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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Westpac Banking Corporation v Billgate Pty Ltd - application for summary judgment - real question to be tried (I, B, C, G)

Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd - security of payments legislation - adjudication determination - jurisdictional error - natural justice - whether reasons adequate (I, C)

Allianz Australia Insurance Ltd v Mackenzie and Anor - judicial review - motor accident - proper officer - procedural fairness - whether jurisdictional error or error of law on the face of the record (I, G)

Eastmark Holdings Pty Ltd v Kabraji (No 3) - discovery and interrogatories - strata titles - legal advice privilege - common interest exception - confidentiality - waiver (I, B, C, G)

Boorer v HLB Mann Judd (NSW) Pty Ltd - professional negligence - retainer - evidence - duty of care - causation - damages (I, B)



500 Burwood Highway Pty Ltd v Australian Unity Ltd & Anor – contract for sale of land - failure of contractual mechanism for adjustment to purchase price - assessment of quantity surveyor - independence - bias - contractual compliance (B, C)

In Roma Pty Ltd v Adams & Anor - pleadings - deed of charge – non-admissions - delivery of deed - instrument of release (I, B, C, G)

Pecenka v Minister for Health - work injury damages - psychiatric injury - estoppel - WorkCover proceedings (I)

Stubing & Anor v Halling & Anor - contract for sale of land - breach of warranty in relation to building work - construction of warranty - assessment of damages - interest (B, C)

Summaries with links (5 minute read)

Westpac Banking Corporation v Billgate Pty Ltd [2012] NSWSC 1447

Supreme Court of New South Wales

Stevenson J

Summary judgment - parties entered into deed for repayment of money owed by defendant to plaintiff under various loan facilities (**deed**) - plaintiff sought summary judgment under r13.1 *Uniform Civil Procedure Rules* 2005 (NSW) for possession of properties pursuant to deed - principles to be applied on an application for summary judgment: *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) HCA 69, *Fancourt v Mercantile Credits Ltd* (1983) HCA 25 - *whether*: there was a real question to be tried; *no prospect* of setting aside deed; claim was so clearly destined to fail it should be dealt with summarily; proper basis for bringing application.

[Westpac Banking Corporation](#) (I, B, C, G)



Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466

Supreme Court of New South Wales

Sackar J

Security of payments legislation - plaintiff sought order quashing adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) or, alternatively, a declaration that the determination was void - plaintiff sought orders restraining enforcement - *whether*: adjudicator erred in determination; failure to perform statutory function; denial of natural justice; manifestly inadequate reasons; jurisdictional error warranting intervention - principles applicable to *jurisdictional error*: *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 - extent of natural justice must accommodate scheme of the Act: *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* (2010) NSWSC 168 - requirements as to reasons: *Bergemann v Power* (2011) NSWSC 1039.

[Avopiling](#) (I, C)

Allianz Australia Insurance Ltd v Mackenzie and Anor [2012] NSWSC 1458

Supreme Court of New South Wales

Johnson J

Judicial review - motor accident - plaintiff sought prerogative or declaratory relief arising from decision of proper officer of Motor Accidents Authority that first defendant be referred for further medical assessment under s62 *Motor Accidents Compensation Act 1999* (NSW) (**Act**) - *whether*: decision and reasons were not those of the *proper officer* so that no valid decision was made under s62 of the Act and Medical Assessment Guidelines; denial of procedural fairness; erroneous reasons; jurisdictional error; error of law on the face of the record.

[Allianz Australia Insurance](#) (I, G)



Eastmark Holdings Pty Ltd v Kabraji (No 3) [2012] NSWSC 1463

Supreme Court of New South Wales

Hallen J

Discovery and interrogatories - legal advice privilege - common interest exception - confidentiality - waiver - application for general access to inspect documents produced by solicitors at plaintiff's request should be restricted - legal advice privilege: *Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 - *whether*: common interest between owners' corporation and lot owners meant that former could not assert privilege against latter: *Schreuder v Murray (No 2)* (2009) WASCA 145; advice was not confidential as against members of owners corporation: s108 *Strata Schemes Management Act 1996* (NSW); privilege had been waived: *Mann v Carnell* (1999) 201 CLR 1, *Carey v Korda* (2012) WASCA 228.

[Eastmark Holdings](#) (I, B, C, G)

Boorer v HLB Mann Judd (NSW) Pty Ltd [2012] NSWSC 1499

Supreme Court of New South Wales

Adamson J

Professional negligence - contract of retainer - plaintiff sued firm of accounts for damages in negligence arising from failure to advise plaintiff as to the nature of certain documents which plaintiff subsequently signed - plaintiff alleged defendant's negligence caused ASIC to disqualify him from managing corporation, damaged his reputation and adversely affected his income - *whether* court ought not accept plaintiff's evidence unless corroborated or against interest: *Sir Richard Eggleston QC, Evidence, Proof and Probability* (1978) - duty owed by defendant to plaintiff - scope of retainer - alleged breaches of duty in relation to form lodged with ASIC and failure to warn of insolvency - *whether*: plaintiff established any breach of duty or causation - assessment of damages: *Wolfenden v International Theme Park Pty Ltd* (2008) NSWCA 78.

[Boorer](#) (I, B)



500 Burwood Highway Pty Ltd v Australian Unity Ltd & Anor [2012] VSC 596

Supreme Court of Victoria

Vickery J

Contract for sale of land - proceedings arising from contractual mechanism to facilitate an adjustment to the purchase price - purpose of mechanism to accommodate cost of completing construction of aged care facility on land (**development**) - *whether*: assessment report of quantity surveyor ought to be set aside; quantity surveyor was *independent*; quantity surveyor was biased; quantity surveyor undertook task required of him under contract - accepted approach to construction of contract: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) HCA 52 - legal principles as to role of contractually appointed expert: *Beevers v Port Philip Sea Pilots Pty Ltd* (2007) VSC 556 (*Beevers*) - circumstances in which court will intervene to overturn expert determination: *Beevers, TX Australia Pty Ltd v Broadcast Australia Pty Ltd* (2012) NSWSC 4 - analogy with principle for setting time at large where a contractual mechanism which involves a time limit fails: *Campbell v Bent* (1879) VicLawRp 168, *Sudbrook Trading Estate Ltd v Eggleton* (1983) AC 444.

[500 Burwood Highway](#) (B, C)

In Roma Pty Ltd v Adams & Anor [2012] QCA 347

Court of Appeal of Queensland

de Jersey CJ; Holmes & Fraser JJA

Pleadings - deed of fixed and floating charge - appeal from decision that appellant was bound by charge and that it was not released from obligations under deed by registered release of mortgage signed by appellant - *whether*: appellant should be deemed to have admitted, as a matter of pleading that it was bound by deed of charge because it failed to explain non-admissions of allegations: r166(5) *Uniform Civil Procedure Rules* 1999 (Qld); deed was *delivered* upon execution by appellant; pleading of agreement to release; absence of finding of agreement to release; instrument of release operated to discharge obligations of appellants - construction of loan agreement.

[In Roma](#) (I, B, C, G)

**Pecenka v Minister for Health [2012] WASCA 250**

Court of Appeal of Western Australia

Pullin, Buss & Murphy JJA

Work injury damages - appeal from dismissal of claim for damages for psychiatric illness suffered in course of employment due to behaviour of another employee towards appellant - *whether*: rule in *Jones v Dunkel* applied in present case: *Jones v Dunkel* (1950) 101 CLR 298; respondent estopped from denying that the cause of the appellant's injury because of decisions made in *WorkCover* proceedings; it was reasonably foreseeable to respondent that appellant would suffer a psychiatric injury; breach of duty of care; trial judge misused his advantage in making findings inconsistent with incontrovertible facts; failure to address claim for exemplary and/or aggravated damages.

[Pecenka](#) (I)

Stubing & Anor v Halling & Anor [2012] SASCFC

Full Court of the Supreme Court of South Australia

Gray, Sulan & White JJ

Contract for sale of land - appeal from finding of breach of warranty - construction of warranty - *whether*: appellants had carried out building work; building work required approval; appellant had obtained approval; reasonable approach to damages in accordance with principles set out in *Hungerfords v Walker* (1989) HCA 8; (1989) 171 CLR 125 - provisions governing costs: s40(1) *Supreme Court Act 1935* (SA), r263(1) *Supreme Court Civil Rules 2006* (SA), *GT Corporation Pty Ltd v Amare Safety Pty Ltd* (2008) VSC 296 - whether discretion contained in s39 *District Court Act 1991* (SA) available in relation to damages awarded for respondents' loss of use of money.

[Stubing](#) (B, C)

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