

Monday 27 August 2012

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Upper Lachlan Shire Council v Rodgers** - personal injury - negligence - contributory negligence - damages for past gratuitous care (I, B)

**Teoh v Hunters Hill Council (No 6)** - application for leave to re-open proceedings - abuse of process (I, B, C, G)

**Hammond v JP Morgan Trust Australia Ltd** - joinder - whether non-party to appeal proceedings ought to be joined (B)

**Liu v Fairfax Media Publications Pty Ltd** - evidence - without prejudice communications - whether documents privileged (I, B)

**In the matter of The Consortium Centre Pty Ltd** - application to restrain solicitor from acting in proceedings (I, B, C, G)



**In the matter of Cheal Industries Pty Ltd** - application to re-open proceedings based on denial of procedural fairness - apportionment of costs (I, B, C, G)

**AAMI Ltd v Ali** - motor accident claim - challenge to decisions of proper officer of Motor Accidents Authority (I, G)

## Summaries with links (5 minute read)

### **Upper Lachlan Shire Council v Rodgers [2012] NSWCA 259**

Court of Appeal of New South Wales

Allsop P; Campbell & Barrett JJA

Personal injury - negligence - plaintiff tripped and fell in car park owned by defendant - whether primary judge erred in findings of negligence and finding no contributory negligence - whether primary judge erred in awarding damages for past gratuitous care - whether sufficient engagement with s5B *Civil Liability Act* 2002 (NSW) (Act) - whether plaintiff took due care for his safety - statutory threshold for damages for gratuitous care: s15(3) of the Act - evidence to justify conclusion of 1 to 2 hours a day gratuitous care.

[Upper Lachlan Shire Council](#) (I, B)

### **Teoh v Hunters Hill Council (No 6) [2012] NSWCA 260**

Court of Appeal of New South Wales

Allsop P; Beazley & Meagher JJA

Judgments and orders - application for leave to re-open proceedings pursuant to r36.16 *Uniform Civil Procedure Rules* 2005 (NSW) - whether any new matter not raised in previous applications - whether abuse of process in requiring court to re-read material - court's inherent power to prevent abuse of process - applicant seeking to re-agitate same issues - whether any change in circumstances or fresh argument to justify re-opening initial decision - vexatious conduct.

[Teoh](#) (I, B, C, G)



## **Hammond v JP Morgan Trust Australia Ltd [2012] NSWCA 261**

Court of Appeal of New South Wales

Beazley JA

Real property - joinder of parties - wife registered proprietor of mortgaged land - husband not party to possession proceedings on appeal - husband claims equitable interest in land - whether husband necessary party to appeal and should be joined - whether husband precluded from raising equitable interest at this stage of proceedings: *John Alexander's Clubs Pty Ltd & Anor v White City Tennis Club Ltd* [2010] HCA 19 - circumstances in which person with beneficial interest in property could be affected by proceedings brought by first registered mortgagee - whether respondent engaged in any conduct to affect husband's claim of equitable interest - priority of first ranking registered mortgage over equitable interest.

[Hammond](#) (B)

## **Liu v Fairfax Media Publications Pty Ltd [2012] NSWSC 900**

Supreme Court of New South Wales

Harrison AsJ

Evidence - admissibility - privilege - *without prejudice* documents in defamation proceedings - defendants seek inspection of documents - documents to be made available on discovery: r21.5(2)(a) *Uniform Civil Procedure Rules* 2005 (NSW) (UCPR) - definition of *privileged documents* in UCPR includes *privileged information* as defined in s131 *Evidence Act* 1995 (Cth) (Act) - whether documents privileged under s131 of the Act - whether documents contain settlement negotiations - whether making the communication or preparing the documents affects the right of a person - whether public interest in upholding confidentiality of negotiation to resolve criminal proceedings.

[Liu](#) (I, B)

## **In the matter of The Consortium Centre Pty Ltd [2012] NSWSC 898**

Supreme Court of New South Wales

Black J

Courts - legal representation - application to restrain solicitor from acting in proceedings - court's inherent power to restrain legal practitioner from representing party in order to ensure justice and appearance of justice: *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 - examples of situations where solicitor may be restrained - jurisdiction to be exercised with caution and due weight to public interest in litigant not being deprived of solicitor of choice: *Geelong School Supplies*



*Pty Ltd v Dean* [2006] FCA 1404 - whether fair-minded and reasonably informed member of the public would have expectation that solicitor unable to act - whether due administration of justice requires court to make order restraining solicitor from acting.

[Consortium Centre](#) (I, B, C, G)

## **In the matter of Cheal Industries Pty Ltd - Fitzpatrick v Cheal [2012] NSWSC 932**

Supreme Court of New South Wales

Ward J

Judgment and orders - application to re-open judgment on basis of denial of procedural fairness - court's inherent and statutory powers to re-open hearing where judgment not yet entered: r36.16(1) *Uniform Civil Procedure Rules* 2005 (NSW) (UCPR) - whether denial of procedural fairness - costs - two offers of compromise - whether first offer valid offer of compromise under the UCPR - whether first offer to be treated as *Calderbank* offer - second offer a *Calderbank* offer expressed to be inclusive of costs - whether unreasonable to reject offers - relevant factors to whether rejection unreasonable: *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 - apportionment of costs - whether costs should be apportioned according to principle of proportionality: s60 *Civil Procedure Act* 2005 (NSW).

[Cheal Industries](#) (I, B, C, G)

## **AAMI Ltd v Ali [2012] NSWSC 969**

Supreme Court of New South Wales

Beech-Jones J

Motor accidents - application by insurer for judicial review of two decisions of proper officers of the *Motor Accidents Authority* - whether proper officer erred in law in applying incorrect legal test contained in s63(3) *Motor Accidents Compensation Act* 1999 (NSW) (Act) - whether failure to take into account medical assessment in applying test in s63(3) - whether failure to accord natural justice - whether constructive failure to exercise jurisdiction - whether imposition of too high a test for satisfaction of s62(1A) of the Act - whether failure to identify relevant material - whether CARS assessor misconstrued s62(1)(b) of the Act in refusing to refer matter for further medical assessment.

[AAMI](#) (I, G)

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