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

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Executive Summary (1 minute read)

Zhai v Luo (FCAFC) - bias - primary judge heard respondent's applications while judgment reserved following completion of trial - bias not established - appeal dismissed

BB Retail Capital Pty Ltd v Alexandria Landfill Pty Ltd (NSWCA) - contract - commercial agreement - amount of borrowings was "organic debt" in terms of issue - appeal allowed - cross-appeal dismissed

EPS Constructions Pty Ltd v Mass Holdings Pty Ltd (NSWCA) - contract - partnership - joint venture - challenges to factual findings - no error in finding partners entered oral agreement - appeal dismissed

Wang v Kaymet Corporation Pty Ltd (NSWSC) - costs - contract - plaintiffs to pay defendants' costs except for those associated with one expert report

Briton v Kipritidis (NSWSC) - Wills - deceased suffering from schizophrenia had testamentary capacity to make Will - probate in solemn form granted to plaintiff

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Summaries With Link (Five Minute Read)

Zhai v Luo [2015] FCAFC 144

Full Court of the Federal Court of Australia

Rares, McKerracher & Gleeson JJ

Bias - appellant sought to appeal from orders of primary judge on basis of a reasonable apprehension of bias - complaint related to fact primary judge heard two applications by respondent while judgment in proceedings reserved - first application was to amend statement of claim to allege fraud against appellant - second application was for freezing order against appellant and others - application for freezing order allowed against appellant in part only - application to amend statement of claim refused - complaint of apprehended bias also related to remarks made by primary judge in second application - *Conveyancing Act 1919* (NSW) - held: Court did not consider that hearing of application to amend pleading with or without application for freezing order could have created reasonable apprehension of bias in the circumstances - appeal dismissed.

[Zhai](#)

BB Retail Capital Pty Ltd v Alexandria Landfill Pty Ltd [2015] NSWCA 319

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Macfarlan JA

Contract - appellant (BBRC), first respondent/cross-appellant (ALF) and second respondent/cross-appellant entered deed by which BBRC became holder of \$30 million of convertible notes issued by ALF - notes matured and converted into preference shares in ALF - BBRC claimed it was entitled to be issued with number of preference shares dictated by conversion formula in clause of Terms of Issue of convertible notes - respondents accepted that \$10 million of BBRC's convertible notes were converted into preference shares at that rate but that remaining \$20 million of BBRC's notes converted on a "\$1.00 for 1 share" basis - on conversion issue primary judge found in BBRC's favour, also finding documents of correspondence between ALF and BB inadmissible on question of contractual construction - primary judge found in favour of ALF on issue concerning determination of amount of "Organic Debt" in ALF group on conversion date - primary judge found that amount of borrowings by ALF to raise funds to redeem convertible notes was not organic debt - held: borrowings fell within definition of organic debt in Terms of Issue for purposes of formula in clause of contract - appeal allowed - cross-appeal in relation to conversion issue and admissibility of documents dismissed.

[BB Retail Capital](#)

EPS Constructions Pty Ltd v Mass Holdings Pty Ltd [2015] NSWCA 317

Court of Appeal of New South Wales

Leeming & Simpson JJA; Sackville AJA

Contract - first respondent was one of four members of partnership or joint venture - first appellant (EPS) was company associated with one of the partners - first respondent sued on alleged oral agreement between partners and EPS - primary judge found EPS and partners

entered into an oral agreement as alleged by respondent and entered judgment for first respondent - appellants challenged factual findings by primary judge - appellants contended primary judge erred in finding partners and EPS reached binding agreement - appellants contended primary judge did not grapple with evidence showing no consensus reached and that an objective observer could not conclude partners reached final agreement - appellants also contended consensus, if it was reached, did not extend to all essential elements of binding agreement - held: primary judge carefully analysed evidence and resolved conflicts to determine whether parties reached consensus - primary judge did not erroneously overlook material evidence or misuse advantage or make findings glaringly improbably or inconsistent with incontrovertible facts - appeal dismissed.

[EPS Constructions](#)

Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 1528

Supreme Court of New South Wales

Stevenson J

Costs - Court concluded plaintiffs failed to establish defendants not entitled to rescind contracts purchase of apartments proposed to be developed on Site - Court found plaintiffs did not establish defendants failed to use reasonable endeavours to register draft Strata Documents by various Dates for Registration - Court found plaintiffs established development delayed by want of reasonable endeavours by defendants concerning certain six week period but that the delay did not cause defendants to fail to register the documents - plaintiffs submitted it was appropriate to reduce costs recoverable by defendants on basis "true events" that caused delay were only revealed by defendants during course of trial - held: Court not prepared to speculate whether plaintiffs would have "pursued the action" had defendants adduced evidence that emerged in cross-examination - overall plaintiffs had failed to make out their case - costs should follow event - plaintiffs to pay defendants' costs except for those associated with one expert .

[Wang](#)

Briton v Kipritidis [2015] NSWSC 1499

Supreme Court of New South Wales

Ball J

Wills and estates - succession - testamentary capacity - deceased suffered from schizophrenia - plaintiff sought grant of probate of deceased's Will - defendants contested Will on basis deceased lacked testamentary capacity - test for testamentary capacity in *Banks v Goodfellow* (1870) LR 5 QB 549 - held: deceased's condition did not affect his ability to make rational decisions concerning recipients of estate to point where he lacked testamentary capacity - probate in solemn form granted to plaintiff.

[Briton](#)

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