



## THE LAW LIBRARY OF VICTORIA

Library  
Bulletin  
22 July 2016

## Library News

### Lyrical Lunchtimes in the Law Library

The Law Library of Victoria and BottledSnail Productions invite you to enjoy a lunchtime classical concert series. Take a seat or simply wander the beautiful library surrounds to enjoy this music. All are welcome, entry is free, no need to register.

#### SAVE THE DATE:

- ❖ Thursday 18 August, 1.15pm
- ❖ Thursday 15 September, 1.15pm
- ❖ Thursday 20 October, 1.15pm

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### Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016



*Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016* has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone 03 9603 6282 for details.

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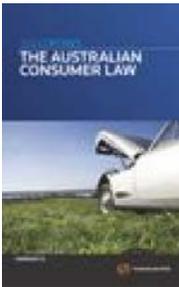
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# New Books

Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: [https://courts.sdp.sirsidynix.net.au/client/en\\_AU/llv/](https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/)

No image  
available

Ananian-Welsh, Rebecca, *Judicial Independence in Australia*  
Federation Press, NSW, 2016  
Call Number: 347.94012 (Supreme Court Library)  
Call Number: 347.012 JUD (Magistrates' Court Library)



Corones, Stephen, *Australian Consumer Law*  
3<sup>rd</sup> ed, Law Book Co, NSW, 2011  
Call Number: 347.071 COR.3 (Magistrates' Court Library)

No image  
available

Handford, Peter, *Limitations of Actions: The Laws of Australia*  
3<sup>rd</sup> ed, Thomson Reuters, NSW, 2012  
Call Number: 347.94052 HAN.3 (County Court Library)

No image  
available

Sappiden, Carolyn, *Macken's Law of Employment*  
8<sup>th</sup> ed, Thomson Reuters, NSW, 2016  
Call Number: 344.011 MAC.8 (Supreme Court Library, Magistrates' Court Library)

No image  
available

Sappiden, Carolyn, *Torts: Commentary and Materials*  
12<sup>th</sup> ed, Thomson Reuters, NSW, 2016  
Call Number: 346.03 SAP.12 (Magistrates' Court Library)



Spencer, David, *Principles of Dispute Resolution*  
2<sup>nd</sup> ed, Thomson Reuters, NSW, 2011  
Call Number: 347.09 SPE.2 (Magistrates' Court Library)



# Legislation

## Victorian Bills

No Victorian Bills received a second reading since the last Library Bulletin.

## Victorian Assents

No Victorian Acts were assented to since the last Library Bulletin.

## Proclamations

There have been no Victorian Act proclamations since the last Library Bulletin.

## EXHIBITIONS IN THE LIBRARY

### Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1916 on display.

The page is turned daily and provides an insight into what was happening 100 years ago to the day.

A snapshot is provided via the Law Library of Victoria Twitter account. You can follow these tweets via [@lawlibraryvic](#) [#argus1916](#)

# High Court Cases

**CONTRACT - Collateral contract** - Where tenants held five year leases under which they operated two restaurants - Where clause of leases required landlord to give notice that leases were to be renewed or continued or the premises were to be vacated - Where in course of negotiations for further leases landlord made statement to tenants that they would be "looked after at renewal time" - Where landlord required tenants to vacate premises on expiration of leases - Whether statement gave rise to collateral contract - Whether statement promissory in nature - Whether obligation uncertain.

**ESTOPPEL** - Whether statement to tenants that they would be "looked after at renewal time" could give rise to estoppel - Whether statement capable of conveying to reasonable person that tenants would be offered further lease - Whether expectation acted upon by tenants.

**APPEALS - Procedure** - Where question whether statement amounted to binding contractual promise - Whether question of fact or question of law.

**WORDS AND PHRASES** - "certainty", "collateral contract", "oral contract", "promissory estoppel", "proprietary estoppel", "question of fact", "question of law", "reasonable correspondence", "remittal".

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998 (Vic), s148.

*Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd*

[\[2016\] HCA 26](#)

20/07/2016

**CRIMINAL LAW - Appeal - Directions to jury** - Where appellant convicted of attempted murder after firing shots during confrontation with man with knife - Where appellant relied on defence of self-defence under s271(1), s271(2) and s272(1) of Criminal Code (Q) - Where prosecutor suggested in closing address existence of "consensual confrontation" negated self-defence - Where trial judge did not direct jury that no evidence of consent - Where no redirection sought by defence counsel on this issue - Whether trial judge failed to properly direct jury as to self-defence - Whether trial judge erred in failing to direct jury as to defence of mistake under s24 of Criminal Code.

**WORDS AND PHRASES** - "assault", "consensual confrontation", "consent to assault", "mistaken belief", "self-defence".

CRIMINAL CODE (Q), s24, s245, s271, s272.

*Graham, Mark James v The Queen*

[\[2016\] HCA 27](#)

20/07/2016

# Victorian Supreme Court Cases

## Court of Appeal

BANKING - Guarantees - Warranties - Code of Banking Practice cl 28.4 - Obligation of bank to give prospective guarantor a prominent notice of certain matters - Whether prominent notice given - Relevance of context - Whether breach of warranty caused loss to guarantor.

***National Australia Bank Ltd v Rose, John Albert***

Warren CJ, Ferguson JA, and McLeish JA

[\[2016\] VSCA 169](#)

21/07/2016

COSTS - Whether successful appellants should be granted costs of the applications to amend statement of claim and stay the trial below in addition to the costs of the appeal - Proceedings below included claims under Corporations Act 2001 which County Court had no jurisdiction to hear - Issue of jurisdictional impediment not the subject of a specific ground of appeal but raised between the practitioners - Whether unusual circumstances apply to displace the ordinary rule that costs follow the event where an appeal succeeds.

***Smith, Brendon Ashley & Donamis Consultants (Vic) P/L (ACN 125 343 268) v J Z Lee Interiors P/L (ACN 075 815 093) (No 2)***

Weinberg JA and Tate JA

[\[2016\] VSCA 161](#)

14/07/2016

CRIMINAL LAW - Appeal - Conviction - Applicant convicted of sexual offences against three complainants - Application for leave to appeal the convictions in respect of the first complainant - Identification evidence - Complainant identified applicant from Facebook and media coverage in circumstances that strongly suggested the applicant was guilty of rape and murder - Risk of unfair prejudice greater than probative value - Verdict unsafe and satisfactory - Leave to appeal granted - Appeal allowed - Verdict of acquittal entered - Evidence Act 2008 (Vic) s137.

CRIMINAL LAW - Appeal - Conviction - Application for leave to appeal the convictions in respect of the third complainant - Whether trial judge erred in admitting telephone records - Whether relevant - Whether verdicts unsafe or unsatisfactory - Leave to appeal granted - Appeal dismissed - Evidence Act 2008 (Vic) s55.

CRIMINAL LAW - Appeal - Sentence - Application for leave to appeal sentence - Whether non-parole period manifestly excessive - Application falls away as first conviction appeal is allowed - Sentences imposed on other convictions not disturbed - Total effective sentence of 12 years and nine months undisturbed - Non-parole period of 40 years fixed afresh.

***Bayley, Adrian Ernest v The Queen***

Warren CJ, Weinberg JA, and Priest JA

[\[2016\] VSCA 160](#)

13/07/2016

CRIMINAL LAW - Appeal - Obtaining financial advantage by deception (five charges) - Three victims - Sum of \$595,000 - Sentence of 6 years' imprisonment with non-parole period of 4 years - Delay in finalising contested charges - Age and ill-health of appellant - Sentence manifestly excessive - Appeal allowed - Re-sentenced to total effective sentence of 4 years and 6 months' imprisonment with non-parole period of 2 years and 6 months.

*Hicks, David v The Queen*

Weinberg JA and Priest JA

[\[2016\] VSCA 162](#)

13/07/2016

CRIMINAL LAW - Appeal - Sentence - Theft from partnership and company - Breach of trust - Severe damage to financial wellbeing of victims - Whether sentencing judge misunderstood punitive nature of a community correction order ('CCO') - Whether judge erred in not imposing CCO - Total effective sentence of 3 years' imprisonment with a non-parole period of 2 years - Whether sentence manifestly excessive - Appeal dismissed.

*Thorpe, Peter v The Queen*

Weinberg JA and Priest JA

[\[2016\] VSCA 158](#)

11/07/2016

CRIMINAL LAW - Appeal - Sentence - Trafficking in methylamphetamine and other offences - Appellant with low IQ - Whether judge failed to apply Verdins principles - Whether sentence manifestly excessive as a result - Sentence of 23 months' imprisonment with two year CCO - Whether error in failing to impose non-parole period - Appeal dismissed.

*Dordevic, Slobodan v The Queen*

Weinberg JA and Priest JA

[\[2016\] VSCA 166](#)

18/07/2016

CRIMINAL LAW - Application for leave to appeal against conviction - Applicant convicted of dealing with money valued at \$100,000 or more which was reasonably suspected of being proceeds of crime contrary to Criminal Code (Cth) s400.9(1) - Elements of offence - Whether accused must intend to deal with money valued at \$100,000 or more - Whether the reasonable suspicion that the money was proceeds of crime must be contemporaneous with the dealing - Whether evidence of a subsequent transaction admissible - Meaning and scope of partial defence in s400.10 of Code - Application for leave to appeal granted and appeal allowed - Conviction set aside - Conviction for offence against s400.9(1A) of Code substituted.

CRIMINAL LAW - Application for leave to appeal against sentence - Applicant sentenced to 14 months' imprisonment, to be released on a recognizance release order after serving 9 months - Applicant resentenced to 10 months' imprisonment, to be released on a recognizance release order after serving 6 months.

*Singh, Harmeet v The Queen*

Ashley JA, Kyrou JA, and Ferguson JA

[\[2016\] VSCA 163](#)

15/07/2016

CRIMINAL LAW - Leave to appeal against sentence - One count each of armed robbery, threatening to inflict serious injury and theft of a motor vehicle - Whether a total effective sentence of four years' imprisonment with a non-parole period of two years manifestly excessive - Youth and intellectual disability of Appellant - Risk of institutionalization - Likelihood that Appellant will serve entirety of parole period in custody - Poor prospects of reformation - Substantial criminal history - Sentence not manifestly excessive - Leave application refused.

***Poidevin, Adam v The Queen***

Weinberg JA and Priest JA

[\[2016\] VSCA 165](#)

18/07/2016

CRIMINAL LAW - Sentence - Trafficking in methylamphetamine ('ice') - Sentence of two years' imprisonment - Whether sentencing judge took into account well-known harmful consequences of ice - Harmful qualities of drug not a relevant sentencing consideration - Matter for legislature whether harmful consequences of ice should be addressed - Sentencing error established - Whether applicant's psychological condition given insufficient weight - Sentence not manifestly excessive - No different sentence should be imposed - Appeal dismissed - R v Pidoto (2006) 14 VR 269; Adams v The Queen (2008) 234 CLR 143 applied.

CRIMINAL LAW - Sentence - Trafficking in methylamphetamine - Prevalence of offence - Common knowledge as to increased prevalence of offence - General deterrence to be given greater emphasis by gradual increase in sentences - R v Downie and Dandy [1998] 2 VR 517; Ashdown v The Queen (2011) 37 VR 341 applied.

***Haddara, Ziad v The Queen***

Redlich JA, Priest JA, and Beach JA

[\[2016\] VSCA 168](#)

18/07/2016

CRIMINAL LAW - Sentencing - Appeal against sentence by Commonwealth Director of Public Prosecutions - Respondent pleaded guilty to dishonestly obtaining property of a Commonwealth entity by deception contrary to s134.1(1) of the Criminal Code Act 1995 (Cth) - Whether sentence manifestly inadequate - Respondent medical practitioner dishonestly obtained \$854 188.20 from Medicare over more than six years - Offending was objectively serious - Significant matters in mitigation - Crown's table of comparative sentences unsatisfactory - Sentence was outside reasonably available range - Manifest inadequacy shown - Appeal allowed - Respondent resentenced.

***Director of Public Prosecutions (Commonwealth) v Phan, Hung Dien***

Ashley JA, Tate JA, and Santamaria JA

[\[2016\] VSCA 170](#)

22/07/2016

CRIMINAL LAW - Sentencing - Single 'course of conduct' charge of obtaining a financial advantage by deception - 541 separate acts of dishonesty - Whether a total effective sentence of seven years' imprisonment with a non-parole period of four years and six months manifestly excessive - Orthodox sentencing principles should apply to 'course of conduct' charges - Maximum sentence should still be treated as 'yardstick' - Total sum obtained almost \$ 5 m - Breach of trust - Single victim - Head sentence stern, but within range - Appeal dismissed.

***Poursanidis, Tom v The Queen***

Weinberg JA and Priest JA

[\[2016\] VSCA 164](#)

11/07/2016

DEEDS - Whether loan and charge enforceable as deeds - Whether parties intended loan and charge to operate as deeds - *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (1993) 27 ATR 154; *Meredith Projects Pty Ltd v Fletcher Construction Australia Ltd* [2000] NSWSC 493; *400 George Street (Qld) Pty Ltd v BG International Ltd* [2010] QSC 66; *Backstop Nominees Pty Ltd v Goscor Pty Ltd* [1990] VR 468, considered - Loan and charge intended to operate as deeds.

EQUITY - Estoppel - Whether respondents estopped from denying validity and enforceability of charge - Subsequent deeds expressly acknowledge and accept validity of charge - Whether detrimental reliance and unconscionability established - Entry by applicant into subsequent deeds and appointment of receivers and managers on basis of validity constitutes detriment - Resiling from validity of charge unconscionable in circumstances.

MORTGAGE - Duty of prior mortgagee to account to subsequent mortgagee - Amount paid on redemption subject of agreement and accompanied by discharge of mortgage and charge - Whether reservation of rights leaves open price to be paid upon redemption - Equity of redemption satisfied and duty to account does not arise.

MORTGAGE - Duties of prior mortgagee to subsequent mortgagee - Whether prior mortgagee obliged to hold surplus proceeds for subsequent mortgagee where funds received otherwise than by virtue of exercise of mortgagee powers - *Westpac Banking Corporation v Daydream Island Pty Ltd* [1985] 2 Qd R 330; *Downsview Ltd v First City Corporation Ltd* [1993] AC 295; *Re Otway Coal Co Ltd* [1953] VLR 557, discussed.

MORTGAGE - Whether mortgagee can be in possession of mortgagor's assets after appointment of receiver - *Refuge Assurance Co Ltd v Pearlberg* [1938] 1 Ch 687, distinguished - Applicant in possession of settlement proceeds notwithstanding appointment of receiver.

RECEIVERS - Receiver agent of mortgagor, not mortgagee - Mortgagee only liable for acts of receiver where mortgagee instructs, directs or interferes with exercise of powers of receiver - *Bank of Western Australia Ltd v Abdul* [2012] VSC 222, referred to.

PRACTICE AND PROCEDURE - Applicant sought to establish first respondent's duty to account on legal basis not pressed at trial - New basis requires resolution of question of contractual interpretation - Resolution of question may require leading of evidence - Applicant precluded from raising point on appeal where evidence could have been given that might have prevented point from succeeding - *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 438; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, 439-40 [38], applied.

REMEDIES - Declaratory relief - Declaration made by trial judge as to obligations of non parties - Declaration set aside.

*Nom de Plume Nominees P/L v Fingal Developments P/L & Ascot Vale Self Storage Centre P/L (receivers and managers appointed) (in liquidation)*

Tate JA, McLeish JA, and Ginnane AJA

[\[2016\] VSCA 159](#)

14/07/2016

PRACTICE AND PROCEDURE - Application for leave to appeal against order granting summary judgment for possession of property - Order for possession already stayed - Imminent trial - Application adjourned.

PRACTICE AND PROCEDURE - Cross application for leave to appeal against order dismissing application for summary judgment for debt - Order effectively granting unconditional leave to defend - Whether any right to appeal - Supreme Court Act 1986 s17A(6) - County Court Act 1958 s74 - Imminent trial - Interests of justice - Cross application dismissed.

***Anderson, Lena Annika (Applicant /Cross Respondent) v Westpac Banking Corporation (ABN 33 007 457 141) (Respondent / Cross Applicant)***

Whelan JA, McLeish JA, and Cavanough AJA

[\[2016\] VSCA 172](#)

20/07/2016

PROCEEDS OF CRIME - Applications for exclusion from restraining orders - Applications for forfeiture orders - Applications for exclusion from forfeiture orders - Whether judge erred in determining the forfeiture applications before determining the applications for exclusion from the restraining orders - Whether judge misapplied Commissioner of the Australian Federal Police v Zhao (2015) 255 CLR 46 - Proceeds of Crime Act 2002 (Cth) s9, s29, s31, s45, s49, s66, s73, s74, s92, s315A and s317 - Leave to appeal granted and appeal allowed.

***The Commissioner of the Australian Federal Police v Zhang, Heng Jie and Shen, Ying***

Tate JA, Priest JA, and Beach JA

[\[2016\] VSCA 171](#)

22/07/2016

TRUSTS - Breach of trust - Second limb of Barnes v Addy - Allegedly dishonest and fraudulent trustees as plaintiffs - Accessorial liability of former officers - Managed investment schemes in liquidation - Court appointed receivers over trust property and liquidators of trustee companies - Whether trustees can sue to redress breach of trust when trustees are guilty of misconduct - Primary judge stayed proceeding as beneficiary representative not joined - Whether independent party representing beneficiaries' interests should be joined to the proceeding - Stay order set aside - Young v Murphy - Marshall Futures Ltd v Marshall - Trustee, even if itself party to wrongdoing, may bring proceeding to redress breach of trust without joining beneficiaries or representative if trustee can properly represent interests of beneficiaries

***Nicholson Street P/L (ACN 069 104 089) (Receivers & Managers Appointed) (in liquidation) & Ors v Letten, Mark Ronald & Lane, Paul James***

Whelan JA, Ferguson JA, and Kaye JA

[\[2016\] VSCA 157](#)

11/07/2016

## Commercial Court

APPEAL - Orders of Associate Judge winding up defendant - Refusal of defendant's application for adjournment - Miscarriage of discretion asserted - Nature of Order 77 Supreme Court (General Civil Procedure) Rules 2005 appeal - Rehearing - Power to receive further evidence under Order 77.06.9(2)(a) - s459 and s459S of Corporations Act 2001 (Cth) - Standing of plaintiff to serve statutory demand - Whether winding up proceedings an abuse of process given that underlying judgment debt - Set aside - Admissibility and probity of expert report as to solvency.

*Fanniesab P/L (ACN 120 335 195) v Futistasera P/L (ACN 120 336 192)*

Digby J

[\[2016\] VSC 359](#)

24/06/2016

CORPORATIONS - Corporations Act 2001 (Cth) s459G - Application to set aside statutory demand - Short point of law to be determined - Promise to pay by holding company after subsidiary debtor in liquidation - Consideration - Consideration moving from creditor - Whether enforceable promise to pay.

*In the matter of Divas Beverages Holdings Ltd (ACN 162 482 680)*

*Divas Beverages Holdings Ltd (ACN 162 482 680) v VA Filtration (SA) P/L (ACN 103 010 162)*

Randall AsJ

[\[2016\] VSC 392](#)

13/07/2016

CORPORATIONS - Corporations Act 2001 (Cth) - Section 459G application to set aside statutory demand - Assignment of creditor's judgment debt - Demand served by assignee - Off-setting claim - Extent of undertaking given to Dixon J to obtain entry to plaintiff's property - Damage to concrete and roof not the subject of the undertaking - Independent contractor - Liability for acts of independent contractor.

*In the matter of Mascarene P/L*

*Mascarene P/L (ACN 099 531 834) v Slater, Geoffrey*

Randall AsJ

[\[2016\] VSC 395](#)

14/07/2016

COSTS - Offer of compromise under the Magistrates Court Rules - Proceeding transferred to the Supreme Court of Victoria - Summary judgment application partially successful.

*Commonwealth Bank of Australia t/as Bank of Western Australia (ABN 48 123 123 124) v Codovo Developments P/L (ACN 122 084 477) & Ors (No. 2)*

Almond J

[\[2016\] VSC 327](#)

10/06/2016

EVIDENCE - Privilege - Legal professional privilege - Whether communications made for the dominant purpose of providing legal advice to client - Multiple purposes - Evidence Act 2008 (Vic) s118 - Whether documents should be inspected under s133 of the Evidence Act 2008 (Vic) - *Tabcorp Holdings Ltd v Victoria* [2013] VSC 302 distinguished.

EVIDENCE - Privilege - Loss of client legal privilege - Waiver of privilege - Whether waiver by reason of disclosure of privileged communications to other parties - Character of communications - Consideration of context in which communications took place - Whether recipients of documents under an obligation of confidence - *DSE (Holdings) Pty Ltd v InterTan* (2003) 135 FCR 151 considered.

EVIDENCE - Evidence Act 2008 (Vic) s122 (3) and s122(5)(a), (b) and (c) - Whether a party in its pleadings has put in issue its state of mind such that it is inconsistent with the maintenance of confidentiality in documents relevant to the formation of that state of mind - *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191 applied.

EVIDENCE - Privilege - Loss of client legal privilege - Whether communications in furtherance of an abuse of power - Insufficient evidence - Evidence Act 2008 (Vic) s125.

EVIDENCE - Privilege - Whether a party with an interest in the outcome of a legal proceeding has a right of access to privileged documents relating to another party's prospect of success in that legal proceeding - Common interest found - *Yunghanns v Elfic Pty Ltd (No 2)* (2000) 1 VR 92 applied (Ruling No 1)

EVIDENCE - Privilege - Legal professional privilege - Confidential communication made between two lawyers acting for the client - Nature of transaction - Context - No "knowing and voluntary" disclosure - Not disclosed with express or implied consent of client - Evidence Act 2008 (Vic) s118(b), s122(3)(a) and (3)(b) - *QUBE Logistics (Vic) Pty Ltd v Wimmera Container Hire Pty Ltd* [2013] VSC 695 followed (Ruling No 2)

PRACTICE AND PROCEDURE - Discovery - Civil Procedure Act 2010 (Vic) s 55 (2)(b) - Claim that party should be relieved from its discovery obligations on the basis that claim against it untenable in fact and law - Not a proper basis for resisting discovery (Ruling No 3)

PRACTICE AND PROCEDURE - Discovery - No issue of principle.

EVIDENCE - Privilege - Legal professional privilege - No issue of principle.

EVIDENCE - Privilege - Legal professional privilege - Without prejudice privilege - Whether any exception under s131(2) of the Evidence Act 2008 (Vic) applies (Ruling No 4)

*Oswal, Radhika Pankaj v Australia and New Zealand Banking Group Ltd (ACN 005 357 522) & Ors (according to the attached schedule) - pre-trial discovery and privilege applications*

*Oswal, Pankaj v Carson, Ian Menzies & Ors (according to the attached schedule)*

*Yara Pilbara Fertilisers P/L (ACN 095 441 151) v Oswal, Pankaj & Ors (according to the attached schedule)*

Daly AsJ

[\[2016\] VSC 386](#)

03/03/2016

PRACTICE AND PROCEDURE - Evidence Act 2008 (Vic) s117 and s119 - Privilege - Client legal privilege - Litigation privilege - Existence of general retainer.

CORPORATIONS ACT 2001 (Cth) - Corporations Act 2001 (Cth) section 597(9) - Direction to produce documents - Objection to inspection on grounds of legal professional privilege.

*In the matter of Anthony Robert Cant and Simon Patrick Nelson (in their capacity as liquidators of Global Contracting Pty Ltd (In Liquidation) (ACN 094 055 811)): Anthony Robert Cant and Simon Patrick Nelson (in their capacity as liquidators of Global Contracting Pty Ltd (In Liquidation) (ACN 094 055 811)): In the matter of Global Contracting Pty Ltd (in liquidation)*

Hetyey, JR

[\[2016\] VSC 409](#)

21/07/2016

PRACTICE AND PROCEDURE - Stay of proceeding - Concurrent arbitration involving similar issues - Whether stay of proceeding pending outcome of arbitration or further order appropriate - *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287, *Reichhold Norway ASA & Anor v Goldman Sachs International* [2000] 2 All ER 679 and *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZCA 536 applied - Stay ordered.

*UDP Holdings P/L ACN 167 100 692 (Receivers and Managers Appointed) (Subject to Deed of Company Arrangement) v Ironshore Corporate Capital Ltd on its own behalf and on behalf of the underwriting members of Syndicate 4000 for the 2013 underwriting year (and another according to the schedule)*

Hargrave J

[\[2016\] VSC 400](#)

19/07/2016

SECURITY FOR COSTS - Form of security - Foreign plaintiffs with no assets in Victoria - Plaintiffs proposed security in the form of a deed of indemnity from United Kingdom insurer with no presence in Australia - Defendants sought security by payment into Court or bank guarantee - Principles to be applied - Held: proposed deed of indemnity, and payment into Court or bank guarantee of amount sufficient to cover costs of registration of any judgment against the insurer in the United Kingdom, constituted adequate security in the circumstances - *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 245, *Energy Drilling Inc v Petroz NL & Ors* (1989) ATPR 40-954, *PS Chellaram & Co Ltd v China Ocean Shipping Company* (1991) 102 ALR 321, *Maxim's Caterers Limited v Magnona Pty Ltd (No 1)* [2010] FCA 450, *Berry v Innovia Security Pty Ltd* [2014] FCA 357, *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 658 (Comm), *Rosengrens Limited v Safe Deposit Centres Limited* [1984] 3 All ER 198, *Blue Oil Energy Pty Limited v Tan* [2014] NSWCA 81 considered and applied - *Nylex Corporation Pty Ltd v Basell Australia Pty Ltd* [2009] VSC 97 considered.

*DIF III Global Co-Investment Fund, L.P. (formerly [Babcock & Brown DIF III Global Co-Investment Fund, L.P.]) & Anor (according to the attached Schedule) v BBLP LLC (formerly [Babcock & Brown LP]) & ORS (according to the attached Schedule)*

Hargrave J

[\[2016\] VSC 401](#)

19/07/2016

SECURITY FOR COSTS - Form of security - Insolvent plaintiff - Plaintiff proposed security in the form of a deed of indemnity from United Kingdom insurer with no presence in Australia - Defendant sought security by payment into Court or bank guarantee - *DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors* [2016] VSC 401 applied.

*Australian Property Custodian Holdings Ltd (ACN 095 474 436) (in liquidation) (receivers and managers appointed) (controllers appointed) v Pitcher Partners (a firm) and Woolridge, Michael Richard Lewis & Ors (third parties)*

Hargrave J

[\[2016\] VSC 399](#)

19/07/2016

## Commercial & Equity Division

CORPORATIONS - External administration - Application to set aside statutory demand pursuant to section 459G of the Corporations Act 2001 (Cth) by reason of alleged genuine dispute in respect of taxation liabilities the subject of Running Balance Account generated upon filing of BAS for self assessed liability - No genuine dispute established - Application dismissed.

*In the matter of Quantum Electrical & Data Pty Ltd (ACN 153 917 938)*

*Quantum Electrical & Data Pty Ltd (ACN 153 917 938) v Deputy Commissioner of Taxation*

Gardiner AsJ

[\[2013\] VSC 660](#)

29/11/2013

## Common Law Division

ADMINISTRATIVE LAW - Judicial review - Supreme Court (General Civil Procedure) Rules 2015 (Vic) O56 - Accident Compensation Act 1985 (Vic) - Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) - Whether the misinterpretation of the plaintiff's work duties to the medical panel resulted in a denial of procedural fairness - Whether the medical panel's reasons were adequate - Whether the medical panel failed to take into account relevant matters - Whether a failure of the medical panel to have regard to certain matters could constitute jurisdictional error - The circumstances in which a failure of the medical panel to have regard to a worker's answers or referral material could constitute jurisdictional error discussed.

*Omerasevic, Smajl v Dr Kotzman, David & Ors*

Riordan J

[\[2016\] VSC 383](#)

22/07/2016

ADMISSIBILITY - Evidence Act 2008 s102, s103 - Admissibility of previous pleadings and interrogatories - Credibility of witness - Balancing probative value and prejudice

*Jameson, Leigh v Amaca P/L (formerly James Hardie & Co P/L) (Ruling No 1)*

Zammit J

[\[2016\] VSC 163](#)

15/04/2016

EVIDENCE - Legal advice privilege - Whether disclosure of summary documents would result in disclosure of the primary advice - Whether emails incorporated in a chain together with an email seeking legal advice are privileged as 'copies' - Application for production refused - *AWB Limited v Cole & Ors* (2006) 152 FCR 382 - *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 - Evidence Act 2008 (Vic) s 118.

*Kamasae, Majid Karami v Commonwealth of Australia & Ors (in accordance with the schedule) (No 2) (LPP Ruling)*

Macaulay J

[\[2016\] VSC 404](#)

20/07/2016

JUDICIAL REVIEW AND APPEALS - Application for leave to appeal from VCAT under Victorian Civil and Administrative Tribunal Act 1998 (Vic) s148 - Whether question of law - Whether real or significant argument that Tribunal was in error - No errors of law - Leave refused.

*Dirckze, Graham v Holmesglen Institute*

Derham AsJ

[\[2016\] VSC 385](#)

15/07/2016

NEGLIGENCE - Personal injury - Occupier's liability pursuant to the Wrongs Act 1958 (Vic) s14B(3) - Plaintiff stepped into a trench dug on the defendant's property and fell - Defendant ran business part time from premises - Defendant in breach of duty to take care to avoid injury to plaintiff by reason of the state of the premises - Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; Erickson v Bagley [2015] VSCA 220 cited.

*Scott, Anthony Roy v Wanklyn, Ross Howard*

Keogh J

[\[2016\] VSC 382](#)

08/07/2016

PRACTICE AND PROCEDURE - Case management conference - Progress of the Settlement Distribution Scheme - Amendment of the Settlement Distribution Scheme - Court declines to intervene in relation to amendment for interim distributions - Allowance for administration costs - Declaration made that administration costs are reasonable.

*Matthews, Carol Ann v Ausnet Electricity Services P/L (formerly SPI Electricity P/L (ACN 064 651 118) and others according to the Schedule (Ruling No 42)*

*Ausnet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) v ACN 060 674 580 P/L and others according to the Schedule*

*ACN 060 674 580 P/L Plaintiff by UAM Counterclaim v Ausnet Electricity Services P/L (formerly SPI Electricity P/L) (ACN 064 651 118) and others according to the Schedule annexed to other rulings of the Court Defendants by UAM Counterclaim*

J Forrest J

[\[2016\] VSC 394](#)

15/07/2016

PRACTICE AND PROCEDURE - Costs of the proceeding - Costs of interpleader summons - Where interpleader application dismissed by consent - McPherson, Thom & Co v Coombie Pastoral Co Pty Ltd [1929] VLR 295 - Supreme Court (General Civil Procedure) Rules 2015, Order 12.

*Poraviappan, Kuhan Arunasalam v Alderuccio Solicitors*

McMillan J

[\[2016\] VSC 417](#)

22/07/2016

PRACTICE AND PROCEDURE - Failure by first plaintiff to attend trial - Consideration of O49.02(1) of the Supreme Court (General Civil Procedure) Rules 2015 - Decision to proceed with trial - First plaintiff's claim dismissed.

*Baljak, Mirko & Ors v Garfirth, Neil Peter William & Ors*

*Cimerman, Amila v Garfirth, Neil Peter William & Ors*

Riordan J

[\[2016\] VSC 184](#)

12/04/2016

PRACTICE AND PROCEDURE - Freezing order - Application to vary - Freezing order made against entirety of superannuation fund containing separate accounts for each respondent - Second respondent seeking to vary freezing order in respect of the funds in her name only - Arguable case established that a portion of the funds in the account in the second respondent's name were 'tainted funds' - Requisite risk of dissipation shown - 'Just and convenient' that a freezing order be made against that portion of the funds in the account only - Freezing order varied.

*Batrouney, Loel & Lyle, Andrew (in their capacity as receivers of the law practice known as Hollows Lawyers ABN 840 058 016) v Forster, David & Forster, Maire Philomena*

Keogh J

[\[2016\] VSC 393](#)

14/07/2016

PRACTICE AND PROCEDURE - Service of originating process out of Australia - Application to set aside service on the basis that service of the writ out of Australia not authorised under r7.01(1) - Relevant test - Whether tort committed in Victoria - Whether damage partially suffered in Victoria - Failure to indorse the writ - Discretionary considerations - No prejudice - Compliance with r7.02 dispensed with - Supreme Court (General Civil Procedure) Rules 2005 (Vic), r7.01(1) (i) & r7.01(1) (j), 7.02.

*Yunghanns, Peter Nicholas v Colquhoun-Denvers, Nicholas*

John Dixon J

[\[2016\] VSC 403](#)

19/07/2016

STATUTORY INTERPRETATION - Determination of the validity of subordinate legislation - Use of a regulation made under an Act for the purposes of construing the Act. OWNER CORPORATIONS - Whether the prohibition of short-term letting within the scope of the rule making power of a body corporate under the Subdivision (Body Corporate) Regulations 2001 (Vic) - Whether a rule prohibiting short-term letting a prohibition of the matter to be regulated - Whether the rule prohibiting short-term letting, if ultra vires, saved by a deeming provision in the Subdivision Act 1988 (Vic) - Whether the rule prohibiting short-term letting validated on registration by the transitional provisions of the Owners Corporations Act 2006 (Vic) - Whether the prohibition of short-term letting within the scope of the rule making power of an owners corporation under the Owners Corporations Act 2006 (Vic).

SUBDIVISIONS - The divergences in the development of subdivision legislation in Victoria and New South Wales discussed.

*Owners Corporation PS 501391P v Balcombe, Belinda, Salter, Paul Kenneth; Owners Corporation PS 501391P v Moodley-Schroter, Deshnee, Moodley, Keshri*

Riordan J

[\[2016\] VSC 384](#)

22/07/2016

## Costs Court

PRACTICE AND PROCEDURE - Application to set aside warrant of execution - Warrant issued pursuant to order of the Costs Court on a taxation of costs between solicitor and client and Barrister and client - Order not an order for payment of costs - Warrant issued irregularly - Warrant set aside - *Scott v Evia Pty Ltd* [2008] VSC 324 distinguished.

*Pippett, Bruce and Wald, Janine v Liu, Ting*

Derham AsJ

[\[2016\] VSC 402](#)

18/07/2016

## Criminal Division

BAIL - Show cause - Child applicant in care of the Department of Health and Human Services on an interim accommodation order - Whether unacceptable risk - Consideration of factors which must be taken into account in determination of bail application by a child - Whether imposition of conditions sufficient to ameliorate risk - Bail Act 1977 (Vic), s3B, s4(1), s4(4).

*In the matter of the Bail Act 1977 (Vic) and In the matter of an Application for Bail by TB (a pseudonym)*

John Dixon J

[\[2016\] VSC 51](#)

11/07/2016 (revised 18/07/2016)

CRIMINAL LAW - Application for bail - Self represented applicant - Obtain financial advantage by deception - Attempt to obtain financial advance by deception - Commit indictable offence while on bail - Show cause - Unacceptable risk of reoffending.

*In the matter of the Bail Act 1977 (Vic): In the matter of an Application for Bail by Whittingham, Mark William*

T Forrest J

[\[2016\] VSC 398](#)

07/07/2016

CRIMINAL LAW - Application for bail - Theft (of motor vehicle) - Handle stolen goods - Theft (from motor vehicle) - Drive with prescribed concentration of drug - Careless driving - Unlicensed driving - Possess drug of dependence - Reckless conduct endangering (serious injury) - Fail to stop a motor vehicle on request - Evade police - Applicant an unacceptable risk of committing further offences whilst on bail - Public safety - Application refused.

*In the matter of the Bail Act 1977*

*In the matter of an application for bail by Peirce, Lex*

T Forrest J

[\[2016\] VSC 397](#)

12/07/2016

CRIMINAL LAW - Sentence - Murder - Brutal attack on stranger late at night on city street - Kicks to head and neck causing vertebral artery to tear - No attempt to assist the victim or ascertain whether he was injured - Some remorse - Limited prior convictions - Good prospects of rehabilitation - Importance of general deterrence for offending of this kind - Sentenced to 20 years' imprisonment with 16 years non-parole.

*The Queen v Zandipour, Kyle*

Emerton J

[\[2016\] VSC 387](#)

12/07/2016

#### Full Court

LEGAL PRACTITIONERS - Application for readmission to the legal profession - Solicitor struck off the Supreme Court roll in 1984 for dishonesty offences - Subsequent engagement in unauthorised legal practice - Inherent jurisdiction of the Supreme Court to refuse admission - Whether fit and proper person to be admitted - Admission to the legal profession subject to conditions.

*Petsinis, Peter v Victorian Legal Services Board*

Warren CJ, Ashley JA, and Weinberg JA

[\[2016\] VSC 389](#)

13/07/2016

#### Practice Court

PRACTICE AND PROCEDURE - Vexatious litigant - General litigation restraint order - Whether leave to commence proceeding should be granted - Where proceeding commenced prior to the commencement of the current legislation - Test to be applied - Supreme Court Act 1986, s21 - Vexatious Proceedings Act 2014, ss54-56, s63, s91.

ADMINISTRATIVE LAW - Application for certiorari and mandamus in respect of a decision made by the Commissioner of Corrections Victoria regarding emergency management days - Whether the decision was wrong in fact and law - Corrections Act 1986, s58E, s112(1)(r) - Corrections Regulations 2009, r78 - *Anderson v Pavic* [2005] VSCA 244.

*Knight, Julian v Shuard, Jan and Roach, Dennis*

McMillan J

[\[2016\] VSC 413](#)

22/07/2016

# County Court of Victoria Cases

Following is a selection of cases recently handed down in the County Court of Victoria. These cases have been selected for inclusion by the presiding judge. If you would like your judgment added to the Library Bulletin, please email the reference librarian in your jurisdiction.

LEGAL PRACTITIONERS - Costs agreement - "No win-no fee" - Whether costs agreement and disclosure statement should have been translated into the Serbian language - Whether the client breached the costs agreement by refusing to accept solicitor's advice to settle. NEGLIGENCE - Whether solicitors breached its duty of care to client - Failure to issue proceedings in respect of other accidents, gynaecological injuries, and for home help and other services - Failure to advise that defence to Magistrates' Court complaint should be filed - Scope of damages claimed.

***ACN 131 110 220 Pty Ltd v Lakic***

Judge Anderson

[\[2016\] VCC 725](#)

18/07/2016

LOAN AGREEMENT - Whether loan amount advanced

***Nader v Valasinavicius***

Judge Cohen

[\[2016\] VCC 1001](#)

15/07/2016

PROCEDURE - Jurisdiction of County Court to set aside order striking out proceeding - Order not perfected by authentication - Order made using case management powers in Civil Procedure Act 2010 - Discretion to set aside order - Plaintiffs arguably lacked standing when proceeding commenced due to bankruptcy - Whether proceeding a nullity - Possible expiry of limitations period - Whether any defect capable of rectification by appropriate amendment - Delay - Whether any prejudice by reason of delay.

***Cetinkaya & Anor v Unal & Anor***

Judicial Registrar Tran

[\[2016\] VCC 992](#)

13/07/2016

# Articles

## Aviation Law

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CASA - Regulations - Drones - Civil Aviation Safety Regulations 1998 (Cth), Pt 101 - Risk identification - Liability - Australia.  
Young, T. and S. Nean. "Rise of the drones." (2016) 36(6) Proctor 15-18.

## Bankruptcy

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Insolvency - Disclaimer of lease - Forests - Investments - Liquidators - Powers - Duties - Proprietary rights.  
Omar, P. and J. Buchan. "Bucolic dream or arboreal fantasy?: the Willmott Saga, insolvency disclaimers and the contract/property dichotomy." (2016) 80(3) Conv 197-214.

## Courts

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County Court - Commercial Division - Structure - Targeted case management - Appointment - Judicial registrars - Reduced appearances - Interlocutory disputes - Judicial resolution conferences - Victoria - Australia  
Kennedy, M. et.al. "Working towards a faster resolution." [2016] 90(7) LIJ 34-37.  
Court buildings - Disabled access - Court facilities - Western Australia - Australia  
Martin, W. "New Supreme Court building." (2016) 43(6) Brief 20-21.

## Criminal Law & Procedure

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Freedom of expression - Offensive speech - Offensive conduct - Crimen laesae majestatis - Racial Discrimination Act 1975 (Cth), s18C - Australia  
French, R. "The fine art of giving and taking offence." (2016) 43(6) Brief 10-14.

Sentencing - Baseline - Repealed - Standard sentencing scheme - Victoria - Australia  
"Baseline sentencing scrapped." [2016] 90(7) LIJ 12.

Sentencing - Study - Juror sentences - Leniency - Judges sentences - Victoria - Australia  
"Sentencing study backs judges." [2016] 90(7) LIJ 11.

## Family Law

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Courts - Appointment - Independent children's lawyer - Evidence gathering - Self-represented litigants - Children's views - Duffy (No. 1) - Australia  
Lynch, P. "In the interests of the child." [2016] 90(7) LIJ 38-41.

Family Court of Western Australia - Orders - Child - Chemotherapy - Parent's wishes - Medical evidence - Jurisdiction - Parens patriae - Director Clinical Service, Child & Adolescent Health Service v Kiszko & Anor - Family Law Act 1975 (Cth), s162 - Western Australia - Australia  
Brown, S. "Chemo by court order." (2016) 36(6) Proctor 20-21.

## Legal Profession

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Lawyers - Health - Well-being - Feelings - Display - Setting standards report 2013 - Emotional regulation - Pastoral care - Resilience - UK  
Feenan, D. "Emotions at work (Pt 2)." (2016) NLJ 166 (7704) 20.

Professional negligence - Solicitors - Duty of care - Intended beneficiaries - Negligent will preparation - Robert Badenoch & Anor v Roger Wayne Calvert - Tasmania - Australia  
Smyth, C. "Solicitor negligence in will making - Are we clear?" (2016) 36(6) Proctor 30-31.

## Practice & Procedure

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Costs - Proportionality test - Bill of Costs - BNM v MGN - UK  
**Regan, D.** "Costs turbulence." (2016) 166(7704) NLJ 9.

Court orders - Disclosure of documents - Documents existence - Special circumstances - Direction on disclosure obligation - Alternative direction - AP v RD - Uniform Civil Procedure Rules 1999 (Qld), rr 367, 223, 211 - Queensland - Australia  
**Jackson, S.** "Alternative routes to document access." (2016) 36(6) Proctor 36-37.

Pleadings - Admissions - Express - Deemed - Denial - Status - ASIC v Managed Investments Limited & Ors (No.3) - Cape York Airlines Pty. Ltd. v QBE Insurance (Australia) Limited - Uniform Civil Procedure Rules 1999 (Qld) - Federal Court Rules 2011 (Cth) - Queensland - Australia  
**Downes, K. and K. Stoye.** "Admissions: express and deemed admissions, and denials." (2016) 36(6) Proctor 26-27.

## Restitution

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Banks - Legal charges - Liens - Subrogation - Unjust enrichment - Foskett v McKeown - Menelaou v Bank of Cyprus UK Ltd - UK  
**Buckingham, C.** "Subrogation, the straightjacket of unjust enrichment and legal taxonomy." (2016) 80(3) Conv 219-227.

## Taxation

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Capital gains tax - Real property - Foreign resident - Australian Tax Office - Procedures - Legal profession - Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016 - Australia  
**Tang, R. and M. McCutcheon.** "A layer of complexity." [2016] 90(7) LIJ 26-29.

Inheritance tax - Residence Nil Rate Band - Inheritance Tax Act 1984 (UK) ss8D-8M - Amendments - Poorly drafted legislation - UK

**Evans, S.** "Another example of how law should not be made - the "Resident Nil Rate Band"." (2016) 80(3) Conv 215-218.

## Torts

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Transport Accident Commission - Protocols - Joint medical examination - Serious injury application - Serious injury conference - Common law Conferences - Impaired assessment - Bypass impairment - Statutory benefit disputes - Legal costs - Non-serious injury - Victoria - Australia  
**Lombard, M. and K. Calderwood.** "Accidental happenings." [2016] 90(7) LIJ 30-33.

## Trusts

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Agents - Powers - Duties - Apparent authority - Mortgages - Registered land - Trustees - Powers - Duties - Trusts of land - Wishart v Credit and Mercantile Plc - Land Registration Act 2002 (UK), s29 - UK  
**Televantos, A.** "Trusteeship, ostensible authority and Land Registration: the category error in Wishart." (2016) 80(3) Conv 181-196.

## INFORMATION SESSIONS

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Visit our website for upcoming events [lawlibrary.vic.gov.au](http://lawlibrary.vic.gov.au)



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## Law Library of Victoria

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