

# THE COST OF EXCESS

The Court of Appeal has ensured the *Civil Procedure Act* has some real bite.

In the recent judgment of *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337, the Court of Appeal found that the legal practitioners acting for the applicants in an unsuccessful appeal had breached their overarching obligations to use reasonable endeavours to ensure that the costs incurred were reasonable and proportionate to the complexity and importance of the issues and sums in dispute.

The ANZ, receivers appointed by the ANZ, and two other applicants had sought security for costs in proceedings in the amounts of \$86,361, \$31,808.20 and \$22,810.80 respectively. Associate Justice Eftim awarded security, but those orders were set aside by Whelan J. An application to the Court of Appeal for special leave to appeal from the orders of Whelan J was refused and the question of costs was dealt with in the joint judgment delivered by Redlich JA, Priest JA and Macaulay AJA on 27 November 2013.

The Court observed that the enforcement of the overarching obligations under the *Civil Procedure Act* 2010 (Vic) (the Act) had not previously been considered in any detail at appellate level. The Court took the opportunity in its judgment to discuss the overarching obligations at length so as to provide guidance to judicial officers and practitioners.

The Court noted that the Act's purpose was to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in Victorian courts, and that the need to ensure that costs were reasonable and proportionate was a core objective.

The Court noted that it is obliged to give effect to the overarching purpose of the Act "to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute".

Significantly the Court noted at [14] that the legal practitioner will not be relieved of this overarching responsibility because of the instructions of their client:

"The legal practitioner's duty is non-delegable. The obligation will override their duty to their client where the discharge of that duty would be inconsistent with the overarching obligations. The legal practitioner will not be relieved of this overarching responsibility because of the instructions of their client".

The Court also commented that the legal practitioner must give careful consideration to the level and extent of the representation that is necessary for a party.

The overarching obligation is also relevant to the extent of material to be filed with the Court.

The Court noted at [40] that the Act is designed to protect against the inappropriate use of the Courts as a public resource:

"Overly voluminous application material strains the administrative resources of the Court and the time of Judges themselves. Where a large volume of material is provided to the Court that is unnecessary and excessive, there will be a prima facie case that the overarching obligation has been breached".

## Was there unnecessary representation?

Each of the four applications for security for costs was supported by submissions that were to a large extent in the same terms. The Court noted that the applicants were represented by seven counsel, three of them senior counsel.

The Court accepted that each applicant had a separate and distinct interest and was entitled to separate representation, and the Act does not require a party to forfeit that right. The Court also accepted at [39] that the parties were not overrepresented in this matter:

"In the context of the broader litigation, which is likely to be immensely complex and expensive, it was appropriate that each party be represented in this application by the counsel that were engaged".

The Court also noted at [38] that the conduct of counsel at the hearing itself did not breach the overarching obligation as there is no unnecessary duplication of submissions with parties simply adopting the primary submissions and, when necessary, making "discrete and brief but important submissions which were relevant to the client's position".

## Were the application books excessive?

The Court's real concern was with the material in the application books.

The Court was provided with six application folders comprising submissions, affidavit material, transcript and authorities running to over 2700 pages. The Court considered at [40] that "much of this material was either peripheral to the application or entirely unnecessary".

The Court stated at [52]: "The Act's objective is the reform of the culture of

unnecessary expenditure in civil litigation . . . The Court was burdened with excessive material. The applicants and the respondent were burdened with the cost of that material. There has been a breach of the overarching obligations to ensure that costs are reasonable and proportionate by including in the application books voluminous material that was extraneous or repetitious and excessive".

The respondents argued for indemnity costs. The Court accepted at [57] that the applicants had not "engaged in unmeritorious or deliberate improper conduct such as would warrant the Court showing its disapproval and at the same time preventing the respondents being left out of pocket".

The Court did however penalise the solicitors for the appellants with the following orders:

- each applicant pay the respondent's costs;
- each applicant's solicitor indemnify the applicant for 50 per cent of the respondent's costs incurred as a consequence of the excessive or unnecessary quantum of the application books;
- each applicant's solicitor be disallowed recovery from the applicants of 50 per cent of the costs relating to preparation of the application books and the costs incidental thereto.

The Court further directed that the solicitors for each of the applicants provide their clients with a copy of the reasons of the Court and of the orders.

The Court of Appeal has shown the overarching obligations imposed upon practitioners must be taken seriously.

It is now clear that legal practitioners must use reasonable endeavours to ensure that the costs incurred in connection with a proceeding are reasonable and proportionate to the complexity and importance of the issues and the amount in dispute. The Courts will now examine the level of representation and the relevance of the material filed with the Court. If the practitioner is found in the conduct of proceedings to have breached the overarching obligations, the practitioner personally may be ordered to pay the extra costs incurred by the other party and prevented from recovering those extra costs from the practitioner's own client. ●

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