

**SUPREME COURT OF VICTORIA  
COMMERCIAL COURT BULLETIN**  
No. 5/2009



# Recent Judgments

**Matter:** TAB Ltd v Greyhound Racing Victoria (No 2)

**Judge:** Davies J

**Date:** 20/08/2009

**Citation:** [2009] VSC 359

**Subject:** PRACTICE AND PROCEDURE – Costs – Whether costs should be apportioned according to issues upon which the parties succeeded – Whether separate and distinct issues – Whether general rule should apply.

[Click here for full text of judgment](#)

**Matter:** Primebroker Securities Ltd v Fortis Clearing Sydney Pty Ltd

**Judge:** Judd J

**Date:** 28/08/2009

**Citation:** [2009] VSC 364

**Subject:** CORPORATIONS LAW – borrowed securities – rights of borrower - default powers – construction of documents – applicability of netting provisions – estoppel by convention.

[Click here for full text of judgment](#)

**Matter:** Ipex ITG Pty Ltd (in liq) v Melbourne Water Corporation (No 5)

**Judge:** Byrne J

**Date:** 11/09/2009

**Citation:** [2009] VSC 383

**Subject:** TRADE PRACTICES – misleading and deceptive conduct – information technology outsourcing agreement – representation as to number and type of help desk calls in preceding six months – whether information accurate – whether implied representation as to number and type of calls in future – whether misleading and deceptive – whether reliance – whether causation of loss – whether loss

[Click here for full text of judgment](#)

**Matter:** Re Timbercorp Securities Limited (in liq) (No 2)

**Judge:** Robson J

**Date:** 14/09/2009

**Citation:** [2009] VSC 411

**Subject:** CORPORATIONS – application by liquidators for directions – liquidators facing conflict in duties – liquidators of members of a group of companies – one of the companies in the group acts as a responsible entity for horticultural managed investment schemes growing almonds – another company owns the land on which the managed investment schemes are conducted - interest of scheme members different to owner of the land - whether liquidators justified in appointing another person to assess the reasonableness of division of sale proceeds between the land owning company and the managed investment schemes - whether direction sought appropriate for a court to give – whether an additional liquidator to represent the managed investment schemes should have been appointed – direction given as sought – s 511 of the *Corporations Act 2001*.

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**Matter:** Re AWB Ltd (No 7)

**Judge:** Robson J

**Date:** 18/09/2009

**Citation:** [2009] VSC 413

**Subject:** CORPORATIONS - civil penalty proceedings by ASIC – application to further amend the amended statement of claim – whether amendments necessary to determine the real question in controversy between the parties – whether amendments necessary to avoid multiplicity of proceedings – whether jurisdiction to amend enlivened under r 36.01- relevance of r 36.03 to amendment of pleadings – relevance of s 29(2) of the *Supreme Court Act 1986* and r 1.14 of the *Supreme Court (General Civil Procedure) Rules 2005* to the exercise of the court's power to amend under r 36.01 – section 29(2) of the *Supreme Court Act 1986* and rr 1.14, 36.01(1), (2) and (3) and 36.03 of the *Supreme Court (General Civil Procedure) Rules 2005*.

## Re AWB Ltd (No 7) (continued)

**Subject:** PRACTICE AND PROCEDURE – amendment of pleadings - whether amendments necessary to determine the real question in controversy between the parties – whether amendments necessary to avoid multiplicity of proceedings – whether jurisdiction to amend enlivened under r 36.01- relevance of r 36.03 to amendment of pleadings – relevance of s 29(2) of the *Supreme Court Act 1986* and r 1.14 of the *Supreme Court (General Civil Procedure) Rules 2005* to the exercise of the court’s power to amend under r 36.01 – section 29(2) of the *Supreme Court Act 1986* and rr 1.14, 36.01(1), (2) and (3) and 36.03 of the *Supreme Court (General Civil Procedure) Rules 2005*.

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**Matter:** Australian Style Pty Ltd v .au Domain Administration Limited

**Judge:** Hargrave J

**Date:** 25/09/2009

**Citation:** [2009] VSC 422

**Subject:** CONTRACT – Regulatory context – Domain name registrar agreement between registrar and regulator – Whether ‘security breach’ of registrar’s systems – Obligation on registrar to give regulator immediate notice of security breach – Whether breach of obligation capable of remedy – Held: breach not capable of remedy – Express obligation to act in good faith – Whether breach of obligation to act in good faith capable of remedy – Held: breach not capable of remedy – Relevant principles discussed.

[Click here for full text of judgment](#)

**Matter:** Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors

**Judge:** Davies J

**Date:** 29/09/2009

**Citation:** [2009] VSC 428

**Subject:** EQUITY – Business operated through corporate/unit trust structure – Equal one third ownership interests in the business held by the three owner/controllers through their respective family trusts – Arrangement implemented for one unitholder to hold the one third interest of another unitholder on trust for that unitholder – Arrangement devised by financial controller who was also one of the owner/controllers – Agreement between financial controller and remaining unitholder to extinguish other unitholder's interest – Unitholding held by financial controller's family trust on trust for other unitholder transferred to financial controller's family trust absolutely – Whether extinguishment of beneficial interest unlawful – Whether financial controller had conflict of interest – whether breach of fiduciary duties – Whether informed consent or ratification of conduct.

## **Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors (continued)**

**Subject:** CORPORATIONS – Purchase of land by company – Director transferred funds from company of which director was financial controller and which was owned by the other director to effect purchase – Director established a unit trust and appointed the company as trustee of that trust – Land treated as asset of that trust – No knowledge of the unit trust nor any interest in the unit trust held by other director – Director then unilaterally removed other director from company without other director's knowledge or consent – Director caused company to purchase second portion of land using the first portion as security without disclosure of purchase or mortgage to other director – Whether funds transfer and the purchase of the two portions of land were within scope of director's authority or amounted to breach of his statutory and fiduciary duties.

**Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors  
(continued)**

**Subject:** CORPORATIONS – Directors – Statutory and fiduciary duties – Contract for management services – Whether excessive fees paid for management services – Whether director in a position of conflict which deprived the company of the opportunity to take appropriate steps to ensure fees were reasonable – Whether non-disclosure of personal interest – Whether account of profits proper remedy – s 181 *Corporations Act 2001* (Cth).

## Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors (continued)

**Subject:** CORPORATIONS – Oppression – Whether a trustee company is a company to which s 232 *Corporations Act 2001* (Cth) can apply – Meaning of “conduct of a company’s affairs” – Alleged oppression arising out of exclusion from management, improper diversion of business, unauthorised payment of funds and exclusion from information – Remedies to be determined based on what is appropriate in relation to the company to ameliorate the oppression – Whether the court has the jurisdiction under s 233 *Corporations Act 2001* (Cth) to order a buy-out of units in a unit trust – Whether buy-out appropriate – Ss 53, 232, 233, 461 and 467 *Corporations Act 2001* (Cth).

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