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

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Executive Summary (1 minute read)

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

Summs of Qld Pty Ltd v Boon (QCA) - security for costs - negligence - respondent stabbed in hand with Leatherman knife by applicant's employee during lunchbreak - neither employee nor applicant found liable - applicant refused security for costs of respondent's appeal

Summaries With Link (Five Minute Read)

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

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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](#)

Summs of Qld Pty Ltd v Boon [2015] QCA 174

Court of Appeal of Queensland

Fraser JA

Security of costs - negligence - respondent stabbed in hand with Leatherman knife by applicant's employee during lunch break at construction site - respondent employed by company (Globe) which was contracted by another company (Downer) to provide workers at construction site controlled and monitored by Downer - applicant company subcontracted by Downer to remove and replace asphalt at construction site - respondent sued applicant company for breach of duty to take reasonable care not to expose him to a foreseeable risk of injury and/or claimed appellant vicariously liable for employee's negligent acts - primary judge found it was not established applicant's employee was negligent and was not satisfied reasonable employer in position of applicant company would have taken steps argued by respondent to avoid the risk of injury applicant sought security for costs of respondent's appeal - held: respondent had very strong argument on liability on appeal - Court satisfied there was significant risk applicant would not be able to recover costs if successful on appeal - some risk making order for security would stifle appeal - it was very unusual case - no security should be ordered.

[Summs](#)

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