



Friday, 27 July 2018

## 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)

**Lowbeer v De Varda** (FCAFC) - bankruptcy - equity - dismissal of creditor's petitions against respondents - appeals dismissed (B)

**Neurim Pharmaceuticals (1991) Ltd v Generic Partners Pty Ltd** (FCA) - patents - legal professional privilege - patent attorney privilege - no waiver of privilege in documents - interlocutory application dismissed (I B C G)

**TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 2)** (NSWSC) - evidence - 'privilege against self-incrimination' - second defendant examined by officers of Australian Securities and Investments Commission - Court satisfied to grant plaintiff access to transcripts (B C I G)

**MWP Transport Pty Limited v Michael Thomas Kent** (NSWSC) - judgments and orders - freezing orders - application for disclosure of amounts paid and to be paid for legal expenses, and the sources of payments - application granted (B C I G)

**Kennedy v Kennedy** (NSWSC) - possession - pleadings - wills and estates - defences disclosed no defence to executors' claim - executors granted leave to move for default judgment and to issue writ of possession (B)

**Defteros v Google Inc LLC** (VSCA) - defamation - pleadings - 'non-publisher defence' -

dismissal of strike-out application - leave to appeal refused (I B)

**Police v Henderson** (SASC) - traffic law - driving motor vehicle over 'applicable speed limit' - contravening provisional licence condition - appeal against verdicts allowed (I B C G)

## Summaries With Link (Five Minute Read)

### **Lowbeer v De Varda [2018] FCAFC 115**

Full Court of the Federal Court of Australia

Reeves, Farrell & Colvin JJ

Bankruptcy - equity - appellant sought sequestration orders against respondents on basis they failed to pay 'two certificates of taxation quantifying an order for costs' - Federal Circuit Court dismissed appellant's creditor's petitions - primary judge found that costs which subject of the costs order (costs) were paid by Congregation with result there was no debt to be paid - common ground Congregation had met the costs - however appellant had contended Congregation paid the costs in recognition of obligation to indemnify him - appellant contended Congregation was subrogated to his rights and respondents still owed debt to him - primary judge found that in 'truth and reality there was no debt due' to appellant because Congregation, not appellant, had incurred the costs - appellant appealed - held: no error in decision of primary judge - appeals dismissed.

[Lowbeer](#) (B)

### **Neurim Pharmaceuticals (1991) Ltd v Generic Partners Pty Ltd [2018] FCA 1082**

Federal Court of Australia

Nicholas J

Patents - legal professional privilege - patent attorney privilege - proceeding commenced by applicant alleging patent infringement - applicant by interlocutory application sought order under s105(1) *Patents Act 1990* (Cth) for amendment of invention's description and of each of patent's nine claims - second respondent opposed application for amendment - second respondent by interlocutory application challenged applicant's claims of legal professional privilege and patent attorney privilege concerning certain documents - waiver - implied waiver - whether inconsistency between case brought and maintenance of privilege - held: Court satisfied there had been no waiver of privilege in documents - interlocutory application dismissed.

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

### **TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 2) [2018] NSWSC 1149**

Supreme Court of New South Wales

Stevenson J

Evidence - privilege - officers of Australian Securities and Investments Commission (ASIC)

made two examinations of second defendant under s19 *Australian Securities and Investments Commission Act 2001* (Cth) - plaintiff sought access to transcripts, which had been produced by ASIC in response to subpoena issued at plaintiff's request - second defendant resisted application on basis of 'privilege against self-incrimination' - held: Court satisfied to grant plaintiff access to transcripts.

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

## **MWP Transport Pty Limited v Michael Thomas Kent [2018] NSWSC 1119**

Supreme Court of New South Wales

McDougall J

Judgments and orders - freezing orders - disclosure - plaintiffs obtained freezing orders against defendants concerning alleged defalcations by first defendant in course of employment as chief financial officer of group of companies which plaintiffs formed a part of - plaintiffs, pursuant to r25.12 *Uniform Civil Procedure Rules 2005* (NSW), sought that certain defendants disclose amounts they paid for legal expenses, amounts of future legal expenses, and the sources of payments - held: Court satisfied to make orders in plaintiffs' favour - application granted.

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

## **Kennedy v Kennedy [2018] NSWSC 1087**

Supreme Court of New South Wales

Davies J

Possession - pleadings - wills and estates - plaintiffs were executors of deceased's estates - property had been transmitted to plaintiffs - defendant was child of deceased and beneficiary of estate - defendant was occupying property - plaintiffs sought possession of property and leave to issue writ of possession - held: defendant's defences did not disclose defence to plaintiffs' claim - defences struck out - leave granted to plaintiffs to move for default judgment and to issue writ of possession.

[View Decision](#) (B)

## **Defteros v Google Inc LLC [2018] VSCA 176**

Court of Appeal of Victoria

Beach & Hargrave JJA; Sifris AJA

Defamation - pleadings - 'non-publisher defence' - applicant contended respondent published 'web matter' defamatory of him - applicant, pursuant to r23.02 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) sought to strike out certain paragraphs of respondent's defence which alleged it was 'not a publisher' of search results, or of 'third party documents' connected to search results - primary judge dismissed strike-out application - applicant sought to appeal, contending primary judge erred in consideration of, and not following *Google Inc v Duffy* (2017) 129 SASR 304 and in construction of r23.02 of the Rules - held: grounds of appeal were without merit - leave to appeal refused.

[Defteros](#) (I B)

## **Police v Henderson [2018] SASC 98**

Supreme Court of South Australia

Peek J

Traffic law - appellant charged with driving motor vehicle over 'applicable speed limit' and contravening provisional licence condition - Magistrate found charges proven - appellant appealed on ground that the verdict was 'unsatisfactory and not support by the evidence' - proper construction of s175(3)(ba) *Road Traffic Act 1961* (Vic) - whether Magistrate erred in construction of s175(3)(ba) - 'permissible certifiable fact' - onus - whether appellant proved that 'five step test' which constable performed had failed to show 'TSA' was accurate to extent stated on certificate - held: appeal allowed.

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

## CRIMINAL

### Executive Summary

**R v AB (No. 2)** (NSWCCA) - criminal law - judgments and orders - 'historic sexual offences' - suppression and non-publication - determination of four applications

**Manolas v The Queen** (NTCCA) - criminal law - stealing property - 'element of intention to deprive' - challenge to trial judge's directions - appeal against conviction and sentence dismissed

### Summaries With Link

## **R v AB (No. 2) [2018] NSWCCA 148**

Court of Criminal Appeal of New South Wales

Meagher JA; Rothman & Garling JJ

Criminal law - judgments and orders - 'historic sexual offences' - Court, on 6 June 2018, set aside District Court orders made under s 7 *Court Suppression and Non-publication Orders Act 2010* (NSW) - AB sought temporary stay of orders pending application to High Court for special leave to appeal - Simpson AJA temporarily stayed orders by consent - AB sought further relief by notice of motion - four matters for determination: AB's application under r50C *Criminal Appeal Rules* (NSW) to set aside Court's orders (r50C application); application for a stay of 6 June 2018 orders pending determination of AB's special leave application; application for a stay 6 June 2018 orders pending determination of an application by AB to District Court; and AB's application for certificate under *Suitors' Fund Act 1951* (NSW) - prospects of success on special leave application - whether AB should have leave to apply to High Court for stay - whether Court had power to grant stay in respect of pending determination of District Court



application - whether power to grant indemnity certificate enlivened - whether to grant indemnity certificate - held: r50C application dismissed - applications for stay refused - indemnity certificate refused.

[View Decision](#)

## **Manolas v The Queen [2018] NTCCA 12**

Court of Criminal Appeal of the Northern Territory

Kelly & Blokland JJ; Graham AJ

Criminal law - stealing property - appellant pleaded not guilty to charge of 20 counts of stealing property - appellant found guilty - appellant sentenced to aggregate sentence of six years in prison with three year non-parole period - appellant appealed against conviction on basis trial judge erred concerning directions to jury in respect of 'element of intention to deprive' - appellant also appealed against sentence, contending judge had failed to determine basis on which appellant intended to deprive owner of property, and that sentence was manifestly excessive. - ss209(1) & 210(1) *Northern Territory Criminal Code* - 'steals' - 'depriving' - 'deprived' - 'regardless of the rights of the owners' - whether prosecution required to prove accused had no 'subjective regard' to owner's interest - whether 'extended definition' of 'depriving' contained 'composite description of the necessary intention' - whether jury might have been misled by use of words 'due' and 'appropriate' in relation to 'alternative basis' for establishment of intent to deprive - held: appeal dismissed.

[Manolas](#)

# Benchmark

## Up-Hill

**By:** CHRISTINA ROSSETTI

Does the road wind up-hill all the way?

Yes, to the very end.

Will the day's journey take the whole long day?

From morn to night, my friend.

But is there for the night a resting-place?

A roof for when the slow dark hours begin.

May not the darkness hide it from my face?

You cannot miss that inn.

Shall I meet other wayfarers at night?

Those who have gone before.

Then must I knock, or call when just in sight?

They will not keep you standing at that door.

Shall I find comfort, travel-sore and weak?

Of labour you shall find the sum.

Will there be beds for me and all who seek?

Yea, beds for all who come.

[https://en.wikipedia.org/wiki/Christina\\_Rossetti](https://en.wikipedia.org/wiki/Christina_Rossetti)

Christina Georgina Rossetti (5 December 1830 – 29 December 1894) was an English poet who wrote a variety of romantic, devotional, and children's poems. She is famous for writing Goblin Market and "Remember". She also wrote the words of the Christmas carols "In the Bleak Midwinter", set to a tune by Gustav Holst, and "Love Came Down at Christmas"

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