ink applied by hand - no

names had been added to the document in lieu of the references to Mr and Mrs Nightingale which had, in effect, been redacted by hand - one of the cousins sought a grant of letters of administration on intestacy - held: s12(2)(g) of the *Wills Act 1997* (Vic) provides that a will can be revoked by the testator writing on the will or dealing with the will in such a manner that the Court is satisfied, from the state of the will, that the testator intended to revoke it - the phrase "from the state of the will" in s12(2)(g) requires that the intention to revoke the will must be evident from the face of the document, and that it was not open to the Court to consider extrinsic evidence as to the testator's intention - since the cases dealing with s20 of the *Wills Act 1837* (Eng), the precursor to s12(2)(g), any liberalisation of the law had come not by amendment of equivalents of s12(2)(g), but by broadening the range of other means of effecting a revocation - the Court was satisfied from the state of the will that the deceased had intended to revoke it - the markings effectively obliterated the names of the executors and beneficiaries, on its face stripping the will of its essential elements - the Court was satisfied the markings had been made by the deceased - there is a prima facie presumption that, where a will is destroyed or found mutilated in a place in which the testator would naturally put it, the testator destroyed it with the intention of revoking it - the Court also closely examined the evidence as to finding of the will and the chain of custody which led to the will being lodged with the Registrar of Probates, and accepted the evidence that the will was not further amended or altered after being found - as the markings on the will were not made in accordance with the formal requirements prescribed by the Act, the presumption of testamentary capacity was not available to the plaintiff; and he must prove the deceased had testamentary capacity at the time of making the markings - the Court was satisfied on the evidence that the deceased did have capacity at all times before his death - declarations made that the will had been revoked and that the deceased had died intestate - plaintiff's application referred Registrar of Probates for the grant of letters of administration on intestacy - plaintiff's costs to be paid out of the estate. Re Thomas (I B)

Giurina v Greater Geelong City Council [2023] VSCA 148
Court of Appeal of Victoria
Osborn & Kaye JJA
Caveats - the applicant is the executor of the estate of his late mother, who is the registered proprietor of a property in Geelong West - Council made an emergency order under s102 of the *Building Act 1993* (Vic) concerning the house on the property - the applicant engaged in two sets of unsuccessful litigation regarding that order, which resulted in orders for costs against him in his capacity as executor - each order was the subject of warrants of seizure and sale against the property issued by Council - the applicant lodged two caveats over the title to the property - Council applied under s90(3) of the *Transfer of Land Act 1958* (Vic) for the removal of the caveats - the primary judge directed the removal of the caveats - the applicant sought leave to appeal - the applicant also sought an interlocutory order that the primary judge's order be stayed pending appeal - held: in order to obtain a stay the applicant must show special or exceptional circumstances, and as part of that requirement, must demonstrate an arguable case of error by the primary judge - the applicant argued that the grant of standing to seek removal of

a caveat in s90(3) to any person "adversely affected by [the] caveat" should be read down to "any person with an interest in the land" - neither the text, context, nor purpose of s90(3) supported the applicant's construction - caveats under the Torrens system are treated by the courts as analogous to applications for interlocutory injunctive relief - when application is made for their removal the onus falls on the caveator to satisfy the two-stage test used by the court when deciding whether to exercise its discretion to grant interlocutory injunctive relief - the applicant's proposed ground of appeal was not reasonably arguable - stay refused.
Giurina (I B C)

LM Investment Management Ltd (in liquidation) & Ors v Whyte [2023] QSC 132
Supreme Court of Queensland
Kelly J
Insolvency - the LM First Mortgage Income Fund was a managed investment scheme that invested by lending on the security of mortgages to borrowers who developed real property - LM Investment Management Ltd (in liquidation) (LMIM) was the responsible entity and was the trustee both under the constitution of the scheme and under the *Corporations Act 2001* (Cth) - voluntary administrators were appointed to LMIM, and in due course a liquidator was appointed - the Court directed LMIM to wind up the Fund and appointed Whyte as receiver of the property of the Fund - Whyte caused LMIM, as the responsible entity of the Fund, to start a proceeding against various directors of LMIM, LMIM in its own right, and the trustee of a related fund - by the time of trial, Whyte had settled with the trustee of the related fund and no longer pressed claims against LMIM in its own right - the proceedings against the directors was dismissed - Whyte caused LMIM to appeal and sought judicial advice whether he would be justified in prosecuting the appeal - the Court refused to provide judicial advice - the appeal was dismissed by consent - Whyte caused LMIM as responsible entity of the fund to settle adverse costs orders at first instance and on appeal, on terms that required LMIM to pay the directors $5million - the liquidator of LMIM, LMIM as responsible entity of the Fund, and two unit holders in the Fund then commenced proceedings, contending that Whyte lacked the power to charge the Fund with payment of the adverse costs orders - they also contended that charging the Fund with payment of the adverse costs liability, and paying that liability out of the Fund, was not justifiable or in the best interests of the Fund's beneficiaries - Whyte sought to strike out the applicants' amended statement of claim on the ground that it disclosed no reasonable cause of action, and that there be no leave to replead - held: by seeking an order that the pleading be struck out with no leave to replead, Mr Whyte effectively sought to summarily terminate the proceeding - the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion that the claim is so obviously untenable that it cannot possibly succeed - there were real issues, involving issues of law and fact, as to whether previous orders of the Court conferred upon Whyte, expressly or impliedly, a power to act in relation to the Fund in the way he now proposed as regards the adverse costs liability - there was also a real question as to whether, by reason of the power given to him by the Court to bring litigation, Whyte was

empowered to apply to the Court, in the name of the trustee, LMIM, for advice or directions under s96 of the *Trusts Act 1973* (Qld) about whether he was justified in commencing and conducting the proceeding against LMIM's directors - in *In re Beddoe* [1893] 1 Ch 547, Lindley LJ said that a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not be allowed to charge them against his cestui que trust unless under very exceptional circumstances - the Court could see no appreciable support for Whyte's contention that the *Beddoe* principles should be limited in their operation to particular factual contexts involving allegations that a trustee had acted in breach of trust or from a position of conflict of interest - strike out application dismissed.
LM Investment Management Ltd (B I)

Re Section 22 of the *Human Tissue and Transplant Act 1982* (WA); Ex parte P [2022] WASC 477
Supreme Court of Western Australia
Fiannaca J
Deceased's body parts - the applicant had been married to her husband for nearly seven years, and they had two children, being 3 years old and 9 weeks old - the applicant was 28 years old and the husband had been 29 years old - the husband severed an artery on a broken window and bled to death very quickly - his body was placed in the State Mortuary - the applicant wished to have spermatozoa removed from her husband and stored for a later date, to be used to conceive another child, should she wish to do so - she urgently applied for an order for the removal and storage of spermatozoa and associated tissue from the body of her husband - the applicant said that she and her husband had discussed the matter after watching a documentary on the subject, and that her husband had told her, in effect, that, if he were to die, it would be for her to decide - the applicant also said that, although her husband's mother was in no state to speak, his father had given his consent to the applicant for the procedure - held: s22 of the *Human Tissue and Transplant Act 1982* (WA) empowers a designated officer for a hospital to authorise the removal of tissue from a body under certain circumstances - the relevant hospital where the State Morgue was located had not been able to identify the designated officer - previous decisions of the Court were authority for the proposition that the Court has jurisdiction to make an order of the type contemplated by s22, under either s22 itself, or under O52 rr 2 and 3 of the *Rules of the Supreme Court 1971* (WA) in conjunction with s22 - the Court did not consider that those decisions were plainly wrong, and so it was required to follow them - the Court was satisfied that (1) the husband's dead body had been brought into the hospital containing the State Morgue; (2). spermatozoa are "tissue" within the meaning of s22, as they are a substance that can be extracted from the human body; (3) the proposed removal of the spermatozoa and associated tissue was for "medical or scientific purposes"; (4) during his lifetime, the husband had consented to the removal after his death of spermatozoa from his body for the purpose of the applicant using it to assist her to become pregnant, and he had not revoked the consent before his death; (5) further and in the alternative, there was no

reason to believe that the husband had expressed an objection to the removal of spermatozoa from his body after his death for the purpose of the applicant using it to assist her to become pregnant; (6) the "senior available next of kin" (that is, the applicant) consented to the removal of the spermatozoa; and (7) as the husband's death was a reportable death, the Coroner was aware of the death and consented to the procedure - the orders sought should be made - this case should also be brought to the attention of the Minister with a view to ensuring that hospitals have procedures in place to enable an authorised officer to deal with these sought of requests expeditiously.

Re Section 22 of the Human Tissue and Transplant Act 1982 (WA (I B)

Poem for Friday

Oh, my love is like a red red rose

By: Robert Burns (1759-1796)

O my Luve is like a red, red rose
That's newly sprung in June;
O my Luve is like the melody
That's sweetly played in tune.
So fair art thou, my bonnie lass,
So deep in luve am I;
And I will luve thee still, my dear,
Till a' the seas gang dry.
Till a' the seas gang dry, my dear,
And the rocks melt wi' the sun;
I will love thee still, my dear,
While the sands o' life shall run.
And fare thee weel, my only luve!
And fare thee weel awhile!
And I will come again, my luve,
Though it were ten thousand mile.

(Oh) My Love is Like a Red, Red Rose, is a song curated by Robbie Burns, as part of a Scotts anthology, *Original Scottish Airs*, published in 1794, based on a traditional Scottish song. Burns wrote of the song, and of a disagreement with the publisher, "*What to me appears to be the simple and the wild, to him, and I suspect to you likewise, will be looked on as the ludicrous and the absurd."* The poem was set to music by Robert Schumann. It was sung by Carly Simon, Pat Boone and many others. Bob Dylan referred to the lyrics of *Red Red Rose* by Robert Burns as the most important and inspirational to him in his music.

Robbie Burns (25 January 1759 - 21 July 1796) is regarded as the national poet of Scotland and an icon of Scotts culture. He was born in Ayr, Alloway, the eldest of seven children to a tenant farmer and his wife Agnes, the daughter of a tenant farmer. The family lived in poverty, doing heavy manual labour on the tenanted farms. Burns' father educated the children. Robbie Burns also attended some irregular formal schooling, which was disrupted by work on the tenanted farms, such as returning home for harvest. He was a poet and lyricist, and collector of Scottish folk songs. Burns died at the age of 37. The descendants of Robbie Burns are said to number over 900 people (as at 2019).
https://en.wikipedia.org/wiki/Robert_Burns

The King's Singers, 2015, perform **Oh my love is like a red, red rose**
https://www.youtube.com/watch?v=XBE1y7u_dBs

Bryn Terfel, with the London Symphony orchestra, sings **My love is Like a Red, Red Rose**
https://www.youtube.com/watch?v=fykWcBWgsTE

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