

Friday, 22 May 2015

## Weekly Construction Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Central Queensland Development Corporation Pty Ltd v Sunstruct Pty Ltd** (FCAFC) - corporations - deed of company arrangement - costs - two related appeals - judgment against company varied - director's appeal allowed (B C)

**Delaney v Winn** (NSWCA) - negligence - no breach of duty of care or negligence by building inspector - appeal dismissed (I B C)

**Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd** (VSCA) - building contract - balance of convenience did not support injunction restraining resource to bank guarantees - appeal allowed (I B C)

**Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd** (WASCA) - contract - deed of company arrangement - creditor not entitled to recover unpaid sums from surety - appeal dismissed. (B C)

# Benchmark

## Summaries With Link (Five Minute Read)

### **Central Queensland Development Corporation Pty Ltd v Sunstruct Pty Ltd [2015] FCAFC 63**

Full Court of the Federal Court of Australia

Besanko, Gilmour & Ranghia JJ

Corporations - deed of company arrangement - costs - two related appeals - first appeal brought by appellant company concerning effect of Deed of Company Arrangement (DOCA) between it and its creditors on amount of judgment entered on counterclaim, and its effect on proper construction on costs orders made against it in relation to counterclaim - second appeal by company's sole director who was non-party - director was ordered with company to pay costs of proceedings - director complained he was denied procedural fairness - held: DOCA was a bar to bringing any claim for unsecured amount - judgment for only secured amount ought to have been entered - first respondent's costs of prosecuting counterclaim against company were not compromised by the DOCA having regard to s444D *Corporations Act 2001* nor first respondent's costs defending company's claims - discretion of primary judge miscarried in relation to costs order against director - there was denial of procedural fairness - judgment against company varied - company's appeal in relation to costs orders dismissed - director's appeal allowed.

[Central](#) (B C)

[From Benchmark Monday, 18 May 2015]

### **Delaney v Winn [2015] NSWCA 124**

Court of Appeal of New South Wales

Ward, Emmett & Gleeson JJA

Negligence - prior to purchase of home appellants obtained property inspection report including report on property's condition based on visual inspection carried out by respondent building consultant - respondent attended site meeting with first appellant and father at which respondent advised on engagement of structural engineer concerning retaining wall showing evidence of movement - after rain first appellant found "new looking" cracking - another building inspector and engineer assessed condition of dwelling as below average - property sold for amount less than what appellants paid - appellants sued respondent seeking damages and equitable compensation - primary judge found building consultant had not breached duty of care to carry out pre-purchase property inspection in compliance with Australian Standard and had not provided negligent advice - ss5D & 16 *Civil Liability Act 2002* - held: primary judge did not err in not articulating or finding duty of care for which appellants had not contended in pleadings or otherwise - primary judge did not err in conclusions on expert evidence or credit findings - no error in conclusion respondent's inspection and advice did not fall below standard expected of reasonably competent building inspector - appeal dismissed.

[Delaney](#) (I B C)

[From Benchmark Thursday, 14 May 2015]



## **Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd [2015] VSCA 98**

Court of Appeal of Victoria

Osborn, Ferguson & Kaye JJ

Building contracts - dispute concerning performance of contract works - appeal against decision granting interlocutory injunction restraining recourse to two bank guarantees which builder had provided to an owner under building contract - whether proprietor acting reasonably in seeking recourse to security - held: primary judge erred in failing to reach concluded view as to correct construction of clause governing availability of recourse to security - balance of convenience did not support grant of injunction - appeal allowed.

[Sugar](#) (I B C)

[From Benchmark Thursday, 14 May 2015]

## **Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd [2015] WASCA 95**

Court of Appeal of New South Wales

Buss, Newnes & Murphy JJA

Contract - corporations - deed of company arrangement - appellants (creditor) supplied goods on credit to principal debtor - related company to principal debtor guaranteed obligations to the creditor - guarantee was supported by charge over surety's land - surety went into administration and entered into a deed of company arrangement (DOCA) which released all claims against surety including contingent claims - surety financially rehabilitated - DOCA terminated - creditor supplied further goods on credit to debtor - debtor defaulted - creditor sought to recover unpaid sums from surety - primary judge found creditor's claims precluded by operation of DOCA - s444D(2) *Corporations Act 2001* (Cth) - terms of DOCA - statutory construction - held (by majority): creditor failed in sole ground of appeal that primary judge erred in concluding 444D prevented secured creditor who did not vote in favour of DOCA from realising or otherwise dealing with its security in respect of contingent or future claims which fructified after date specified in DOCA - appeal dismissed.

[AustralianGypsum](#) (B C)

[From Benchmark Tuesday, 19 May 2015]



# Benchmark

## **Among the Rocks**

By Robert Browning

Oh, good gigantic smile o' the brown old earth,  
This autumn morning! How he sets his bones  
To bask i' the sun, and thrusts out knees and feet  
For the ripple to run over in its mirth;  
Listening the while, where on the heap of stones  
The white breast of the sea-lark twitters sweet.

That is the doctrine, simple, ancient, true;  
Such is life's trial, as old earth smiles and knows.  
If you loved only what were worth your love,  
Love were clear gain, and wholly well for you:  
Make the low nature better by your throes!  
Give earth yourself, go up for gain above!

[Robert Browning](#)

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