Federal Court of Australia

Quach v MLC Limited [2022] FCAFC 202

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| Appeal from:  Application for leave to appeal from: | *Quach v MLC Limited (No 6)* [2021] FCA 271  *Dr Michael Van Thanh Quach v MLC Life Limited (No 4)* [2020] FCA 532  *Dr Michael Van Thanh Quach v MLC Life Limited (No 5)* [2020]FCA 1134  *Quach v MLC Limited (No 6)* [2021] FCA 271 |
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| File numbers: | ACD 20 of 2020  ACD 38 of 2020  ACD 2 of 2021  ACD 14 of 2021  ACD 19 of 2021 |
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| Judgment of: | **COLLIER, PERRY AND THOMAS JJ** |
|  |  |
| Date of judgment: | 21 December 2022 |
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| Catchwords: | **INSURANCE** – appeal from decision of a single Judge of the Federal Court of Australia – where appellant submits the respondent had breached s 13 of the *Insurance Contracts Act 1984* (Cth)– where appellant made a claim for total and permanent disability caused by injury or sickness and claims he is unable to practise in his profession – where appellant had not provided insurer with any medical evidence supporting the claim and had not complied with policy terms - where appellant submits he was not afforded a fair hearing at first instance – where the appellant submits apprehended bias on behalf of the primary Judge – where appellant submits evidence of the respondent was inadmissible before the primary Judge – where appellant submits that the respondent could not establish ‘jurisdictional fact’ in the Court below - appeal dismissed  **PRACTICE AND PROCEDURE** – application for leave to appeal from interlocutory decisions of a Judge of the Federal Court of Australia – applicable principles - whether decision of primary Judge is affected by sufficient doubt as to necessitate its reconsideration – whether substantial injustice would result if leave were refused supposing the decision to be wrong - applications dismissed  **PRACTICE AND PROCEDURE –** application to adduce evidence not before the primary Judge – rule 36.57 of the *Federal Court Rules 2011* (Cth) – section 27 of the *Federal Court of Australia Act 1976* (Cth) – applicable principles - whether the evidence had been adduced before the primary Judge would have very probably resulted in a different outcome – whether the appellant was able to demonstrate that he was unaware of the evidence and could not have been with reasonable diligence made aware of the evidence – applications refused  **PRACTICE AND PROCEDURE** – application for stay of costs order – applicable principles – application dismissed |
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| Legislation: | *Evidence Act 1995* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011* (Cth)  *Insurance Contracts Act 1984* (Cth) |
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| Cases cited: | *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2018] FCAFC 122  *Australia Bay Seafoods Pty Ltd v Northern Territory of Australia* [2022] FCAFC 180  *Carlill v Carbolic Smoke Ball Company* [1892] 2 QB 484  *Charisteas v Charisteas* [2021] HCA 29  *Dasma Environmental Pty Ltd v Environment Protection Authority* [2022] VSCA 248  *Décor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 655; (1991) 33 FCR 397  *Dr Michael Van Thanh Quach v MLC Life Limited (No 1)* [2019] FCA 1194  *Dr Michael Van Thanh Quach v MLC Life Limited (No 2)* [2019] FCA 1322  *Dr Michael Van Thanh Quach v MLC Life Limited (No 4)* [2020] FCA 532  *Dr Michael Van Thanh Quach v MLC Life Limited (No 5)* [2020]FCA 1134  *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43  *Gunns Finance Pty Ltd (Receivers and Managers Appointed) (in Liquidation) v Sithiravel* [2016] NSWSC 1543  *Michael Wilson & Partners v Nicholls* [2011] HCA 48; (2011) 244 CLR 427  *National Retail Association v Fair Work Commission (No 2)* [2014] FCA 664  *Quach v MLC Limited (No 6)* [2021] FCA 271  *Quach v RU (No 3)* [2017] ACTSC 258  *Quach v Ru* [2019] FCA 2041  *Re Bolton; Ex parte Beane* [1987] 162 CLR 514; HCA12  *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98  *Revill v John Holland Group Pty Ltd* [2022] FCAFC 178  *Young v Hughes Trueman Pty Ltd (No 5)* [2017] FCA 690 |
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| Division: | General Division |
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| Registry: | Australian Capital Territory |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
|  |  |
| Number of paragraphs: | 134 |
|  |  |
| Date of hearing: | 22 November 2022 |
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| Solicitor for the Appellant: | The Appellant appeared in-person |
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| Counsel for the Respondent: | Mr S Donaldson SC with Mr N Olson |
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| Solicitor for the Respondent: | Turks Legal |

ORDERS

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|  | | ACD 20 of 2020 |
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| BETWEEN: | DR MICHAEL VAN THANH QUACH  Applicant | |
| AND: | MLC LIMITED  Respondent | |

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| order made by: | COLLIER, PERRY AND THOMAS JJ |
| DATE OF ORDER: | 21 December 2022 |

THE COURT ORDERS THAT:

1. The applicant’s application for leave to appeal filed on 30 April 2020 in proceeding ACD20/2020 be refused.
2. The applicant pay the respondent’s costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | ACD 38 of 2020 |
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| BETWEEN: | DR MICHAEL VAN THANH QUACH  Applicant | |
| AND: | MLC LIMITED  Respondent | |

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| order made by: | COLLIER, PERRY AND THOMAS JJ |
| DATE OF ORDER: | 21 December 2022 |

THE COURT ORDERS THAT:

1. The applicant’s application for leave to appeal filed on 13 August 2020 in proceeding ACD38/2020 be refused.
2. The applicant pay the respondent’s costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | ACD 2 of 2021 |
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| BETWEEN: | DR MICHAEL VAN THANH QUACH  Applicant | |
| AND: | MLC LIMITED  Respondent | |

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| order made by: | COLLIER, PERRY AND THOMAS JJ |
| DATE OF ORDER: | 21 December 2022 |

THE COURT ORDERS THAT:

1. The applicant’s application for leave to appeal filed on 29 December 2020 in proceeding ACD2/2021 be refused.
2. The applicant pay the respondent’s costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | ACD 14 of 2021 |
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| BETWEEN: | DR MICHAEL VAN THANH QUACH  Applicant | |
| AND: | MLC LIMITED  Respondent | |

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| order made by: | COLLIER, PERRY AND THOMAS JJ |
| DATE OF ORDER: | 21 December 2022 |

THE COURT ORDERS THAT:

1. The applicant’s application for leave to appeal filed on 15 March 2021 in proceeding ACD14/2021 be refused.
2. The applicant pay the respondent’s costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | ACD 19 of 2021 |
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| BETWEEN: | DR MICHAEL VAN THANH QUACH  Appellant | |
| AND: | MLC LIMITED  Respondent | |

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| order made by: | COLLIER, PERRY AND THOMAS JJ |
| DATE OF ORDER: | 21 December 2022 |

THE COURT ORDERS THAT:

1. The appellant’s interlocutory applications filed on 2 September 2021, 6 December 2021 and 9 December 2021 in proceeding ACD19/2021 be dismissed.
2. The appellant’s notice of appeal filed on 22 March 2021 in proceeding ACD19/2021 be dismissed.
3. The appellant pay the respondent’s costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. There are a number of related matters before the Court, with the same parties. These matters have a long and complex history. For the sake of convenience I shall refer to Dr Quach as “the appellant” notwithstanding that he has multiple applications before the Court.
2. These matters are as follows:
3. an appeal (**proceeding ACD19/2021**) by the appellant from the whole of the decision of the Federal Court of Australia in *Quach v MLC Limited (No 6)* [2021] FCA 271;
4. in proceeding ACD19/2021, three interlocutory applications, namely:
   1. Application filed by the appellant on 2 September 2021 seeking the following order:

Pursuant to Federal Court rule 36.57 and Section 27 of the Federal Court of Australia Act 1967 (Cth), admit Affidavit 2 September 2021 as evidence.

(**Interlocutory application 1**)

* 1. Application filed by the appellant on 6 December 2021 seeking the following order:

Pursuant to Federal Court rule 36.57 and Section 27 of the Federal Court of Australia Act 1976 (Cth), admit Affidavit 6 December 2021 as further evidence.

(**Interlocutory application 2**)

* 1. Application filed by the appellant on 9 December 2021 seeking the following order:

Stay of order 2 of Quach v MLC Limited (No 6) [2021] FCA 271

(**Interlocutory application 3**)

1. Applications filed by the appellant in the related matters ACD20/2020, ACD38/2020, ACD2/2021 and ACD14/2021 (**related matters**). In summary, these applications are as follows:
   1. In proceeding ACD20/2020 the appellant sought leave to appeal and to be heard by oral hearing;
   2. In proceeding ACD38/2020 the appellant sought leave to appeal and to be heard by oral hearing;
   3. In proceeding ACD2/2021 the appellant sought leave to appeal and stay of Orders 2 and 3 of the Federal Court on 16 December 2020;
   4. In proceeding ACD14/2021 the appellant sought leave to appeal and to be heard by oral hearing.
2. At the hearing, in order to streamline the proceedings, the Court sought submissions from the parties:
3. First, in respect of the related matters;
4. Second, the three interlocutory applications filed in the substantive appeal in proceeding ACD19/2021; and
5. Finally, the substantive appeal in proceeding ACD19/2021.
6. We now turn to each of these matters.

# RELATED MATTERS

1. It is not in dispute that, in each of the related matters, the appellant requires leave to appeal. Principles relevant to applications for leave to appeal from interlocutory judgments are well settled. As this Court explained in *Décor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 655; (1991) 33 FCR 397, in terms recently reiterated by Feutrill J in *Revill v John Holland Group Pty Ltd* [2022] FCAFC 178:

53. … In general, the Court will take into account and weigh two interdependent criteria. First, whether, in all the circumstances, the decision is attended with sufficient doubt to warrant it being considered by the Full Court. Second, whether substantial injustice would result if leave were refused, supposing the decision to be wrong. In a case, such as this, where the practical effect of the interlocutory judgment is to finally dispose of the proceedings, leave will be more readily granted…

1. It is these principles which apply in respect of each of the appellant’s applications for leave to appeal.

## Proceeding ACD20/2020

1. In proceeding ACD20/2020 the appellant claims:

Leave to appeal is required by Section 24 (1A) of the *Federal Court Act 1976* (Cth) in the Appellate jurisdiction pursuant to Section 24 (1) of the *Federal Court Act 1976* (Cth).

1. The grounds of this application, filed on 30 April 2020, are:

1. The Court of Appeal granted leave to appeal the decision of Griffiths J in Dr *Michael Van Thanh Quach v MLC Life Limited (No 2)* [2019] FCA 1322. Notwithstanding this, Griffiths J was not persuaded and upheld privilege to the legal advice from Suzane Oliver in *Dr Michael Van Thanh Quach v MLC Life Limited (No 4)* [2020] FCA 532 at [21].

2. I have not had my day in the Full Court to set aside legal privilege applied to legal advice from Suzane Oliver.

3. Pursuant to Section 80 of the Judiciary Act 1903 (Cth) Common law to govern, Graham J common law in *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No. 2)* [2007] FCA 1445, ruled that in-house lawyers who are not independent do not attract Legal Professional Privilege.

i. Suzane Oliver, is an employee of MLC Limited. She is not an independent legal practitioner from MLC Limited.

ii. The evidence in support of this Application for Leave to Appeal is the Affidavit of Service, dated 14 May 2019, which affirmed that Suzane Oliver accepted service of the Subpoena in question, addressed to Terri Jorgensen, MLC Limited, Level 7 Mount Street NORTH SYDNEY NSW 2060.

iii. With respect, due to Suzane Oliver’s lack of independence from MLC Limited, Griffiths J Order 1 of 20 August 2019,

“The respondent’s claims for legal professional privilege in respect of the Legal Referral Form and Legal Opinion dated 11 July 2019, together with a copy of the Legal Referral Form, are upheld.”

is inconsistent with *Section 80 of the Judiciary Act 1903 (Cth) Common law to govern*.

1. In the same interlocutory application the appellant lists “Other applications” as:

1. As the applicant, I wish to have the application dealt with by oral hearing

1. To the extent that we can understand the position, it appears to be as follows.
2. First, in proceeding ACD18/2019 Griffiths J on 20 August 2019 made the following Orders:

1. The respondent’s claims for legal professional privilege in respect of the Legal Referral Form and Legal Opinion dated 11 July 2019, together with a copy of the Legal Referral Form, are upheld.

2. There be no order as to costs.

1. These Orders of Griffiths J were made in the course of his Honour’s judgment in *Dr Michael Van Thanh Quach v MLC Life Limited (No 2)* [2019] FCA 1322 (***Quach (No 2)***). Relevantly, his Honour in that decision noted that MLC Life had pressed its claim for privilege in relation to a document entitled “Legal Opinion”, together with a copy of the Legal Referral Form, created by Ms Suzanne Oliver (MLC’s Senior Legal Counsel) on or around 11 July 2019 (see *Quach (No 2)* at [5]).
2. Second, on 28 August 2019 the appellant filed an application for leave to appeal the judgment of Griffiths J in *Quach (No 2)*. This application for leave to appeal was filed in a new proceeding, being proceeding ACD61/2019.
3. Third, on 20 November 2019, in proceeding ACD61/2019, Rares J made an order granting the appellant leave to appeal against the orders of Griffiths J of 20 August 2019 in proceeding ACD18/2019 in *Quach (No 2)*, however:

1. … limited to the issue of whether Ms Suzanne Oliver was sufficiently independent of the respondent for the purposes of the respondent upholding its claim of legal professional privilege over two documents, being “Legal Referral Form” and “Legal Referral Form and Legal Advice”.

1. Fourth, Rares J ordered in the same orders in proceeding ACD61/2019:

2. The appellant file and serve a notice of appeal in accordance with order 1 and r36.03(a) of the *Federal Court Rules 2011*.”

1. Rule 36.03 of the *Federal Court Rules 2011* (Cth) relevantly provides:

**Time for filing and serving notice of appeal**

An appellant must file a notice of appeal:

(a) within 28 days after:

(i) the date on which the judgment appealed from was pronounced or the order was made; or

(ii) the date on which leave to appeal was granted; or…

1. It follows that Order 2 of Rares J of 20 November 2019 required the appellant to file a notice of appeal within 28 days of 20 November 2019, namely by 18 December 2019. Insofar as we can ascertain, the appellant did not file a notice of appeal within this time.
2. Fifth, it appears that MLC Life abandoned its claim for legal professional privilege in relation to the documents created by its employee Ms Suzanne Oliver. That this was the case appears from later comments of Griffiths J in *Dr Michael Van Thanh Quach v MLC Life Limited (No 4)* [2020] FCA 532 (***Quach (No 4)***) delivered on 24 April 2020, where his Honour at [9] quoted from submissions of the appellant, who had plainly received a copy of Ms Oliver’s advice, and continued:

12. In his oral submissions, Dr Quach referred several times to the internal legal advice given to MLC by its legal counsel, Ms Suzanne Oliver. Originally, MLC claimed legal professional privilege in respect of that advice. I upheld that position in *Quach v MLC Life Limited (No 2)* [2019] FCA 1322. Justice Rares subsequently granted Dr Quach leave to appeal from that decision. The appeal was then rendered moot when MLC provided a copy of Ms Oliver’s advice to Dr Quach. Dr Quach drew attention to statements by Ms Oliver at page 8 of her advice where she wrote (emphasis in original):

Dr Quach has said he was diagnosed with an “impairment” in 2009. The NCAT decision shows that Dr Phillips concluded that Dr Quach was “a medical practitioner who may be suffering from an impairment which will put the public at risk”. That was in the context of the particular legislation about impairment pursuant to which Dr Phillips was examining Dr Quach. Notably, Dr Phillips was unable to conclude that Dr Quach had any recognisable or diagnosable paranoid or other psychiatric disorder but said; “I believe an underlying paranoid disposition or paranoid illness cannot be ruled out”. Accordingly, there is no evidence of psychiatric diagnosis at this point.

1. Significantly, his Honour continued in *Quach (No 4)*:

21. Thirdly, I reject Dr Quach’s submission that MLC reached its duty of utmost good faith under s 13 the Insurance Contracts Act 1984 (Cth) by withholding Ms Oliver’s legal advice in the previous proceeding before me and the subsequent proceeding involving Dr Quach’s application for leave to appeal before Rares J. Assuming for the moment that my judgment was correct in upholding MLC’s claim for legal professional privilege, the assertion of such a privilege cannot be inconsistent with any duty of upmost good faith. In subsequently deciding to grant leave to appeal against my judgment, Rares J did not hold that the legal advice was not subject to legal professional privilege. Rather, the effect of the grant of leave to appeal was to have that matter heard and determined by a Full Court. In the events that occurred, this did not happen because, as was its right, MLC decided at that point to provide a copy of Ms Oliver’s advice to Dr Quach, which rendered the appeal moot. None of that constitutes conduct on MLC’s part which is in breach of the duty of utmost good faith.

1. In the same judgment, Griffiths J also dismissed interlocutory applications of the appellant relating to the issue of subpoenas, however plainly that aspect of his Honour’s decision is not referred to in this application for leave to appeal before the Court.
2. Sixth, the appellant filed his application for leave to appeal in ACD20/2020 on 30 April 2020, namely more than 4 months after the orders of Rares J contemplated, and following the decision of Griffiths J in *Quach (No 4)*.
3. It is *Quach (No 4)* which is the subject of the application for leave to appeal.
4. Taking into consideration all of this material, it is plain that any application for leave to appeal the decision of Griffiths J of 20 August 2019 should be refused because there is no utility in determining any such appeal. As Griffiths J correctly observed in *Quach (No 4)*, the issue had become moot because MLC Life had ceased to press its claim for legal professional privilege over the advice of Ms Oliver, and had actually provided a copy of that advice to the appellant.
5. We further note that the appellant failed to comply with the orders of Rares J to file a notice of appeal within 28 days of the grant of leave by Rares J. In circumstances where events had plainly superseded the requirement for the grant of leave, we consider that at least the appellant had abandoned his opportunity to file a notice of appeal.
6. We note Dr Quach’s wish to have an oral hearing at first instance. However, an Order to that effect would be entirely inconsistent with the provisions of s 37M of the *Federal Court of Australia Act 1976* (Cth).
7. The application for leave to appeal in proceeding ACD20/2020 is refused.

## Proceeding ACD38/2020

1. In proceeding ACD38/2020, the appellant applies for leave to appeal “from the judgment of Federal Court given on 31 July 2020 at Sydney.” The grounds of this application, filed on 13 August 2020, were as follows:

1. MLC Limited’s pleading to the court on 1 August 2019,

“*Well, they cover the same field. I will certainly concede that, your Honour*.” (Page 41, Line 43-44)

MLC Limited duplicated requests for documents from “various regulatory bodies” and experts by issuing subpoenas in order to circumvented the Orders of Griffiths J to refuse leave to issue subpoenas to “various regulatory bodies” and set aside parts of subpoena,

“*All correspondence with The Medical Council of NSW, The Australian Health Practitioner Regulation Agency, The Medical Board of Australia, The Health Care Complaints Commission or any other medical regulatory authority an in relation to the applicant*. “

2. Pursuant to Section 80 of the *Judiciary Act 1903* (Cth), Rares J had a statutory requirement rule consistently with Griffiths J in *Dr Michael Van Thanh Quach v MLC Life Limited (No 1)* [2019] FCA 1194. The transcript of the hearing on 1 August 2019 will show the following:

I. The Court, Griffiths J ruled (Page 41, Line 46 to Page 42, Line 3),

“*I mean, I must say it looks to me very much like a fishing expedition on your part in respect of these regulatory agencies. I can see that there is some force in what you say in respect of the subpoena to Dr Samuels, but, at the moment, I’m unpersuaded as to why leave should be granted in respect of the regulatory bodies*. “

Griffiths J refused leave to issue subpoenas to various regulatory bodies, Order 9 of 1 August 2019.

In response to MLC Limited pleadings to the Court:

i. “*Documents held by AHPRA and the Medical Council of New South Wales are, therefore, relevant to these proceedings, namely, whether the applicant suffers – whether the applicant satisfies definitions of “total disability” or “partial disability” in the policy as a result of an illness; whether the applicant failed to disclose or misrepresented his medical history to the respondent; and whether the claim – whether his claim is excluded under the pre-existing condition exclusion under the policy*. “ (Page 41, Line 33-39)

ii. In relation to documents from the various regulatory bodies and experts,

“Well, they cover the same field. I will certainly concede that, your Honour.” (Page 41, Line 43-44)

II. The Court, Griffiths J ruled (Line 14-15, Page 34),

“*Well, I must say, I at the moment can’t see the apparent relevance of (f) at all. I think it’s over-reach*.”

Griffiths J set aside the request for “All correspondences” with “various regulatory bodies (Orders 6(a)-(h)),”

“(d) All correspondence with The Medical Council of NSW, The Australian Health Practitioner Regulation Agency, The Medical Board of Australia, The Health Care Complaints Commission or any other medical regulatory authority an in relation to the applicant. “

*“(f) All correspondence with The Medical Council of NSW, The Australian Health Practitioner Regulation Agency, The Medical Board of Australia, The Health Care Complaints Commission or any other medical regulatory authority an in relation to the applicant*.”

In response to MLC Limited pleadings to the Court,

“*We have the Health Care Complaints Commission ..... other medical regulatory authority, AHPRA, which is the licensing agency. I’m not sure about the Medical Council of New South Wales. But it would seem that those bodies would be 10 relevant – potentially to issues of misconduct and also the applicant’s fitness to practise, your Honour*.” (Line 8-12, Page 34)

3. Pursuant to Section 29(3) of the *Insurance Contract Act 1984* (Cth),

“29 (3) If the failure was not fraudulent or the misrepresentation was not made fraudulently, the insurer may, within 3 years after the contract was entered into, avoid the contract.”

MLC Limited is statute barred from obtaining information from Dr Samuels because his reports date from 1998–2004. The claim was made in 2015, which is much greater than “3 years after the contract was entered into,” for MLC Limited to avoid the contract.

4. The Court has not granted leave for MLC Limited to change any of its pleadings.

1. In the same application for leave to appeal the appellant lists “Other applications” as:

1. I wish for the application to be dealt with by an oral hearing.

1. To the extent that we understand the position, it appears to be as follows.
2. First, the Orders the subject of the application for leave to appeal were made by Rares J on 31 July 2020 in *Dr Michael Van Thanh Quach v MLC Life Limited (No 5)* [2020]FCA 1134 (***Quach (No 5)***), as follows:

1. The interlocutory application filed on 14 July 2020 be dismissed.

2. The applicant pay the costs of the respondent on the interlocutory application filed on 14 July 2020 on an indemnity basis.

3. The applicant file and serve any expert reports and outlines of further lay evidence on which he proposes to rely on or before 25 September 2020.

4. The matter be listed for a case management hearing on 2 October 2020.

1. Second, and in summary, the interlocutory application filed by the appellant on 14 July 2020 (the subject of Order 1 above) sought Orders denying MLC Limited access to documents produced on subpoenas issued to authorised persons of “various regulatory entities”. That application substantially set out the appellant’s summary of earlier rulings of Griffiths J, in particular the decision of Griffiths J in *Dr Michael Van Thanh Quach v MLC Life Limited (No 1)* [2019] FCA 1194 (***Quach (No 1***)) and Orders made by his Honour in the following terms:

9. The Court does not grant leave to the respondent for the issue of the following subpoenas:

a. the subpoena addressed to The Proper Officer of the Australian Health Practitioner Regulation Agency;

b. the subpoena addressed to the The Proper Officer of the Medical Council of NSW; and

c. the subpoena addressed to Dr Justine Ellis.

1. However, Griffiths J at that time in Order 8 of those Orders granted leave to the respondent for the issue of the following subpoenas:

a. the subpoena addressed to Dr Jeff Bertucen;

b. the subpoena addressed to Professor Roy Gary Beran;

c. the subpoena addressed to Dr Anthony Samuels;

d. the subpoena addressed to Dr Simon John Whitfield Young;

e. the subpoena addressed to Dr Yvonne Skinner; and

f. the subpoena addressed to Dr Jonathan Phillips.

1. Third, it appears from comments of Rares J in (*Quach (No 5)*) at [5] that, following the decision of Griffiths J in *Quach (No 1)*, fresh subpoenas were issued by MLC Life, namely subpoenas issued to:

* Dr Anthony Samuels
* Dr Jeff Bertucen
* Dr Jonathan Phillips
* Professor Roy Gary Beran
* Dr Andrew Petherbridge
* Dr Dzu Nguyen
* Dr Susan Morton
* Ms Cindy Watts
* Department of Human Services

1. In his reasons for decision, published in *Quach (No 5)*, Rares J at [8] summarised the appellant’s arguments as being that Griffiths J’s decision was “determinative of the enforceability or validity of the nine subpoenas in issue”. Justice Rares also observed at [9] that the appellant had argued that the documents were subject to his legal professional privilege. Justice Rares relevantly continued:

18. Mr Quach’s argument was that the doctors, the subject of the seven subpoenas addressed to them, would never have produced the reports used in evidence in the regulatory proceedings that he faced without there being some correspondence in relation to those reports. He then contended that, therefore, when Griffiths J held that particular paragraphs in the earlier subpoenas that sought the production of correspondence between the recipient and the various regulatory bodies was of no apparent relevance to the proceeding before the Court, that his Honour was, in some way, ruling that any report produced as a result of a request in correspondence to produce a report, was also of no apparent relevance.

19. That argument is misconceived. His Honour made no such ruling and was not asked to do so. The documents sought in the subpoenas the subject of Mr Quach’s current challenge have an apparent relevance and they ought to be made available for MLC’s inspection.

20. ***Those documents cannot possibly be the subject of a claim for legal professional privilege on the basis that Mr Quach raised, namely that he received advice from his own solicitors about the reports from the doctors retained by the regulatory authorities in proceedings against him following the service of those reports on Mr Quach or his lawyers***.

(emphasis added)

1. Turning now to the present application for leave to appeal, which is against the decision of Rares J of 31 July in *Quach (No 5)*, it should be refused. This is because, in summary,

* Final judgment determining proceedings between the parties was delivered by Rares J in the primary judgment presently the subject of the appeal;
* Submissions of the appellant do not demonstrate how substantial injustice would be caused to him by the relevant interlocutory decision (assuming it is wrong); and
* Critically, and noting the observations of Rares J in *Quach (No 5)*, the Court is not persuaded that there is sufficient doubt in respect of his Honour’s findings concerning Dr Quach’s assertions of legal professional privilege over documentation the subject of the nine subpoenas, to warrant reconsideration of that decision. Certainly the appellant has pointed to no authorities which would provide such doubt.

1. The application for leave to appeal in proceeding ACD38/2020 is refused.

## Proceeding ACD2/2021

1. In proceeding ACD2/2021 the appellant applies for leave to appeal from “the judgment of Federal Court given on 16 December 2020 at Sydney.” The grounds of this application, filed on 29 December 2020, are:

1. Order 2 is in direct breach of the ruling by the Court of Appeal that “You don’t get subpoena [Court order] for discovery” made on 15 November 2020.

2. Order 3 was made without procedural fairness.

I. I was not notified that Rares J intended to make an order adverse to me case.

II. It was made unfairly, after the Applicant, myself, was ordered to file and serve final evidence on the Respondent.

1. In the same application for leave to appeal the appellant lists “Other applications” as:

1. Stay on orders 2 and 3 of Rares J on 16 December 2020

1. The appellant filed a supporting affidavit in on 29 December 2020 in which he deposed:

1. I am the Appellant.

2. It is true that on 15 November 2019, in the matter of *Quach v RU*, the Court of Appeal ruled that, “You don’t get a subpoena (court order) for discovery.”

3. It is true that Rares J did not notify me before making an order for the Respondent to amend its Defence in order 3.

4. It is true that Rares J order 3, for the Respondent to amend its Defence, is adverse to my matter because I had already filed and served the evidence I wish to rely on for the trial, as per Rares J orders on 7 October 2020.

1. The decision of *Quach v Ru* [2019] FCA 2041 (to which the appellant appears to refer in his supporting affidavit) was a decision of Rares J of 15 November 2019 in which Rares J dismissed an application by Dr Quach for leave to appeal an order made by Griffiths J on 24 September 2019 that the name of the respondent not be published and the respondent be referred to by the pseudonym “RU”. The matter related to a decision of the ACT Supreme Court in *Quach v RU (No 3)* [2017] ACTSC 258. To that extent, it appears that the relevant decision in *Quach v Ru* was a decision of the Federal Court (ie Rares J), not “the Court of Appeal” as stated by Dr Quach.
2. Annexed to the appellant’s affidavit were the Orders he sought leave to appeal, dated 16 December 2020 in proceeding ACD18/2019.
3. The relevant Orders of 16 December 2020 were:

2. On or before 12 January 2021, the applicant give discovery and simultaneous inspection of the medical reports to which he referred in the claim form annexed to his affidavit of 18 November 2020, together with the other medical reports referred to in the reasons of the New South Wales Civil and Administrative Tribunal in *Health Care Complaints Commission v Quach* [2015] NSWCATOD 2 and *Health Care Complaints Commission v Quach (No 2)* [2015] NSWCATOD 32.

3. On or before 12 February 2021, the respondent file and serve any medical evidence in response to the discovery material, and an amended defence.

1. In his affidavit of 18 November 2020 (filed 19 November 2020) the appellant relevantly deposed:

…

2. It is true that I made a claim on my MLC income protection policy number 1688-8009, dated 9 October 2015 (Annexure “MVTQ1”)

1. In his annexure to the affidavit in the Federal Court proceedings the appellant referred for example to “diagnosis of impairment & narcissistic personality disorder by Dr Jonathan Phillips & Dr Andrew Petherbridge”.
2. We note that Rares J delivered a substantive judgment in proceeding ACD18/2019 on 2 March 2021 in *Quach v MLC Limited (No 6)* [2021] FCA 271 (***Quach (No 6)***). In that decision Rares J relevantly observed:

17. Mr Quach has persisted in that untenable view throughout his engagement, or lack of it, with MLC and during this proceeding. ***That includes in failing to comply at all with orders that I made on 16 December 2020, that on or before 12 January 2021, he give discovery and simultaneous inspection of the medical reports to which he referred in the claim form, together with the medical reports referred to in NCAT’s reasons***. ***He has chosen not to provide MLC or the Court with medical evidence of any kind***, ***except Dr Skinner’s report in the claim form***, that would be relevant to an evaluation of whether he was or is suffering from an illness causing his incapacity to practice medicine, which the policy covers.

18. Today, Mr Quach said that he had not referred to any medical reports in his claim form and did not, therefore, have to comply with that part of the order of 16 December 2020. He also asserted that he had legal advice that he did not have to produce anything to which the implied undertaking not to use a document produced under compulsion of a court order otherwise than for any purpose for which it was provided to him unless it was received into evidence: see *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125 at 131 [3] per Gleeson CJ, 154–155 [96] per Hayne, Heydon and Crennan JJ.

19. This, in part, explains the lack of any medical evidence, in terms of reports from practitioners establishing what, if any, illness Mr Quach may have had, the subject of his claim for total or partial disablement under the policy, ***in the context in which his own treating doctor said in her report in the claim form that he was not ill***. The extensive use of the medical reports in evidence before NCAT, even assuming that it was a court in which the implied undertaking operated, made Mr Quach’s assertion that he could not produce those reports untenable.

20. On 30 November 2015, MLC wrote to Mr Quach saying that it understood that his claim related to the narcissistic personality disorder referred to in the NCAT decisions and that his return to work depended on the outcome of his legal proceeding (the November 2015 letter). The letter referred to those decisions and NCAT’s orders and said that, in light of those, it was unclear if Mr Quach was entitled to benefits under the policy. The letter attached a copy of his proposal and noted that it appeared to be inconsistent with information that by then was known. That information included that his application for registration as a medical practitioner had been deferred in 1998 due to concerns regarding his health. The letter asked for copies of the decisions of the Medical Board and Medical Council about his medical registration, including decisions made in 1998, 1999 and 2004, as well as any associated medical reports. In the alternative, the letter asked Mr Quach to sign and return to MLC a *Government Information (Public) Access Act 2009* (Cth) application form so that MLC could obtain that material itself. MLC disclosed that it had also written directly to five doctors seeking information, including to Dr Phillips and Dr Skinner.

21. Mr Quach declined to respond to the November 2015 letter and has never provided such reports or permission.

(emphasis added)

1. We understand that it is this decision in *Quach (No 6)* which is the subject of the appellant’s substantive appeal in proceeding ACD19/2021, presently before this Full Court.
2. We refuse leave to appeal.
3. First, given that apparently the appellant never complied with the Orders of 16 December 2020, there is no indication how he has suffered substantial injustice from those Orders, assuming they were wrong, other than opposing them in Court before Rares J.
4. Second we note that the Orders the subject of the present leave to appeal application concerned discovery and inspection of medical reports, and were made in the course of case management of the proceedings by his Honour. We are unable to identify how his Honour was wrong in making those Orders, particularly in light of subsequent comments at [17]-[21] of the primary judgment.
5. Finally, final judgment has been delivered in proceeding ACD18/2019. Dr Quach is appealing that judgment in proceeding ACD19/2021. It was open to the appellant to appeal the final judgment by reference to such interlocutory Orders as those of 16 December 2020. However he did not and, given that Dr Quach never complied with those interlocutory Orders, it is difficult to know on what grounds he could have appealed them.
6. The application for leave to appeal in proceeding ACD2/2021 is refused.

## Proceeding ACD14/2021

1. In proceeding ACD14/2021 the appellant applied for leave to appeal from “the judgment of the Federal Court of Australia given 2 March 2021 at Canberra.” The grounds of this application, filed on 15 March 2021, are:

1. From the outset, Rares J declared,

“You’re here today saying MLC has got to pay you more money than they have paid you and that you are legally entitled to get something more” (Affidavit 13 March 2021, Annexure “MQ2”, page 9, line 7-9).

That is, the hearing was about my legal entitlement for more money than MLC Limited undertaken to pay in the Letter to Applicant dated 11 February 2021 (Affidavit 13 March2021, Annexure “MQ1”). That is my interlocutory application for “Assessment hearing for Compensatory Damages, Interests and Costs”.

2. Apprehended bias of Rares J.

3. Errors of law:

I. Breach of *Section 80 of the Judiciary Act 1903* (Cth), ***Common law to govern***,

i. Rares J was ubounded by common law handed down by Griffiths J (Affidavit 13 March 2021, Annexure “MQ3” line 19 to 21),

“*What Griffiths J said in an interlocutory application has nothing to do with this trial.*

*DR QUACH: It’s common law*.

i. Griffiths J, on 20 August 2019 in this matter, made a finding of a finding in *Dr Michael Van Thanh Quach v MLC Life Limited (No 2)* [2019] FCA 1322

At [4],

*“a finding that Dr Quach had a mental impairment, disability, condition or disorder (a narcissistic personality disorder) which detrimentally affected his capacity to practice medicine*.”

ii. Griffiths J, on 1 August 2019 in this matter ruled that (Affidavit 13 March 2021, Annexure “MQ4” page 25, line 29-31).

“*any question which requires this court, the Federal Court, to rule on whether you engaged in professional misconduct. That’s not within our jurisdiction. It’s not a matter for this court to rule it*.”

II. MLC Limited cannot establish “*jurisdictional fact*” (*Gedeon v NSW Crimes Commission* [2008] HCA 43 at [43], Affidavit 13 March 2021, Annexure “MQ5") to interfere with Dr Yvonne Skinner’s medico legal report for the claim on income protection policy 1688-8009N of the insured, Dr Michael Van Thanh Quach.

**III**. The *Evidence Act 1995* (Cth) has no application to the medical report of Dr Yvonne Skinner, dated 9 October 2015 (Exhibit A, pages 301-341 of the Court Bundle).

IV. Evidence of MLC Limited requesting information from regulatory bodies is irrelevant and inadmissible (Affidavit 13 March 2021, Annexure “MQ6”).

**Other applications**

1. I wish to have an oral hearing

1. The appellant filed an affidavit in support of his application in which he expanded on these grounds.
2. It appears that the appellant filed an interlocutory application on 12 February 2021 seeking the following interlocutory orders:

1. Vacate Orders 2 to 8 of Rares J of 16 December 2020.

2. Assessment hearing for Compensatory Damages, Interests and Costs

1. The primary Judge however delivered a final judgment in proceeding ACD18/2019 shortly afterwards.
2. Dr Quach claims there has been a gross miscarriage of justice to him.
3. The Orders in respect of which the appellant seeks “leave to appeal” are those of the primary Judge of 2 March 2021. The transcript of the delivery of judgment records that judgment was delivered from Sydney by video conference on that date. It was the substantive and final judgment in proceeding ACD18/2019, being *Quach (No 6)*, and now the subject of appeal in proceeding ACD19/2021 currently before this Court. The decision of his Honour of that date was not an interlocutory decision. To the extent that the appellant seeks “leave to appeal” that decision, his application is misguided, and incompetent. Further this application conflicts with the notice of appeal filed on 22 March 2021 in proceeding ACD19/2021, currently before this Court.
4. The application for leave to appeal in proceeding ACD14/2021 is refused.

# INTERLOCUTORY APPLICATIONS IN PROCEEDING ACD19/2021

1. As we have noted, there are three interlocutory applications presently before the Court in proceeding ACD19/2021. We will consider these applications in turn.

## Interlocutory Application 1

1. In this interlocutory application the appellant seeks the admission of further evidence in the substantive appeal, being his affidavit dated 2 September 2021 pursuant to rule 36.57 of the Federal Court Rules and Section 27 of theFederal Court of Australia Act.
2. The affidavit is 38 pages in length. In that affidavit the appellant relevantly deposes:

2. The business record of Dr Yvonne Skinner’s relate to the ground 2 (1)(ii) and 2 (II)(ii).

3. The evidence necessary to establish the grounds of the application is evidence of diagnosis of Narcissistic Personality Disorder and impairment as it appears on Dr Yvonne skinner’s business record.

4. Pursuant to Section 69 of the Evidence Act… business records of Dr Yvonne Skinner’s are exempt from The Hearsay Rule.

5. The evidence for the Court to receive are:

(1) statement from Dr Yvonne Skinner declaring that:

i. Medical records of Dr Michael van Thanh Quach, dated 31 August 2009

ii. Medico-legal report titled, Doctor’s Report Income Protection and Disablement

form part of her business record.

(2) Evidence of paid consultation, on 9 October 2015, with Dr Yvonne Skinner for the making of the Medico-legal report titled, Doctor’s Report Income Protection and Disablement.

…

12. The evidence for the court to receive is the Auscript transcript of the telephone conversation between MLC Limited, Mark Forrest, and myself, the appellant.

13. The evidence was not adduced before Rares J, because there was insufficient time to provide a court standard, accurate, transcript of the verbal abuse I suffered from MLC Limited. MLC Limited had prepared a transcript which contains mistakes and is misleading because it give the impression I was an orderly conversation, which it was not.

14. Annexure “MQ3” is a copy of Court standard transcript prepared by Auscript of the telephone conversation between MLC Limited, Mark Forrest, and the Appellant, Dr Michael Van Thanh Quach, on the 26 November 2015.

1. The appellant further deposes that the reason the evidence was not put before the primary Judge was because “MLC Limited did not have the full set of Dr Skinner’s business records at the hearing on 1 March 2021.” The appellant expanded on this reason in oral submissions at the hearing of this matter. Notably, the appellant conceded at the hearing as follows:

COLLIER J: You are submitting that page 7 and 8 of this affidavit contains a medical record of Dr Yvonne Skinner on 31 August 2009, which was not available to you prior to the – this commencement of the litigation in ACD18 of 2019, is that correct?

DR QUACH: It was available to me. It wasn’t made available to the Court by MLC because they were ordered to make the court bundle. They left this out.

(transcript p 42 ll 9-15)

1. In relation to the transcript of a telephone conversation, which Dr Quach describes as an “abusive” call, the appellant submitted that an earlier version of the transcribed conversation was inaccurate.
2. It appears from the appellant’s submissions that his argument is that, although the evidence he now seeks adduced in this appeal was available to him during the course of proceedings at first instance, fault should properly be attributed to the respondent for not including it in the Court bundle in proceeding ACD18/2019. Further, when questioned by the Bench as to why the appellant, who accepted that he had access to this evidence during the course of the proceedings below, did not make it known to Rares J that the material was omitted from the court bundle, Dr Quach again submitted that the fault was of the respondent, and further that he “was quite winded by Rares J’s sweeping comments”, including his Honour’s observations concerning the hearsay rule (transcript p 42-43).
3. Section 27 of the Federal Court of Australia Act provides:

**Evidence on appeal**

In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which evidence may be taken:

(a) on affidavit; or

(b) by video link, audio link or other appropriate means in accordance with another provision of this Act or another law of the Commonwealth; or

(c) by oral examination before the Court or a Judge; or

(d) otherwise in accordance with section 46.

1. Rule 36.57 of the Federal Court Rules provides:

**Further evidence on appeal**

(1) A party may apply for the Court to receive further evidence on appeal.

(2) The application must be filed at least 21 days before the hearing of the appeal and be accompanied by an affidavit stating the following:

(a) briefly but specifically, the facts on which the application relies;

(b) the grounds of appeal to which the application relates;

(c) the evidence that the applicant wants the Court to receive;

(d) why the evidence was not adduced in the court appealed from.

(3) The application and the affidavit must be filed as follows:

(a) if the appeal is to the Full Court--4 copies;

(b) if the appeal is to a single Judge--2 copies.

(4) Any other party to the appeal who wants to adduce evidence on the appeal must file an affidavit at least 14 days before the hearing of the appeal.

Note: Section 27 of the Act allows the Court to receive further evidence on appeal.

1. Recently in *Australia Bay Seafoods Pty Ltd v Northern Territory of Australia* [2022] FCAFC 180 the Full Court reiterated principles governing the admission of further evidence in appellate proceedings in the Court. In particular the Court observed:

[118] The principles which guide the exercise of the Court’s discretion under s 27 of the FCA Act were restated recently by Griffiths and White JJ in *Northern Land Council v Quall (No 3)* [2021] FCAFC 2 at [16] (cited with approval by the Full Court in *District Council of Streaky Bay v Wilson* (2021) 287 FCR 538 at [149] ):

… Drawing on authorities including *CDJ v VAJ* [1998] HCA 67; 197 CLR 172; *Cottrell v Wilcox* [2002] FCAFC 53; *Sobey v Nicol and Davies, in the Matter of Guiseppe Antonio Mercorella* [2007] FCAFC 136; 245 ALR 389; *Watson Australian Community Pharmacy Authority* [2012] FCAFC 142; 206 FCR 365 and *Kedem v Johnson Lawyers Legal Practice Pty Ltd* [2014] FCAFC 3, they may be summarised as follows:

(1) The discretion conferred by s 27 is unfettered, save that it must be exercised judicially and according to principle.

(2) The power to receive further evidence is remedial and its primary purpose is to empower the Court to receive further evidence to ensure that proceedings do not miscarry.

(3) The power is not constrained by common law rules that govern the grant of new trials on the ground of discovery of “fresh evidence”.

(4) The following two considerations will normally be relevant to the exercise of the discretion:

(i) the further evidence is such that, had it been adduced at trial, the result would very probably have been different; and

(ii) the party seeking to adduce the evidence demonstrates that it was unaware of the evidence and could not have been, with reasonable diligence, made aware of the evidence.

(5) The interests of third parties and the public at large may outweigh a party’s interest in the finality of litigation. For example, a greater willingness to receive further evidence on appeal has been apparent in bankruptcy matters which affect the interests of creditors generally.

1. The medical evidence dated from 2009. The conversation the subject of the transcription took place in 2015. It is plain that, during the proceedings, the appellant was aware of this evidence, which he now seeks to adduce. He conceded it was available to him.
2. It is a fundamental proposition that an applicant is required to adduce his evidence in support of his claim. The contention of the appellant that he failed to produce evidence for consideration by the primary Judge, in proceedings where he was the instigator of the litigation, because he was relying on the respondent to do so, is not only entirely unpersuasive, it is implausible. As is plain from examination of the file in ACD18/2019, various case managing Judges and Registrars made repeated orders in ACD18/2019 for the filing and service of evidence by Dr Quach and the respondent, including Orders to that effect of 30 April 2019 (Griffiths J), 31 May 2019 (Registrar Lackenby), 31 July 2020 (Rares J) and 16 December 2020 (Rares J).
3. Further, we note the comments of the primary Judge in *Quach (No 6)* that the appellant had refused to file evidence in accordance with Court orders. This refusal on the part of the appellant does not appear to be in dispute, although the appellant has sought to characterise his refusal as (*inter alia*) misunderstanding of the hearsay rule. We do not accept such characterisation, against the background of repeated encouragement by the Court of the appellant to file evidence, as demonstrated by the repeated case management Orders to which we have referred. We also note that Dr Quach has been involved in extensive litigation in this Court, and other Courts, and, notwithstanding that he is a litigant in person, we do not, therefore, accept that he misunderstood his obligation to file evidence in support of his own claim.
4. In such circumstances, the appellant cannot, very belatedly, seek to file evidence allegedly supporting his claim.
5. In any event, it is unclear how the evidence the appellant seeks to adduce at this stage could have resulted in a different outcome at the trial. Given that the essence of Dr Quach’s claim against the respondent in ACD18/2019 concerned allegations of breach of the duty of utmost good faith on the part of the respondent, we are unable to identify how evidence now sought to be produced by Dr Quach of a medical condition (which he denied at various times during the course of litigation), and the transcription of a phone call, would have made a difference, particularly in light of the contents of that evidence. The respondent submits that it would not. The appellant has not put forward any satisfactory arguments to counter that proposition.
6. This interlocutory application is dismissed.

## Interlocutory Application 2

1. Similarly to the preceding application, this interlocutory application sought leave for the Court to admit new evidence in the appeal pursuant to s 27 of the Federal Court Act and rule 36.57 of the Federal Court Rules. That new evidence comprised an affidavit of the appellant dated 6 December 2021.
2. Relevantly, that affidavit annexed a “copy of extract of testimony of Dr Andrew Pethebridge under oath on 12 December 2014”. The body of the affidavit is brief, and the appellant deposed:
3. I am the Appellant.
4. It is true that Dr Andrew Pethebridge made a diagnosis of Narcissistic Personality Disorder on myself.
5. It is true that Dr Andrew Pethebridge, under oath on 12 December 2014, confirmed that he made the diagnosis of Narcissistic Personality Disorder on myself (Annexure “MQ1”, page 175, line 24-26).

*“Q. It’s correct to say that you have diagnosed Dr Quach with narcissistic personality disorder?*

*A.* Yes.”

1. As already noted, the appellant is required to demonstrate that this evidence was not available at the time of the hearing before the primary Judge, and that, had it been adduced at trial, the result would very probably have been different. Noting further that this evidence has apparently been available to the appellant since December 2014, in our view there is nothing of substance to add to the reasons we have already given in respect of Interlocutory Application 1 to find that this interlocutory application should be dismissed.

## Interlocutory Application 3

1. Interlocutory Application 3 concerned an application for a stay of the costs orders of the primary Judge in proceeding ACD19/2021. We note that on the day of the hearing the appellant was plainly conflicted about whether or not he should press this application. We also hold reservations regarding the utility of the stay, particularly given the time in which it has come before the Court, being at the hearing of the substantive appeal. Nonetheless, the appellant pressed the application for the stay of those costs orders pending the outcome of the substantive appeal in proceeding ACD19/2021.
2. The appellant did not rely on any affidavit material in support of this application. At the hearing in oral submissions the appellant submitted as follows:

DR QUACH: What I am suggesting and I have said all along, I had to drag them through the courts – the court over a number of interlocutory proceedings before they were willing to pay. Now, being the person who dragged them through the courts and having to – having to do all of that, then I should be awarded costs because I made them pay by commencing the proceeding. And there have been a number of rulings by the court below and other courts to say that their justification for delaying payment was not legal. I refer to Griffiths Js ruling on 1 August 2019 – 31 August 2019 where he ruled that the subpoenas to the Medical Council were not within the 40 jurisdiction of this court and were irrelevant.

I rely on Quach v Horvath [2021] NSWSC 1401 at paragraph 59 where Harrison J ruled that the complaint from the Canberra Hospital was not jurisdictional ..... to commence an inquiry which ballooned into all these things that MLC is asking access for. So what I’m trying to say is that I made them pay me by dragging them through the courts, having favourable rulings in this court and in the New South

Wales Supreme Court as well as the Full Court of the Federal Court which is against their reasons for delaying payment. For that reason, any order of costs against me for making them pay is a gross injustice.

…

Well, in essence, the prejudice to my position as a person who is bringing MLC to comply with the contract which they breached for several years by not paying – so I think, in my respectful submission, costs should be stayed until the Full Court determines the appeal.

(transcript p 62-63)

1. We note also that the appellant made somewhat misguided submissions concerning correspondence he received from the respondent prior to the hearing before the primary Judge. Relevantly, the appellant submitted that it was unfair of the primary Judge to have made a costs order against him, in circumstances where the appellant alleges the respondent had agreed to pay his costs in what he termed the “letter of forfeiture” dated 11 February 2021. The appellant submitted:

DR QUACH: No, I press the application that I have been treated unfairly by Rares J and in the application for a stay of the order for costs, and it is truly unfair that both parties start the proceeding on 1 March 2021, believing that Rares J would order costs in my favour. That appears in the letter from MLC dated 11 February 2021, where they said they admit the claim and pay your costs. The last page of their paragraph – last page of their letter. And I had every expectation that I would – I would be - - -

COLLIER J: So which letter is this again, I’m sorry?

DR QUACH: Letter of 11 February 2021, letter of forfeiture.

COLLIER J: Is that in the appeal book?

PERRY J: That offer to pay your costs was on the basis that you would accept the $1 million that was being given to you by MLC and that would bring the proceeding to an end, not that you would then bring a – expand the proceedings to make claims for compensation, interest and costs.

…

DR QUACH: If I may, can I refer to the page 1 of 4 March 2 transcript, where they say that that payment was not contingent on the outcome of the proceedings, they were – no - - -

PERRY J: No, but this isn’t – you’re here, talking about whether you should be paying costs.

DR QUACH: Well - - -

PERRY J: And your point taking the Court to a letter in which you’re being offered $1 million effectively on an assumption that the proceedings will come to an end, but, in fact, you didn’t bring the proceedings to an end. You then continued with them and the matter went to trial, so why shouldn’t they get their costs?

DR QUACH: No. I don’t think that’s how it transpired, your Honour.

DR QUACH: - - - the letter well. On the last page, it starts off with: “Having admitted your claim and agreeing to pay your costs.” With respect, Justice Perry, I don’t think that’s how Mr Donaldson has presented to the Court when he first spoke about saying that they were willing to pay regardless of the outcome of the trial.

COLLIER J: Okay.

DR QUACH: And that - - -

COLLIER J: I’m sorry, Dr Quach, I just need to – you don’t have a copy of the letter here. So I’m looking at page 470:

*Costs of the Federal Court proceedings. In addition to you accepting your claim as detailed in this letter MLCL also offers to pay your ordinary “costs” of your litigation against MLC on the basis that you are a self-represented litigant, less any offsets for various costs order made against you by the Court.*

However, the next paragraph is:

*Having admitted your claim and agreeing to pay your costs as set out in this letter, our client is of the view that the controversy, the subject of the Federal Court proceedings, has now been resolved. That being the case, I invite you to contact me with a view to agreeing on consent orders disposing of the proceedings, which can be provided to his Honour, Rares J. I look forward to hearing from you in this regard and by no later than cob 18 February 2021.*

DR QUACH: Yes. But - - -

…

DR QUACH: Because I think – I think, if I may – I need to draw the distinction between what your Honour has said was the letter being an offer to pay, subject to you getting consent orders as opposed to the reason why it hasn’t been paid, we need an update – an up-to-date account number. So they, in fact – and in fact today, Mr Donaldson had said, “We will pay it anyway.”

COLLIER J: When’s that?

DR QUACH: Earlier today.

COLLIER J: Earlier today, Mr Donaldson said they would pay your costs?

DR QUACH: No, they will pay their – they will pay the $1 million.

COLLIER J: Yes. What has that to do with costs?

DR QUACH: Well - - -

COLLIER J: There’s a big difference between getting paid a lump sum payout - - -

DR QUACH: Well, your Honour - - -

COLLIER J: - - - and costs.

…

DR QUACH: I’m trying to make the distinction. I’m trying to make the distinction that this was not a deal that I broke. I didn’t welsh on this deal and it wasn’t agreed to. They have always said – and it has been clear in the court transcript – that they were going to pay anyway, so in relation to the payment of $1 million, that wasn’t – that wasn’t, as they say, contingent on the outcome of this proceeding. And in regards to the cost side of things, there were – I had to put in, in that interlocutory application which your Honour heard – heard about – for compensatory damages, costs and interest. So the cost part of it needed to be examined by a Court, and in my respectful submission, that needed to be – that needs to be stayed. I mean, that needed to be stayed some time ago and it should be stayed now as well, because I’m pressing it. Because it is substantive injustice for somebody who had to bring a major proceeding in a major court against an insurance company to make them pay.

COLLIER J: And you lost.

(emphasis added, transcript pp 56-63)

1. In reply, Counsel for the respondent submitted that the appellant’s submissions had strayed from an application seeking a stay into, rather, a challenge to the primary Judge’s costs orders, where no ground of appeal related to the exercise of discretion of the primary Judge in ordering costs against the appellant. In addition, Counsel submitted that the appellant had failed to adduce any evidence or satisfactory reason to justify the Court exercising its power to grant the stay, pending the outcome of the appeal.
2. In *National Retail Association v Fair Work Commission (No 2)* [2014] FCA 664 the Court made the following observations in respect of stay applications:

11. Relevant principles to which the Court ought have regard in the present circumstances include the following:

* An order granting a stay is an interlocutory order at the discretion of the primary judge, although the discretion must be exercised judicially: *National Australia Bank Limited v Norman* [2009] FCAFC 13 at [44].
* Further, the discretion of the Court in granting a stay ought not be exercised lightly, and only in circumstances where there would be so adverse and serious a consequence that interlocutory intervention should take place notwithstanding that there has not been an opportunity for full consideration of the appeal: *Nikolaides v Legal Services Commissioner* [2005] NSWCA 91 per Bryson JA at [18]; *Thomson v Young* [2013] NSWCA 300 at [8]. Circumstances warranting the grant of a stay have been described as “exceptional” (*Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No. 1)* [1986] HCA 84; (1986) 161 CLR 681 at 683; *Rahme v Commonwealth Bank* [1993] HCA 62; (1993) 117 ALR 618 at 620; *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 82 at [24]; *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256).
* To that extent the balance of convenience plays an important role in determining whether an order ought be made: *Bannister & Hunter Pty Ltd v Transition Resort Holdings Pty Ltd* [2014] NSWCA 87 per Ward JA at [18].
* The Court may be minded to refuse a stay where it is satisfied that there are no serious questions for the determination in the appeal or review: *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* [2002] NSWCA 383; (2002) 55 NSWLR 737 at [18]; *ACES Sogutlu Holding Pty Ltd v Commonwealth Bank of Australia* [2014] NSWCA 84 at [6]. Conversely, the Court may be minded to grant a stay where, on a preliminary assessment of the case, the Court is satisfied that grounds of appeal or review have merit: *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 695; *Attorney-General for the State of Queensland v Fardon* [2013] QCA 299 at [15].
* The Court may be minded to grant a stay where it is satisfied that any subsequent appeal or review would be rendered nugatory should a stay be refused: *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 695; *Jennings Construction Limited v Burgundy Royale Investments Proprietary Limited* [1986] HCA 84; (1986) 161 CLR 681; *Paringa Mining & Exploration Co PLC v North Flinders Mines Ltd (No 2)* [1988] HCA 53; (1988) 165 CLR 452; *National Australia Bank Limited v Norman* [2009] FCAFC 13 at [43].
* Decisions at first instance should not be treated as merely provisional. A successful party in litigation is entitled to the fruits of its judgment, and courts should not be disposed to delay the enforcement of orders. A sufficient basis must be shown to outweigh these considerations: Keane JA in *Cook’s Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455; *Attorney-General for the State of Queensland v Fardon* [2013] QCA 299 at [15]; *Julia Farr Services Inc v Hayes* [2003] NSWCA 142 at [24].
* The Court will consider whether a stay is warranted in the interests of justice: *Alexander v Cambridge Credit Corporation Limited* (1985) 2 NSWLR 685 at 694; *NSW Bar Association v Stevens* [2003] NSWCA 95 at [83]; *ACES Sogutlu Holding Pty Ltd v Commonwealth Bank of Australia* [2014] NSWCA 84 at [5].

1. Applying these principles to the application currently before the Court, we are not persuaded that a stay of the costs orders made by the primary Judge in the substantive judgment should be granted. We so find for the following reasons:

* The appellant did not file any affidavit or material in support of his interlocutory application for a stay of the costs order, to which the Court could have regard.
* The appellant has not demonstrated that there would be so adverse and serious a consequence that interlocutory intervention should take place to stay the costs order made at first instance, notwithstanding that there has not been an opportunity for full consideration of the appeal presently before the Court in ACD19/2021.
* The appellant has made no submissions in relation to the balance of convenience in this case.
* In relation to the question whether there are serious questions for the determination in the appeal or review, I note again that the appellant did not appeal from the exercise of the primary Judge’s discretion concerning the costs order. It may be that there are other serious questions for determination in the appeal, however the appellant has not argued that the costs order should be stayed for that reason.
* To the extent that a successful party in litigation is entitled to the fruits of its judgment, and courts should not be disposed to delay the enforcement of orders, examination of the Court file in ACD18/2019 reveals that, following the substantive decision of   
  Rares J presently the subject of appeal:
  + An order for security for costs was made by Cheeseman J against the appellant on 20 May 2022 in the sum of $39,395; and
  + The costs order of Rares J of 2 March 2021 has already been the subject of taxation, resulting in an order by Registrar Parkyn of 1 July 2022 fixing the respondent’s costs in the amount of $169,612.17 and the issue of a certificate of taxation.
* Plainly there has been significant activity by the parties in respect of the costs orders of Rares J following the filing of Interlocutory Application 3 on 9 December 2021, including orders for security for costs and taxation of those costs. The appellant has not demonstrated why the respondent should be denied the benefit of those orders.

1. Perhaps the most compelling reason the Court should refuse the appellant a stay of the costs order of Rares J of 2 March 2021 is that the primary reason the appellant argues for such a stay simply lacks merit. In summary, the appellant argues that the primary Judge’s costs order in favour of the respondent was “unfair” because the respondent had, in essence, made an unconditional, irrevocable and open-ended offer to the appellant to pay all of his costs, indefinitely, in connection with his litigation against it. The appellant in particular relied on the so-called “letter of forfeiture” from the respondent to him of 11 February 2021.
2. This argument is fundamentally misguided. The letter of 11 February 2021 was a letter from the lawyers of the respondent to the appellant in which the respondent offered to pay the appellant a settlement amount of $1,014,625.65 referable to the period from 9 August 2014 until 28 February 2021, and noted its view that entitlement to further benefits under the appellant’s policy was subject to attendance by the appellant at a doctor regularly for treatment and provision of a Treating Doctor’s Report. The letter concluded:

**Costs of the Federal Court proceedings**

In addition to accepting your claim as detailed in this letter, MLCL also offers to pay your ordinary costs of your litigation against MLCL on the basis that you are a self-represented litigant, less any offsets for various costs orders made against you by the Court.

**Resolution of the Federal Court proceedings**

Having admitted your claim and agreeing to pay your costs as set out in this letter, our client is of the view that the controversy the subject of the Federal Court proceedings has now been resolved. That being the case, I invite you to contact me with a view to agreeing on consent orders disposing of the proceedings which can be provided to his Honour Justice Rares. I look forward to hearing from you in this regard and by no later than COB 18 February 2021.

1. The primary Judge observed in relation to this correspondence:

**MLC seeks to resolve the matter**

47. On 11 February 2021, MLC’s solicitors wrote an open letter to Mr Quach in which it noted that many of its important evidentiary requirements, that were conditions necessary to establish a claim, had not been met. The letter said that, nevertheless, MLC had determined that it would waive those important requirements, accept his claim for total disability from 9 August 2014 to 28 February 2021 and refund premiums that Mr Quach had been paying in the meantime. That involved MLC agreeing to pay Mr Quach a total of $1,014,625.65 which it intends to pay without deduction of any tax, once Mr Quach gives it details of a bank account to which it can transfer the money.

48. The letter said that because his policy will continue, some way into the future, until he is aged 65, it wanted to remind him of pertinent information about which he needed to satisfy it in respect of any further payments. Those are that, first, if he was not working in any capacity, he would fall within the definition of total disability, provided that his inability was caused by injury or sickness, and of the corresponding requirement in the case of partial disability. Secondly, the policy required him to be treated regularly by an appropriately qualified doctor in order to be eligible to receive benefits. The letter stated:

Accordingly, to be entitled to further benefits under your policy you must, amongst other things, attend a doctor regularly for treatment and have a Treating Doctor's Report completed so that MLCL can assess whether you continue to be Totally Disabled or Partially Disabled, and confirm that you are undergoing treatment as required by the policy. Please note that these ongoing requirements are at your own cost.

Given these provisions, should you wish to pursue an ongoing claim, MLCL may also contact your treating doctor or specialist by phone and request a medical report directly from them. MLCL may also ask you to attend an Independent Medical Examination by one of their chosen specialists. MLCL will pay for these if required.

We may also require financial information about your earnings.

49. MLC offered to pay Mr Quach’s ordinary costs of the proceeding on the basis that he was a litigant in person, less any offsets for various costs orders already made against him. The letter also said that, having admitted his claim and agreed to pay costs, MLC was also of the view that the controversy between the parties had now resolved and asked Mr Quach to contact its solicitors with a view to agreeing consent orders.

50. As is evident from his unfortunate, self-defeating behaviour in the way he has pursued his claim under the policy and his conduct of this litigation and others, Mr Quach is not a man to come to any sensible agreement. On 20 October 2017, F. Gleeson and Simpson JJA and Sackville AJA made orders under the Vexatious Proceedings Act 2008 (NSW) against Mr Quach: *Quach v New South Wales Health Care Complaints Commis*sion [2017] NSWCA 267.

1. It does not appear to be in dispute that Dr Quach did not accept the terms of the offer of the respondent, although it also appears that he has been paid the settlement monies offered by the respondent in the letter of 11 February 2021 (transcript p 17). Plainly the offer of 11 February 2021 by the respondent to pay the appellant’s costs was referable to settlement of the proceedings in ACD18/2019, consent orders being provided to the primary Judge, and discontinuance of the proceedings by the appellant. None of this happened. There is no merit in the appellant’s interlocutory application, being founded on his erroneous belief that he could continue the proceedings and the respondent would fund that further Court action against it.
2. Interlocutory Application 3 is dismissed.

# APPEAL IN PROCEEDING ACD19/2021

1. We now turn to the substantive appeal in proceeding ACD19/2021. In that decision the primary Judge (Rares J) dismissed the appellant’s application for compensatory damages for an alleged breach by the respondent of s 13 of the *Insurance Contracts Act 1984* (Cth).
2. By his Notice of Appeal filed 22 March 2022, the appellant seeks the following orders:
3. Rares J judgment 2 March 2021 be set aside.
4. The appeal [substantive matter] be dismissed as moot.
5. The respondent pay the appellant’s [applicant’s] costs of the appeal [substantive matter] as a litigant in person.
6. The respondent pay the Appellant Compensatory Damages, Interests and Costs.
7. The respondent pay the insured (Appellant) benefits for the Income Protection Insurance claim on policy no. 1688 8009N.
8. The grounds of appeal as set out in the notice of appeal are as follows:

1. I was not afforded a fair hearing.

I. Rares J was not persuaded on the question of apprehended bias, notwithstanding more than three hundred pages of evidence in Affidavits.

II. Rares J prejudged the substantive matter, notwithstanding MLC Limited had forfeited.

III. Rares J participated in the proceeding by:

1. giving unsolicited legal advice, in favour of MLC Limited. After Griffiths J had ordered amendment of the statement of claim on 30 April 2019, Rares J ordered me, the Applicant, to re-amendmy statement of claim on 29 May 2020,

*“1. The applicant file and serve a further amended statement of claim particularising, among other matters, the policy wording under which the applicant claims, his disability or condition the subject of his claim for indemnity and the date of making his claim for indemnity on or before 26 June 2020”.*

On the 16 December 2020, unsolicited, Rares J ordered MLC Limited to respond to, as if to let MLC Limited off the hook (unhook).

*“3. On or before 12 February 2021, the respondent file and serve any medical evidence in response to the discovery material, and an amended defence”.*

1. Rares J ordered discovery, unsolicited, in favour of MLC Limited without having knowledge of the existence of the documents, which amounts to a “fishing expedition”. The order for discovery did not specify documents to be produced.

*“2. On or before 12 January 2021, the applicant give discovery and simultaneous inspection of the medical reports to which he referred in the claim form annexed to his affidavit of 18 November 2020, together with the other medical reports referred to in the reasons of the New South Wales Civil and Administrative Tribunal in Health Care Complaints Commission v Quach [2015] NSWCATOD 2 and Health Care Complaints Commission v Quach (No 2) [2015] NSWCATOD 32”.*

IV. Rares J refused leave to issue subpoenas to:

i. Canberra Hospital, and

ii. Medical Council of NSW,

that would prove that the MLC Limited requesting information from regulatory bodies were not admissible, because they were made without first establishing *“jurisdictional fact”* (*Gedeon v NSW Crimes Commission* [2008] HCA 43 at [43]).

1. Dr Andrew Martin Petherbridge as a witness, who diagnosed the Narcissistic Personality Disorder in the Applicant.
2. Rares J breached the High Court ruling in *Re Bolton; Ex parte Beane* [1987] HCA 12 at [4],

“…the task of the Court remains clear. The function of the Court is to give effect to thE will of Parliament as expressed in the law”.

Rares J rulings did not “give effect to the will of the Parliament as expressed in the law”.

I. *The Evidence Act 1995* (Cth), does not apply to the decisions of:

i. *Health Care Complaints Commission v Quach* [2015] NSWCATOD 2 and 32, and

ii. Dr YvonneSkinner’s medico legal report made in the Health Practitioner Regulation National Law (NSW), lodged with the claim for income protection insurance on policy 1688-8009N for the Appellant.

pursuant to *Section 9 (3)(a) of the Evidence Act 1995* (Cth) ***Effect of Act on other laws***,

“(3) For the avoidance of doubt, this Act does not affect a law of a State or Territory so far as the law provides for:

* + - 1. the operation of a legal or evidential presumption (except so far as this Act is, expressly or by necessary intendment, inconsistent with the presumption); or”

II. Notwithstanding the expressed law as *“binding”* under *Section 79 of the Judiciary Act 1903* (Cth), Rares J made rulings on the evidence of:

i. Health Care Complaints Commission v Quach [2015] NSWCATOD 2 and 32, and

ii. Dr Yvonne Skinner’s medico legal report made in the Health Practitioner Regulation National Law (NSW), lodged with the claim for income protection insurance on policy 1688-8009N for the Appellant, was hearsay, under Section 59 of the Evidence Act 1995 (Cth).

as not “be binding on all Courts exercising federal jurisdiction in that State”, under Section 79 of the Judiciary Act 1903 (Cth), State or Territory laws to govern where applicable states,

“(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.”

On the 30 April 2019, in this matter ACD 18/2019 Quach v MLC Limited, Griffiths J said,

*“HIS HONOUR: And it makes no different whether or not your matter was heard in Sydney or in Canberra”*.

III. MLC Limited is statute barred from affecting the operations “of any other law of the Commonwealth, the operation of law of a State or Territory”. Section 7 of the Insurance Contract Act 1984 (Cth) states,

*“7 Effect of Act on other laws*

*It is the intention of the Parliament that this Act is not, except in so far as this Act, either expressly or by necessary intendment, otherwise provides, to affect the operation of any other law of the Commonwealth, the operation of law of a State or Territory or the operation of any principle or rule of the common law (including the law merchant) or of equity”.*

3. MLC Limited, as a corporation, cannot establish “*jurisdictional fact*” (*Gedeon v NSW Crimes Commission* [2008] HCA 43 at [43]) to interfere with Dr Yvonne Skinner’s medico legal report (*made in the Health Practitioner Regulation National Law* (NSW)) for the claim on income protection policy 1688-8009N of the insured, Dr Michael Van Thanh Quach. MLC Limited did not adduce any expert medical evidence to that contradicts the findings of *Health Care Complaints Commission v Quach* [2015] NSWCATOD 2 and 32, and Dr Yvonne Skinner’s medico legal report.

4. The evidence of MLC Limited is not admissible pursuant to Section 80 of the Judiciary Act 1903 (Cth), ***common law to govern***:

I. The substantive matter is “*moot*”. The common law relating to MLC Limited forfeiting in *ACD 61/2020 Quach v MLC Limited* in the Court of Appeal, is binding on the substantive matter of *ACD 18/2019 Quach v MLC Limited* in the Original jurisdiction of the Federal Court of Australia.

i. The matter of *ACD 61/2019 Quach v MLC Limited* was ruled, “*The appeal be dismissed as moot*”, when MLC Limited defaulted on the question of legal privilege over documents of in house lawyer, Suzanne Oliver.

ii. The Court of Appeal Ordered costs against MLC Limited in favour of the Appellant (Applicant), “*The respondent pay the appellant’s costs of the appeal as a litigant in person*”.

iii. Pursuant to *Section 80 of the Judiciary Act 1903* (Cth) ***Common law to govern,*** Costs should be Ordered against MLC Limited, *“The respondent pay the appellant’s* [applicant’s] *costs of the appeal as a litigant in person”*.

II. Griffiths J ruled that all *“correspondence between the recipient of the subpoena and various regulatory bodies, is not of apparent relevance to the proceedings before this Court*” in *Dr Michael Van Thanh Quach v MLC Life Limited (No 1)* [2019] FCA 1194 at [5].

III. Griffiths J, on the 1 August 2019, ruled that “*any question which requires this court, the Federal Court, to rule on whether you engaged in professional misconduct. That’s not within our jurisdiction. It’s not a matter for this court to rule it”.*

1. At the hearing the appellant relied on his written submissions in respect of these grounds of appeal. In oral submissions he focused, in essence, on ground of appeal 1, in particular his allegation that the respondent had relied on the “wrong policy”.
2. We will examine each ground in turn.

## Ground of appeal 1

1. The appellant submitted, in summary, as follows:

* The primary Judge decided the matter on the incorrect policy. The policy does not appear anywhere in the respondent’s product disclosure statement (**PDS**) at the time the contract was entered.
* In fact the respondent was bound by the terms of its PDS which required it to pay the appellant unconditionally into the future, in accordance with the principles articulated in the seminal decision of *Carlill v Carbolic Smoke Ball Company* [1892] 2 QB 484.
* Section 47 (2) of the *Insurance Contracts Act 1984* (Cth) is applicable.
* The fact that the respondent had agreed to pay the appellant’s claim up until the hearing before the primary Judge meant that costs should be awarded against the respondent.
* The primary Judge had not informed the appellant that he was minded to make an adverse finding against him.
* The same Judge cannot preside over a matter both at first instance and on appeal. Given that Rares J sat in the appeals in both ACD52/2019 and ACD61/2019, he could not preside in ACD18/2019.
* Justice Rares was biased. Justice Rares inappropriately refused to state whether he had any personal investment or family members in the medical, dental or allied health professions.
* Justice Rares used language consistent with the fictitious language of Newspeak from George Orwell’s novel *1984*.
* Justice Rares used the coercive powers of the Court to benefit the respondent by:
  + giving unsolicited legal advice to the appellant to re-amend his statement of claim;
  + ordering the respondent to file and serve any medical evidence in response and an amended defence;
  + enabling a “fishing expedition” by ordering discovery without an application nor having knowledge of the existence of the documents;
  + refusing leave to issue subpoenas to Canberra Medical Hospital, Medical Council of NSW and Dr Andrew Pethebridge.

1. In our view this ground of appeal has no merit.
2. Claims of bias and apprehended bias are serious matters which must be properly pleaded and substantiated.
3. An enquiry about actual bias in the form of pre-judgment requires an assessment of the state of mind of the decision maker in question, that is, whether the decision maker has ***in fact*** prejudged an issue to be determined in the proceeding: *Michael Wilson & Partners v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [33] (Gummow A-CJ, Hayne, Crennan and Bell JJ). The relevant principles are conveniently summarised in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 at [73] (Gleeson JA, Tobias and Emmett JJA agreeing) as follows:

68. A finding of actual bias is a grave matter... Authority requires that an allegation of actual bias must be distinctly made and clearly proved; that such a finding should not be made lightly; and that cogent evidence is required…

69. Where the issue is actual bias in the form of prejudgment, the appellant had to establish that the primary judge was "***so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented***": *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing at [176]). ….

70. As Gleeson CJ and Gummow J observed in that case at [71]:

"***The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion***."

(emphasis added)

1. By contrast, a claim of apprehended bias does not involve any inquiry into actual state of mind of the decision-maker. As the High Court observed recently in *Charisteas v Charisteas* [2021] HCA 29:

11. Where, as here, a question arises as to the independence or impartiality of a judge, the applicable principles are well established, and they were not in dispute. The apprehension of bias principle is that "a judge is disqualified if a fair‑minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal. ***Its application requires two steps: first, "it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.***

(emphasis added)

1. None of the factors raised by the appellant, either individually or cumulatively, come close to establishing either actual or apprehended bias, even leaving aside the inadequate pleading of the allegations.
2. First, the fact that the primary Judge did not find in the appellant’s favour on his claim cannot establish bias on his Honour’s behalf or a perception of bias. It is in the nature of the adversarial system of justice that there will be a winning and a losing party. As Justice Bromwich observed in *Young v Hughes Trueman Pty Ltd (No 5)* [2017] FCA 690 at [14]:

14. Merely reaching an adverse view of the merits of a case, even if firmly expressed, does not necessarily, or even ordinarily, preclude a judge determining the next stage of the same proceedings. Damages hearings routinely follow determination of liability; in the criminal jurisdiction sentences follow determinations of guilt (including in cases by way of trial by judge alone). In any court where costs may be awarded, including in particular indemnity costs, the way in which a case was run will fall to be assessed against the backdrop of an unfavourable prior decision which may go to the heart of the decision to be made. It simply cannot be the case that in such situations a new judicial officer is required as a matter of course for that last stage. The focus must be on a proper basis for recusal.

1. Similarly, the fact that Rares J had made rulings in respect of aspects of the proceedings, and other related proceedings, adverse to the appellant does not of itself mean that his Honour had prejudged the merits of the appellant’s originating application. In this regard, s 37M of the Federal Court of Australia Actcontemplates that Judges make case management Orders to promote the efficient progression of a case towards final hearing. Case management Orders of the type criticised by the appellant as “participation in the proceeding” by his Honour, including with respect to the filing and service of a further amended statement of claim, medical evidence and an amended defence, and an Order for discovery, are entirely unremarkable, and do not constitute “prejudgment” of the case by his Honour, or any basis on which it could be found that his Honour decided the case other than on its legal and factual merits. This was particularly so against the background of the multitude of applications filed by the appellant in this and related proceedings.
2. Secondly, equally unarguable is the suggestion that the fact that there were “three hundred pages of evidence in Affidavits” mean that the appellant’s case at first instance was substantiated and therefore the primary judge must have been biased or would be perceived to be so in rejecting the appellant’s case notwithstanding the volume of his evidence. The judicial task necessarily involves an assessment of the strength of the evidence on which the parties’ rely. The number of pages of evidence is not of itself material.
3. Thirdly, the appellant’s bare assertion that the primary judge “prejudged the substantive matter, notwithstanding MLC had forfeited” is a statement also replete with misunderstanding.
4. As we noted earlier, the respondent had not “forfeited” its opportunity to oppose the appellant’s claims at first instance.
5. Fourthly, the appellant has also not demonstrated that the primary Judge provided “legal advice” of any kind to the respondent during the course of the proceedings.
6. With respect to sub-ground 1 (IV) relating to the alleged refusal to issue subpoenas, the ground rises no further than an unsupported assertion by the appellant, and even to that extent is difficult to understand in the following circumstances:

* There is no information *before* the Court concerning the alleged refusal of Rares J to issue the subpoenas identified by the appellant. We note that in *Quach (No 4)*   
  Griffiths J dismissed interlocutory applications by the appellant to *set aside* subpoenas issued by the first respondent, and his Honour noted correspondence concerning Canberra Hospital, however we can identify nothing more specific.
* The reference to the decision of the High Court in *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43 is curious, and unclear. We note that their Honours at [43] in *Gedeon* ***alluded*** to the “loose” use of the expression “jurisdictional fact” in the submissions in that case, and further observed that generally the expression is used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question. The case was also authority for the proposition that relief should be granted sparingly by way of declaration in respect of matters which are the subject of criminal proceedings (see for example commentary by the Court of Appeal of Victoria in *Dasma Environmental Pty Ltd v Environment Protection Authority* [2022] VSCA 248 at [136]). We are unable to discern how the decision in *Gedeon* is relevant tothe issue of subpoenas (or refusal to do so) in the present case.

1. Finally, to the extent that the appellant claims that the primary Judge made findings by reference to the “wrong policy”, he has not substantiated that claim. In the amended statement of claim filed by the appellant at first instance on 26 June 2020, the appellant relevantly pleaded:

1. Notwithstanding that the decision *Health Care Complaints Commission v Quach* in [2015] NSWCATOD 2 and [2015] NSWCATOD 32 is a nullity, because ADCJ Marks was not a “term member” (*Quach v HCCC* [2016] NSWCA 10 at [24]). Medical practitioner hearings require appointments of a “term member” or an “occasional member,” pursuant to Schedule 5 Clause 12 of the *Civil and Administrative Tribunal Act 2013* (NSW).

The Plaintiff’s claim for total disability cover on his MLC Income Protection Policy (1688-009N) was lodged on the basis of an alleged “illness” by the New South Wales Medical Board, dating back to 2008.

The applicable definition of Total disability is, “*You are totally disabled if you are continuously unable to do at least one of the important duties of your occupation necessary to producing your income*.”

1. The applicant also particularised his claim for compensatory damages against the respondent as including:

4. Plaintiff’s claim for total disability cover on Policy number 1688-009N, which MLC has refused to pay.

5. MLC Limited caused financial loss by acting with the intention to cancel the Plaintiff’s Income Protection Insurance Policy, 1688-009N. This is in breach of MLC Limited’s “duty of the utmost good faith” pursuant to the *Insurance Contract Act 1984* (Cth).

6. MLC Limited caused financial loss by way of breach of contract. MLC Limited collected money as payment while refusing to pay the overdue Income Protection Insurance claim lodged, 15 November 2015, on Policy number 1688-009N. The MLC Income Protection Insurance Policy stipulates that the Plaintiff would not pay Income Protection Premium while being paid benefits, which are overdue.

1. The primary judge relevantly observed:

1. Michael Quach, the applicant, was a general practitioner. On 5 September 2005, he completed a proposal for personal protection portfolio policy underwritten by MLC Limited, the respondent. The policy incepted on 25 November 2005 and, relevantly, covered Dr Quach for income protection in the event of total and permanent or partial disability and critical illness as defined in the policy wording. Mr Quach claims that MLC has failed to indemnify him under the policy and has breached its duty of utmost good faith under s 13 of the *Insurance Contracts Act 1984* (Cth). He claims compensatory damages and other relief.

**The policy**

2. Relevantly, the policy provided that the life insured was totally disabled if he or she was continuously unable to do at least one of the important duties of his or her occupation and was not working for earnings. “Earnings” was defined as income from self-employment or the life insured’s business or practice that he or she generated by personal efforts or, if an employee, his or her total remuneration, payment, or profit.

3. Importantly, the definition of totally disabled included the condition that “the inability **must be caused by injury or sickness**.”

4. To fall within the definition of being partially disabled, the life insured had to have returned to work in his or her own or another occupation and that “as a result of their inability, their monthly earnings in that occupation are lower than their earnings before disability.”

5. The policy had the following conditions relevant to the claim that Mr Quach makes:

* Benefits will only be paid while the life insured is being regularly treated by an appropriately qualified doctor
* This type of insurance does not cover You for any disability... of the Life Insured arising from or connected with any... sickness that first appears before this policy commenced...
* The following special requirements apply:

You (or someone representing You) must tell us the Life Insured is Totally Disabled within 30 days of the beginning of the Total Disability. We will send You, or Your representative, a claim form or arrange a representative to contact You to complete the claim form. You must return the claim form to us (completed where required by the Life lnsured and their Doctor) within 90 days of the Total Disability beginning. lf You don't get a claim form, You must still provide details of the Total Disability to us within 90 days, including the nature, cause and extent of the Total Disability. We may ask for more information to help us assess Your claim. Your Benefit will be reviewed regularly. We may require further proof of disability if it continues.”

(emphasis added)

1. Plainly, the appellant’s claim as pleaded in the amended originating application was by reference to the respondent’s policy of insurance as issued to the appellant. Equally plainly, his Honour’s reasons were by reference to that policy of insurance.
2. The primary judge did not make findings in respect of the “wrong” policy of insurance.
3. To the extent that the appellant made submissions in relation to the respondent’s document *MLC Personal Protection Portfolio: Product Disclosure Statement* (PDS) we note that:

* This document was simply not pleaded by the appellant;
* The PDS specifically stated that it gave important information about the MLC Personal Protection Portfolio, including the legal terms of the insurance the respondent would provide, however was a document which was subject to replacement. It followed that it was plainly an information document only;
* Despite the appellant’s reliance on *Carlill*, the PDS specifically states under the heading “Important Information” that it “*does not constitute and should not be construed as an offer, invitation or recommendation by MLC to apply for life insurance in any state, country or jurisdiction other than Australia*”. In any event, the PDS was plainly not a unilateral offer by the respondent. As Steward J explained in respect of a PDS in *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2018] FCAFC 122:

212. The June 2015 Product Disclosure Statement and Supplementary Product Disclosure Statement are documents mandated by the Corporations Act which compel the disclosure of information to proposed investors. ***Their function and purpose is not to be a source of contractual terms, but to convey a description of a proposed investment***. As the Explanatory Memorandum to the Financial Services Reform Bill 2001, which introduced the provisions concerning product disclosure in Div 2 of Pt 7.9 of the *Corporations Act*, states at [14.28]:

Division 2 of proposed Part 7.9 deals with point of sale disclosure in relation to all financial products other than securities (as defined in proposed section 761A). The broad objective of point of sale disclosure obligations is to provide consumers with sufficient information to make informed decisions in relation to the acquisition of financial products, including the ability to compare a range of products.

…

214. The conclusion that the June 2015 Product Disclosure Statement is not a source of contractual terms is supported by authority. In *Gunns Finance Pty Ltd (Receivers and Managers Appointed) (in Liquidation) v Sithiravel* [2016] NSWSC 1543, it was contended that statements made in a product disclosure statement contained the terms of a contract. The claim was rejected by Robb J who said at [176], [177] and [179]

176. Mr Sithiravel submitted, at par 76, that he applied for the products and services offered by Gunns Plantations on the basis of what was contained in the PDSs, and that appears to be the basis of his claim that the PDSs contained terms of the contract. He relied upon a number of statements in the Woodlots Project 2006 PDS (court book p 145) concerning “Key Features” of the project that: “Growers are offered a unique investment opportunity allowing the flexibility of three planting options” and “Growers are offered the opportunity to acquire a Forestry Right over Woodlots...” (emphasis added in both cases) as signifying that the PDSs were offers capable of acceptance. He said that these offers were “akin to the offer to the world at large in the contract case which sticks in all law students’ minds *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1; [1893] 1 QB 256”.

177. There is no place in the analysis of the effect of the PDSs for the principles governing unilateral contracts, where the offeror makes an offer to a class which is capable of acceptance by the doing of an act identified in the offer.

...

179. While the statements relied upon do make various assertions about the nature of the project and the rights of investors, those statements are expressed in descriptive rather than promissory language. They plainly constitute representations, but they do not appear to be independent sources of contractual obligations.

215. I respectfully agree with Robb J’s analysis of the effect of a product disclosure statement . I also respectfully agree with Buss JA, who rejected a similar argument about contractual intent, this time made with respect to an information memorandum, in *Emu Brewery Mezzanine Limited (in liquidation) v Australian Securities and Investments Commission* [2006] WASCA 105; (2006) 32 WAR 204…

(emphasis added)

1. As observed by both Steward J in *Aussiegolfa*, and by Robb J in *Gunns Finance Pty Ltd (Receivers and Managers Appointed) (in Liquidation) v Sithiravel* [2016] NSWSC 1543, arguments relying on *Carlill* referable to a PDS have been previously raised and, for reasons explained, rejected.
2. We consider this aspect of the appellant’s complaint to be similarly baseless.
3. Ground of appeal 1 is not substantiated.

## Ground of appeal 2

1. In relation to ground of appeal 2 the appellant submits, in summary:

* Justice Rares did not give effect to the will of Parliament as expressed in the law, and in particular breached the High Court ruling in *Re Bolton; Ex parte Beane* [1987] 162 CLR 514; HCA12;
* The medico-legal report of Dr Skinner was not subject to the *Evidence Act 1995* (Cth);
* Business records such as evidence of Dr Skinner constituted an exception to the hearsay rule; and
* The respondent had expert evidence that the appellant was subject to narcissistic personality disorder.

1. We understand that, in relation to this ground of appeal, the appellant took issue with para [54] of the decision of the primary judge which was as follows:

54. *Thirdly*, drawing on the preservation of other laws for which s 7 provided, Mr Quach asserted that s 7 required MLC and this Court to accept, and prevented MLC from challenging on any basis, including s 91 of the *Evidence Act*, the conclusiveness of the findings of fact in NCAT’s decisions, including its findings about the impact of his narcissistic personality disorder. He asserted that, somehow, s 7 of the *Insurance Contracts Act* precluded s 91 of the *Evidence Act* from applying to excuse MLC from recognising the binding force of NCAT’s findings of fact about the narcissistic personality disorder in its internal consideration of his claim (a proposition which may be both irrelevant and unexceptional) but also to this Court’s consideration of his claim. The latter is untenable, having regard to the fact that, by force of s 4(1), the *Evidence Act*, including s 91, applies to all proceedings in a federal court.

1. We note that his Honour further continued:

55. *Fourthly*, Mr Quach said that his argument, however, got around s 4(1) and the exclusionary provisions of s 91 of the *Evidence Act* because s 8(1) provided that:

This Act does not affect the operation of the provisions of any other Act, other than sections 68, 79, 80 and 80A of the *Judiciary Act 1903* (Cth).

56. Again, somehow despite s 8(1), he contended that s 79 of the *Judiciary Act* bound MLC and therefore (in the terms of his argument, as opposed to any legal intelligibility that I could discern in the submission) this Court to apply the laws of New South Wales including those relating to procedure and evidence. He asserted that this must result in the findings of fact in NCAT’s decisions being binding on all courts exercising federal jurisdiction in New South Wales to the extent that they are applicable. It is not necessary in dealing with this nonsensical contention to discuss any consequence of the facts that Mr Quach filed this proceeding in the Australian Capital Territory registry and I am hearing it in Canberra.

1. Section 91 of the Evidence Act provides:

**Exclusion of evidence of judgments and convictions**

(1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

(2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

*Note: Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions*.

1. As the respondent correctly submitted at this appeal hearing, the primary Judge was not required to treat any decision of the New South Wales Civil and Administrative Tribunal (NCAT) as binding, and his Honour was not required to accept Dr Skinner’s opinion notwithstanding that it had apparently been adduced as evidence in the NCAT proceeding. Rather, the appellant was required to substantiate his Federal Court claim in the Federal Court.
2. We are unable to identify how the primary Judge failed in the primary decision to give effect to the will of Parliament, or how the Evidence Act was not applicable.
3. Ground of appeal 2 has no merit.

## Ground of appeal 3

1. In relation to ground of appeal 3 the appellant submits, in summary:

* the respondent cannot challenge Dr Skinner’s medical report;
* the respondent did not adduce expert medical evidence to rebut evidence of Dr Skinner or Dr Petheridge concerning the appellant’s narcissistic personality disorder; and
* the respondent is expressly prohibited from interpreting the law.

1. In relation to this ground of appeal it is clear that:

* The appellant’s reliance on *Gedeon* is misconceived;
* It was not incumbent on the respondent to “establish ‘jurisdictional fact’”;
* As we have already observed, the primary Judge was not required to accept evidence of Dr Skinner in the NCAT proceedings;
* The respondent was not required to adduce medical evidence of its own.

1. This ground of appeal has no merit.

## Ground of appeal 4

1. In relation to this ground of appeal the appellant submits, in summary:

* The respondent’s evidence was inadmissible;
* The respondent had “forfeited” in respect of the substantive claim, as was clear from its letter of 11 February 2021; and
* A ruling by NCAT, which prevented the respondent from gaining access to the NCAT file in an earlier proceeding against the appellant, was binding on the Federal Court.

1. As already observed, the respondent was not prevented by its written offer of settlement of proceedings on 11 February 2021 to oppose the appellant’s claim in the primary proceedings. Further, any rulings by NCAT are not binding on this Court in respect of proceedings initiated in this Court.
2. The appellant’s contention in respect of evidence of the respondent has no merit.
3. This ground of appeal has no merit.

# CONCLUSION

1. It follows that the appeal should be dismissed.
2. Finally we note that Rares J delivered judgment *ex tempore*, and subsequently published written reasons revised from the transcript. There is no issue concerning the timing of the publication of his Honour’s written reasons, or that that timing in any way prejudiced the appellant filing his notice of appeal. Nonetheless the appellant complains that he was denied the opportunity to amend his notice of appeal on receiving the written reasons of Rares J in the primary judgment. The appellant referred to email correspondence between himself and the Federal Court Registry in Canberra.
3. Examination of the Court file in the appeal indicates that:

* The appellant emailed the registry on 12 April 2021, relevantly enquiring:

*Would you be so kind as to grant leave to amend the Notice of Appeal*

* On 12 April 2021 a client services officer of the Court emailed the appellant as follows:

*I refer to your email below and advise that you should refer to Rule 36.10 of the Federal Court Rules in relation to an amendment of your appeal.*

1. Rule 36.10 of the Federal Court Rules provides:

**Amendment to notice of appeal**

An appellant may, without the Court's leave, amend a notice of appeal during the period of 28 days after filing the notice of appeal by filing a supplementary notice of appeal in accordance with rule 36.01.

1. The appellant filed his notice of appeal on 22 March 2021. The client services officer directed the appellant to r 36.10. As at 12 April 2021 the appellant was within time to file a supplementary notice of appeal. He did not do so, presumably because he chose not to do so. No denial of procedural fairness to the appellant is apparent in this respect.
2. Costs should follow the event.

|  |
| --- |
| I certify that the preceding one hundred and thirty-four (134) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Collier, Perry and Thomas. |

Associate:

Dated: 21 December 2022