

Selected cases from Supreme Court and Victorian Court of Appeal

Viterra Malt Pty Ltd & Ors v Youil & Ors S EAPCI 2022 0062: Recent appearance in the Court of Appeal (with Coral Alden) responding to an application for leave to appeal against an indemnity costs order made in favour of Simon's client, following a 14 month trial.

Re Estate of P Mirabella (dec'd) [2023] VSC 185 – This was a case involving construction and rectification of a will in circumstances where a clerical error had been made in drafting the will. Simon (with Kirsti Halcomb) succeeded in their rectification and construction cases.

Re Estate of P Mirabella (dec'd) [2023] VSC 473 – Interesting costs decision arising out of a rectification application where a costs order was made against the non-party solicitor who drafted the erroneous will. Simon (with Kirsti Halcomb) succeeded in the application for costs against the solicitor.

Will and Estate of Kalliopi Siapantas [2023] VSC 125 – this case started as a contested will application and ended up as an application for probate of a will in solemn form.

Re Schweitzer (Re Beddoe application) S ECI 2022 04991 – application for judicial advice about whether an administrator would be justified in defending litigation brought against the estate. Application granted.

Kornwasser v Spigelman [2022] VSC 759 – TFM application by adult daughter. Simon acted for the Estate. An award of provision was made, but for an amount less than an open offer made at the beginning of trial.

Payton Securities Pty Ltd v Bertacco Ferrier Pty Ltd [2022] VSC 394 – Concurrent claim in tort and contract against a professional valuer. Simon (with Julia Nikolic) successfully defended the valuer – claim dismissed.

Re Caruso [2022] VSC 242 – application for judicial advice concerning the question of whether a joint tenancy had been severed in equity.

Re Caruso (No 2) [2022] VSC 318 – Simon successfully argued that his client, as effective contradictor in the proceeding, should have her costs of the proceeding from estate.

Maher v Burden & Anor - S CI 2016 01961 (trial part heard) – TFM claim brought by adult son, as part of a broader series of disputes involving family farms.

Thorne v Todhunter [2022] VSC 284 – Simon successfully defended an application for summary judgment brought under the *Supreme Court (General Civil Procedure) Rules* and the *Civil Procedure Act*.

Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28) [2022] VSC 13 – Simon (with Coral Alden) appeared in a very significant piece of litigation arising from the sale of a malt business to Cargill Australia. The trial ran for 14 months. The claim against Simon's client was dismissed with indemnity costs.

Re Holloway [2022] VSC 181 – application for admission to probate of an informal codicil.

Re Wissa; Wissa v Wissa [2021] VSC 565 – costs decision where Simon successfully argued that a defendant executor should not have his costs from the estate in circumstances where he had acted in a way that had precipitated Simon's client bringing the proceeding.

Payton Securities Pty Ltd v Mason White McDougall (Hurstbridge) Pty Ltd - [2021] VSC 375 – application for joinder of parties on the basis of them being concurrent wrongdoers in the context of an apportionable claim under the *Wrongs Act* 1958.

Gardiner v Hughes (No 2) [2019] VSCA 198 – appeal concerning the question of whether a prima facie case existed in an application for revocation of a grant of probate (with C M Caleo KC).

Gardiner v Hughes [2017] VSCA 167 – appeal concerning the question of standing in an application for revocation of a grant of probate (with N J Young KC).

Re Walker; Kevin Edward Roache & Anor v Attorney General for the State of Victoria - S ECI 2021 00659 – application for approval of *cy-pres* scheme. Application granted.

Re Hamilton; Hughes v O'Donoghue [2020] VSC 876 - construction of will case.

Lemmens v Davis & Anor [2020] VSC 795 - successful application for dismissal for want of prosecution of a TFM claim.

Re Stewart [2020] VSC 737 - application for judicial advice.

Joss v Joss [2020] VSC 424 - contested TFM trial.

Re Rush; Holt v Rush [2020] VSC 412 - contested TEP costs dispute.

Markin v Animals Australia Federation & Anor (No 2) [2020] VSC 270 - contested costs dispute.

Schmidt (a pseudonym) & Anor v Walter & ors; Wagner (a pseudonym) v Walter & ors (No 2) [2020] VSC 122 - complicated costs dispute following successful Part IV claim.

Regine v Pletka [2020] VSC 129 - application for early vesting of testamentary trust.

Markin v Animals Australia Federation & Anor [2020] 61 VR 73; [2020] VSC 113 - Judicial advice proceeding regarding devolution of shares and dividends under a will.

McIntyre & Ors v Hipkin & Ors [2020] VSC 30 - application for stay of proceedings - alternatively striking out of pleading.

Re Tsaousis [2019] VSC 511 - successful application for indemnity costs against executor personally.

Re Hutchinson [2019] VSC 495 - successful application for indemnity costs against executor personally.

Cargill Australia Ltd v Viterro Malt Pty Ltd (No 24) [2019] VSC 438.

Schmidt (a Pseudonym) & Anor v Walter & Ors; Wagner (a Pseudonym) v Walter & Ors [2019] VSC 385 - Successful Part IV claim.

Chan v Valmorbida: IMO the Will of Adrian Valmorbida - deceased [2019] VSC 336 - successful interpretation / construction of will case.

Cargill Australia Ltd v Viterro Malt Pty Ltd (No 20) [2019] VSC 44. Interlocutory decision concerning admissibility of expert evidence.

Maher & Ors v Maher & Ors [2018] VSC 318 – extension of time application in TFM case.

Re Gardiner (No 3) [2018] VSC 414 – Simon successfully defended a judicial recusal application.

Re McKenzie (No 3) [2018] VSC 311 – successful costs application following a TFM case.

Carter v Caason Investments Pty Ltd & Ors [2016] VSCA 236. Simon (with Stephanie Scully) successfully defended an appeal against a decision by Justice Elliott in the Supreme Court granting Simon's clients non-party costs orders against a director and shareholder of a litigation funder.

Re Gardiner [2016] VSC 541. Simon acted for a substantial estate and successfully defended an application by intermeddlers to the estate on the basis that they lacked standing to seek to revoke a grant of probate.

YZW Pty Ltd v Sushi Sushi Franchising Pty Ltd & Anor [2016] VSC 538. Simon acted for a nationwide franchisor in an interesting application involving questions of waiver of privilege under the *Evidence Act 2008* (Vic). The case considered questions arising out of s131(2) of that Act for the first time in Victoria.

1165 Stud Road v Power & Ors (No 2) [2015] VSC 735: Simon successfully defended a non-party costs application which was brought against a firm of solicitors. This case involved claims being made against Simon's client under the *Civil Procedure Act - the Supreme Court Act - the Supreme Court (General Civil Procedure) Rules and Flower & Hart principles*.

Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd (No 3) [2015] VSC 644: Simon successfully applied for a non-party costs order against a litigation funder and related parties.

Semmler v Todd [2015] VSC 657: Simon successfully defended a testator's family maintenance claim brought by a person who was not related to the deceased but was in a relationship with the deceased.

Jarrold v Registrar of Titles & Anor [2015] VSCA 45: Interesting decision by the Court of Appeal remitting the matter back to trial before a different judge.

Simon recently gave expert evidence on Victorian wills and estates law at the Philippine Consulate in Canberra - as part of a multi-jurisdictional dispute over the deceased estate of professional gambler Alan Woods worth almost \$1 billion. Simon was instructed by Baker & McKenzie.

Mercier Rouse Street v Burness & Ors [2015] VSCA 8 (with Ted Woodward SC, as his Honour then was): Simon acted for successful respondents in the Court of Appeal in a matter involving questions of sale of land - contracts and the imposition of trusts over assets of a company in liquidation.

Bakers Investment Group Australia v Caason Investments Pty Ltd [2014] VSC 598: Recent win in the Supreme Court in a trial involving questions of contract - equity and consumer law.

Baxter v Baxter [2014] VSC 377: Simon acted for the plaintiff in this matter who successfully applied for further provision out of the estate of his deceased father - pursuant to Part IV of the Administration and Probate Act.

Levy v Watt & Anor (2014) 308 ALR 748; [2014] VSCA 60: Fascinating matter in the Court of

Appeal involving a stolen painting and the *Limitation of Actions Act 1958*.

Glezer v Deals.com.au & Ors [2014] VSC 202: Simon successfully defended an appeal from a decision of an Associate Judge of the Supreme Court - who granted Simon's client pre-action discovery.

Bakers Investment Group v Caason Investments [2014] VSC 154: Successful application in the Supreme Court for a company seeking security for costs.

IMO Zinc Port Melbourne Pty Ltd [2013] VSC 599: Simon acted on behalf of a mortgagee seeking declaratory relief and consequential orders in respect of a deed of charge. Simon successfully defended allegations that certain properties covered by the deed of charge were subject to various trusts.

Smoel v Morris [2013] VSC 594: This was an interesting case involving a binding death benefit nomination under a self-managed superannuation fund which raised issues of a trustee's right of indemnity to claim costs out of a trust fund.

Harpur v Levy & Ors [2013] VSCA 209: Successful matter in the Court of Appeal dealing with discretionary trusts / beneficiaries - equitable principles of contribution and recoupment - deceased estates and more.

Jarrold v Isajul & Ors [2013] VSC 461. Successful matter in the Supreme Court where Simon defended a claim by his client's ex-wife who had alleged the forgery of a signature on a power of attorney in order to sell a jointly owned property.

Fast & Ors v Rockman & Ors [2013] VSC 18. Simon successfully applied on behalf of Mrs Rockman to have scandalous and offensive words omitted from the copy of her late husband's will which was admitted to Probate.

Levy v Watt & Anor [2012] VSC 539 (with D.A. Klempfner). Simon acted in a case involving extinguishment of legal title to a valuable painting by Rupert Bunny under s.6 of the *Limitation of Actions Act 1958*. The case involved the fraud exception under s.27 of that Act.

Alabakis v Alabakis & Anor [2012] VSC 437 (with Kate McMillan SC - as Her Honour then was). Simon acted for the daughter of the deceased in a successful claim under Part IV of the *Administration and Probate Act 1958*. The case involved alleged disentitling conduct and a family farm.

Environinvest Ltd (in liq) v Pescott & Ors; Environinvest Ltd (in liq) v Blackburne Pty Ltd (in liq) & Ors (No 2) [2012] VSC 151 (with F.G.A. Beaumont QC). Application to amend pleading, considering allegations of directors duties and various provisions of the *Civil Procedure Act 2010*.

Pridham v Archer [2012] NSWSC 752. Successful application on behalf of defendant in proceedings involving an alleged fake Brett Whiteley painting titled "Blue Lavender Bay".

McCann v Ward & Burgess [2012] VSC 63 (with Kate McMillan SC - as Her Honour then was). Acted for the executors and trustees of a \$14m estate - defending a claim brought by the deceased's stepdaughter under Part IV of the *Administration and Probate Act 1958*.

Harpur v Levy & Ors [2011] VSC 653 (with D.A. Klempfner). Successfully defended proceedings by a trustee plaintiff for equitable relief (recoupment) against the executors of a deceased estate. The proceeding involved questions of equity/ trusts/ foreign law/ expert

evidence and sections 76 and 79 of the *Evidence Act 2008*.

Environinvest Ltd (in liq) v Pescott & Ors; Environinvest Ltd (in liq) v Blackburne Pty Ltd (in liq) & Ors [2011] VSC 325 (with F.G.A. Beaumont QC). Successful application to strike out large parts of a liquidator's statement of claim. Part of an ongoing matter involving directors' duties under the *Corporations Act 2001* arising out of the liquidation of a series of managed investment schemes within Environinvest Ltd (in liq).

Story v Semmens & Anor [2011] VSC 305. Summary judgment application brought pursuant to Part 4.4 of the *Civil Procedure Act 2010* in a proceeding brought under Part IV of the *Administration and Probate Act*.

Port of Portland Pty Ltd v State of Victoria (2010) 242 CLR 348 (with J.D. Merralls QC). Successful appeal to the full court of the High Court (7:0) in proceedings involving the enforceability of a government contract. The proceedings involved questions of constitutional law, contract law and land tax.

Port of Portland v State of Victoria (2009) 27 VR 366 (with M.R. Pearce SC). Appeal from decision of Mandie J at first instance ([2007] VSC 488) on questions of constitutional law/ contract law/ valuation of land and land tax.

Ansett v Moss & Ors [2007] VSCA 161 (with Kate McMillan SC as Her Honour then was). Successful appeal to the Court of Appeal seeking an extension of time within which to bring proceedings pursuant to Part IV of the *Administration and Probate Act*. Successfully established error on the part of the trial judge and had the proceeding remitted to Trial Division.