

Friday, 24 July 2015

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

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### Executive Summary (1 minute read)

**J Cummins Pty Ltd v F & D Bonaccorso** (NSWCA) - contract - option agreement - no common intention deposit to be treated as paid - appeal dismissed

**Arinson Pty Ltd v City of Canada Bay Council** (NSWCA) - easements - appellants granted easements over Council's land - appellants required to pay compensation to Council - appeal dismissed

**Austin v Verini** (WASC) - insurance policy - balcony collapse - exclusion clause - insurer liable to indemnify owner builder for injuries suffered by plaintiffs

**Maples Winterview Pty Ltd v Liu** (ACTSC) - contract - standard form building contract - builder not entitled to payments following its termination of contract - judgment for defendants

### Summaries With Link (Five Minute Read)

#### **J Cummins Pty Ltd v F & D Bonaccorso [2015] NSWCA 200**

Court of Appeal of New South Wales

Beazley P; Ward & Leeming JJA

Contract - evidence - credit - appellant sought rectification of option agreement it entered with respondent, and order for specific performance of rectified agreement - agreement preceded by an earlier option agreement not exercised prior to its expiry - second option agreement provided for higher purchase price - whether common intention at time second option agreement entered

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that stated deposit to be treated as if paid - trial judge found no such common intention established - held: trial judge justified in not accepting evidence of appellant's principal of an arrangement outside formal contract documents - evidence did not support principal's version of events - there was evidence that developer interested in property at higher price than in either option agreement - appellant's contention rejected that price in second agreement was commercially irrational - appeal dismissed.

[JCummins](#)

[From Benchmark Thursday, 16 July 2015]

## **Arinson Pty Limited v City of Canada Bay Council [2015] NSWCA 199**

Court of Appeal of New South Wales

Basten & Meagher JJA; JC Campbell AJA

Easements - Land and Environment Court granted easements to appellants pursuant to s88K Conveyancing Act 1919 over land of which respondent Council was registered proprietor - Land and Environment Court ordered appellants to pay compensation to the Council and its costs - appellants challenged decision that compensation should be paid for the easements - appellants also challenged order for costs if appeal otherwise succeeded - 'special circumstances' - onus - required reasoning process - restoration of status quo - 'blight' argument - expectation to purchase - legal policy - s55 *Environmental Planning and Assessment Act 1979* - s58(3) *Land and Environment Court Act 1979* - ss5, 6, 37, 38, 43(4) *Roads Act 1993* - r14.7 Uniform Civil Procedure Rules 2005 - held: appellants' submissions unsuccessful - question of costs did not arise - appeal dismissed.

[Arinson](#)

[From Benchmark Friday, 17 July 2015]

## **Austin v Verini [2015] WASC 258**

Supreme Court of Western Australia

Allanson J

Insurance contract - exclusion clause - personal legal liability cover - preliminary question - balcony collapsed at house while owners holding party - plaintiffs standing on balcony when it collapsed and suffered injury - house built by defendant - plaintiffs sued defendant - defendant issued third party notice against insurer claiming indemnity against plaintiffs' claims under policy - insurer contended exclusion clause applied - exclusion clause stated insurer did not insure against liability for personal injury caused by or arising out of breach of insured's duty as owner or occupier of building which was not insured by insurer at time of occurrence that caused injury - parties agreed insurer did not insure defendant against loss or damage to house or contents at time of balcony collapse - whether third party liable to indemnify defendant - whether liability of defendant for breach of duty was breach as owner - whether ownership integral to duty of care - construction of policy - ss4 & 4A(1)(c) *Builders' Registration Act 1939 (WA)* - held: both parties accepted defendant had duty of care to plaintiffs and breached that duty - Court satisfied duty was not a duty 'as the owner' - insurer liable to indemnify defendant - defendant entitled to orders sought in third party statement of claim.

[Austin](#)

[From Benchmark Wednesday, 22 July 2015]

**Maples Winterview Pty Ltd v Liu [2015] ACTSC 58**

Supreme Court of the Australian Capital Territory

Mossop AsJ

Contract - standard form building contract - plaintiff building company sued first and second defendants who were joint owners of property - claim sought payment of amount owing following termination of building contract by plaintiff - whether contract validly terminated for defendants' breach of obligation to pay one or more payment claims - held: due to plaintiff's failure to install under slab insulation, plaintiff had no entitlement to progress payment for stages 2 and following - because plaintiff not entitled to make those progress claims it was not entitled to further money by reason of adjustment of contract price - plaintiff not entitled to make the claims it did on certain date and defendants not in breach of contract by failing to make payments - plaintiff not entitled to terminate contract - entitlement to payment dependent upon contract being terminated in accordance with clause - contract not terminated by plaintiff in accordance with that clause - plaintiff not entitled to payment under clause - defendant's failure to obtain loan from bank was not breach of contract - judgment for defendants.

[Maples](#)

[From Benchmark Monday, 20 July 2015]



# Benchmark

## **La Belle Dame sans Merci: A Ballad**

By John Keats

O what can ail thee, knight-at-arms,  
Alone and palely loitering?  
Thesedgehas withered from the lake,  
And no birds sing.

O what can ail thee, knight-at-arms,  
Sohaggardand so woe-begone?  
The squirrel's granary is full,  
And the harvest's done.

I see a lily on thy brow,  
With anguish moist and fever-dew,  
And on thy cheeks a fading rose  
Fast withereth too.

I met a lady in themeads, Full beautiful—a faery's child,  
Her hair was long, her foot was light,  
And her eyes were wild.

I made a garland for her head,  
And bracelets too, and fragrant zone;  
She looked at me as she did love,  
Andmade sweet moan

I set her on my pacing steed,  
And nothing else saw all day long,  
For sidelong would she bend, and sing  
A faery's song.

She found me roots of relish sweet,  
Andhoney wild, and manna-dew,  
And sure in language strange she said—  
'I love thee true'.

She took me to herElfin grot,  
And there she wept and sighed full sore,  
And there I shut her wild wild eyes  
With kisses four.

And there she lullèd me asleep,



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And there I dreamed—Ah! woe betide!—  
The latest dream I ever dreamt  
On the cold hill side.

I saw pale kings and princes too, Pale warriors, death-pale  
were they all;  
They cried—'La Belle Dame sans Merci  
Thee hathin thrall!'

I saw their starved lips in the gloam,  
With horrid warning gapèd wide,  
And I awoke and found me here,  
On the cold hill's side.

And this is why Isojournhere,  
Alone and palely loitering,  
Though the sedge is withered from the lake,  
And no birds sing.

[John Keats](#)

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