Civil Procedure Case & Statute Law Update – 2013

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This session will examine recent significant decisions regarding the interpretation of civil procedure legislation in both the State and Federal jurisdictions.

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Introduction

There has been a steady progression of consideration of the ***Civil Procedure Act*** 2010 over the roughly two years since its commencement. A fair observation that may be preferred is that some judges are more prepared to have recourse to the precise provisions of the Act than others. It is not quite the '*old school vs. new school*' approach. Should there be any judges falling into the category of 'old school' they generally seem to provide their decisions with respect to procedure according to the rules of court themselves presumably because they are more comfortable with those having grown up with them in practice. In the author's opinion the 'new school' (once again should there be such a thing) are more readily able to recite the provisions of the Act and use them more as a sword in their attempts to manage their lists more efficiently.

These observations apply, in the writer's personal opinion, be they judges in the Supreme or Federal Courts.

This paper will review a number of the more pragmatic decisions which practitioners should be aware of in the conduct of civil litigation. Above all this is a paper delivered to practitioners with a pragmatic outcome in mind. There have now been several cases which have made their way to the Court of Appeal from which we gain some more steady direction than being left at first instance.

The ***Civil Procedure Amendment Act*** 2012 was given assent on 30 October 2012. This Act makes a number of considerable changes in practice and procedure. I shall come to those in the paper.

I emphasise that the evident tension in the provisions of the ***Civil Procedure Act*** 2010 requires the court to strike a balance between case management considerations and the dictates of a fair trial. The court cannot lose sight of the fundamental requirement that a trial must be conducted fairly and in accordance with the principles of natural justice and procedural fairness.

This paper assumes a basic knowledge of the ***Civil Procedure Act*** 2010.

A Starting Point

The principles in the ***Civil Procedure Act*** 2010 (Vic) were actually preceded in the Federal sphere by amendments introduced by the ***Access to Justice (Civil Litigation Reforms) Amendment Act*** 2009 (*Cth*) introducing sections 37M, 37N and 37P to the ***Federal Court of Australia Act*** 1976. These sections oblige the parties to a civil proceeding before the Court to conduct it in a way that is consistent with the overarching purpose of the civil practice and

procedure provisions of the FCA Act and Rules *(**the overarching purpose**)*.

Part VB—Case management in civil proceedings

37M The overarching purpose of civil practice and procedure provisions

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
  (a) according to law; and
  (b) as quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
  (a) the just determination of all proceedings before the Court;
  (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
  (c) the efficient disposal of the Court's overall caseload;
  (d) the disposal of all proceedings in a timely manner;
  (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The ***civil practice and procedure provisions*** are the following, so far as they apply in relation to civil proceedings:
  (a) the Rules of Court made under this Act;
  (b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

37N Parties to act consistently with the overarching purpose

(1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:
  (a) take account of the duty imposed on the party by subsection (1); and
  (b) assist the party to comply with the duty.

(3) The Court or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:
  (a) the likely duration of the proceeding or part of the proceeding; and
  (b) the likely amount of costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:
    (i) the costs that the lawyer will charge to the party; and
    (ii) any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.

37P Power of the Court to give directions about practice and procedure in a civil proceeding

(1) This section applies in relation to a civil proceeding before the Court.

(2) The Court or a Judge may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding.

(3) Without limiting the generality of subsection (2), a direction may:

(a) require things to be done; or

(b) set time limits for the doing of anything, or the completion of any part of the proceeding; or

(c) limit the number of witnesses who may be called to give evidence, or the number of documents that may be tendered in evidence; or

(d) provide for submissions to be made in writing; or

(e) limit the length of submissions (whether written or oral); or

(f) waive or vary any provision of the Rules of Court in their application to the proceeding; or

(g) revoke or vary an earlier direction.

(4) In considering whether to give directions under subsection (2), the Court may also consider whether to make an order under subsection 53A(1).

(5) If a party fails to comply with a direction given by the Court or a Judge under subsection (2), the Court or Judge may make such order or direction as the Court or Judge thinks appropriate.

(6) In particular, the Court or Judge may do any of the following:

(a) dismiss the proceeding in whole or in part;

(b) strike out, amend or limit any part of a party's claim or defence;

(c) disallow or reject any evidence;

(d) award costs against a party;

(e) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.

(7) Subsections (5) and (6) do not affect any power that the Court or a Judge has apart from those subsections to deal with a party's failure to comply with a direction.

In Victoria, the ***Civil Procedure Act*** 2010 *(Vic)* came into effect on 1 January 2011 and applies to all civil proceedings, save for those specifically exempted by s 4(2) and (3) (which are not relevant to this seminar).

7 Overarching purpose

(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

(2) Without limiting how the overarching purpose is achieved, it may be achieved by—

(a) the determination of the proceeding by the court;

(b) agreement between the parties;

(c) any appropriate dispute resolution process—

(i) agreed to by the parties; or

(ii) ordered by the court.

8 Court to give effect to overarching purpose

(1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—

(a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or

(c) arise from or are derived from the common law or any procedural rules or practices of the court.

Statutory Developments

The Victorian ***Civil Procedure Amendment Act 2012*** was assented to on 30 October 2012.

The Amendment Act amends the ***Civil Procedure Act*** 2010 to introduce specific powers and discretions for the courts in relation to ***costs and expert evidence***, to amend and create greater flexibility in the overarching obligations and proper basis certification requirements and to make other technical amendments.

The Act aims to reduce costs and delays for persons involved in civil litigation in Victoria, and improve the effectiveness of the civil justice system. The Act builds on the foundation established by the ***Civil Procedure Act*** 2010 in seeking to give judges and magistrates a clear legislative mandate to proactively manage cases in a manner that will promote the just, efficient, timely and cost-effective resolution of the real issues in dispute in a civil proceeding.

Costs

Part 2 of the Amendment Act gives the Court power to require costs disclosure to a lawyer's own client, and expands the type of costs orders which are able to be made. These sections are quite new.

65B Order to legal practitioner as to length and costs of the proceeding

(1)A court may make an order directing a legal practitioner acting for a party to prepare and give to that party a memorandum setting out—

(a) the actual costs and disbursements incurred in relation to the proceeding or any part of the proceeding; and

(b) the estimated costs and disbursements in relation to the proceeding or any part of the proceeding; and

(c) the estimated costs that the party would have to pay to any other party if that party is unsuccessful at trial; and

(d) the estimated length of the proceeding or any part of the proceeding.

(2) An order under subsection (1) may be made at any time in a proceeding.

65C Other costs orders

(1) In addition to any other power a court may have in relation to costs, a court may make any order as to costs it considers appropriate to further the overarching purpose.

(2) Without limiting subsection (1), the order may—

(a) make different awards of costs in relation to different parts of a proceeding or up to or from a specified stage of the proceeding;

(b) order that parties bear costs as specified proportions of costs;

(c) award a party costs in a specified sum or amount;

(d) fix or cap recoverable costs in advance.

(3) An order under subsection (1) may be made—

(a) at any time in a proceeding;

(b) in relation to any aspect of a proceeding, including, but not limited to, any interlocutory proceeding.

65D Court may revoke or vary order or direction

A court may revoke or vary any order made or direction given by it under this Part.

Disclosure of litigation costs by a lawyer to his or her client is necessary for informed decision-making concerning the conduct of civil litigation. The Act gives the courts a discretionary power to order that a lawyer make costs disclosure to the lawyer's own client. The order may be made at any stage of the proceeding. This will allow the courts, in appropriate cases, to increase the parties' access to information in relation to actual and estimated costs and disbursements incurred prior to trial, thereby encouraging more informed decision-making and the settlement of appropriate cases.

The Act also clarifies and strengthens the courts' discretionary power to make other costs orders aside from the usual order that the losing party pay the winning party's costs. The Act provides that the court may make any costs order that it considers appropriate to further the overarching purpose. Specific powers include ordering costs as a lump sum figure instead of taxed costs, ordering a party to pay a proportion of costs or fixing or capping recoverable costs in advance. Such orders avoid or narrow the scope of a taxation of costs. The objective is to increase the use of other costs orders in appropriate cases, thereby reducing the complexity, time and cost associated with taxation. Orders may be made in relation to any aspect of a proceeding, including, but not limited to, any interlocutory proceeding.

The Amendment Act amends the certification requirements, including extending certification to any 'substantive document' that a party relies on (with some qualification).

Part 3 of the Amendment Act gives the Court greater power to manage expert evidence, including requiring parties to seek directions if the party intends to adduce expert evidence at trial, ordering conferences and joint reports and limiting expert evidence in Court:

Expert Evidence

Expert evidence plays a critical role in civil litigation and is often essential to the just determination of an issue in dispute between the parties. However, expert evidence can also be a significant source of expense, complexity and delay in civil litigation. For example, the disproportionate use of expert witnesses has the potential to increase costs and delays for parties and reduce the effectiveness of the civil justice system as a whole. The inherent complexity and volume of expert evidence can also limit its usefulness to decision-makers.

The amendments introduced by the Amendment Act are extensive, prescriptive and will need to be carefully considered by litigation lawyers. They are too extensive to list here. The main objective of the expert evidence provisions is to reduce the costs and delays associated with expert evidence by providing clear legislative guidance and encouragement for the courts to actively manage and control expert evidence. The provisions also aim to improve the quality and integrity of expert evidence and enhance its usefulness to judges and magistrates.

Some of the expert evidence provisions consolidate existing powers of the courts, for example in the rules of court and practice directions. Although the existing powers of the court may be sufficient for the court to give directions and impose reasonable limits on any party in respect of expert evidence, clear statutory provisions will have greater impact in encouraging the courts to actively manage and control expert evidence. This will also resolve any argument about the limits of existing rule-making powers and will overcome any constraints on the exercise of powers that exist at common law.

The new provisions provide, *inter alia*:

- If a party intends to use expert evidence at trial they must as soon as practicable seek directions from the court; s65G(1),(2)

- The court may give directions concerning the preparation, time for service of an expert's report, limiting evidence to specified issues, limiting the number of experts, and providing for the appointment of a single joint expert or court appointed expert; s65H(2)(2)

- The court may give directions in relation to conferences of experts (with or without the attendance of the parties, legal practitioners or an independent facilitator) and for the preparation of a joint report; s65I(2),(3)

- A joint report may be tendered as evidence of any matters agreed or not agreed but only in accordance with the rules of evidence and practices of the court; s65J

- The content of any joint report must not be referred to at the trial unless the parties agree, or the court directs; s65J(1),(2),(3)

- Except by leave of the court, a party may not adduce evidence from any other expert witness on issues dealt with in a joint report; s65J(4)

- The provisions do not limit any other power a court may have pursuant to its inherent jurisdiction, statutory or otherwise in relation to the management and reducing of expert evidence; s65Q

Case Law Developments

I will now take you through a number of decisions handed down over the past year or thereabouts which I have grouped under subject headings for ease of reference:

Pleadings:

There have been a number of decisions dealing with adequacy of pleadings.

- ***Othman v Stanley*** [2012] VSC 211 at [2] by Mukhtar As J as to the game in pleadings.
- ***Forrest v ASIC*** [2012] HCA 39 at [24], [25], [27] - specific condemnation of ASIC for unduly complicating its pleading which may lead to an unfair trial.
- ***Knorr v CSIRO (No 2)*** [2012] VSC 268 at [44] – principles applying to an application to replead.
- ***Mainfreight v Trailer Corporation*** [2012] FCA 922 at [5] – how to plead a contract.

I will start with a delightful reference in:

Othman v Stanley [2012] VSC 211 at [2] by Mukhtar As J

2 The author (Richard Harris QC) then gave this piece of advice with an astringent ending which would not be to everyone's liking:

> *Pleadings nowadays may be carelessly, inartistically drawn. I assume that your own will be perfect. Look well after their perfections, and don't have too keen an eye for the imperfections of your neighbours. Exercise a little charity, which will cover a multitude of his deficiencies, until the trial, and then you can expose him to the scorn and ridicule of a pitiless world.*

Forrest v ASIC [2012] HCA 39 at [24], [25], [27]

24 ASIC sought to explain and justify the inclusion in its statement of claim of a plea that Fortescue had no genuine or reasonable basis for making the statements as a plea that anticipated Fortescue alleging that the impugned statements were expressions of opinion not fact. But it was neither necessary nor appropriate for ASIC to attempt to use its statement of claim to meet an answer that had not been made.

25 This is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law. It is for the party making those allegations (in this case ASIC) to identify the case which it seeks to make and to do that clearly and distinctly. The statement of claim in these matters did not do that.

.....

27 The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations. As Keane CJ observed in his judgment in the Full Court :

> *"The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues".*

Knorr v CSIRO (No 2) [2012] VSC 268 at [44]

Should the plaintiff's proceeding be dismissed?

44 In Udowenko & Ors v Chief Executive Officer and Board of Directors of St George Bank – A Division of Westpac Banking Corporation & Ors (No 2), Johnson J struck out what was only the second version of a statement of claim, refused leave to re-plead and dismissed the proceeding. In so doing, his Honour said:

> *"**[111]** The question then arises as to whether there should be an opportunity to replead. Courts allow opportunities, within reason, to litigants to refine and replead in circumstances where pleadings are struck out. However, that does not apply in every case, and it does not operate so that pleading after pleading is struck out, with the court*

providing yet another opportunity. That approach would fly in the face of the provisions of the Civil Procedure Act 2005 to which I have made mention.

[112] *...*

[113] *The question whether leave is granted to replead is a related question. It comes down to this: at this point in the litigation, should the court's discretion be exercised to allow a further opportunity to the Plaintiffs to file an amended pleading? The history of this matter, the occasions before Davies J and what are now two hearing days before me provide the court with no confidence that, if leave was granted, the position would be any better next time.*

Mainfreight v Trailer Corporation [2012] FCA 922 at [5] – essential issues concerning pleadings

5 *The plaintiff argues that there is no deficiency in the pleading because the pleading provides a sufficient statement of its case to afford the defendant a fair opportunity to meet it; defines the issues for resolution; and gives the defendant an adequate appreciation of the plaintiff's case to enable the defendant to make a payment into court should it wish to do so: see Dare v Pulham (1982) 148 CLR 658 at 664.*

Overarching Obligations:

Kuek v Devflan Pty Ltd & Anor [2012] VSC 327 (7 August 2012) MUKHTAR AsJ – concerning contraventions **(Kuek #1)**

47 *In this case, I think at the very least the statutory duty to act cooperatively (that is, to work together, to the attainment of the same end) and the duty to act promptly to minimise delay under s 25 are both attracted. I have considered whether Kuek's decision to deliberately remain silent about the review in the face of steps being taken by the respondents to tax their costs was likely to mislead and deceive. He allowed the respondents to go about on the assumption that he would not be appealing. He filed objections to the bill on the taxation yet, according to him, had sent review papers to the Court months earlier. Was there a duty to speak up? Analogically, silence is a difficult area in the field of misleading and deceptive conduct under trade practices laws. The problem here is that unlike commercial cases, it cannot readily be seen that the silence led the respondents to do something that they might not otherwise have done, although they might have taken a different course with the costs of the taxation. I think it is enough to say the obligations under s 20 and 25 have been breached.*

Costs Implications:

Hudspeth V Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No. 4) [2013] VSC 14 (4 February 2013) DIXON J

PRACTICE AND PROCEDURE – Overarching obligations – Issue arising of whether breach of overarching obligations by expert witness and by solicitors instructing that expert has occurred – Where court proposes to make orders on its own motion – Nature of inquiry to be conducted – Directions proposed – Sections 16, 17, 21, 26 and 29 Civil Procedure Act 2010 (Vic).

1 On 12 December 2012 following a trial that commenced on 13 November 2012 and the verdict of a jury of six, I entered judgment for the defendants in this proceeding.

2 When pronouncing judgment, I noted in 'Other Matters', amongst other things, that:

C. The court considers there are prima facie grounds in this proceeding on which the court might be satisfied that Mark Francis Dohrmann of 200 Mount Alexander Road, Flemington, 3031 Victoria and Clark, Toop & Taylor Lawyers (a firm), 67 Jeffcott Street, West Melbourne, 3003, Victoria (Ms Patsy Toop) have contravened an overarching obligation under any or all of ss 16, 17, 21 or 26 of the Civil Procedure Act 2010 (Vic) in relation to the circumstances surrounding a third version of a report of Mark Francis Dohrmann that are identified in the evidence transcribed at pages 601-626, 664-686, 687-786, the file marked D1I(MFI), the submissions transcribed at 1481-1493, 1519-1534, 1590-1609 and the ruling at 1609-1615.

D. Pursuant to s 29(2)(b) of the Civil Procedure Act 2010 (Vic) the court proposes, on its own motion to consider whether any order under s 29(1) of the Act should now be made in the interests of justice.

I ordered and directed that:

3 Mark Francis Dohrmann and Clark Toop & Taylor, a firm, attend before the court at 9.30 am on Wednesday 30 January, 2013 for directions to be given for the hearing and determination of the court's motion that an order under s 29(1) of the Civil Procedure Act 2010 be made against them or either of them.

4 The solicitors for the second defendant shall by 15 January serve a copy of this judgment on Mark Francis Dohrmann and Clark Toop & Taylor.

5 Any application by any party pursuant to s 29 of the Civil Procedure Act 2010 shall be made returnable before me at 9.30 am on 30 January 2013.

4 Sections 28 and 29 of the Civil Procedure Act 2010 provide that a court may take into account any contravention of an overarching obligation in exercising any power in relation to a civil proceeding including exercising its discretion as to costs. The court may

make any order it considers appropriate in the interests of justice if the court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation. Such orders may include orders that the contravening person pay costs or expenses, or pay compensation, or any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

5 *This statutory jurisdiction has, I think, its origins in the ability of the courts to enforce duties owed by practitioners to the court in conjunction with the jurisdiction to award costs against persons who are not parties to the proceeding. That jurisdiction is compensatory, not punitive. ....*

6 *An order under s 29 of the Act may be made on the court's own motion, and that basis for this application has been enlivened....*

8 *Because the trial was conducted before a jury, there was no opportunity to inquire properly into questions about discharge of duties to the court when Mr Dohrmann gave evidence. Neither was their evidence of the consequences for any party to the proceeding arising from the events of the third version of Mr Dohrmann's report.*

15 *....The intention of the legislature is precisely that the court be more pro-active in achieving that purpose. In any event, the inherent jurisdiction of the court over its officers and processes is not in doubt.*

16 *I reject Mr Dohrmann's submission that the court should be hesitant to act on its own motion where it is open to a party to the civil proceeding to move for appropriate relief....*

18 *A court must seek to give effect to the overarching purpose in exercising its powers, which includes the objects identified in s 9 of the Act. Proper identification of the remedy, for which any party to the proceeding contends, affords an opportunity for resolution of disputes by agreement. It is a basic feature of litigation that the entitlement to pursue the benefit of a remedy properly carries a risk of costs.*

20 *Returning to the question of directions that Mr Dohrmann and Clark, Toop & Taylor explain the material circumstances surrounding the third version of Mr Dohrmann's report, I do not accept that those circumstances are not evident on reading the evidentiary material identified in 'Other Matters' in the judgment. I do not accept the submission that Mr Dohrmann and Clark, Toop & Taylor should not be required to explain the circumstances surrounding the third version of Mr Dohrmann's report until 'full particulars of the contraventions' are provided. Had the proceeding been a cause, I may well have questioned Mr Dohrmann and the plaintiff's counsel directly about those circumstances. It was not appropriate to conduct or complete such an inquiry before a jury. What the court now seeks is an explanation from non-parties who either are, or stand in an analogous position to, its officers of conduct that appears to have caused*

additional or wasted costs, possibly as a result of the conduct and outcome in the trial, and of the loss of possible opportunities to compromise the proceeding. The court is yet to consider the precise form of alleged contraventions of overarching obligations that require a response.

BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industriewerke GmbH (No 3) [2012] VSC 414 (13 September 2012) HABERSBERGER J **(Kuek #2)**

General Costs Principles

18 Section 24 of the Supreme Court Act 1986 provides that, in all matters before the Court, the Court has a discretion as to the making of orders for costs, including "full power to determine by whom and to what extent the costs are to be paid", unless otherwise "expressly provided by this or any other Act or by the Rules". Whilst the discretion is "absolute and unfettered" it must be exercised judicially, not arbitrarily or capriciously.

19 Rule 63.28 of the Supreme Court (General Civil Procedure) Rules 2005 ("the Rules") provides that the Court has the power to order that costs be taxed on one or more different bases. Rule 63.31 states that except as provided by the Rules or any order of the Court "costs shall be taxed on a party and party basis".

20 Steuler submitted that, in accordance with the usual principles, it was entitled to the costs of the two proceedings, at least on a party and party basis, because it was the successful party in each case. Steuler submitted that it was a fundamental requirement of the plaintiffs' causes of action under the TPA or in negligence that they establish that they suffered loss or damage. This the plaintiffs failed to do. Therefore, it submitted that there was no reason why the usual rule, that costs followed the event, should not apply. This was particularly the case where the failure or deficiency in proof was an issue within the specific knowledge and control of the plaintiffs.

The Issue by Issue Approach

21 Whilst acknowledging that as a general rule costs should follow the event, WMC and Protec submitted that the Court had a wide discretion to award costs so as to produce a "fair and just" result in all the circumstances, particularly in cases where there were multiple issues and "a particular issue or group of issues is clearly dominant or separable". They submitted that the Court was entitled to examine the "realities of the case" to do "substantial justice" as between the parties on matters of costs. The plaintiffs also drew attention to r 63.04 which empowers the Court to make costs order "in relation to a particular question in or a particular part of a proceeding", and to s 49(3)(k) of the Civil Procedure Act 2010 which empowers a court to make any order for costs "including the proportions in which the parties are to bear any costs".

44 The commencement point is s 7 of the Act which states that the overarching purpose of the Act and the Rules of Court in relation to civil proceedings "is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute." That language tends to be attuned to the process from commencement to trial but there is no reason why it should not also apply to post judgment steps such as taxation. Indeed, under s 16 of the Act, Kuek "has a paramount duty to the Court to further the administration of justice in relation to any civil proceeding in which that person is involved ... ".

45 To my mind, there are a number of obligations that could be identified as having possible application –

(a) the duty to "act honestly" at all times in relation to a civil proceeding – s 17;

(b) the duty to "cooperate with the parties to a civil proceeding and the Court in connection with the conduct of that proceeding ... " – s 20;

(c) the obligation to not engage in conduct which is likely to mislead or deceive – s 21; and

(d) the obligation to use reasonable endeavours in connection with the civil proceeding to act promptly and minimise delay – s 25.

46 It would not be right to denigrate what has occurred here by calling it dishonest. I have used the word "unconscientious" to better describe what happened. By that I mean, even outside the obligations under the Civil Procedure Act it was wrong and unfair in the circumstances and history of this case for Kuek as a legal practitioner to have stayed completely silent about his actions for as long as he did. His actions affect the affairs of the respondents and the conduct of litigation and orderly legal process in this Court. ..... I think if the Civil Procedure Act is to have any meaning, reformist efficacy, and practical influence on lawyers and litigants and the conduct of litigation, then judges ought apply it when circumstances call for it.

Modra v State of Victoria [2012] FCA 240 **(Kuek #3)**

COSTS – legal practitioner – whether legal practitioner should be ordered to pay costs – costs thrown away by reason of failure to comply with orders in relation to statement of claim – costs of unnecessary directions hearing – costs ordered against client – circumstances in which legal practitioner may be ordered to pay those costs – nature of duty of client – overarching purpose of civil practice and procedure provisions – nature of duty of legal practitioner – whether serious dereliction – whether retention of counsel absolved

solicitor – whether solicitor unable to explain failure by reason of legal professional privilege not waived

The nature of the solicitor's duty

31 *Counsel for Mr Kuek was disposed to argue that the question whether Mr Kuek should be ordered to pay costs personally should be determined by reference to the principles found in the decided cases. With one significant qualification, that submission can be accepted. The qualification is that, since 1 January 2010, the duty of a legal practitioner in a proceeding in this Court has been changed significantly. To accept the proposition that ss 37M and 37N of the Federal Court Act leave the situation as it was according to authorities decided prior to 2010 would be to attribute to Parliament the intention to achieve nothing by enacting detailed legislation. In truth, the impact of those sections on the obligations of legal practitioners practising in this Court is significant. Section 37N(2)(b) requires a legal practitioner to assist the party on whose behalf he or she acts to comply with a duty to conduct a proceeding in a way that is consistent with the overarching purpose to which s 37M refers. That overarching purpose has objectives that include efficiency, timeliness and economy, as well as justice. It may be accepted that costs can only be ordered against a legal practitioner in the event of that practitioner's serious dereliction of duty, but it must be recognised that the content of the duty has been changed by legislation.*

The role of counsel

37 *It is true that Mr Kuek did engage senior counsel to settle the amended statement of claim. It is also true that senior counsel told the Court that he took responsibility for any deficiencies in that document. This does not absolve Mr Kuek of responsibility altogether. It was he who filed the document.* .....

Summary judgment – new test under CPA:

Capital One Securities Pty Ltd v Soda Kids Holdings Pty Ltd & Ors [2012] VSC 163 (27 April 2012) BELL J

11 In terms of the standard to be applied, summary judgment can be ordered under s 63(1) if the claim or defence 'has no real prospect of success', which is more liberal

than the standard governing the exercise of the existing powers of the court. Summary judgment or dismissal may be ordered under the court's existing powers where the substantive claim or defence is baseless or unarguable, where a fatal allegation of fact is not answered or answerable or where a determinative proposition of law is not disputed or disputable. The new provisions go further and allow the court to order summary judgment, subject to the residual discretion, in cases in which the claim or defence may be none of those things yet have no real prospect of success.

12 A claim or defence will have no real prospects of success if those prospects are no more than fanciful. A claim or defence may be arguable but only fancifully so, which illustrates the additional scope of the court's new power of ordering summary judgment. It is not sufficient for the party to have a merely arguable case. It must have a real prospect of succeeding, although it need not have a probability of succeeding. A real prospect of success is one that is not fanciful or unreal even if the prospects are less that 50 per cent.

Westpac Banking Corporation v Tesoro [2012] VSC 182 (8 May 2012) LANSDOWNE AsJ

Approach to summary judgment

6 Section 61 of the Civil Procedure Act 2010 (Vic) enables a plaintiff to apply for summary judgment i.e. judgment without a trial on oral evidence "on the ground that a defendant's defence or part of that defence has no real prospect of success". A number of cases have now held that this test is a lower threshold than the test previously to be met by a plaintiff seeking summary judgment under Order 22 of the Supreme Court (General Civil Procedure) Rules 2005 ("the Rules"). Under the previous test the plaintiff was required to show that any proffered defence was bound to fail. Now it is not necessary to show that the defence is bound to fail- it is sufficient if its prospects of success are fanciful rather than realistic. The new test may require examination of the merits of the proposed defence. Although the threshold for summary judgment is lowered, the Court is still required to exercise the power with caution.

Karam v Palmone Shoes Pty Ltd & Anor [2012] VSCA 97 (15 May 2012)

*28 There is then the question of summary judgment. Since the coming into force of s 63 of the **Civil Procedure Act** 2010, the test for summary judgment in favour of a plaintiff in a civil proceeding has been whether a defence or part of it 'has no real prospect of*

success'. In terms, it is a little different to the criterion under Rule 22.02 of the Supreme Court (General Civil Procedure) Rules 2005, of whether the defendant has no defence. But the change in terms was not intended to establish a new or different test; rather to express more accurately the way in which the rule had been interpreted by the courts. It remains, as the High Court said in Fancourt v Mercantile Credits Ltd, that the power to order summary judgment is to be exercised sparingly and not 'unless it is clear that there is no real question to be tried'. Accordingly, we agree with the judge that the Magistrate correctly identified the test for summary judgment as being that it should only be granted if it is clear there is no real question to be tried.

Case Management:

Amcor Ltd & Ors v Barnes & Ors [2012] VSC 434 (20 September 2012) Vickery J

Case Management

75 Further, considerations of case management now assume fundamental importance in determining to grant an amendment to pleadings. The movement towards the reform of civil litigation practices in common law jurisdictions has been a pervasive and worldwide trend over what is now approaching two decades.

76 Reform in the modern era can be traced back to 1994 when the Lord Chancellor of Great Britain instructed the Master of the Rolls, Lord Woolf, to report on options to consolidate the existing rules of civil procedure in England and Wales. On 26 July 1996, Lord Woolf published his report, Access to Justice. It identified a number of principles which the civil justice system should meet in order to ensure access to justice.

77 The reform process in Victoria resulted in the passage of the Civil Procedure Act 2010 (Vic) ('the Act').

*79 In Australia another development of significance has occurred, namely in the common law. On 5 August 2009, the High Court of Australia handed down its judgement in earlier mentioned **Aon**. This decision affirmed the importance, not only to the parties, but to the Court and other litigants, of a 'just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants'. French CJ noted that there is 'an irreparable element of unfair prejudice in unnecessarily delaying proceedings'. In particular, the Chief Justice drew attention to 'the waste of public resources', the 'strain and uncertainty imposed on litigants' and 'the potential for loss of public confidence in the legal system' arising from the adjournment of trials without adequate justification. Similarly, in Aon, Gummow, Hayne, Crennan, Kiefel and Bell JJ referred to the 'ill-effects of delay' upon employees and officers of corporations, as well as upon defendant corporations whose ability to plan financially may be affected by a contingent liability.*

*80 Significantly, in **Aon**, the High Court accepted the principles of case management by the courts, saying:*

> *Such management is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised some time ago, by courts here and elsewhere in the common law world, that a different approach was required to tackle the problems of delay and cost in the litigation process.*

.....

83 The Court of Appeal of Victoria in Trevor Roller Shutter Service Pty Ltd v Crowe reinforced the reasoning in Aon when it observed:

> *As we construe Aon, it was about the impropriety of granting a party leave to make a late amendment to a pleading, in circumstances where that party had failed to act expeditiously, and where to allow the amendment was likely to be productive of wasted costs and resources. More generally, Aon may be thought to have re-invigorated the procedural paradigm, to some extent and for some time diminished by JL Holdings, that time, costs and limited judicial resources are relevant considerations in the determination of whether to allow late applications for amendment and invoke other interlocutory process.*

Wright Rubber Products Pty Ltd v Bayer AG [2010] FCAFC 85 (13 July 2010) MOORE, JESSUP AND DODDS-STREETON JJ

42 There is now no room to debate whether it is necessary for Courts to hear and determine cases with as much expedition as is reasonably possible. It is necessary. The point was made by the plurality in Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27; (2009) 239 CLR 175 at [114] and emphatically made by Heydon J at [156]. The time it has taken to resolve the pleading issues concerning the formulation of the applicant's case in this matter is at odds with what litigants can reasonably expect in this Court about how a docket judge will case manage a case towards resolution by judicial determination or settlement. And it is not simply a question of litigants' reasonable expectations. To the extent that mechanisms for fulfilling this need can be enshrined in legislation, the recent amendments to the Federal Court of Australia Act made by the Access to Justice (Civil Litigation Reforms) Amendment Act 2009 (Cth) and s 37M(1)(b) of Schedule 1 (which speaks of legal disputes being resolved "as quickly, inexpensively and efficiently as possible") and s 37M(2)(d) of Schedule 1 (which contains the objective of "the disposal of all proceedings in a timely manner"), appear to be intended to serve this purpose.

43 Delay can have insidious consequences.

Gatto v Felstead [2012] VSCA 14 (9 February 2012) - granting an extension of time

> *19 My conclusion that the trial judge was entitled to determine that special circumstances existed is reinforced by ss 7, 8 and 9 of the Civil Procedure Act 2010 ('CP Act').*
>
> *20 Section 7(1) of the CP Act provides that the overarching purpose of the Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. Section 8(1) provides that the Court must seek to give effect to the overarching purpose in the exercise of any of its powers or in the interpretation of those powers. Section 9(1) provides that, in making any order, the Court shall further the overarching purpose by having regard to several objects, including the efficient use of judicial resources, the timely determination of the proceeding and dealing with the proceeding in a manner proportionate to the complexity or importance of the issues and the amount in dispute.*
>
> *21 The trial judge was required to have regard to the above provisions of the CP Act in deciding whether special circumstances existed. Although his Honour did not expressly refer to the provisions, his reasoning and conclusion in relation to the extension of time under r 56.02(3) were consistent with them. The granting of the extension of time and the treatment of the O 56 proceeding as the substantive proceeding facilitated the just, efficient, timely and cost-effective resolution of the real issues in dispute.*

Klement v Randles [2012] VSCA 73 (26 March 2012) - granting an extension of time

> *22 Further, the case management principles stated in Aon and the overarching obligations stated in the Civil Procedure Act 2010 tend strongly against granting an extension of time in the present circumstances.*

Discovery Issues:

Group proceedings

National Australia Bank v Pathway Investments [2012] VSCA 168 - Relevance of Civil Procedure Act to making identity and discovery orders in respect of group members

> *Relevance of Civil Procedure Act to making identity and discovery orders in respect of group members*

55 The powers of the Court to make orders under s 33ZF of the Supreme Court Act and r 32.07 of the Supreme Court (General Civil Procedure) Rules must now be exercised in accordance with the Civil Procedure Act. One purpose of the ***Civil Procedure Act*** *is 'to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme Court' (s 1(1)(a)). Another is to provide for an overarching purpose in the conduct of civil proceedings (s 1(1)(c)), which is stated in s 7(1) thus:*

The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

.....

57 Separately to the enactment of the Civil Procedure Act but consistently with the policy of its provisions, the Court has tightened the scope of the discovery which parties to civil proceedings are required to provide under the Supreme Court (General Civil Procedure) Rules. Pursuant to r 29.01(3), parties are now required to give discovery of:

(a) documents on which the party relies;

(b) documents that adversely affect the party's own case;

(c) documents that adversely affect another party's case;

(d) documents that support another party's case.

.....

59 Although the terms of r 32.07 must be acknowledged, s 8(1) of the Civil Procedure Act now requires the exercise of the discretion to make an order for non-party discovery to be exercised in a manner which seeks to give effect to the overarching purpose specified in s 7(1) and furthers the object specified in s 9(1) of that Act. The general powers of the Court in group proceedings specified in s 33ZF of the Supreme Court Act must also be exercised in that manner. In an application for an order for third-party discovery, the exercise of the discretion in r 32.07 and the power in s 33ZF in that manner requires a tighter focus than previously on the relevance of the documents, and how the documents would affect a party's case, in relation to the real issues in dispute, as is now required under r 29.01(3) in relation to party discovery.

Mediation:

Regent Holdings Pty Ltd v State of Victoria and Anor [2012] VSCA 221

Propriety of ordering discovery for mediation

20 We do not accept that submission. Of course, mediation should be conducted without prejudice. But that does not mean that is should be conducted in ignorance. Court ordered mediation is not a game of bluff and bluster in which one party is free to mislead another to conclude that a claim is worth more than it is. It is designed to be an exercise in rational bargaining between relatively well-informed parties aimed at providing just compensation for worthy claims. The more accurate and complete the available information as to quantum, the more likely that rational settlements will be achieved. Where a party seeks the court's assistance to obtain further information which ex facie will facilitate a court directed mediation process, cogent submissions are required to demonstrate that the provision of that assistance will undermine the process.

21 In Thomas v Powercorp Australia Limited (Ruling No 1) J Forrest J said:

> ***[52]** Such powers are clearly given to the court by s 33ZF of the Act which permits the court to:*
>
> *of its own motion or an application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.*
>
> *In Multiplex (No 2), Finkelstein J was of the view that this provision enabled him to make an order for discovery from a group member. I respectfully adopt his Honour's opinion. Moreover, s 48(1) of the CPA will, from January 2011, enable a court to make:*
>
> *any order or give any direction it considers appropriate to further the overarching purpose in relation to pre-trial procedures.*
>
> ***...***

Examination under s 57 CPA re discovery:

Smith v Gould [2012] VSC 89 (20 March 2012) ZAMMIT AsJ

Application for an examination of the defendant pursuant to s 57 of the Civil Procedure Act 2010 (Vic)

25 Section 57 of the CPA provides:

Cross-examination regarding discovery obligations

Unless a court orders otherwise, any party to a civil proceeding may crossexamine or seek leave to conduct an oral examination of the deponent of an affidavit of documents prepared by or on behalf of any other party so that if there is a reasonable basis for the belief that the other party may be –

(a) misinterpreting the party's discovery obligations; or

(b) failing to disclose discoverable documents.

26 The plaintiff submits that there is a reasonable basis to believe that the defendant may be misinterpreting his discovery obligations by failing to disclose discoverable documents.

.....

62 Subject to hearing from the parties on costs, I make the following observations. The parties reached agreement except for the post 2004 Gould Gallery catalogues. While I have dismissed the plaintiff's application pursuant to s 57 of the CPA, given the circumstances of this case and the recent introduction of the Civil Procedure Act, I do not consider the plaintiff's application was misconceived or frivolous. Each party had a summons before the Court. Each party has had some success, but most importantly the parties have reached agreement over issues which would have resulted in unnecessary costs to the parties, delay and use of court resources. I consider an appropriate costs order in relation to the two summonses and the plaintiff's application pursuant to s 57 of the CPA is that such costs be reserved. These observations are relevant to any outstanding costs orders in relation to the objections to the plaintiff's subpoenas.

Multiple proceedings:

Consolidation:

Traditional Values Management v Taylor *[2012] VSC 299 at [8] – [11]*

When should separate proceedings be consolidated?

8 Consolidation of multiple proceedings is dealt with in r 9.12 of the Supreme Court (General Civil Procedure) Rules 2005 which provides as follows:

(1) Where two or more proceedings are pending in the Court, and—

(a) some common question of law or fact arises in both or all of them;

(b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) for any other reason it is desirable to make an order under this Rule — the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.

(2) Any order for the trial together of two or more proceedings or for the trial of one immediately after the other, shall be subject to the discretion of the trial Judge.

9 In Buckley v The Herald and Weekly Times, Nettle JA (with whom Ashley and

Weinberg JJA agreed) said:

> *Generally speaking, applications for the consolidation of proceedings are governed by two principles. First, as Young CJ said in Bolwell Fibreglass Pty Ltd v Foley consolidating orders should very rarely be made; speaking generally, it is better to confine them to cases where several actions have been brought which might have been joined in one writ. Secondly, as was recognised by Herring CJ in Cameron v McBain, where a consolidation order is likely to expose a plaintiff to a substantial risk of real prejudice, the order should not be made. [citations omitted]*

10 *Other matters that have been taken into account by courts in considering whether orders for consolidation, concurrent or sequential trials should be made include:*

- *(a) whether the proceedings are broadly of a similar nature;*
- *(b) the level of overlap of witnesses (lay and expert) between the proceedings;*
- *(c) time savings or other efficiencies that might be achieved;*
- *(d) any procedural or evidentiary difficulties that might be encountered;*
- *(e) inconvenience that might be caused to parties to the separate proceedings if they are required to participate in a consolidated proceeding or concurrent trials;*
- *(f) the stage each proceeding has reached;*
- *(g) the number and nature of the issues that are not common to the proceedings;*
- *(h) whether inconsistent findings might result from separate trials;*
- *(i) the effect on the prospects of non-judicial resolution of the dispute through negotiation or mediation.*

11 *All of these matters are considered in the context of a party's entitlement to a fair trial and the overarching purpose of the Civil Procedure Act 2010 (Vic) and the Court Rules to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.*

Trials at same time:

Humphries v Newport Quays Stage 2A *[2009] FCA 699 at [7] and [11]*

7 *The second order is the gravamen of the applicants' application. The applicants referred to s 23 of the Federal Court of Australia Act 1976 (Cth), but the more directly relevant source of power to make the order is O 29 r 5 of the Federal Court Rules. That rule provides as follows:*

> *"Where several proceedings are pending in the Court, then, if it appears to the Court:*
>
> *(a) that some common question of law or fact arises in both or all of them;*
>
> *(b) that the rights to relief claimed therein are in respect of, or arise out of, the same transaction or series of transactions; or*
>
> *(c) that for some other reason it is desirable to make an order under this rule;*
>
> *the Court may order those proceedings to be consolidated or may order them to be tried at the same time or one immediately after another or may order them to be stayed until after the determination of any of them."*

The application that the proceedings be tried together

The relevant factors

11 There is no dispute that the eight proceedings engage O 29 r 5(a). The critical question then is whether it is appropriate that the proceedings be tried together. In determining this question, the relevant factors are as follows:

1. *Are the proceedings broadly of a similar nature?*
2. *Are there issues of fact and law common to each proceeding?*
3. *Will witnesses (lay and expert) in one proceeding be witnesses in one or more of the other proceedings?*
4. *Has there been an alternative proposal put forward that there be a test case and have the parties agreed to abide the outcome, or, at least, the determination of common issues of fact and law?*
5. *Is there a prospect of multiple appeals with substantial delays if the proceedings are not tried at the same time?*
6. *Will there be a substantial saving of time if the proceedings are tried at the same time, compared with each proceeding being tried separately?*
7. *Will an order that the proceedings be tried at the same time create difficulties in terms of trial management, complexity of procedural issues and difficulties in determining cross-admissibility of evidence?*
8. *Is one proceeding further advanced in terms of preparation for trial than the others?*
9. *Are there parties to one or some only of the proceedings who will be inconvenienced if all of the proceedings are tried at the same time?*

David H Denton, S.C.

Chancery Chambers