

SUPREME COURT OF
VICTORIA
COMMERCIAL COURT
BULLETIN

No. 24/2011



Matter: *ACN 074 971 109 (as Trustee for the Argot Unit Trust) and Pegela Pty Ltd v The National Mutual Life Association of Australasia Ltd*

Judge: Croft J

Date: 25/11/2011

Citation: [2011] VSC 519

Subject: CONTRACT – Investment linked life insurance policy - Construction of terms – Whether special terms negotiated on plaintiffs’ behalf created right to make arbitrage profits at the defendant’s expense through switching of investments between portfolios – Whether defendant breached terms of policy.

APPEAL – Extent of issues remitted for determination by Court of Appeal – Jurisdiction to deal with other matters, the subject of subsequent proceedings and otherwise – Extent to which *res judicata*, cause of action estoppel and *Anshun* estoppel arise – *Port of Melbourne Authority v Anshun Pty Ltd*

[1981] HCA 45; (1981) 147 CLR 589.

UNCONSCIONABLE CONDUCT – Damages for unconscionable conduct or, in the alternative, for a breach of s 52 of the Trade Practices Act 1974 – Loss of opportunity to make an alternative investment – *Sellars v Adelaide Petroleum NL* [1994] HCA 4; (1994) 179 CLR 332.

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Matter: *IMO Nutshack Franchise Holdings Pty Ltd*

Judge: Gardiner AsJ

Date: 29/11/2011

Citation: [2011] VSC 561

Subject: CORPORATIONS – External administration – Application to set aside a statutory demand –pursuant to section 459J of the *Corporations Act* - Claim not a “debt” within the meaning of section 459E of the *Corporations Act* rather was a claim for damages which were not “readily calculable” – Demand set aside as being defective – Plaintiff also established genuine disputes in relation to the amounts demanded.

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Matter: *IMO Nillumbik Community Church Incorporated*

Judge: Gardiner AsJ

Date: 2/12/2011

Citation: [2011] VSC 590

Subject: *Associations Incorporations Act* – Section 36CA – Distribution of surplus assets of church incorporated under *Associations Incorporation Act 1981* at conclusion of winding up – Surplus distributed to bodies which had similar objects and purposes to liquidated church and whose constitutions proscribed distributions of surplus assets to their members in the event of any liquidation or dissolution.

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Victorian Supreme Court of Appeal: Recent Appeals from Commercial Court Judgments

Matter: *Commissioner of State Revenue v Challenger Listed Investments Ltd (No 2) [2011] VSCA 398 (1 December 2011)*

Judges: BUCHANAN and TATE JJA and SIFRIS AJA

Date: 1/12/2011

Citation: [2011] VSCA 398

Subject: COSTS – APPEAL – Appeal unsuccessful – *Calderbank* offer from respondent to unsuccessful appellant – Offer not accepted – Whether indemnity costs should be awarded – Whether non-acceptance of offer was unreasonable – Where appeal sought to establish recent decision of the Court was plainly wrong – Appeal was not hopeless or conducted in bad faith – Offer effectively an offer to capitulate – Failure to accept offer not unreasonable.

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Victorian Supreme Court of Appeal: Recent Appeals from Commercial Court Judgments

Matter: *Action Cycles Pty Ltd (recs & mgrs apptd) & Ors v Ross & Ors*

Judges: NETTLE and HANSEN JJA

Date: 1/12/2011

Citation: [2011] VSCA 411

Subject: PRACTICE AND PROCEDURE – Stay pending appeal – Interlocutory appeal – Application for stay of order dissolving interlocutory injunction to restrain receivers from selling mortgaged properties pending hearing and determination of action – Serious question to be tried – Interest – Dispute as to applicable interest rate – Dispute as to date interest payments due for payment – Balance of convenience – Whether material change in circumstances so exceptional as to warrant discharge of injunction – Delay – Whether delay coming to trial caused by respondent – Injunction granted.

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Victorian Supreme Court of Appeal: Recent Appeals from Commercial Court Judgments

Matter: *National Australia Bank Ltd & Anor v Horne & Anor (No 2)*

Judges: BUCHANAN and MANDIE JJA and ALMOND AJA

Date: 8/12/2011

Citation: [2011] VSCA 414

Subject: COSTS – Substantial success by both sides – No order as to costs.

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