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News update for all practitioners from the Victorian Legal Services Board + Commissioner

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Reasonable and proportionate costs: a lawyer's overarching obligations to the *Civil Procedure Act 2010* (Vic)

In late 2015 the Supreme Court of Victoria handed down [an important decision](#) which all lawyers involved in litigation should be aware of. It touches on the powers of Victorian courts to make orders under the *Civil Procedure Act 2010* (Vic) when an overarching obligation has been breached.

Background

The matter involved the plaintiff (a company) suing a former employee over an alleged breach of contract. By trial, the pleadings had been significantly amended to remove the damages claim, with a claim for nominal damages substituted.

Throughout the matter the plaintiff refused the defendant's numerous offers to settle, and only made counter offers to settle on the basis that the parties bear their own costs, despite having caused the defendant employee to incur very high legal costs defending the damages claim.

At trial, the plaintiff succeeded in establishing some issues, and failed to establish others. By this point, over \$900,000 in legal costs had been accrued: approximately \$600,000 by the plaintiff and over \$300,000 by the defendant, essentially in the pursuit of nominal damages. The defendant submitted the plaintiff breached a number of overarching obligations under the Civil Procedure Act for the way the litigation was conducted.

Analysis by the Court

The Court chose to focus its analysis on whether the overarching obligation under section 24 of the Act had been breached. Section 24 stipulates:

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.

The Court weighed the total costs incurred against the complexity and importance of the issues, as well as the amount in dispute.

Determination

The Court determined that the costs incurred were ‘manifestly not reasonably proportionate to the relatively minor importance of the issues in dispute, which in amount represented purely nominal value’ (see paragraph 72).

The Court also determined that there were reasonable endeavours the plaintiff could have taken to ensure disproportionate costs were not incurred, such as making reasonable settlement offers, or bringing the proceeding to the Court for a disposition hearing instead of following through to trial. In light of this, the plaintiff was found to have breached the overarching obligation in section 24.

It was noted that section 28 of the Act allows courts to take contravention of overarching obligations into account when exercising any power in relation to a civil proceeding. In this context it was determined that the broad language in section 29(f) of the Act empowered the Court to dismiss the proceedings, and make a costs order against the plaintiff. The Court made such orders.

Lessons for all litigation lawyers

This important decision demonstrates the willingness of courts to make orders pursuant to the Act that may have very significant impacts for practitioners and their clients. It is worth briefly remembering some of the other lessons regarding costs that have emerged following commencement of the Civil Procedure Act:

- Practitioners are not discharged of their obligation under s.24 merely because of their client’s instructions (ss.13(2)-23 of the Act).
- Over-representation by Counsel and filing of excessive material that is not directly relevant to proceedings may constitute a breach of the overarching obligation in s.24 of the Act. – [Yara Australia Pty Ltd & Ors v Oswal \[2013\] VSCA 337](#).
- Failure to comply with procedural orders of a court to save costs is likely to be contrary to the overarching obligations, even where practitioners act on a ‘no win, no fee’ basis and do so to reduce costs. – [Eaton v ISS Catering Pty Ltd & Ors \[2013\] VSCA 361](#).
- Courts are willing to make orders that have direct and indirect consequences for practitioners in response to a breach of the overarching obligation in s.24 of the Act, including:
 - Costs orders against the practitioner – *Yara Australia Pty Ltd & Oswal*
 - Dismissal of a proceeding – *Actrol v Coppi [2015] VSC 758*.

These lessons are worth keeping in mind if you are representing parties to litigation.

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