



Civil Procedure Update 2014

Recent changes affecting litigation practitioners

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This session will examine recent significant decisions regarding the interpretation of civil procedure legislation in the State jurisdiction.

Contents

Civil Procedure Update 2014 – Recent changes affecting litigation practitioners..... 1

Introduction..... 3

A Starting Point..... 3

Part VB—Case management in civil proceedings..... 4

 7 Overarching purpose 6

 8 Court to give effect to overarching purpose 6

Statutory Developments..... 7

Case Law Developments..... 12

Costs:..... 12

Breach of overarching obligations 16

Summary judgment..... 18

Introduction

There has been a heightened judicial consideration of the **Civil Procedure Act** 2010 (**CPA**) since its commencement three years ago.

The Victorian Court of Appeal has now had the opportunity to consider several matters to come before it involving first instance decisions of judges.

It has quite recently given some very stark rulings on the extent to which the CPA extends to legal practitioners – both barristers and solicitors.

As has happened to me again when agreeing to present a paper for Leo Cussen, having obtained copies of relevant cases and drafted the paper; Parliament in its wisdom on 6 February 2014 has introduced substantial changes to the CPA which in this case is contained in the **Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Bill** 2014 (currently in its Second Reading phase). As there appears no reason to believe that this Bill will have trouble passing through the Parliament I have assumed the Bill will be an Act in similar effect making a number of considerable changes in practice and procedure. I shall come to those in the paper.

This paper will review a small number of the more pertinent decisions which practitioners should be aware of in the conduct of civil litigation.

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.*

The overarching obligations are a fundamental and revolutionary feature of the CPA. The Explanatory Memorandum noted that the '*primary objective of these proposals is to change the culture of litigation, rather than to punish misconduct*'.

The overarching obligations create a model standard for the conduct of parties in the form of a positive set of obligations and duties.

The overarching obligations apply as soon as a party files its first 'substantive document' in a proceeding and they apply to all aspects of a civil proceeding including interlocutory proceedings, mediations and appeals.

The overarching obligations prevail over any legal, contractual or other obligation which a person to whom the obligations apply may have to the extent that the obligations are inconsistent.

You should be aware that in the case of legal practitioners these obligations are additional to the other duties of legal practitioners under common law and statute.

Statutory Developments

The ***Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Bill*** 2014 has not yet passed the Parliament but I have assumed that it will do so in this current term of Parliament.

The Bill provides courts with greater powers to simplify and reduce the costs of discovery and disclosure of documents for parties in civil litigation.

The Bill allows a court to make some novel orders such as :

- to order that parties consult to prepare a statement of the key issues in dispute in the proceeding, which will enable parties to identify the key issues and define the scope of their discovery at an early stage in proceedings;
- to require a party requesting discovery to bear some or all of the costs of discovery, encouraging parties to avoid unjustified or unreasonable costs being incurred;
- if the parties consent, to order a party to provide to another party all documents within their possession or control that are related to the issues in the proceedings, subject to safeguards to ensure that a party is not prejudiced. This will mean that the requesting party rather than the providing party is responsible for the time and cost of reviewing the documents, again encouraging parties to minimise the cost of discovery;
- to order or direct a party to provide an affidavit setting out the volume, manner of arrangement, storage, type and/or location of discoverable documents, or information about a party's document management processes; and
- to order that a deponent of such an affidavit, or another suitable person, can be orally examined in relation to the matters dealt with in the affidavit. The order for an affidavit and an examination on it will allow parties to more easily identify documents, particularly in the context of complex document storage and other IT systems, and minimise disputes about discovery.

New sections 50 and 50A**50 Statement of issues**

- (1) *Without limiting any other power of a court under this Part, a court may order or direct that parties to a proceeding consult and prepare a statement of issues which identifies and summarises the key issues in dispute in the proceeding.*
- (2) *The court may settle the contents of the statement of issues ordered or directed to be prepared under subsection (1) if the parties are unable to agree on the contents of the statement.*

50A Use of statement of issues

- (1) *The court may use a statement of issues in a proceeding in any manner the court considers appropriate to further the overarching purpose in relation to the following—*
 - (a) *pre-trial procedures;*
 - (b) *the conduct of the proceeding at trial.*
- (2) *Without limiting subsection (1), a statement of issues may be used for the purpose of discovery of documents.*
- (3) *A statement of issues does not displace the function of any pleadings in the proceeding.*

New sections 55(2)(c)(iii) and 55(4)&(5)

New section 55(2)(c)(iii) of the Principal Act, will enable a court to make any order or give any directions limiting the obligation of discovery to a class or classes of documents specified in the order or to documents relating to one or more specified facts or issues in dispute. The clause inserts a new subparagraph (iii) to introduce a specific power for a court to make any order or give any directions limiting the obligation of discovery to some or all of the issues set out in a statement of issues filed in the proceeding.

New sections 55(4) will enable a court to order or direct a party to pay a specified amount to another party in relation to the costs of discovery in any manner the court considers appropriate. This may include an order or direction that a party pay a specified amount in advance of discovery for some or all of the estimated costs of discovery.

New subsection 55(5) will enable a court to order or direct that any costs payable under an order made or direction given pursuant to subsection (4) are recoverable as "costs in the proceeding", which means that the costs would be payable as part of the final costs award made in the proceeding. The clause does not limit the courts' discretion to make a different costs order in the proceeding.

55(4) A court may order or direct a party to pay to another party an amount specified or determined by, or in accordance with, the order or direction in relation to the costs of discovery in any manner considered appropriate by the court, including, but not limited to, payment in advance of an amount to the other party for some or all of the estimated costs of discovery.

(5) Without limiting any other power of a court to make costs orders, a court may order or direct that costs payable under an order or a direction under subsection (4) are recoverable as costs in the proceeding.

New sections 55A to 55C

New section 55A will enable a court to order or direct a party to provide to another party all documents in the party's possession or control which relate to the issues in the proceeding. This may include documents that would not ordinarily be required to be discovered in accordance with the rules of court.

An order under this section can only be made if all parties consent and if the court is satisfied as to the matters set out in subsection (2), such as that the documents can be identified and located at a reasonable cost and can be identified by a general description or category. This will ensure that the process is only used in appropriate circumstances and that no substantial prejudice will be suffered by the providing party. An order or direction may specify that documents are to be provided in a searchable electronic format if practicable or in another format considered appropriate by the court.

Documents that are provided under this section are provided on the basis that privilege is not waived, which preserves privilege claims in respect of the documents. A court may also make any order or direction in relation to the maintenance of privilege claims. Subsection (4) enables the providing party to exclude privileged documents prior to providing the documents, at that party's own expense. Where the providing party elects to exclude privileged documents, the providing party must provide the other party with a list of documents for which privileged is claimed and state the grounds on which privilege is claimed.

55A Provision of all documents in party's possession to other party by consent

(1) Subject to subsection (2), if all parties to a proceeding consent, a court may order or direct a party to provide all documents in the party's possession or control which relate to the issues in the proceeding to any other party on the basis that privilege is not waived.

(2) The court may make an order or give a direction under subsection (1) if satisfied that—

(a) giving the receiving party access to the documents is not likely to give rise to any substantial prejudice to the party providing the documents; and

- (b) the documents can be identified and located without unreasonable cost to the party providing the documents; and*
- (c) the documents are able to be identified by a general description or category.*
- (3) An order or direction under subsection (1) may—*
- (a) specify that the documents are to be provided—*
- (i) in a searchable electronic format, if practicable; or*
- (ii) in any other manner or format that the court considers appropriate; and*
- (b) include any other order or direction that the court thinks fit, including, but not limited to, any order or direction in relation to the maintenance of privilege claims.*
- (4) Subject to subsection (5), if an order is made or a direction is given under subsection (1), the party providing documents to which the order or direction applies, at that party's own expense, may exclude any privileged documents prior to providing the documents to the other party in accordance with the order or direction.*
- (5) A party who excludes any privileged documents in accordance with subsection (4) must provide to the other party a list of the documents for which privilege is claimed which specifies the grounds on which privilege is claimed.*
- (6) An order or a direction under subsection (1) may apply to documents whether or not those documents are required to be discovered in accordance with any rules of court.*
- (7) Nothing in this section limits any other power of a court under this Part or the rules of court.*

New section 55B will provide that a court may order or direct a party to provide an affidavit of document management, which may include the matters set out in subsection (2). For example, the affidavit may include information about the volume or location of discoverable documents, the way in which those documents are arranged or stored, or the party's document management processes more generally. This order can be made for the purpose of assisting the court to make appropriate orders or directions in relation to discovery. Subsection (3) clarifies that the affidavit of document management provided under this section does not replace an affidavit of documents, which may still be required to be provided in the proceeding.

55B Affidavit of document management

- (1) *For the purpose of assisting a court to make any appropriate orders or directions in relation to discovery, the court may order or direct that a party provide to the court an affidavit of document management.*
- (2) *An affidavit of document management may include the following—*
 - (a) *the volume, manner of arrangement or storage, type or location of discoverable documents;*
 - (b) *the party's processes of document management.*
- (3) *An affidavit of document management is in addition to any affidavit of documents which may be required in any proceeding.*

New section 55C will enable the court to make an order for the oral examination of the deponent of an affidavit of document management or another appropriate person who is able to provide information about the matters dealt with in the affidavit. The court may specify the time, place and manner of conducting the examination, who is to conduct the examination and who is to pay for the examination in the first instance. This section does not limit any other powers of a court in relation to oral examination, including section 57 of the Principal Act, which enables a party to seek leave to conduct an oral examination of the deponent of an affidavit of documents prepared by or on behalf of any other party to that proceeding in specified circumstances.

55C Order for oral examination

- (1) *A court may order that the deponent of an affidavit of document management be subject to oral examination in relation to the affidavit of document management.*
- (2) *A court may order that an appropriate person (other than the deponent of an affidavit of document management) who is able to provide information in relation to the matters dealt with in the affidavit of document management be subject to oral examination in relation to those matters.*
- (3) *An order under subsection (1) or (2) may—*
 - (a) *specify the time, place and manner of conducting the examination; and*
 - (b) *specify whether the oral examination is to be conducted by—*
 - (i) *the court; or*
 - (ii) *the court constituted by a judicial officer other than the judicial officer constituting the court that made the order; and*
 - (c) *specify who is to pay the costs of the oral examination in the first instance; and*

(d) include any other orders or directions that the court considers appropriate.

(4) Nothing in this section limits section 57 or any other powers of a court in relation to oral examination.

Also note that new section 85 also provides that the amendments made to the Principal Act by Part 2 of the Bill apply to all civil proceedings on and from the date that Part 2 of the Bill commences, regardless of whether the civil proceeding was commenced prior to that date.

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:

Costs:

YARA AUSTRALIA PTY LTD (ACN 076 301 221) v OSWAL & ORS [2013] VSCA 337
REDLICH JA, PRIEST JA, MACAULAY AJA

Over-representation, voluminous material and costs proportionality:

This case is important because it has considered the core case management provisions in the CPA. It has signalled that the purpose of s28 and 29 is both punitive and compensatory, and that parties and practitioners who do not act reasonably and who do not comply with their overarching obligations ought to beware, as a court may be obliged, because of circumstances that arise during a case, to undertake its own inquiry into whether or not there has been a breach of the Act.

The Court of Appeal noted that legal practitioners cannot rely on their client's instructions as an excuse for a breach of their overarching obligations, and must ensure they also comply. This applies to both the seniority of counsel and number of lawyers engaged on the matter, and the volume and relevance of documentation before the Court.

By way of summary, the Court of Appeal noted the following relevant facts:

The leave to appeal application was from a decision by Whelan J to set aside orders of Efthim AsJ that the respondents provide security for costs of the applicants in the proceedings.

The amount of security for costs sought for each party was between \$20,000 and \$80,000.

There were five senior counsel, six junior counsel and five firms of solicitors representing the parties. One group of parties had two senior counsel and one junior acting for them; another had two juniors; and another had senior and junior counsel.

The Court was provided with six application folders comprising submissions, affidavit material, transcript and authorities running to over 2,700 pages. The affidavits filed by the applicants contained many unnecessary documents, many of which were not referred to in the submissions.

Salient observations are set out hereunder:

- 1 *Following the publication of our reasons refusing an application for leave to appeal from orders of Whelan J in which he had set aside the order of an Associate Justice for security for costs, we requested the parties to address the question whether in the conduct of the leave application there had been a breach by any party of their overarching obligation under the Civil Procedure Act 2010 ('the Act') to use reasonable endeavours to ensure that the costs incurred in the proceeding were reasonable and proportionate to the complexity and importance of the issues and the sums in dispute*
- 2 *...The application for leave to appeal was heard in one day, there being five senior counsel, six junior counsel and five firms of solicitors representing the parties. The applicants, ANZ and the receivers, were represented by two senior counsel and one junior, Yara by two junior counsel, Apache by senior and junior counsel, Mr Oswal by senior and junior counsel and Mrs Oswal by senior counsel. Different firms of solicitors represented each party. In addition to the notices of appeal and the parties' written cases, the parties between them filed six lever arch folders of material (the application books).*

The obligation to ensure costs are reasonable and proportionate

- 12 *The overarching obligation in issue is the obligation of the parties and their practitioners to ensure that legal costs are reasonable and proportionate. Section 24 imposes a positive obligation to take steps to ensure that costs are not excessive and empowers courts to sanction those who breach their obligations. Section 24 provides:*

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to -

- (a) the complexity or importance of the issues in dispute; and*
- (b) the amount in dispute.*

- 13 *Section 24 adopts a flexible test. There is plainly no costs matrix or formula that can be applied in determining whether the parties have met their obligations. Rather, the court must weigh the legal costs expended against the complexity and importance of*

the issues and the amount in dispute, in order to determine whether the parties used reasonable endeavours to ensure those costs were proportionate.

- 14 *Each party and their solicitor and counsel have an obligation to comply with the overarching obligation. Whether any of them have breached that overarching obligation is to be determined by an objective evaluation of their conduct having regard to the issues and the amount in dispute in the proceeding.*
- 15 *Legal practitioners, whether solicitor or counsel, involved in the preparation of pleadings, affidavits or other materials that are to be used in the proceeding or who provide advice as to such matters, have individual responsibilities to comply with the overarching obligation. Both solicitor and counsel also have an overarching responsibility with respect to the extent and level of their client's representation. Each must ensure that, having regard to the issues, the extent and level of representation proposed is reasonable and proportionate. Advice or instructions given or received by legal practitioners, and instructions given by the client may inform but will not be determinative of the question whether, viewed objectively, there has been a breach of the obligation.*
- 17 *Section 29 in particular is a unique provision, conferring powers broader than those in any other jurisdiction in Australia, to sanction legal practitioners and parties who fail to meet their overarching obligations.*
- 18 *Section 29 of the Act provides the Court with broader and more flexible powers than under the Supreme Court (General Civil Procedure) Rules 2005 ('the Rules') or under its inherent jurisdiction. Rule 63.23(1) enables the Court to make orders for costs against a legal practitioner who has caused costs to be incurred improperly by a failure to act with reasonable competence and expedition. However, the primary object of r 63.23(1) is not punitive or disciplinary but compensatory, enabling reimbursement of a party's costs incurred because of the default of the solicitor. The primary object of the Rule is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. Rule 63.23(1) also protects solicitors from the negligence or incompetence of counsel.*
- 20 *The Court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates. In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Where there is a failure by the practitioner, whether solicitor or counsel, to use reasonable endeavours to comply with the overarching obligations, it will be no answer that the practitioner acted upon the explicit and informed instructions of the client. A sanction may be imposed where,*

contrary to s 13(3)(b), the legal practitioner acts on the instruction of his or her client in breach of the overarching obligations.

This next decision of the Court of Appeal builds on the Yara decision.

JOSIP KALINIC v ACRON ENGINEERING PTY LTD & VICTORIAN WORKCOVER AUTHORITY [2013] VSCA 363 WARREN CJ, OSBORN JA and ROBSON AJA

6 This Court has a broad discretion in making an award of costs under the Rules. In addition to the principles set out above, the Civil Procedure Act 2010 ('CPA'), which was not in force at the time *Chen* was decided, guides the exercise of this discretion. This Court is obliged to give effect to the overarching purpose of the CPA, which is 'to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.' In addition, the CPA makes plain the overarching obligation on parties to narrow the scope of the issues in dispute. As the Court of Appeal held in *Yara Australia Pty Ltd & Ors v Oswal*, 'the Act [CPA] does not merely reaffirm the existing inherent powers of the court but provides a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck. (footnote 7)'

Footnote 7 [2013] VSCA 337 [21]. See also *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46, [56]-[57] (French CJ, Kiefel, Bell, Gageler And Keane JJ). There the High Court discussed the exercise of powers under the Civil Procedure Act 2005 (NSW), which pursues the overriding purpose of facilitating 'the just, quick and cheap resolution of the real issues in the proceedings' and held that:

The evident intention and the expectation of the CPA is that the court use these broad powers [available under the CPA] to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.

That purpose may require a more robust and proactive approach on the part of the courts. Unduly technical and costly disputes about non-essential issues are clearly to be avoided. However, the powers of the court are not at large and are not to be exercised according to a judge's individualistic idea of what is fair in a given circumstance. Rather, the dictates of justice referred to in s 58 require that in determining what directions or orders to make in the conduct of the proceedings, regard is to be had in the first place to how the overriding purpose of the CPA can be furthered, together with other relevant matters, including those referred to in s 58(2). The focus is upon facilitating a just, quick and cheap resolution of the real issues in the proceedings, although not at all costs. The terms of the CPA assume that its purpose, to a large extent, will coincide with the dictates of justice.

Breach of overarching obligations

RHONDA EATON v ISS CATERING SERVICES PTY LTD & ORS [2013] VSCA 361 NEAVE JA, HARGRAVE and DIXON AJJA

This case whilst being an appeal in a jury matter had also to consider the issue of the appellant failing to comply with court direction requiring expert evidence to be served within time limit. Was this a Breach of overarching obligations?

- 47 *In the past, appellate courts more readily accepted that an adjournment should be granted if its refusal would prevent a party making out his or her case. That predisposition must now be qualified in light of the importance which is now accorded to case management principles, following the High Court's decision in AON, the subsequent enactment of the Civil Procedure Act 2010, and the further authorities mentioned below. Although the 'overarching purpose' of the Act and the rules includes the fair and just resolution of disputes, it also includes the efficient and timely resolution of disputes. So parties cannot casually ignore case management orders or directions. As Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in AON:*

Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a 'just resolution' is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.

In the past it has more readily been assumed that an order for the costs occasioned by the amendment would overcome injustice to the amending party's opponent. In Cropper v Smith Bowen LJ described an order for costs as a panacea that heals all. Such a view may largely explain the decision of this Court in Shannon v Lee Chun, which upheld a decision allowing the plaintiff to raise a new case at the second trial, but which imposed a condition as to costs. The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment. In the present case it is

difficult to see that such an order could be sufficient compensation, given that AON would be required to again defend litigation which was, effectively, to be commenced afresh.

*The views expressed by Lord Griffiths in *Ketteman v Hansel Properties Ltd*, that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants, are also now generally accepted. In *Bomanite Pty Ltd v Slatex Corporation Aust Pty Ltd*, French J said of Bowen LJ's statements in *Cropper v Smith*:*

... That may well have been so at one time, but it is no longer true today ... Non-compensable inconvenience and stress on individuals are significant elements of modern litigation. Costs recoverable even on an indemnity basis will not compensate for time lost and duplication incurred where litigation is delayed or corrective orders necessary.

- 48 *The importance of case management principles in guiding the Court's discretions in exercising case management powers has been reinforced by recent pronouncements of the High Court and this Court.* In *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategies Management and Marketing Pty Ltd & Ors*, the High Court explained the importance of the 'overriding purpose' under the Civil Procedure Act 2005 (NSW) in the exercise of its powers under that Act or Court rules. The High Court referred with approval to the doubts expressed by Lord Woolf MR in *Biguzzi v Rank Leisure PLC*, that 'authorities decided under the old procedure could continue to be binding or even persuasive'. Later, the High Court summarised the purpose of the Civil Procedure Act 2010 in the following terms:

The evident intention and the expectation of the CPA is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.

That purpose may require a more robust and proactive approach on the part of the courts. ...

- 49 *In *Yara Australia Pty Ltd v Oswal*, this Court gave similar emphasis to the importance of the overarching purpose, and to the overarching obligations on parties and their lawyers under the Civil Procedure Act 2010. The Court re-stated that such obligations on parties and their lawyers to this general effect have always existed.*

- 50 *The application for an adjournment of the trial in this case needed to be considered in the above context. The overarching purpose applies to the Court 'in the exercise of any of its powers', however they may arise – including all powers arising under 'any*

procedural rules or practices of the Court'. The Court's power to adjourn proceedings or to refuse an application for an adjournment is therefore subject to the Court's obligation to give effect to the overarching purpose.

Summary judgment

Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158

This decision of the Court of Appeal was the result of a referral of the question from the trial judge as to the appropriate test to use. The Court of Appeal had to decide whether test for summary judgment under s 63 of CPA more liberal than 'hopeless' or 'bound to fail test' applied under Order 22 of Supreme Court (General Civil Procedure) Rules 2005

WARREN CJ, NETTLE JA:

1 *There is before the court a question of law, referred to us pursuant to s 17B(1) of the Supreme Court Act 1986, as to the test to be applied when determining whether to give summary judgment in a civil proceeding pursuant to s 63 of the Civil Procedure Act 2010.*

2 *Sections 63 and 64 of the Civil Procedure Act provide that:*

63. Summary judgment if no real prospect of success

- (1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.
- (2) A court may give summary judgment in any civil proceeding under subsection (1)-
 - (a) on the application of a plaintiff in a civil proceeding;
 - (b) on the application of a defendant in a civil proceeding;
 - (c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

64. Court may allow a matter to proceed to trial

Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because-

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

- 16 *It is to be noted, however, that there are two significant differences between Section 31A of the Federal Court of Australia Act and s 63 of the Civil Procedure Act (and also, therefore, Rule 292 of the Uniform Civil Procedure Rules 1999 (Qld) and Rule 24.2 of the CPR), namely: (1) it prescribes a test of 'reasonable prospect' of success as opposed to 'real prospect' of success; and (2) it contains an express provision in s 31A(3) that, for the purposes of the section, a proceeding or part of a proceeding need not be hopeless or bound to fail for it to have 'no reasonable prospect of success'.*
- 29 *It follows that, for present purposes, the test under s 63 of the Civil Procedure Act should be construed as one of whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success; that the 'real chance of success' test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test; and that, as the law is at present understood, the real chance of success test permits of the possibility that there may be cases, yet to be identified, in which it appears that, although the respondent's case is not 'hopeless' or 'bound to fail', it does not have a real prospect of succeeding.*
- 34 *For the reasons we have given, we would answer the question posed for the determination of the court as follows:*

Upon the present state of authority;

- a) *the test for summary judgment under s 63 of the Civil Procedure Act 2010 is whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success;*
- b) *the test is to be applied by reference to its own language and without paraphrase or comparison with the 'hopeless' or 'bound to fail test' essayed in General Steel;*
- c) *it should be understood, however, that the test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test essayed in General Steel and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;*
- d) *at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of*

action (and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.

Conclusion

There are, of course, now many first instance decisions where judges are availing themselves of the increased powers of the CPA. It may be with the encouragement of the decisions of the Court of Appeal that we have discussed today that there is yet more strife awaiting the hapless legal practitioner.

David H Denton, S.C.

Chancery Chambers