

AWARDING COSTS IN ARBITRATION

A VIEW FROM THE BENCH*

The Hon. Justice Clyde Croft**

Supreme Court of Victoria

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Introduction

Although costs issues are in many cases a critical obstacle to the settlement of arbitration or litigation proceedings and are, understandably, very much in the minds of parties, as a legal subject, it does not generally inspire great interest. However, there are important issues with respect to the conduct of arbitration or litigation proceedings, in relation to which the manner in which costs liability is applied may have significant consequences.

The principles applicable to the awarding of costs in arbitration or litigation proceedings – particularly in relation to the exercise of the discretion by an arbitrator or a judge – are reasonably clear.¹ Consequently, I do not intend to provide an exposition of those principles. Another caveat is that I feel that it would be impertinent of me, to say the least, as an Australian judge to presume to lecture you or comment upon New Zealand civil procedure or the approach of the New Zealand courts. I do think, though, that as a Judicial Fellow of AMINZ I may be able to make some useful comments.

Modern Commercial Arbitration and Commercial Courts

For the purpose of setting a context for these comments, I observe at the outset that there is far greater similarity between commercial arbitration proceedings and those adopted by courts, such as the Commercial Court in the Supreme Court of Victoria, than is generally understood. We see, continually, the now rather hackneyed comparisons made between arbitration and civil litigation in the courts – and the advantages of the former. In saying this, I am not suggesting that there are not real advantages in well run arbitration processes, but there are also advantages in well managed litigation processes – all of which need to be properly considered by parties and their advisers in deciding which process to utilise, to the extent that they may have a choice.

¹ AAP Willy, *Arbitration in New Zealand* (2nd ed, Lexis Nexis, 2003); and *Williams and Kawharu on Arbitration* (Lexis Nexis, 2011).

Many years ago now I said at a conference attended by a number of judges that we had seen in Australia constructive “competition” between arbitration and the developing judge-managed commercial divisions or commercial lists, particularly in the Supreme Courts of Victoria and New South Wales and the Federal Court of Australia. Judge management in a docket system, use of witness statements and expedited procedures made arbitration, as it was then being conducted, look very slow and expensive by comparison. Arbitrators looked at what the courts were doing and arbitration became more efficient and attractive. The courts, in turn, had regard to these developments in arbitration processes and further developed more efficient and attractive litigation processes. So the process of development of arbitration and litigation continued – and continues now.

The judges at that conference looked horrified. Competition from an “inferior” jurisdiction – what temerity! Fortunately, this kind of thinking is a thing of the past, and a cooperative and constructive approach to dispute resolution is the norm – every effort now being made to ensure that the dispute resolution process adopted by parties best suits the nature of the particular dispute and its elements. Indicative of this position is the legislative imperative in Victoria to apply appropriate dispute resolution processes – as defined in the *Civil Procedure Act 2010*:²

appropriate dispute resolution means a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, including, but not limited to –

- (a) mediation, whether or not referred to a mediator in accordance with rules of court;
- (b) early neutral evaluation;
- (c) judicial resolution conference;
- (d) settlement conference;
- (e) reference of a question, a civil proceeding or part of a civil proceeding to a special referee;
- (f) expert determination;

² Section 3.

(g) conciliation;

(h) arbitration;

Moreover, against this background it should be emphasised that the flexibility of the procedures adopted by the Commercial Court in Victoria enable a judge hearing a trial to apply the same procedures and techniques that would be expected of a commercial arbitrator in the same circumstances – in other words, a modern court of this kind can, relevantly, do anything an arbitrator can do and, in many instances, more quickly.³ Again, I emphasise that I am not discounting some of the real advantages of arbitration, nor am I discounting the real advantages of this kind of litigation - simply emphasising that there is real competition between dispute resolution options, competition which should advantage the parties.

Costs and Efficient Procedures

It is against the background I have outlined – and in the context of constructive competition in the provision of dispute resolution services, in which I include both arbitration and litigation – that I seek to focus my comments.

At the outset, it is important to note and emphasise that an arbitrator has a very broad discretion in relation to the awarding of costs, party by party, issue by issue and in relation to the cases and quantum of costs awarded. Subject to express agreement between the parties in relation to costs, the costs regime in New Zealand is provided for in paragraph 6 of Schedule 2 of the *Arbitration Act 1996*. These empowering provisions, whether based solely or partially on party agreement or this legislative machinery, are supplemented by the *AMINZ Arbitration Protocol*, the *AMINZ Guide to Arbitration*, the *AMINZ Guidelines to Awarding Costs in Arbitration* and the *AMINZ Rules for Awarding Costs in Arbitration*.

³ *Supreme Court of Victoria, Commercial Court, Practice Note 10 of 2011.*

The approach that has commonly been taken with respect to costs is that the sum ordered to be paid is in the nature of “a reasonable contribution to costs actually and reasonably incurred”, total recovery not being the intention.⁴ This general approach was endorsed by the New Zealand Court of Appeal in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* where it was said:⁵

“The guiding principle in both Courts has been except where special circumstances justify a solicitor and client basis to limit orders to a reasonable contribution towards costs on a party and party basis. This reflects the philosophy that litigation is an uncertain process where the unsuccessful party who has not acted unreasonably should not be unduly penalised.”

More recently it has been suggested that this “reasonable contribution” approach may not necessarily translate into the arbitration arena:⁶

“There is no longer any reason why, in arbitration, the primary principle that costs follow the event should result in successful parties being able to recover only a reasonable *contribution* towards costs. In fact, there is a developing trend in domestic commercial arbitration and in international commercial arbitration to award a successful party the whole of its costs.” [Referring to G Born *International Commercial Arbitration* (Kluwer, The Netherlands, 2009) at 2500 – and see now G Born, *International Commercial Arbitration* (2nd ed, Kluwer, The Netherlands, 2014) at 3097 to 3099.]

Continuing, the suggestion is qualified to the extent that it is acknowledged that the parties may agree a costs regime:⁷

“Nothing in this paragraph is intended to convey that parties to an arbitration may not, by agreement, provide that the arbitral tribunal shall fix and allocate costs by reference to the rules and principles applying to determination of costs as set out in Part 14 of the Judicature (High Court Rules) Amendment Act 2008, including the appropriate daily recovery rates for the three categories of proceedings

⁴ *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143 at 149 (McGechan J).

⁵ [1991] 3 PRNZ 571 at 574.

⁶ *Williams and Kawharu on Arbitration*, [16.9], p 455.

⁷ *Williams and Kawharu on Arbitration*, [16.9], p 455-6.

identified in r 14.3. In some instances known to the authors, the parties have taken this step to keep costs awards at a lower level as a means of confining full recovery of the legal and other expenses of the parties to cases where a party has behaved in such a way as to justify ordering that party to pay full indemnity costs for one or more of the reasons set out in r 134.6(4) of the Judicature (High Court Rules) Amendment Act 2008.”

There are, however, circumstances where it has been accepted that courts and arbitrators properly depart from any notion of an award of costs on a “contribution” or partial indemnity basis and order payment on a full indemnity basis in response to the behaviour of a party – acts of commission or omission – which warrant condemnation.

Full indemnity costs may be ordered with respect to the whole or a part of the proceeding in exceptional circumstances. In *Turner v Whitehead*,⁸ Fisher J said:

“The latter will usually be appropriate only in the most exceptional of circumstances. For example where the proceedings had been brought to remedy the breach of a solicitor’s undertaking or to remedy a contempt of Court, or where the proceedings were utterly without foundation and ought never to have been issued.”

The approach of the courts to the award of indemnity costs is, as a matter of general law, substantially consistent across jurisdictions, as indicated by a review of some of the Australian authorities:⁹

“[7] The usual order as to costs is an award of costs to the successful party on a party and party basis.¹⁰ This position is reflected in rule 63.31 of the Rules. While the Court has a discretion to make special costs orders, guidance is provided by previously identified categories of circumstances that warrant a special costs order. In *Colgate Palmolive Company v Cussons Pty Ltd*, Sheppard J identified some of the categories as:¹¹

⁸ (1993) 7 PRNZ 79 at 88; and see *Alla New Zealand Ltd v Heli Harvest Ltd* (Unreported, High Court, Hamilton, CP 68/96, 11 May 1998, Penlington J), where the principles are discussed.

⁹ *Auswest Timbers Pty Ltd v The Secretary to the Department of Sustainability and Environment* [2010] VSC 513 at [7] to [10] (Croft J)

¹⁰ *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67]-[69] (McHugh J).

¹¹ (1993) 46 FCR 225 at 233-234; and see also *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at [7].

‘...the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud ...; evidence of particular misconduct that causes loss of time to the Court and to other parties ...; the fact that the proceedings were commenced or continued for some ulterior motive ... or in wilful disregard of known facts or clearly established law ...; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions ...; an imprudent refusal of an offer to compromise ...; and an award of costs on an indemnity basis against a contemnor...’

- [8] In relation to commencing or continuing proceedings with no chance of success, Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* said that a special costs order may be warranted when:¹²

‘... it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established laws.’

- [9] The Victorian Court of Appeal in *Macedon Ranges Shire Council v Thompson* said that:¹³

‘Where the proceeding has no prospect of success

[15] Costs may be ordered whenever it appears that an action has been commenced in circumstances where the applicant properly advised should have known it had no chance of success. When a litigant presses on where on proper consideration their case should have been seen to be hopeless, the discretion to make a special costs order may be enlivened. French J (as he then was) in *J-Corp Pty Ltd v Australian Builders*

¹² (1988) 81 ALR 397 at 401. This passage has been cited with approval in many subsequent decisions, including by French J (as he then was) in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers Western Australia* (unreported, Federal Court of Australia, 9 February 1993), and in the Supreme Court of Victoria in *Murdaca v Maisano* [2004] VSCA 123 at [40]; *Aljade and MKIC v OCBC* [2004] VSC 351; and *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209 at [15].

¹³ [2009] VSCA 209 at [15].

*Labourers Federated Union of Workers Western Australia & Anor*¹⁴ considered that the discretion to award such costs would be enlivened when a party persisted, for whatever reason, in what should on proper consideration have been seen to be a hopeless case, and alluding to the presumption referred to by Woodward J in *Fountain Selected Meats* said that it was an unnecessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. But where the litigant did not recognise that its case was without merit a court may be disinclined to make a special costs order.¹⁵ The Court must measure the litigant's conduct against the facts then known or which ought to have been known, the inquiries that the litigant ought reasonably to have made and the legal advice which the litigant ought reasonably to have obtained.¹⁶ This exercise may be subject to some qualification in respect of a self represented litigant.'

[10] As Sheppard J said in *Colgate Palmolive Company v Cussons Pty Ltd*,¹⁷ a special costs order may be warranted when a party has engaged in misconduct leading to unnecessary costs or delay. French J (as he then was) considered an application for a special costs order on this basis in *Re Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd*:¹⁸

'[21] Counsel for the respondent next attacked the applicant's conduct of the proceedings saying that interlocutory steps had been protracted by its failure to comply with requests for particulars and discovery and with orders of the Court. Further, it was said, there were untenable applications to amend pleadings and for leave to appeal. Discontinuance of the action was at the last minute and no explanation had been advanced for it. He submitted that it should be inferred that there had been a sudden acceptance by the applicant of the hopelessness of its case and that this was a matter which should have been apparent very shortly

¹⁴ Unreported FCA, 9 February 1993 (French J).

¹⁵ *Hurstville Municipal Council v Connor* (1991) 24 NSWLR 724; *Monitronix Ltd v Michael* (1992) 7 WAR 195; *Ugly Tribe Co Pty Ltd v Sikola*, [2001] VSC 189, [18] (Harper J); *Clarke v Deputy Commissioner of Taxation* (2002) 50 ATR 173.

¹⁶ *Aljade and MKIC v OCBC* [2004] VSC 351.

¹⁷ (1993) 46 FCR 225 at 233-234; and see above paragraph [7].

¹⁸ [1991] FCA 187 at [21]-[22].

after the commencement of the proceedings.

[22] I accept that the interlocutory processes were unduly protracted and that the applicant must bear much of the responsibility for this. However, costs orders were made in favour of the respondent where the applicant was responsible for wasted appearances. When, in an individual case, there is evidence of particular misconduct on the part of a party that causes loss of time to the Court and to other parties then an order for solicitor-client costs and/or costs to be paid forthwith may be made. In my opinion a global order of this kind is not warranted in this case.”

The cases do indicate, however, that an award of costs is compensatory only – and only with respect to expenditure on what, at general law, is regarded as “costs”. It follows that a party cannot recover as costs more than the sum reasonably expended in the circumstances by way of costs. Thus it can be said, as a general proposition, that a court or an arbitrator cannot, in circumstances where the behaviour of a party is disapproved, use costs as a disciplinary measure. Nevertheless, there are circumstances where the behaviour of a party does invite attention in terms of costs:¹⁹

“It is, however, the duty of the Court and arbitrators to condemn a party in costs that have been properly incurred where the party has supported a dishonest claim or defence by giving false evidence in seeking or opposing the relief sought: see *Gemmell v Gemmell*.²⁰ This approach was endorsed by the Court of Appeal in *Kenderdine v Robert Raymond Associates Ltd*.²¹ Similarly in *Boon v Australian Guarantee Corporation Ltd*²² Barker J made an order for costs against a third party who had disregarded a Court order as to time limits.”

It is against this sketch of the general law, supported by party agreement and statutory machinery, that I suggest that the circumstances that invite, indeed merit, attention in terms of costs should be interpreted broadly in the context of arbitration proceedings on the basis

¹⁹ AAP Willy, *Arbitration in New Zealand* (2nd ed, Lexis Nexis, 2003), [8.6], p 159; and see Born, *International Commercial Arbitration* (2nd ed, Kluwer, The Netherlands, 2014), pp 3098-9.

²⁰ [1924] NZLR 248.

²¹ [1975] 1 NZLR 300.

²² (1991) 4 PRNZ 197.

of express or implied obligations contained in arbitration agreements having regard to their nature and purpose - overarching obligations. Moreover, to the extent that institutional arbitration rules do not provide “overarching obligations” of this kind, it is, in my view, in the interests of potential parties to arbitration proceedings that they be revised to provide for such obligations.²³

Overarching Obligations

Some arbitration rules are put on clearer bases than others for the implication of “overarching obligations” of parties - and some contain provisions which might be regarded as in the nature of express provisions. An example in this respect is provided by the Australian Centre for International Commercial Arbitration (ACICA) *Expedited Arbitration Rules*. Rule 3 sets the scene and underpins the remainder of the Rules:

“3 Overriding Objective

- 3.1 The overriding objective of these Rules, which is to inform the processes, powers and rights here described, is to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved.
- 3.2 By invoking these Rules the parties agree to accept the overriding objective and its application by the Arbitrator.”

These provisions are very similar to Rules 1.1 to 1.3, which are contained in Section A of the English *Civil Procedure Rules* 1998:

“The overriding objective

- 1.1 1.1-(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

²³ And see Born, *International Commercial Arbitration* (2nd ed, Kluwer, The Netherlands, 2014), p 3101.

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

- 1.2 1.2 The court must seek to give effect to the overriding objective when it –
- (a) exercises any power given to it by the Rules; or
 - (b) interprets any rule,
- Subject to rules 76.2 and 79.2.

Duty of the parties

- 1.3 1.3 The parties are required to help the court to further the overriding objective.”

Similarly, the Victorian *Civil Procedure Act 2010* provides for an overarching purpose:

“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.”

Under the provisions of sections 8 and 9 of the Act, the courts are to seek to give effect to the overarching purpose in the exercise of their powers. The provisions of section 9 are more specific, referring to the exercise of court powers to further the overarching purpose, having regard to a series of objects which are set out in that section. The parties are, in terms of the overarching obligations provided for under the Act, required to cooperate and facilitate the overarching purpose of the Act through their cooperation in and facilitation of the litigation process in terms of various more particular overarching obligations. Each of these overarching obligations is grounded in terms of a paramount duty, provided for in the following terms:

“Paramount duty

Each person to whom the overarching obligations apply 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, including, but not limited to—

- (a) any interlocutory application or interlocutory proceeding;
- (b) any appeal from an order or a judgment in a civil proceeding;
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.”

At this stage of the development of statute law with respect to civil procedure, overarching obligations of this kind have not been applied to arbitration proceedings – at least not explicitly by legislation or arbitration rules. Nevertheless, the provisions of modern arbitration rules do now come very close to spelling out obligations of this kind. For example, the *AMINZ Rules for Awarding Costs in Arbitration* appear to contemplate and accommodate obligations of this kind:²⁴

²⁴ *AMINZ Rules for Awarding Costs in Arbitration*, Rule (3)(d) and (e).

“(3) *Costs fixed and allocated by the arbitral tribunal*

Unless the agreement to arbitrate provides otherwise, either directly or by reference to institutional arbitral rules, the following rules apply:

...

(d) *Allocating costs of the arbitration* – unless the parties agree otherwise, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, at its discretion, the tribunal may:

- (i) apportion such costs, in whole or in part, between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, or
- (ii) otherwise, depart from this principle for special reasons.

Where the tribunal departs from this principle that costs follow the event, it shall provide reasons for doing so.

(e) *Circumstances of the case* – where the arbitral tribunal decides to apportion costs between the parties, the circumstances to be considered may include, but not be limited to:

- (i) any interim cost orders;
- (ii) the degree of success of the parties (including, for example, whether the successful party has failed on issues on which significant time has been spent);
- (iii) the conduct of the parties (for example increasing cost or prolonging the arbitration); or
- (iv) any other factor the arbitral tribunal deems relevant.”

Similarly, the new *LCIA Arbitration Rules* (effective 1 October 2014) also cast the net broadly in this respect:²⁵

²⁵ *LCIA Arbitration Rules* (effective 1 October 2014), Rule 28.4

“28.4 The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties’ relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties’ conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.”

Nevertheless, even where relevant arbitration legislation and rules are not so explicit, it would not seem too much of a leap to imply the substance of obligations of this kind in arbitration agreements and arbitration rules – particularly having regard to the vast cost and expense involved in the complex and high value arbitration proceedings which we now see quite commonly.

In this context, the proportionality of costs is more and more a critical issue, and one which must be addressed by courts and arbitrators – both proactively and reactively. Consequently, I now seek to focus on this important aspect of case management in the context of costs issues.

Proportionality and the Management of Costs

It will come as no surprise that the problem of overblown legal costs is not confined to Victoria, or Australia. Sir Rupert Jackson’s report, published in January 2010, and entitled; “Review of Civil Litigation Costs”²⁶ highlighted that in England, the costs arguments in some cases had almost overshadowed the litigation. The costs wars and resulting satellite litigation that occurred after litigation had become a significant issue. England has its own particular issues. The recoverability of an uplift, or “success fee”, upon a successful outcome in a case, had caused significant problems. Legal aid had been replaced by a

²⁶ Sir Rupert Jackson, *Review Civil Litigation Costs: Final Report*, (The Stationary Office, 2010).

system in which lawyers were able to recover a success fee from an unsuccessful party.²⁷ Lord Jackson concluded that that development had come at a massive cost to taxpayers, council tax payers, and insurance premium payers.²⁸ These are not, however, issues which arise either in New Zealand or Australia.

The principle of proportionality was also an issue before Lord Jackson, along with costs management. In the report, Lord Jackson adopted the principle of proportionality developed by Lord Woolf in his final report on access to civil justice (published in July 1996).²⁹ That is, “[p]rocedures and cost should be *proportionate* to the nature of the issues involved”.³⁰ Lord Jackson reviewed the authorities dealing with the concept of proportionality in civil litigation since 1999, and said:

“Proportionality is an open-textured concept. It now pervades many areas of the law, both substantive and adjectival. The essence of proportionality is that the ends do not necessarily justify the means. The law facilitates the pursuit of lawful objectives, but only to the extent that those objectives warrant the burdens thereby being imposed on others.”

On 27 November of last year, the statutory regime established by the Victorian *Civil Procedure Act* and the obligations imposed by that Act were considered in detail at the appellate level for the first time when the Court of Appeal handed down judgment in the *Oswal Proceedings*.³¹ Following the publication of the Court’s reasons for refusing an application for leave to appeal orders from a Trial Division Judge which had set aside the order of an Associate Judge for security for costs, the Court then “requested the parties to address the question of 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 to use reasonable endeavours to ensure that the costs incurred in the proceeding were reasonable

²⁷ Section 58A(6) *The Courts and the Services Act* 1900 (commenced on 1 April 2000).

²⁸ Sir Rupert Jackson, *Review Civil Litigation Costs: Final Report*, (The Stationary Office, 2010) at page 109 to 116.

²⁹ Lord Woolf, *Access to Justice – Final Report* (The Stationary Office, July 1996).

³⁰ Sir Rupert Jackson, *Review Civil Litigation Costs: Final Report*, (The Stationary Office, 2010) at page 30.

³¹ *Yara Australia Pty Ltd v Oswal; Carson & ors v Oswal; ANZ Banking Group Limited v Oswal; Apache Fertilisers v Oswal* [2013] VSCA 337 :(collectively referred to as the “*Oswal Proceedings*”),

and proportionate to the complexity and importance of the issues and the sums in dispute.”³²

Collectively, across the four related proceedings, six separate parties were involved – two of whom were represented by the same counsel at the application for leave to appeal. The application for leave to appeal was heard in one day. Five senior counsel, six junior counsel and five firms of solicitors were present at the hearing representing the parties. In addition to the notices of appeal and the parties’ written cases, the parties between them filed six lever arch folders of material.

In handing down its judgment, the Court addressed two factual questions in focusing on the issue of proportionality. First, whether there was any over representation of parties by counsel and, secondly, whether the material produced at the hearing of the application for leave to appeal was unnecessary or excessive. After considering the overarching purpose of the Act and the court’s obligation to give effect to this purpose, the Court turned its attention to the duty of the parties to ensure costs are reasonable and proportionate.

Before turning to that issue, however, it is important to highlight the significance of the Court of Appeal requesting the parties to make submissions as to whether they have breached their obligations under the Act.

The role of the Judge in enforcing the practitioner’s obligation

The provisions of the Act – as well as providing a concise restatement of the duties that parties to litigation owe to the courts and to each other – give judges the means to exert greater control over the conduct of the parties and their legal representatives. In discussing the nature of the role of judges in common law – as opposed to civil law – jurisdictions, Denning LJ once said:³³

³² *Oswal Proceedings*, para 1

³³ *Jones v National Coal Board* [1957] 2 QB 55, 63 referred to in *ALRC Review* note 175, p 102

“In the system of trial we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happened, we believe in some foreign countries.”

As has been recognised by Professor Zuckerman, “[t]he presence of a management infrastructure is not sufficient to deliver the hoped for result. These can be delivered only by managers willing to use the management tools to best effect.”³⁴ The paramount importance that both the Parliament and the highest Court in this country have placed on adhering to strong case management principles to ensure the achievement of the just, efficient, timely and cost-effective resolution of the real issues in dispute, means that these comments of Denning LJ can no longer apply to judges in this country.

In this context the Court of Appeal observed that:

“[S]anctions imposed for a breach of any overarching provisions have been a rarity at first instance. When no party invites the court to determine whether there has been a breach of the Act, there may be a judicial disinclination to embark upon such an own-motion inquiry for fear that inquiry as to a potential breach may be time consuming and may require the introduction of material that was not before the court as part of the proceeding. Such fears cannot relieve judges of their responsibilities.”³⁵

These comments by the Court of Appeal in regard to the proactive role that judges must take in enforcing the provisions of the Act may be seen as a watershed moment for both practitioners and the judiciary alike. For judges, it is a helpful reaffirmation of their important responsibilities, and the critical importance of the overarching obligations for all involved in civil litigation. For practitioners, it is a gentle warning of the even greater role judges must play in closely managing civil proceedings – using all the means at their disposal – to ensure that the overarching purpose of the Act is achieved. For arbitrators and,

³⁴ Adrian Zuckerman, “Litigation Management under the CPR: A Poorly-used Management Infrastructure” in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 94

³⁵ *Oswal Proceedings*, para 27.

I think, arbitral institutions as the masters of their arbitration rules, it is a call to attend to these issues as they do arise, or are likely to arise, in arbitration proceedings.

The obligation to ensure costs are reasonable and proportionate

Section 24 of the Victorian *Civil Procedure Act* provides that a person to whom the overarching obligations apply must use reasonable endeavours to ensure that the legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate, having regard to the complexity or importance of the issues in dispute, as well as to the amount that is in dispute.

In discussing the nature of the test to be applied for the purposes of the provision, the Court of Appeal said:³⁶

“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. The legal practitioners’ 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 obligation. The legal practitioner will not be relieved of this overarching responsibility because of the instructions of their client.

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

³⁶ *Oswal Proceedings*, para 13

responsibilities to comply with the overarching obligations. 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 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."

The test of proportionality

In discussing whether there was in fact any unnecessary representation of the parties in the *Oswal Proceedings*, the Court of Appeal said that while the scope of s 24 is not rigidly defined, there is plainly an obligation within the meaning of that section to ensure that the parties are not over-represented. In this respect the Court considered the second reading speech to the Act, which specifically refers to the practice of unnecessary representation as being a procedural issue that needs redress:³⁷

"The Attorney-General, in discussing s 24 said:

"In relation to the duty to ensure costs are reasonable and proportionate, an example of a possible breach may be the practice of briefing two barristers (senior counsel and junior counsel) where the complexity of the case does not warrant it. I note that the obligation is worded so that resources are not unreasonably constrained for cases that might in themselves be for a small amount, but that have significant precedent or public interest value."³⁸

The Court of Appeal emphasised that the decision as to the level and extent of representation that is necessary for a party in a proceeding is not one that can be left solely in the hands of the parties. Even where it may be the case that the party has provided informed instructions to their legal practitioners that they wish for a particular counsel to be

³⁷ *Oswal Proceedings*, para 34

³⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2609 (Attorney-General Rob Hulls) referred to in *Oswal Proceedings*, para 34

briefed, it is incumbent upon those legal practitioners to consider whether, having regard to the overarching obligations contained in s 24 of the Act, the level of representation would contravene the Act. The Court of Appeal recognised that “there will be proceedings in which the complexity or importance of the issues and the amount in dispute will not justify the engagement of counsel of particular seniority or will not justify the engagement of more than one counsel.”³⁹

In this instance, the Court did say that there was in fact an “unusual degree of legal representation.”⁴⁰ Despite this, it was not held that the level of representation was such as to constitute a breach of the obligations under s 24 of the Act. Having regard to the explanations proffered by the parties as to this unusual level of representation, as well as the importance and complexity of the issues, the likely costs of the proceedings, the manner in which the hearing was conducted and the fact that the oral submissions of lead senior counsel succinctly narrowed the focus of the application, the Court was satisfied that there was no breach of the overarching obligation in regard to the level of representation

It was, however, a different story in relation to the large volume of material that was provided to the Court. In the six lever arch folders produced for the hearing, there was over 2700 pages of material, including “affidavit material from the parties’ solicitors [that] contained a variety of largely extraneous materials, included old statements of claim, swathes of email correspondence, materials from related proceedings in Western Australia, and transcripts from related hearings in the Supreme Court of Victoria. Much of this material was either peripheral to the application or entirely unnecessary.”⁴¹ The Court noted that, while the Act is designed to protect litigants from incurring excessive costs, the provisions were also intended to protect against the inappropriate use of the courts as a public resource. The Court said:⁴²

³⁹ *Oswal Proceedings*, para 36

⁴⁰ *Oswal Proceedings*, para 39

⁴¹ *Oswal Proceedings*, para 40

⁴² *Oswal Proceedings*, para 40

“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 overriding obligation has been breached.”

The Court said that the application books contained substantial amounts of duplicated materials, while the proceedings in Western Australia were not mentioned at all in the applicants’ submissions. One affidavit ran for 198 pages, while a letter containing a copy of an amended writ and statement of claim ran for 170 pages and duplicated the copy already provided in the application book.⁴³ A further affidavit ran for 492 pages, which included superfluous material, including 20 pages of Reserve Bank data on the daily price of the \$US.

Under these circumstances, the Court found that:⁴⁴

49 The application books contained voluminous unnecessary material which increased the costs for all parties and the burden on the court. Very little of it was the subject of any reference in oral argument. In all, significantly more than half of the material in the application books was entirely unnecessary to the questions raised by the notice of appeal.

...

51 ... Such expenditure as is incurred on an interlocutory application must be proportionate to the proceeding in question. We are satisfied on the balance of probabilities that the overarching obligation under s 24 to ensure that costs were reasonable and proportionate has been breached by the filing of excessive material.

In producing this type of material to the Court, the practitioners displayed little regard for their obligations under the Act. The fact that the material filed was in some instances duplicated would lend itself to the conclusion that the parties themselves were not even sure about the content of the material they were putting before the

⁴³ *Oswal Proceedings*, para 44

⁴⁴ *Oswal Proceedings*, para 49, 51

Court. As Redlich JA and Beach AJA had said in *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd & ors*,⁴⁵ the obligation which rests upon legal practitioners to give such assistance has become increasingly important. Cobbling together as much material as possible to fill up an impressive array of lever arch folders to present to the court – especially where much of this material is duplicated or irrelevant – was shown by the Court to be a clear breach of the Act.

The Court’s comment that “where a large volume of material is provided to a court that is *unnecessary and excessive*⁴⁶ there will be a *prima facie* case that the overriding obligation has been breached” make it clear that the volume of material – or the degree of legal representation, as the case may be – does not of itself mean that the overarching obligation in s 24 has been breached. The decisive factor which determines whether the obligation has been breached is found in the plain language of the section itself – what is ‘reasonable and proportionate.’ There may be instances where practitioners file a similar amount of material as that which was filed in the application hearing in the *Oswal Proceedings*, and no breach of the overarching obligations will have occurred, or be suggested. Similarly, the courtroom may be filled with senior counsel – “standing room only” at the bar table – and yet, again, no obligation will be breached. It all depends upon whether, given the complexity or importance of the issues in dispute, as well as the amount in dispute, the costs that have been charged are, in all the circumstances, considered reasonable and proportionate. The duty lies squarely with the practitioners to ensure that whatever action is taken, it is reasonable and proportionate.

It is worth noting that other jurisdictions in our region are also taking a more proactive approach to managing costs that are incurred in litigation. On this topic, the Singapore Court of Appeal has said:⁴⁷

⁴⁵ *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd & ors* (2009) 25 VR 189

⁴⁶ [emphasis added],

⁴⁷ *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [56] (VK Raja JA)

We think that costs that are plainly disproportionate to, inter alia, the value of the claim cannot be said to have been reasonably incurred. Thus, in assessing whether costs incurred are reasonable, it needs to be shown that the costs incurred were not just reasonable and necessary for the disposal of the matter, but also, in the entire context of that matter, proportionately incurred...

The Court of Appeal went on to explain in that case where it was that the lack of proportionality lay:⁴⁸

In this matter, it seems to us that perhaps because the respondent was over-anxious to clear his name, few legal stones were left unturned by his counsel. Indeed, based on the time said to have been spent by the respondent's legal team, ie, 2,309.3 hours, it seems to us that several stones were repeatedly turned by different members of the team of six solicitors and counsel.

These comments by both the Singapore Court of Appeal and the Victorian Court of Appeal provide a clear example of where a court can find that parties to litigation have breached their obligations to ensure costs are reasonable and proportionate, and can provide guidance as to the manner in which arbitrators may also approach this highly important area of dispute resolution.

Reasonable and Proportionate Costs in Arbitration

It is a general principle in arbitration that only reasonable costs may be recoverable under an award as to costs. The UNCITRAL Rules define party costs as:

The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

⁴⁸ *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [80] (VK Raja JA)

The question then becomes what measures an arbitrator may take to ensure that costs remain reasonable.⁴⁹ A common complaint amongst practitioners is that a lack of predictability of costs outcomes makes managing proceedings difficult from a party's point of view.⁵⁰ Adopting a greater focus on ensuring that the reasonableness and proportionality of costs incurred during an arbitration is an obligation which all parties must adhere to can lead to greater certainty regarding outcome, while also creating the possibility of greater harmonization of costs principles across jurisdictions. One avenue that can assist in this process is early guidance from the tribunal by indicating the principles that will apply when awarding costs. By emphasising the role that the related concepts of reasonableness and proportionality will hold in any costs award, an arbitrator can direct a party's focus, for example, to be more selective of the claims and defences advanced so as to ensure each has a proper basis; to focus on the main issues, ensuring that any evidence produced to the tribunal is appropriate and relevant; and that only reasonable requests are made of both the tribunal and others involved in the arbitration.

In England, another approach to managing civil litigation which in time may have a positive impact on arbitration has been through the use of costs estimates and budgeting,⁵¹ an approach which encourages positive management of costs from the outset. The rationale behind this approach was explained by Mr Justice Ramsey:⁵²

(i) Litigation is in many instances a 'project', which both parties are pursuing for purely commercial end. (ii) Any normal project costing thousands (or indeed millions) of pounds would be run on budget. Litigation should be no different. (iii) The peculiarity of litigation is that at the time when costs are being run up, no-one knows who will be paying the bill. There is sometimes the feeling that the more one spends, the more likely it is that the other side will end up paying the

⁴⁹ See *Effective Management of Arbitration: A Guide for In-house Counsel and Other Party Representatives*, Commission of Arbitration and ADR, International Chamber of Commerce, May 2014.

⁵⁰ Ong, CYC and O'Reilly, MP, *Costs in International Arbitration*, (LexisNexis, 2013) [10.4].

⁵¹ *ibid.*

⁵² Ramsey J, *Costs Management: A Necessary Part of the Management of Litigation* (Law Society Conference, 29 May 2012) para 2 in Ong, CYC and O'Reilly, MP, *Costs in International Arbitration*, (LexisNexis, 2013), page 177.

bill. This gives rise to a sort of 'arms race'. (iv) Under the present regime, neither party has any effective control over the (potentially recoverable) costs which the other side is running up. (v) In truth both parties have an interest in controlling total costs within a sensible original budget, because at least of them will be footing the bill. (vi) The parties' interest may, in truth, be best served if the court (a) controls the level of recoverable costs at each stage of the action, or alternatively (b) makes less prescriptive orders (eg requiring notification when the budget for any stage is being overshot by, say, 20% or more).

While there must remain some scope for flexibility to depart from the original budget should the tribunal feel that this is necessary, encouraging the parties to turn their minds to the issue of costs at the outset can only help to foster an environment that seeks a more cost-effective means of dispute resolution.

One final area that I will address is that of the possibility of costs limitation. This element of pro-active costs management in civil litigation by the courts can be seen in Order 62A rule 1 of the *Federal Court Rules* which provides:

The Court may, by order at a directions hearing, specify the maximum costs that may be recoverable on a party and party basis.

The purpose of this rule, its application, and proposals for extension of the Court's power to specify the maximum amount that may be recoverable pursuant to an order for costs has been examined in detail by the Australian Law Reform Commission, with recommendations for expanded powers.⁵³

Similar provisions can be found, in respect of arbitration, in the *International Arbitration Act* (Cth), which provides:

Managing Discovery – Discovery of Documents in Federal Courts (Final Report), ALRC Report 115 (2011), [9.37] to [9.87].

27. ... (2) an arbitral tribunal may ... (d) limit the amount of costs that a party is to pay to a specified amount.

(2A) An arbitral must, if it intends to make a direction under paragraph (2)(d), give the parties to the arbitration agreement notice of that intention sufficiently in advance of the incurring of costs to which it related, or the taking of any steps in the arbitral proceedings which may be affected by it, for the limit to be taken into account.

Conclusions

The challenges of modern dispute resolution – whether it be by arbitration, litigation or other processes – become more pressing as the cost and complexity of proceedings grows and continues to grow very significantly. Efficient dispute resolution is of the utmost importance, both domestically and internationally in many respects. It is clearly important in seeking to avoid unnecessary costs on the commercial community and the community generally, and is also a critical ingredient in attracting international dispute resolution to a jurisdiction, with all the benefits that brings to a jurisdiction and its economy.