

**SUPREME COURT OF VICTORIA  
COMMERCIAL COURT BULLETIN**  
No. 2/2010



# Recent Judgments

**Matter:** Allison & Anor v BDO (NSW-Vic) Pty Ltd & Ors

**Judge:** Judd J

**Date:** 11/02/2010

**Citation:** [2010] VSC 35

**Subject:** INJUNCTION – Restraint of trade – Application to restrain plaintiffs from employing, soliciting or enticing away any employee of the applicant – Restraint contained in sale agreement for business – Whether the restraint was for the protection of goodwill of the business or a restraint upon employment – Scope of a valid restraint upon employment - Whether void provision of restraint clause could be severed – Application refused.

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**Matter:** Re Timbercorp Securities Limited (in liq)

**Judge:** Davies J

**Date:** 26/02/2010

**Citation:** [2010] VSC 50

**Subject:** CORPORATIONS – Application by liquidators for judicial advice and directions – Managed investment schemes – Responsible entity in liquidation – Sale of land on which citrus schemes conducted – Sale to be completed unencumbered by Growers’ rights to use and enjoy the land – Scheme constitution amended to include the power in the responsible entity to terminate the Growers’ licenses with respect to the use of the land – Whether liquidators justified in procuring the extinguishment of Growers’ rights – Net proceeds to be held on trust pending determination of persons entitled to receive the proceeds – S 511 of the *Corporations Act 2001* (Cth).

STATUTORY INTERPRETATION – Power to amend a scheme constitution – Requirements for a responsible entity to amend a constitution unilaterally – S 601GC of the *Corporations Act 2001* (Cth).

## **Re Timbercorp Securities Limited (in liq) (continued)**

Subject: CORPORATIONS – Unilateral action by responsible entity to amend scheme constitution – Whether responsible entity considered whether the amendment “adversely affected members’ rights” – Whether consideration reasonably based.

LIQUIDATORS – Duties as a liquidator of a company which is the responsible entity of a managed investment scheme – Whether conflict of interest – Whether breach of fiduciary duty.

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**Matter:** AED Oil Limited & Anor v Puffin FPSO Limited

**Judges:** Buchanan and Bongiorno JJA and Croft AJA

**Date:** 5/03/2010

**Citation:** [2010] VSCA 37

**Subject:** ARBITRATION – Application for stay of court proceedings – Construction of arbitration agreement – Meaning of ‘urgent interlocutory or declaratory relief’ – Enforcement of declarations made by arbitrators – Claim not urgent – Waiver – *International Arbitration Act 1974* (Cth).

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**Matter:** Priceline Pty Ltd v JHY Nominees Pty Ltd & Ors

**Judge:** Croft J

**Date:** 11/03/2010

**Citation:** [2010] VSC 61

**Subject:** PRACTICE AND PROCEDURE – Evidence – Privilege - Inspection of documents alleged to be subject to client legal privilege – Waiver of privilege - s 117, s 118, s 122, s 126, s 131A, s 133 of the *Evidence Act 2008* (Vic) - *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237; (2004) 140 FCR 101.

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**Matter:** AED Oil Limited v Puffin FPSO Limited (No 4)

**Judge:** Judd J

**Date:** 11/03/2010

**Citation:** [2010] VSC 65

**Subject:** PRACTICE AND PROCEDURE – Amendment of pleadings – Inherent jurisdiction of the court to prevent abuse of process or injustice – Objectives of the power to grant leave to amend – Factors to be taken into account in decision to grant leave – Orderly and timely disposition of the issues between the parties – Unfair prejudice to the responding party – Failure to provide adequate explanation for late amendments - Efficient trial management and allocation of court resources – *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, rr 1.14, 36.01, *Supreme Court Act 1986 (Vic)*, s 29(2).

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**Matter:** Woodcroft-Brown v Timbercorp Securities Limited (in liq) & Ors

**Judge:** Judd J

**Date:** 12/03/2010

**Citation:** [2010] VSC 68

**Subject:** CORPORATIONS - Group proceeding – Application for leave to proceed against company in liquidation - Whether claims are in respect of ‘related circumstances’ – Distinction between claims the group members have and relief to which individual group members may be entitled – Common issues of law and fact - *Supreme Court Act 1986* (Vic), s 33C(1)(b) – *Corporations Act 2001* (Cth), s 500(2).

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**Matter:** First East Auction Holdings Pty Ltd v Ange

**Judge:** Hargrave J

**Date:** 16/03/2010

**Citation:** [2010] VSC 72

**Subject:** CONTRACT – Paintings consigned for auction – Written consignment agreement – Whether agreement incorporated by reference terms contained in another document – Held: terms incorporated and formed part of the consignment agreement.

CONTRACT – Penalty – Whether penalty doctrine applies where allegedly penal provision triggered in absence of breach of contract – Provision capable of being triggered by breach – Held: penalty doctrine inapplicable – Provision enforceable – *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* [2008] NSWCA 310; (2008) 257 ALR 292.

CONTRACT – Paintings consigned for auction – Paintings withdrawn from auction by seller – Whether withdrawal a breach of contract – Held: withdrawal not a breach.

## **First East Auction Holdings Pty Ltd v Ange (continued)**

Subject: TRADE PRACTICES – Unconscionable conduct – Paintings consigned for auction by wife – Matrimonial dispute with husband – Husband and wife both legally represented in dispute – Auctioneer knew of legal representation and of disputed ownership of the paintings – Whether auctioneer’s conduct in nevertheless entering into consignment agreement with wife was unconscionable – Held: no unconscionable conduct.

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**Matter:** Re Mitre 10 Limited

**Judge:** Robson J

**Date:** 17/03/2010

**Citation:** [2010] VSC 100

**Subject:** CORPORATIONS – schemes of arrangement – approval of schemes – takeover schemes involving two related corporations – different classes of shareholders – consideration of s 411(17) of the *Corporations Act 2001* – role of court – exercise of discretion to approve – schemes approved – s 411(11) and (17) of the *Corporations Act 2001*

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**Matter:** Re Twenty-First Larena Pty Ltd; Maximova v Goodwin & Ors

**Judge:** Davies J

**Date:** 22/03/2010

**Citation:** [2010] VSC 84

**Subject:** PRACTICE & PROCEDURE – Exercise of power to dismiss summarily where plea of *res judicata* substantiated.

ESTOPPEL – *Res judicata* – Settlement of earlier proceeding – Action struck out with right of reinstatement in the event of non payment of settlement sum – Compliance with settlement terms – Conclusive determination of rights and liabilities in earlier proceeding – Finality of order for the purposes of *res judicata* – Application of principles of *res judicata* to consent order – Where different causes of action in later proceedings – Whether cause of action is substantially the same in subsequent proceeding.

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**Matter:** Burchell & Anor v Hill & Ors

**Judge:** Mukhtar AsJ

**Date:** 31/03/2010

**Citation:** [2010] VSC 96

**Subject:** PRACTICE AND PROCEDURE — Subpoena to non party before trial — Production to Prothonotary under special procedure — Requirement that production be sought “for evidence” — Meaning of “for evidence” — Rules of Court, Order 42A.01

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**Matter:** Re Bill Express Limited (in liq)

**Judge:** Davies J

**Date:** 31/03/2010

**Citation:** [2010] VSC 101

**Subject:** CORPORATIONS – Appeal against decision of an Associate Justice – Application to discharge or vary summons for production of documents under s 596D of the *Corporations Act 2001* (Cth) – Consideration of power to summon a person for examination about a corporations “examinable affairs” and for that purpose require production of books – Consideration of the content of a summons for production of books under s 596D of the *Corporations Act 2001* (Cth) – *Corporations Act 2001* (Cth) s 596D.

CONSTRUCTION – Meaning of “specified books” in s 596D of the *Corporations Act 2001* (Cth) – Requirement for clarity and precision in the identification of the books required to be produced under the summons – Requirement that the scope of documents for production under the summons relate to “examinable affairs” – Requirement for production of specified books in the “possession of” the examinee.

## **Re Bill Express Limited (in liq) (continued)**

Subject: EXAMINATIONS – Consideration of powers of the Court under ss 596A and 596B of the *Corporations Act 2001* (Cth) – Purpose of examination order — *Corporations Act 2001* (Cth) ss 596A, 596B, 596D, 597.

SUMMONS – Whether summonses too wide, oppressive or uncertain.

WORDS AND PHRASES – “Examinable affairs” – “Specified books” – *Corporations Act 2001* (Cth) ss 9, 596D.

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