

Monday 25 March 2013

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Visy Packaging Pty Ltd v Siegwirk Australia Pty Ltd (FCA)** - contract - insurance - broadform liability policy - claim for damages for loss arising from corrosion of cans - insurer's obligation to bear costs of resin supplier's defence to unsuccessful cross-claim (I)

**Lahey Constructions Pty Ltd v Newbold Bulk Haulage Pty Ltd (NSWSC)** - security of payments - application by subcontractor for declaration that adjudicator's decision void - non-disclosure of reasons - denial of natural justice - application granted (I, C)

**Chaina v Presbyterian Church (NSW) Property Trust (No. 9) (NSWSC)** - evidence - inconsistency between assertion of mental harm causing incapacity to instruct solicitors and claim of client legal privilege over correspondence - privilege waived in respect of certain correspondence (I)

**In the matter of Mogul Stud Pty Ltd (NSWSC)** - corporations - application for rectification of share register due to erroneous allocation of shares - court's discretionary power of rectification - register did not reflect intention of parties - orders made (B)

**Lawstrane Pty Ltd and Victorian WorkCover Authority v Ruttmar (VSCA)** - work injury damages - appeal from decision of County Court granting stay of grant of leave and pronouncing order *nunc pro tunc* - court's power to make stay order - appeal dismissed (I)



**Johnson v Forefront Automotive Industries Pty Ltd (ACTSC)** - work injury damages - dispute concerning extent of loss of income earning capacity - medical evidence - assessment of loss - judgment for plaintiff (I)

**Fekete v Construction Occupations Registrar (ACTSC)** - judicial review - rectification order - application for dismissal of proceedings on basis matters could be dealt with by Tribunal - issues of significance for building work certifiers and professional indemnity insurers - application dismissed (I, C, G)

## Summaries with links (5 minute read)

### **Visy Packaging Pty Ltd v Siegwerk Australia Pty Ltd [2013] FCA 231**

Federal Court of Australia

Gray J

Contract - insurance - exclusion clauses - applicant sought to recover damages from respondent for loss arising from corrosion of lacquer coating on inside of can ends - respondent cross-claimed against supplier of resin used as ingredient of lacquer which respondent supplied to applicant - respondent's cross-claim was prosecuted by its insurer using right of subrogation - supplier of resin cross-claimed against its insurer - causation - construction of insurance policy - held: insufficient evidence to establish any cause of damage to cans out of which applicant's claim against respondent arose - respondent's claim against supplier of resin fell within coverage clause of supplier's broadform liability policy with its insurer and was not excluded from coverage - respondent's cross-claim dismissed - insurer obliged to bear costs of supplier's defence to cross-claim.

[Visy](#) (I)

### **Lahey Constructions Pty Ltd v Newbold Bulk Haulage Pty Ltd [2013] NSWSC 215**

Supreme Court of New South Wales

Pembroke J

Security of payments - dispute arising from contract between plaintiff and subcontractor which provided that financial risk associated with adverse unforeseen site conditions lay with subcontractor - application for declaration that adjudication determination made pursuant to *Building and Construction Industry Security of Payment Act 1999* (NSW) was void and should be quashed and set aside - failure to disclose reasoning - approach not agitated by either party -



failure to seek further submissions concerning view formed in resolution of claim which adjudicator knew had not been raised by either party - denial or natural justice - held: decision of adjudicator void.

[Lahey](#) (I, C)

**Chaina v Presbyterian Church (NSW) Property Trust (No. 9) [2013] NSWSC 212**

Supreme Court of New South Wales

Davies J

Evidence - client legal privilege - waiver - claim by second plaintiff against defendants for mental harm caused by defendants' negligence - defendants sought to tender documents which were privileged by reason of either or both of ss118 & 119 *Evidence Act 1995* (NSW) - defendants contended privilege waived by reason of commencement of proceedings and particular claims made - purpose of tender was to show correspondence was passing between plaintiffs and solicitors and that second plaintiff was capable of providing instructions - inconsistency between second plaintiff's assertion of inability to provide instructions and maintenance of client legal privilege over correspondence - held: privilege waived in respect of certain correspondence.

[Chaina](#) (I)

**In the matter of Mogul Stud Pty Ltd [2012] NSWSC 1639**

Supreme Court of New South Wales

Black J

Corporations - application by plaintiff for rectification of share register under s175(1) *Corporations Act 2001* (Cth) due to erroneous allocation of shares - court's discretionary power to order rectification of register: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 - principles of rectification: *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407 - held: present position as recorded in register did not reflect intention of parties - orders made.

[Mogul](#) (B)

**Lawstrane Pty Ltd and Victorian WorkCover Authority v Ruttmar [2013] VSCA 57**

Court of Appeal of Victoria

Redlich JA & Davies AJA

Work injury damages - respondent sought to bring proceedings to recover damages for pecuniary loss and pain and suffering for work-related injuries - court granted leave to seek damages for pain and suffering - respondent applied for stay of grant of leave pending appeal against decision refusing leave in respect of claim for pecuniary loss - appellants contended stay order was beyond court's power and that order lacked utility - held: court did not have power under s134AB(16)(b)



*Accident Compensation Act 1985 (Vic) (ACA)* to grant stay and to pronounce such order *nunc pro tunc* but it did have implied power to make stay order as well as power conferred by s49 *County Court Act 1958 (Vic)* and r66.14 *County Court Rules* - stay order amended to remove references to r66.16 and operation of s134A(12) ACA - appeal otherwise dismissed.

[Lawstrane](#) (I)

### **Johnson v Forefront Automotive Industries Pty Ltd [2013] ACTSC 44**

Supreme Court of the Australian Capital Territory

Sidis AJ

Work injury damages - plaintiff suffered eye injury while working as panel beater - dispute concerning extent to which plaintiff's income earning capacity was affected by injury - medical evidence - assessment of loss dependent on findings concerning prospects of gaining entry to Australian Army and promotion during career with Army - judgment for plaintiff.

[Johnson](#) (I)

### **Fekete v Construction Occupations Registrar [2013] ACTSC 45**

Supreme Court of the Australian Capital Territory

Sidis AJ

Judicial review - appropriate forum - plaintiff sought judicial review of rectification order issued by defendant under s38 *Construction Occupations (Licensing) Act 2004 (ACT)* - plaintiff subsequently applied for stay of order - defendant sought order that proceedings be dismissed on basis that matters complained of by plaintiff could be dealt with by ACT Civil and Administrative Tribunal - both Supreme Court and Tribunal had jurisdiction to determine issues - issues of significance for building work certifiers and their professional indemnity insurers - held: appropriate for matter to proceed in Supreme Court - defendant's application dismissed - order stayed.

[Fekete](#) (I, C, G)

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