

Monday, 12 May 2025

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

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Executive Summary (One Minute Read)

SMBC Leasing and Finance, Inc v Flexirent Capital Pty Ltd (Discovery) (FCA) - Court decided two issues of legal professional privilege in commercial dispute

Gillies v State of New South Wales (NSWCA) - primary judge who had given judgment in two previous related proceedings had correctly refused to recuse himself from hearing two motions in the current proceedings

Tjong v Chang (No 2) (NSWCA) - Court of Appeal dismissed application that it set aside its orders allowing appeal and instead ordering appeal be dismissed on basis that it had overlooked two principles of the law of trusts

The Owners - Strata Plan No. 81376 v Dylam Developments Pty Ltd (NSWSC) - Court answered separate questions as to whether claims under an insurance policy for breach of warranties implied by the *Home Building Act 1989* (NSW) were valid or within time

LaserBond Limited v Hooper (NSWSC) - defendant's undertaking to the Court had been released by a general release in heads of agreement settling proceedings

Summaries With Link (Five Minute Read)

SMBC Leasing and Finance, Inc v Flexirent Capital Pty Ltd (Discovery) [2025] FCA 459
Federal Court of Australia

Needham J

Legal professional privilege - SMBC sued Flexirent in respect of an agreement under which SMBC purchased receivables and related assets from Flexirent that arose under contracts purportedly entered into by an agent of Flexirent and Veolia - SMBC contended the receivables and assets did not exist, and that the purported contracts between Flexirent's agent and Veolia were forged, and alleged breach of warranty, negligence, negligent misrepresentation, misleading conduct, and breach of duty - SMBC said Flexirent had failed to give proper discovery, including by withholding documents due to misconceived privilege claims, failing to discover relevant documents, and failing to comply with the agreed discovery protocol - Court now decided issue of client legal privilege - held: legal advice privilege does not only protect formal advice on the law, and extends to professional advice as to what a party should prudently or sensibly do in a relevant legal context - privilege upheld regarding documents of two officers of Flexirent created when legal advice, both as to Flexirent's legal position and the strategy required to respond to issues such as subpoenas, would have been given - joint privilege arises where two or more parties join in communicating with a legal advisor for the purposes of retaining their services or obtaining their advice - no joint privilege claim regarding communications with a law firm who provided certain opinions to both SMBC and Flexirent as required by a contractual condition precedent, as the opinions were careful to exclude solicitor/client relationship between SMBC and the law firm.

[SMBC Leasing and Finance, Inc](#)

Gillies v State of New South Wales [2025] NSWCA 98

Court of Appeal of New South Wales

Leeming & Stern JJA

Bias - applicant convicted of criminal offence and imprisoned in 2006 - appeals against conviction and sentence were dismissed and he was refused special leave to appeal to the High Court - applicant later sued multiple parties including a District Court Judge, the State of NSW, the Commonwealth, a solicitor who had acted for him in the 2006 proceedings, and a former domestic partner - motions before primary judge by NSW and Commonwealth, and by the applicant, for summary judgment - primary judge refused applicant's request that he recuse himself by reason of his earlier involvement and judgment in the applicant's proceedings against his former solicitor and his former partner - applicant sought leave to appeal - held: primary judge had not determined any issues of credit in the proceedings against the former solicitor or the former partner - nothing in the primary judge's reasons for judgment in that matter suggested prejudgment of any matters raised in the current proceedings - the outcome of the previous proceedings also did not suggest prejudgment in these proceedings - entirely proper for primary judge to decline to make an order granting the transcript providers permission to give applicant a copy of the audio recording of the hearings - no evidence before primary judge transcript had been altered - primary judge's failure to refer expressly to individual documents applicant had tendered on the recusal application did not suggest primary judge had ignored relevant material, much less that he did so deliberately because of actual bias against applicant - leave to appeal refused.

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Tjong v Chang (No 2) [2025] NSWCA 96

Court of Appeal of New South Wales

Basten, Griffiths, & Price AJJA

Civil procedure - Court had allowed an appeal by majority - primary reason for allowing appeal was finding that a trust had been distributed by a final payment in 1999 such that the trust had terminated at that time - respondent applied to have Court of Appeal's orders set aside and appeal dismissed on the basis the Court had 'overlooked' two matters - appellant objected to the competence of this application - held: jurisdiction to set aside orders should be exercised sparingly and with caution, having due regard to the importance of the finality of litigation - Court must have proceeded according to some misapprehension of the facts or the relevant law which cannot be attributed solely to the neglect or default of the party seeking the rehearing - an application that is no more than an attempt to reargue the appeal should be refused - the allegedly overlooked principle that a distribution made in breach of trust is incapable of terminating the trust was not, in the terms the respondent now raised, a disputed issue on the appeal - Court had not overlooked the principle in *Re Hallett's Estate* (1880) 13 Ch D 696 (where a trustee mixes trust monies with their own funds, the trustee is presumed to act honestly and withdraw their own money first) - this principle applies to withdrawals from a comingled fund, and not to payment to a beneficiary in exercise of an existing legal power of distribution, which does not engage any presumption of honesty - too late now to run argument that particular person could not be a beneficiary of the trust and so principle was engaged - application dismissed.

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The Owners - Strata Plan No. 81376 v Dyldam Developments Pty Ltd [2025] NSWSC 438

Supreme Court of New South Wales

Stevenson J

Home building - owners corporation sued builder and developer who had since become subject to a deed of company arrangement and gone into liquidation, respectively - insurer under a Residential Building Insurance Policy joined as third defendant - Court ordered separate questions be answered as to whether a letter sent by the owners corporation's solicitor within time had been a valid claim under the policy, and whether two further letters sent had been within time - held: policy would only respond if the owners corporation suffered loss or damage by reason of, relevantly, a breach by the builder of the statutory warranties implied in the building contract by s18B of the *Home Building Act 1989* (NSW), which loss or damage it could not recover from the builder because of, relevantly, the builder's insolvency - both the loss and its irrecoverability would have to occur before the policy responded - first letter sent by the owners corporation's solicitor to the insurer had not been a valid claim under the policy - owners corporation not entitled to make a claim as at the date of that letter as the builder was not insolvent at that date - occupation certificate issued in breach of s109H(2) of the *Environmental Planning and Assessment Act 1979* (NSW) is not invalid - entitlement to make claim 'after the

period of insurance' subject to the long stop limitation period in s103BC(1) of the *Home Building Act* - claims on policy in second and third letters were made out of time.

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LaserBond Limited v Hooper [2025] NSWSC 442

Supreme Court of New South Wales

Hmelnitsky J

Contempt - Hooper was one of the founders and a former director of LaserBond, and seemed to have waged a campaign of disparagement against LaserBond and its current management on a social media site for investors LaserBond sued seeking relief under the *Australian Consumer Law* and in injurious falsehood - in response to LaserBond's application for urgent interlocutory relief, Hooper undertook to refrain from making certain disparaging representations about LaserBond and its current management - at mediation, parties executed heads of agreement to settle substantive proceedings, expressed to be immediately binding, that included an undertaking by Hooper in the same terms as the undertaking to the Court - parties exchanged and all but agreed the terms of a draft deed contemplated by the heads of agreement, but which was not executed - in the two months after settlement, Hooper made posts to two social media sites including representations that were arguably within the scope of his undertakings to the Court and in the heads of agreement - LaserBond sought orders to punish Hooper for contempt of court and to give effect to the settlement - held: the giving of an undertaking to the Court is equivalent to an injunction - Hooper's and LaserBond's rights in relation to the dispute were entirely resolved on the basis of the heads of agreement - heads of agreement contained sweeping, immediately-effective, mutual releases - LaserBond gave up all existing claims against Hooper in return for the inter-partes undertakings in the heads of agreement - the claims which the parties released included any claims to enforce compliance with Hooper's undertaking to the Court - even if the contempt charges were made out, this was not a case in which the Court should exercise its power to punish Hooper for contempt - settlement agreement enforced under s73 of the *Civil Procedure Act 2005* (NSW).

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