

**Colin
Biggers
& Paisley**

Ending Proceedings Early.

Resolving litigation as soon as possible

11 February 2026

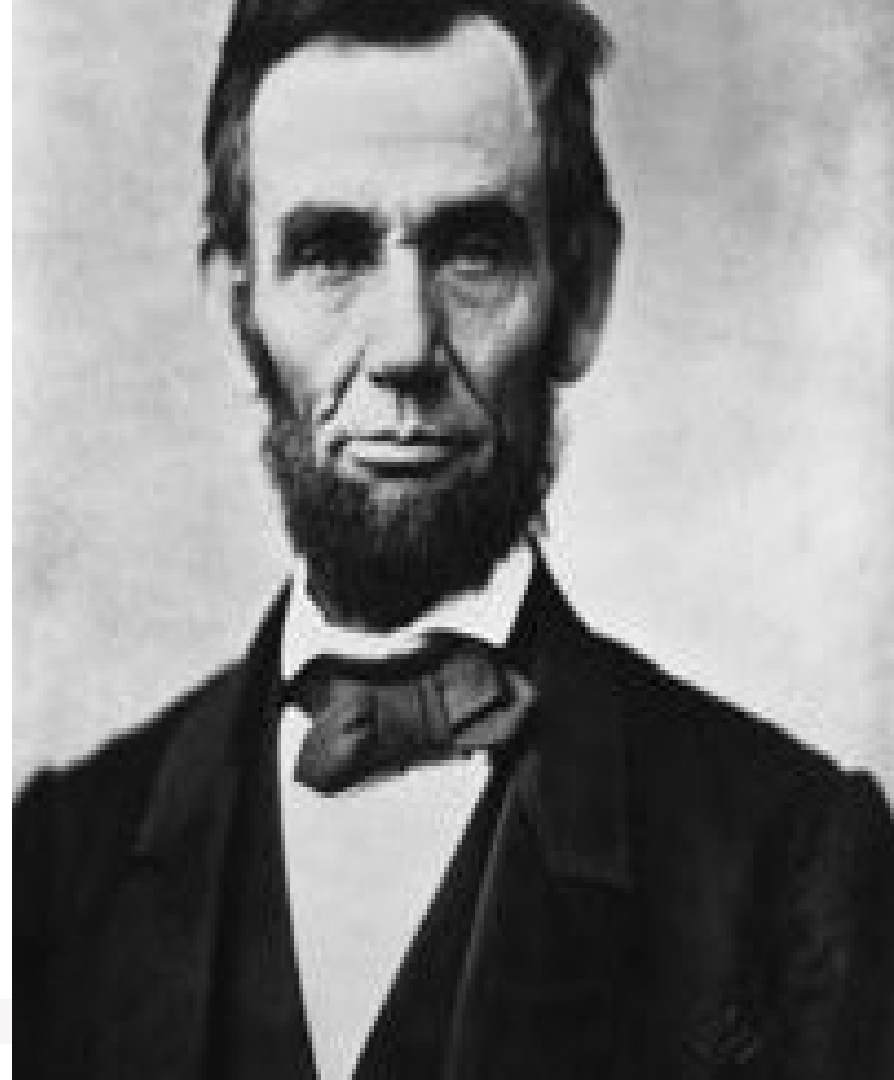


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“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

— **Abraham Lincoln**



Why Settle?

Cost-Effectiveness: Reduces expensive legal fees and procedural costs.

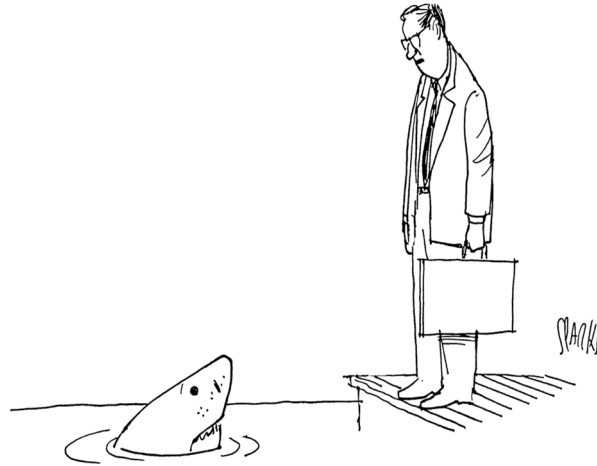
Control & Certainty: Parties decide the outcome, avoiding the risk of a judge's ruling.

Time & Efficiency: Avoids prolonged legal battles that consume "time, and money, and rest, and friends".

Confidentiality: Settlements can keep records sealed, protecting trade secrets.

Reduced Emotional Strain: Trials require reliving traumatic events and enduring cross-examination. Settling removes this significant emotional strain.

Creative Solutions: Allows for tailored agreements (e.g., payment plans) that courts cannot order.



"My client is willing to settle.
Do you still have the leg?"

CartoonStock.com

Why Not Settle?

Inability to afford it: The settlement proposed is unable to be paid.

Think they are right: Parties believe they will win and the evidence supports their world view.

Don't want to be wrong: Parties do not want to concede they are in error.

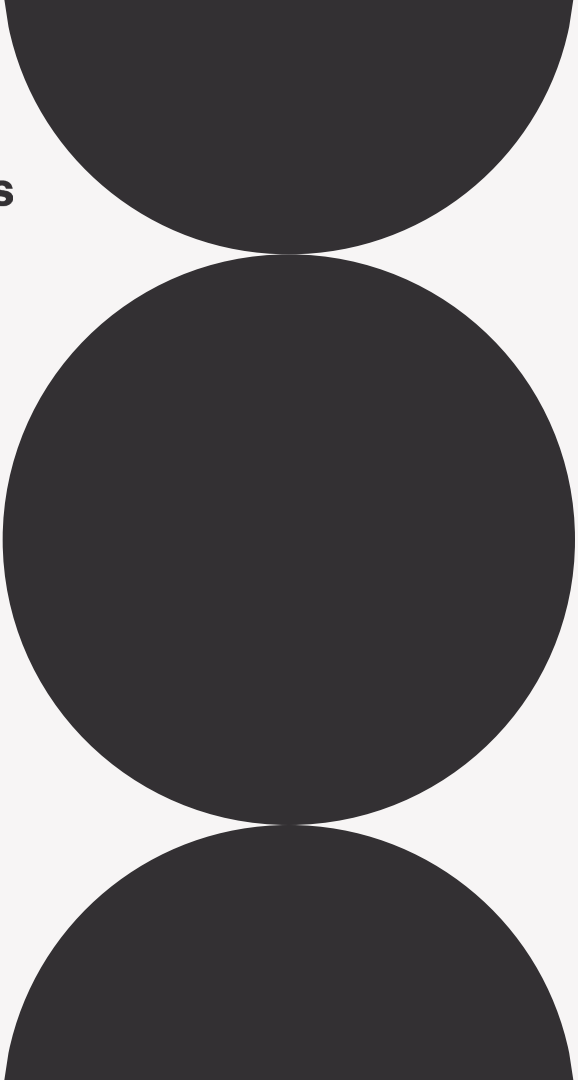
Fear of being taken advantage of: They fear any settlement will better suit their opponents.

They feel exposed: They feel vulnerable.

Getting poor advice: Legal advice recommends litigating.

Thinking "below the line": Parties are not thinking strategically or problem solving.





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"If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle"

**Sun Tzu,
The Art of War**

Approximately 5th century BC

The 3 P's: Preparation, Preparation, Preparation

1. Know your matter:

- Strengths and weaknesses
- Evidence - oral and written
- Who is your opponent - resources, advisors, etc.

2. Stand your LoD out from the pack:

- Know what you're required to trigger (i.e. notice provisions or call for payment)
- Standard LoD gets standard response
- Who is your audience?
- Produce documents?
- What response?

3. Establish the ground rules early:

- "If you don't by # we will...."
- Do what you say
- Make contact - show that you have mastery over the subject matter and the tools of your trade
- Establish and maintain pressure
- Create and maintain momentum



The Proceeding

Use the **KISS** principles:

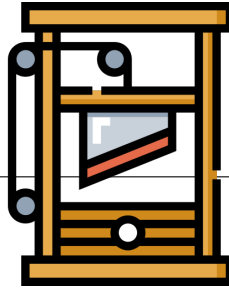
- A complex claim/defence needs complex proofs;
- Draft your claim/defence knowing what you need to prove/defend;
- Don't be afraid of pleadings;
- Identify the key evidence you can easily obtain and use.



Pleadings are intended to define the issues in dispute. They are your tools of trade.

- Know what you are intending to do;
- Know what your opponent will try and do - generally it's the opposite to you - if you want simple, they want complex.

Default Judgment



Be aware of time frames:

- If you act for the Plaintiff, make sure you know what date proceedings were served.
- Court rules establish when parties must file documents and what you can do if they don't.
- To set aside a judgment, a party must go on affidavit - that is much more difficult, costly and onerous than filing an appearance or a defence.
- Setting aside a judgment by consent - after a settlement has been reached is far more efficient use of all parties' time.

Guillotine orders / self-executing orders:

- An order which states that the action will be dismissed, or judgment may be entered unless a party takes a specified step in the proceedings within a particular time.
- Set your opponents up for such orders from the beginning.
- Momentum - complete identified matters early and note non-compliance immediately.

A default judgment is a binding Court order made in favour of a plaintiff when a defendant fails to respond to a proceeding within the required timeframe. It is entered without a full trial, assuming the plaintiff's claims are true, because the defendant did not defend themselves.

Default Judgment

Default in complying with rules of Court and/or Orders

- **Rule 24.05 of the SCR and CCR:** the Court has inherent jurisdiction to dismiss a proceeding for want of prosecution or for a party's failure to follow court orders or rules.
- This power is to be exercised sparingly.
- Think about whether you can show that:
 - your opponent has caused inordinate and inexcusable delay in complying with the rules;
 - whether the delay is likely to materially prejudice your client, and/or has created a substantial risk that your client has been denied a fair hearing.



When to consider default judgment?

- the plaintiff fails to serve its statement of claim;
- the defendant has failed to file an appearance;
- the defendant has failed to file a defence within the time prescribed by the rules of court;
- A party has failed to comply with an order for the discovery and production of documents or for the supply of interrogatories;
- the plaintiff fails to set down the action for trial;
- the plaintiff fails to comply with a case management requirement; and
- a party fails to appear at trial.

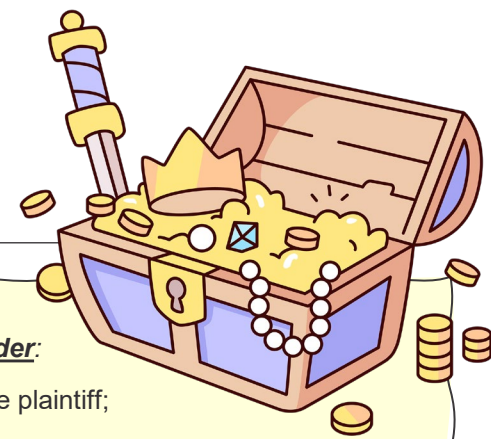
Security for Costs

Security for costs requires a plaintiff to pay a certain amount of money into Court before the proceeding can continue. Money is held until the proceeding is resolved so that it is available to the defendant to meet any costs order they might obtain.

- **Reg 62.02 SCR: Security for costs may be ordered where:**
 - the plaintiff is ordinarily resident out of Victoria;
 - The plaintiff is suing, not for his or her own benefit, but for the benefit of another person;
 - there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so;
 - a proceeding by the plaintiff in another court for the same claim is pending;
 - the address of the plaintiff is not stated or is not stated correctly in the plaintiff's originating process;
 - the plaintiff has changed the plaintiff's address after the commencement of the proceeding to avoid the consequences of the proceeding.

Court will usually consider:

- the impecuniosity of the plaintiff;
- The residence of the plaintiff;
- whether it has any assets in the jurisdiction in which the claim has been commenced;
- whether the plaintiff can satisfy an order for security for costs not only from its own resources, but from other resources including those who will benefit from the litigation; and
- whether an order will frustrate the litigation / stifle the action;
- Public interest;
- Timing of the application for security - Don't bring it too late!!



Security for Costs



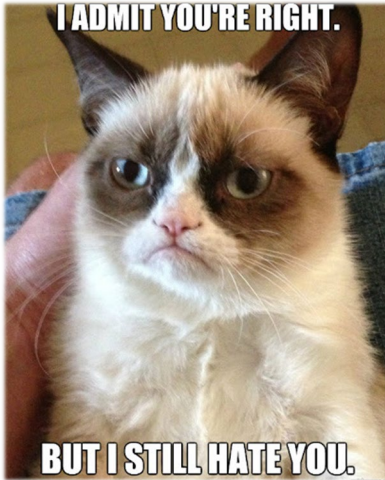
Why bring an application?

- Valuable tool for defendants - forces a plaintiff to "put their money where their mouth is" early in the litigation;
- Guards against a situation where a defendant is dragged into a proceeding and forced to incur significant costs, without any chance of later recovering those costs if they successfully defend the claim (if, e.g. the Plaintiff has no assets).
- Can either stall proceedings before they get going (proceedings are stayed until security is given) or bring them to an end if the security is not provided
- However, note that it is very rare for a security for order to be made against a natural person.

Rule 62.04 SCR = Court may dismiss a claim if plaintiff fails to give security.



Notice to Admit



Notice to admit - Order 35 SCR / CCR

- Two types - an invitation to admit documents, or an invitation to admit facts.
- Unless, within a specified time (not less than 14), the other party disputes the facts or documents expressed in the notice, that party is taken to admit those facts.
- Limit the issues that are contested at trial. For example, liability might be admitted but damages may be contested.

If you can get your opponent to admit liability. this halves what you need to prove at trial;

Rule 35.06 = if your opponent denies facts or the authenticity of documents in the notice, and afterwards those facts or documents are proven, that party is liable for costs.

Benefits:

- Saves time at hearing (trims away uncontroversial issues / agreed evidence);
- Failure to respond or blanket denials has costs consequences for you opponent;
- narrows the issues in a dispute; and
- places an opponent under pressure by compelling it to clarify its case.
- Admissions can't be withdrawn without leave of the Court: Regs 35.03(3), 35.05(3)

Splitting Issues & Separate Trials

Determination of a preliminary question

- Splitting issues or having a preliminary question determined can be a useful means of resolving the dispute without the need for a lengthy trial.
- Cost effective and timely way to deal with points of contention (or conversely, to resolve non-contentious / agreed matters).
- **Rule 47.04 SCR** = Court may order that any question in a proceeding be tried before, at or after the trial of the proceeding.
- **Rule 47.05 SCR** = if the determination of any question in a proceeding tried separately from the proceeding substantially disposes of the proceeding, or renders the trial of the proceeding unnecessary, the Court may dismiss the proceeding, make any other order, or give such judgment as it thinks fit.

ALSO CONSIDER:

Expert referrals -

- Technical issues may be exclusively referred to an expert for determination, leaving the Court to determine damages.

Statement of agreed facts -

- Less coercive than notice to admit and similarly limits the issues in dispute.
- May be preferable to a notice to admits because the other party can't object to it.



Summary Judgment

Summary Judgement is an expedited procedure under the Civil Procedure Act 2010 allowing a Court to decide a civil case—or part of it—without a full trial if a claim or defence has "no real prospect of success".

Section 63 of the CPA

- **Relevant test** = 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**.

Section 64 of the CPA

- Court may still allow the matter to proceed to trial where:
 - summary disposal is not in the interest of justice;
 - The dispute is of such a nature that only a full hearing on the merits is appropriate.

NOTE:

- It can be applied for by plaintiffs, defendants, or initiated by the Court itself
- Bring it early in the proceedings!
- You only get one shot (without leave)

Earlier decisions crucial:

- How is the claim put
- What evidence can be put by you
- What will your opponent say?
- Complexity vs simplicity

Summary Judgment

"No real prospect of success"

- CPA test intended to liberalise process - previously:
 - "No defence or no defence except to the amount of the claim"
 - "Hopeless" or "bound to fail"

The High Court has noted:

- That the power to order summary judgement should be "**exercised with great care**"
 - *Spencer v Commonwealth* (2010) 241 CLR 118 at 131-132
- However, if "there is a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way" summary judgement will be appropriate

- *Agar v Hyde* (2002) 201 CLR 552 at 575-576



Summary Judgment

Lysaght Building Solutions v Blanalko Pty Ltd (2013) 42 VR 27, [35]

Warren CJ and Nettle JA stated:

"[35] 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."

Procedure governed by:

- Part 2 of Order 22 of the relevant Victorian Court Rules for an application made by a plaintiff; and
- Part 3 of Order 22 for an application made by a defendant.
- Evidential burden shifts (party served must show cause why judgement should not be entered)

Summary Judgment

What do you need to file?

A summary judgment application needs:

- To be made by summons;
- Supported by an affidavit verifying the facts on which the claim is based and state the belief that the defence to the claim has no real prospect of success.

The responding party then required to "show cause" as to why summary judgment should not be granted.

Can be done by:

- pointing to a deficiency in the material in support of the application;
- or by filing affidavit material in response as to the merits of its claim.

When is summary judgment inappropriate?

It has been found that summary judgment is not appropriate in cases:

- that require the Court to closely analyse the facts to:
 - resolve a disputed construction of a contract, or
 - assess whether, on the facts, a duty of care arises;
- or where the consequences of a proceeding may affect a large number of persons.

What are the benefits?

1. Requires the defending party to go on oath.
2. Demands that the defending party consider its claim and its defences - are they sound, can they be proven.
3. Might be able to cross examine.



Strike Out Applications



Defective pleadings?

- Consider is Order 23 of the Supreme Court Rules.
- Should only be used in plain and obvious cases.
- A party is entitled in justice to have the opposing party's case presented in an intelligible form and in compliance with the rules of pleading.

Grounds to strike out - Rule 23.02 of the SCR:

Where an indorsement of claim on a writ or originating motion or a pleading or any part of an indorsement of claim or pleading -

- does not disclose a cause of action or defence;
- is scandalous, frivolous or vexatious;
- may prejudice, embarrass or delay the fair trial of the proceeding; or
- is otherwise an abuse of the process of the Court -

the Court may order that the **whole or part** of the indorsement or pleading be **struck out or amended**.

At any time during a proceeding, a party may bring a strike-out application before the Court.

Court may order that the offending pleading, be either amended or struck out. If only a part is objectionable, that part may be struck out, if it is severable from the rest. If it is not severable, or if the pleading as a whole is defective, the court may strike it out entirely, and is not bound to reframe it to the party's benefit

What can you strike out?

- ❖ Strike out or limit the plaintiff's statement of claim;
- ❖ Strike out or limit a defence;
- ❖ Strike out or amend any document (wholly or partially);
- ❖ Strike out or disallow witness statements, outlines or any further evidence.

Strike Out Applications

Directions and orders of the court

- **Rule 24.02 SCR** - if a party fails to comply with an order to give particulars of any pleading or with an order for the discovery or inspection of documents or for answers to interrogatories, the Court may order, if the party is the plaintiff, that the proceeding be dismissed, or if the party is a defendant, that the defendant's defence be struck out.

Inherent Jurisdiction

- **Rule 24.05 SCR** - the Court also has inherent power to dismiss a proceeding for want of prosecution, or order that the defence be struck out and judgement be entered into.

Civil Procedure Act - case management

- **Section 51** - provides sanctions which may be applied to any party who contravenes a case management direction, which includes, *inter alia*, that the Court can:
 - strike out or limit any claim made by a plaintiff;
 - strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly;
 - strike out or amend any document filed by the person, either in whole or in part;
 - disallow or reject any evidence that the person has adduced or seeks to adduce;

Benefits?

- ❖ Strategic way to shorten litigation and/or improve your chances of winning - e.g. your opponent may not be able to defend the proceeding, or lead evidence.
- ❖ Your opponent may incur additional costs of re-pleading;
- ❖ Your opponent may have to amend their cause of action, which might not be supported by the evidence.



Strike Out Applications

Hodgson v Amcor Ltd (2011) 32 VR 495, [99]:

Court identified a **non-exhaustive** list of discretionary factors which may be relevant to the exercise of the Court's strike out powers:

- the effect of the conduct on the just resolution of the real issues in an efficient, timely and cost-effective manner;
- the extent of any **delay** caused by the conduct and the prejudice associated with it, and whether the delay was inordinate and inexcusable;
- whether the history of **non-compliance** indicates an unwillingness or inability to co-operate with the court and other parties;
- whether the **non-compliance** is continuing to occasion unnecessary **delay**, expense or other prejudice to the other party;
- any **prejudice** which might reasonably follow for the other party;
- Whether **efficiency** in the conduct of the proceeding by other parties, in other cases before the court, has been compromised;
- the veracity and reasonableness of any explanation given for the contravening conduct;
- whether the default was **intentional** or the product of contumelious conduct;
- whether any alternative remedy by way of a lesser, but equally efficient, sanction is available;
- whether the contravening conduct meant it was **impossible to conduct a fair trial**, or would make any judgment in favour of the offending party unsafe, or would render any further proceedings unsatisfactory and prevent the court from doing justice, or there is a real risk of any of these things happening, and
- whether the object of the order which has been contravened is ultimately secured.



Stay Applications

A claim may be effectively disposed of without the need for a trial in circumstances where a court grants a stay of proceedings.

BUT NOTE: generally, only available in extreme cases where there is "a fundamental defect "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences" - *Dupas v The Queen* (2010) 241 CLR 237, 245 [18].

Must so completely lack foundation in fact or law that no legitimate pleading amendment could remedy the problems inherent in it.

Court's Inherent jurisdiction:

- Courts have power to grant a stay of a proceeding under its inherent jurisdiction. Inherent jurisdiction is supplemented by the relevant court rules.
- All Courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression.

Court Rules:

Rule 23.01 SCR: Where a proceeding generally or any claim in a proceeding—

- **is scandalous, frivolous or vexatious; or**
- **is an abuse of the process of the Court—**

the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.

Where the defence to any claim in a proceeding is scandalous, frivolous or vexatious, the Court may give judgment in the proceeding generally or in relation to any claim.

Stay Applications

Principles concerning a permanent stay are well settled. They have been summarised in *Re AWB Ltd (No 10)* (2009) 76 ACSR 181 [264]:

- The court has an inherent jurisdiction to stay its proceedings as an abuse of process if the proceedings are **unjustifiably oppressive and vexatious or manifestly unfair or otherwise bring the administration of justice into disrepute among right-thinking people**.
- The jurisdiction should only be exercised in exceptional cases or sparingly with the utmost caution.
- Abuse of process is not limited to cases where the proceedings have been brought for an improper purpose or where there is no possibility of the court affording the affected party a fair hearing.
- The circumstances in which abuse of process may arise are extremely varied and the courts have refrained from fixing categories.
- The court should undertake a weighing process involving a subjective balancing of a variety factors and considerations.



Stay Applications

'Scandalous, frivolous or vexatious':

Hoh v Frosthollow Pty Ltd [2014] VSC 77, [12]:

- **Scandalous**: Allegations made in a pleading for the purpose only of abusing or injuring the opposite party and allegations which are indecent or offensive are scandalous within the meaning of the rule, and liable to be struck out.
- **Frivolous or vexatious**: These words in combination have traditionally been used to describe a wide variety of circumstances in which a claim is found to be groundless or lacking a legal basis or merit.

Abuse of process:

Broad and incapable of being described by closed categories, but at least one of three characteristics will be present in many cases of abuse of process:

- The court's processes being invoked for an illegitimate or collateral purpose;
 - The use of the court's procedures being unjustifiably oppressive to a party;
 - The use of the court's procedures bringing the administration of justice into disrepute.
-
- **Improper purpose**: "*using a proceeding as a means of obtaining some advantage that the proceeding is not designed to provide or some collateral advantage beyond what the law offers*" - *Moti v The Queen* (2011) 283 ALR 393, 397 [10], citing *Rogers v The Queen* (1994) 123 ALR 417, 433–44.

Stay Applications



- A court may also stay proceedings in circumstances where it is so **unjustifiably oppressive** that it amounts to an abuse of process.
- This may include where:
 - a proceeding is incapable of serving any legitimate purpose; or
 - regardless of the purpose for bringing proceedings, where it is inevitably doomed to fail; or
 - where it unnecessary duplicates existing or previous proceedings.

Settlement



ADR resolutions

- **Section 66 of the CPA** = Court may order, at any stage of a proceeding, that all or part of the proceeding be referred to ADR.
- May include:
 - Mediation;
 - early neutral evaluation
 - judicial resolution conference
 - settlement conference
 - referring a question, a civil proceeding, or part of a civil proceeding to a special referee
 - expert determination
 - conciliation
 - arbitration

Supreme, County and Magistrates Court Rules

- In pre-trial procedures, courts can use ADR to assist in the conduct and resolution of all or part of proceedings
- **Rule 50.07(1)** = Supreme and County Courts have the power to refer a proceeding, or a part of a proceeding to a mediator, at any stage, with or without the consent of any party.
- **Reg 50.01 of MCR** = appropriate dispute resolution has the same meaning as CPA. Includes:
 - pre-hearing conference;
 - mediation;
 - early neutral evaluation; and
 - settlement conference.

ADR is defined under the CPA as a process that a party attends, or participates in, for the purposes of negotiating a settlement of the proceeding or resolving or narrowing the issues in dispute.



Settlement



Even if ADR / mediation is "unsuccessful" it:

- allows you to gain a better understanding of your opponent's case (its strengths and weaknesses);
- narrows the issues in dispute;
- opens a dialogue between the parties to the proceeding;
- creates future and ongoing opportunities for settlement to occur,

all of which may ultimately, or indirectly, achieve the goal of resolving the proceedings earlier

Court's Rules protect the confidentiality of anything said or done in a mediation that is not presided over by a judicial officer. This encourages frank discussions.

It allows the parties to actively negotiate possible settlement outcomes (including commercial resolutions)

For maximum benefit ensure:

- ❖ You select a skilled mediator who is best suited to the specific needs of the matter and/or client;
- ❖ You are fully prepared;
- ❖ You have a full knowledge of the relevant facts;
- ❖ You know the strengths and weaknesses of your case; and
- ❖ You have considered the strengths and weaknesses of your opponent's case

Conclusions

In this presentation we have explored the various tools available to end proceedings early. In particular, we have discussed:

- default judgments & self-executing orders;
- security for costs applications;
- notices to admit;
- splitting issues;
- summary judgment applications;
- strike out applications;
- stay applications; and
- alternative dispute resolution and settlement.

You should be aware of how each applies and operates, whether directly or indirectly, to shorten litigation.



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Questions?



**Colin
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Thank you.

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