Summary Judgment

Part 4.4 of the Civil Procedure Act*

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Supreme Court of Victoria

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Introduction

In exercising and interpreting their powers the courts must give effect to the overarching purpose of the *Civil Procedure Act 2010* (Vic) ("the Act").[2] The overarching purpose of the "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."[3] One of the powers that the courts must consider exercising in this context is the power to give summary judgment. The new provisions relating to summary judgment are in Part 4.4 of the Act.

The aim of the summary judgment provisions is to save the parties and the courts the time and expense associated with unmeritorious claims and defences. However, this needs to be achieved while still doing justice between the parties and, consequently, not by unduly inhibiting parties from putting their cases to the courts.

If exercised, the power to give summary judgment, against a defendant or a plaintiff, is a powerful tool of case management, but one that is not to be exercised lightly. It can save costs for all parties and the court. If the overarching obligations under the Act are complied with,[4] summary judgment applications should be rare – and successful applications should be rarer. It is important not to look at the summary disposition provisions, or any other provisions, in isolation - it is important to analyse them as part of the new regime.

The current summary judgment regime

The power to order summary judgment is found in the various rules of the courts. The rules currently applicable to summary judgment for a plaintiff (or plaintiff by counterclaim) and a defendant (or defendant by counterclaim) are different.[5]

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2 *Civil Procedure Act 2010* (Vic) s 8.

3 *Civil Procedure Act 2010* (Vic) s 7(1).

4 *Civil Procedure Act 2010* (Vic) Part 2.3.

5 The rules relating to summary judgment for a plaintiff are the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Order 22; *County Court Civil Procedure Rules 2008* (Vic) Order 22; *Magistrates' Court Civil Procedure Rules 2009* (Vic) Order 10. The rules relating to summary judgment for a defendant are the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 23.03; *County Court Civil Procedure Rules 2008* (Vic) r 23.03.

Summary judgement for a plaintiff

Under both the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) ("the *Supreme Court Rules*") and the *County Court Civil Procedure Rules 2008* (Vic) ("the *County Court Rules"*) the plaintiff can make an application for summary judgment under rule 22.02:[6]

> "**22.02 Application for judgment**
>
> (1) Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against that defendant *on the ground that the defendant has no defence to the whole or part of a claim* included in the writ or statement of claim, or no defence except as to the amount of a claim.
>
> (2) Paragraph (1) shall not apply to a claim for libel, slander, malicious prosecution, false imprisonment or seduction or to a claim based on an allegation of fraud.
>
> (3) Where the writ or statement of claim includes a claim within paragraph (2), the plaintiff may apply for judgment in respect of any other claim and continue the proceeding for the firstmentioned claim.
>
> (4) Except by order of the Court, the plaintiff shall make only one application for judgment under this Order."
>
> [emphasis added]

An application of this kind can be made after the defendant has filed its appearance in the matter.[7] The defendant "may show cause against the application by affidavit or otherwise to the satisfaction of the Court".[8] The defendant may also seek to avoid summary judgment by satisfying the Court that in respect of the claim or, part of it, a "question ought to be tried or that there ought for some other reason be a trial of that claim or part". This test is set out in rule 22.06 of both the *Supreme Court Rules* and the *County Court Rules*:

> "(1) On the hearing of the application the Court may—
>
> (a) dismiss the application;
>
> (b) give such judgment for the plaintiff against the defendant on the claim or the part of the claim to which the application relates as is appropriate having regard to the nature of the relief or remedy claimed *unless the defendant satisfies the Court that in respect of that claim or part a question ought to be tried or that there ought for some other reason be a trial of that claim or*

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6 The equivalent provision under the *Magistrates' Court Civil Procedure Rules 2009* is rule 10.08.

7 *Supreme Court Rules* r 22.02; *County Court Rules r 22.02.*

8 *Supreme Court Rules* r 22.04; *County Court Rules* r 22.04

part;

(c) give the defendant leave to defend with respect to the claim or the part of the claim to which the application relates either unconditionally or on terms as to giving security, paying money into court, time, the mode of trial or otherwise; or

(d) with consent of all parties, and notwithstanding Rule 77.03(1) [77A.03(1)], dispose of the proceeding finally in a summary manner."

[emphasis added]

The Magistrates' Court rules are very similar and include the words "a question ought to be heard and determined at hearing or that there ought for some other reason be a hearing of that claim or party".[9]

Various descriptions have been used in court rules to describe what the defendant needs to show. The Full Court discussed this in *Australian Can Co Pty Ltd v Levin & Co Pty Ltd*:[10]

> "From all this it appears that where there is a real case to be investigated in fact or in law, leave to defend should be given ... but in whatever language the *discrimen* is expressed to determine in what cases liberty to the plaintiff to sign judgment or liberty to the defendant to defend should be given, the length at which or the detail in which or the vigour with which counsel has argued the matter cannot be the determining factor. So to hold would be to allow the pertinacity or ingenuity of counsel or even the tolerance of the judge to obscure the real requirement of the rule. Whatever the language various courts have used, it seems to us that the substance of the criterion to be applied is that after the matter involved has been explained to the judge there must be a real uncertainty without full argument or further investigation of the facts as to the plaintiff's right to judgment."

In *Fancourt v Mercantile Credits Ltd* the High Court said:[11]

> "The power to order summary judgment or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."

Even if the court considers that there is no question for which there ought to be a trial, there is a discretion under rule 22.06 to not order summary judgment if "there ought for some other reason be a trial of that claim or part".

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9 *Magistrates' Court Civil Procedure Rules 2009* ("the *Magistrates' Court Rules*") r 10.13(1)(b). Rule 10.08(1) of the *Magistrates' Court Rules* allows a summary judgment application to be made after the defendant has given a notice of defence.

10 [1947] VLR 332 at 334 to 335.

11 (1987) 154 CLR 87 at 99.

It is clear from these tests that summary judgment will rarely be given under the current regime.

Summary judgement for a defendant

The Magistrates' Court does not have rules for an application for summary judgment by a defendant. The summary judgment rule for a defendant is found in rule 23.03 of the *Supreme Court Rules* and the *County Court Rules*. Rule 23.03 provides:

> "On application by a defendant who has filed an appearance, the Court at any time may give judgment for that defendant against the plaintiff *if the defendant has a good defence on the merits."* [emphasis added]

Vickery J set out the main judicial statements applicable to rule 23.03 in *Kyriackou v Ace Insurance Ltd*:[12]

> "**[4]** In *Dey v Victorian Railway Commissioners*[13] (" *Dey* "), Dixon J said of the forerunner to rule 23.03:
>
> > It is peculiar to Victoria, it is the counterpart for the Defendants of order 14. It confers a power of summarily dealing with an action which should be reserved for the exercise as to the actions that are absolutely hopeless.
>
> **[5]** These observations were cited with approval by Tadgell J in respect of an application under the present rule of 23.03 in *Holland-Stolte Pty Ltd v Bill Acceptance Corporation Ltd & Princess Theatre Holdings Pty Ltd*,[14] where his Honour said:
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> > That the proposition of Dixon J, in *Dey* , holds good, as His Honour observed, whether you subscribe to the view that the Defendant will fail to obtain summary judgment unless hopelessness is readily discernible or whether you concede that it suffices that the Defendant must demonstrate it even after thorough and protracted investigation and argument.
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> **[6]** The test was stated in not dissimilar terms in *Camberfield Pty Ltd v Klapanis*[15] ("*Camberfield*"), where Batt JA said,[16] after referring to the well-known text of Dixon J which I have already referred to in *Dey* , of the requirement for the Plaintiff's case to be absolutely hopeless before an order 23.03 application may succeed:
>
> > Dixon J also said the case must be very clear indeed to justify summary intervention under the inherent jurisdiction and that once it

12 [2009] VSC 647 at [4] to [7].
13 *Dey v Victorian Railways Commissioners* (1948) 78 CLR 62 at 90.
14 30 March 1992, unreported.
15 [2004] VSCA 104.
16 Ibid at [12].

> appears that there is a real question to determine, whether of fact or law, and the rights of the parties depend on it, then it is not competent for the court to dismiss the action.

[7] The judge at first instance in *Camberfield*, as Batt JA observed, also set out the well-known passage from the judgment of Barwick CJ *in General Steel Industries Inc v Commissioner for Railways (NSW)*[17] where the Chief Justice stressed the great care which must be exercised to ensure that, under the guise of achieving expeditious finality, a Plaintiff is not improperly deprived of his opportunity of a trial of his case by the appointed tribunal. Barwick CJ went on to state that:

> I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the Plaintiff's claim."

The new summary judgment regime

The summary judgment provisions are found in Part 4.4 of the *Civil Procedure Act*:

> **"PART 4.4—SUMMARY JUDGMENT**
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> **60 References to defendant and plaintiff in this Part**
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> In this Part, a reference—
>
> (a) to a plaintiff includes a reference to a plaintiff by counterclaim; and
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> (b) to a defendant includes a reference to a defendant by counterclaim.
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> **61 Plaintiff may apply for summary judgment in proceeding**
>
> A plaintiff in a civil proceeding may apply to the court for summary judgment in the proceeding *on the ground that a defendant's defence or part of that defence has no real prospect of success*.
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> **62 Defendant may apply for summary judgment in proceeding**
>
> A defendant in a civil proceeding may apply to the court for summary judgment in the proceeding *on the ground that a plaintiff's claim or part of that claim has no real prospect of success*.
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> **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*.

[17] (1964) 112 CLR 125 at 130.

(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.

65 Interaction with rules of court

The powers of a court under this Part are in addition to, and do not derogate from, any powers a court has under rules of court in relation to summary disposal of any civil proceeding."

[emphasis added]

The basics

The summary judgment provisions apply to plaintiffs, plaintiffs by counterclaim, defendants and defendants by counterclaim (section 60). There is no exclusion of the summary judgment provisions for claims involving libel, slander, malicious prosecution, false imprisonment or seduction, or to a claim based on an allegation of fraud. The same test applies to both plaintiffs and defendants – that the other party's defence or claim "has no real prospect of success (sections 61 and 62). The court can give summary judgment on its own motion (section 63). There is still a residual discretion to allow the matter to go to trial (section 64)

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Summary judgment in the Federal Court

The test adopted in the Act is based, in part, and similar to the tests adopted in the Federal Court and in the United Kingdom. Section 31A of the *Federal Court of Australia Act 1976* provides:

"**Summary judgment**

(1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is prosecuting the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no *reasonable prospect of successfully defending the proceeding or that part of the proceeding*.

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party *has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding*.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section.

(5) This section does not apply to criminal proceedings."

[emphasis added]

Foster J, in *Wang v Anying Group Pty Ltd*, summarised the principles applicable to section 31A:[18]

"The critical words of s 31A(1), when applied to the present case, require me to be satisfied that the respondents have "... no reasonable prospect of successfully defending the proceeding ...". The following principles may be extracted from the authorities:

(a) The moving party does not have to demonstrate that the defence is hopeless or unarguable;

(b) The Court must consider the pleadings and the evidence with a "critical eye" in order to see whether the respondent party has evidence of sufficient

[18] [2009] FCA 1500 at [43].

quality and weight to be able to succeed at trial (*Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; (2008) 167 FCR 372 at [23] (p 382) (per Finkelstein J));

(c) The respondent party is not obliged to present its whole case in order to defeat the summary judgment applicant but must at least present a sufficient outline of the evidence in order to enable the Court to come to a preliminary view about the merits for the purpose of considering the statutory test in s 31A(1)(b) (*Jefferson Ford Pty Ltd* [2008] FCAFC 60; 167 FCR 372 at [22] (p 382) (per Finkelstein J)); and

(d) The test may require greater scrutiny of the pleadings and evidence in some cases than in others. In my judgment, the words of s 31A(1) compel a flexible approach. The real question in every case is not so much whether there is any issue that could arguably go to trial but rather whether there is any issue that should be permitted to go to trial. This seems to be the approach of Finkelstein J in *Jefferson Ford Pty Ltd* [2008] FCAFC 60; 167 FCR 372 and of Gordon J in the same case (as to which see [123]–[134] (pp 406–409)), although Rares J in that case at [73]–[74] (p 394) and in *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352; (2006) 236 ALR 720 esp at [45] (p 731) favoured a test which is much closer to the older test articulated in authorities decided under Rules of Court expressed in terms different from the language of s 31A(1)).”

Summary judgment in England and Wales

In England and Wales, rule 24.2 of the *Civil Procedure Rules 1998* provides:

“**24.2 Grounds for summary judgment**

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

(Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)”

It has been held that “real prospect” means that the case must be stronger than merely arguable.[19] However, a party does not need to show that they will probably succeed at

[19] *International Finance Corp v Utexafrica Sprl* [2001] C.L.C. 1361 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472.

trial. Such a requirement would be costly, time consuming and be almost equivalent to running the trial. Nothing would therefore be gained by the summary judgment procedure.

Summary judgment in the context of the *Civil Procedure Act*

The new test for summary judgment is a requirement to show that the claim, defence or counterclaim has "no real prospect of success". This is intended to be a liberalisation of the requirements for summary judgment. This new test was recommended by the Victorian Law Reform Commission:[20]

> "The threshold issues is whether there should be a liberalisation of the criteria for summary disposal of a claim or defence. On balance, the commission has concluded that the present requirements to show that there is no defence, or no cause of action, or no real question to be tried are unduly restrictive. Summary disposition should be available where a claim or defence has 'no real prospect of success'. This is arguable a more liberal test, is consistent with the rules applicable in some other jurisdictions, and a change in the formulation may encourage a more robust approach to be adopted by parties and courts."

The language of the new test, "no real prospect of success", is cast differently and apparently in more liberal terms than the existing test. Nevertheless there is, of course, a danger that the interpretation of these provisions on a more literal basis may result in their actual operation more or less reflecting the status quo. For example, Lord Hope in *Three Rivers District Council v Bank of England* said:[21]

> "The difference between a test which asks the question 'is the claim bound to fail?' and one which asks 'does the claim have real prospect of success?' is not easy to determine … While the difference between the two tests is elusive, in many cases the practical effect will be the same."

However, in my view the adoption of a more literal approach would be to overlook the context of these provisions in the new regime established by the Act, its legislative history, and that of these particular provisions. These are matters to which the *Interpretation of Legislation Act 1984* (Vic) directs attention.[22]

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20 Victorian Law Reform Commission, *Civil Justice Review Report*, Report No. 14 (2008), page 355 at 10.7.

21 [2001] 2 All ER 513 at [541].

22 See *Interpretation of Legislation Act 1984* (Vic) s 35.

The legislative context is critical. The summary disposition provisions are part of a regime that includes the overarching purpose, overarching obligations, and more rigorous case management provisions.

Parties and solicitors have an overarching obligation requiring them "not make any claim or make a response to any claim that does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis."[23] If this obligation is complied with it is difficult to see how a claim or defence could have "no real prospect of success". Consequently, as noted previously, it seems significantly less likely that parties will need to pursue a summary judgment application if their obligations under the Act are complied with.

Prior to commencing litigation "each person must take reasonable steps, having regard to the person's situation and the nature of the dispute – (a) to resolve the dispute by agreement; or (b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced."[24] This includes exchanging documents critical to the resolution of the dispute. More interaction between the parties, and the exchange of documents, prior to commencing proceedings should help to filter out claims that have "no real prospect of success".

On commencing proceedings and defending proceedings a party's legal representative or the party personally must certify that "(a) each allegation of fact in the document has a proper basis; (b) each denial in the document has a proper basis; (c) there is a proper basis for each non-admission in the document".[25] Again, this requirement will focus parties and their representatives on the strength of their claims before commencement.

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23 *Civil Procedure Act 2010* (Vic) s 18(d).
24 *Civil Procedure Act 2010* (Vic) s 34(1).
25 *Civil Procedure Act 2010* (Vic) s 42(1).

Summary judgment and case management

Once proceedings have commenced the courts can utilise their case management powers. Summary judgment is one aspect of case management. This is made clear by section 47(3)(c) which states "a court may actively case manage civil proceedings by:

> "(c) deciding the order in which the issues in dispute in the civil proceeding are to be resolved including—
>
> (i) deciding promptly which issues need full investigation and a hearing; and
>
> (ii) *disposing summarily of other issues*;"

Under section 63(2)(c) a court can even give summary judgment "on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding." Exercising this power would be a strong use of case management powers, but it may be appropriate and useful in particular circumstances, whether to dispose of the whole proceeding or particular parts of or issues in the proceeding.[26]

The usual situation will be that a party applies for summary judgment. This will usually occur after the parties have already complied with their pre-litigation obligations, exchanged critical documents and made a genuine attempt to settle the dispute or narrow the issues. Each party should be familiar with its case. If, by this stage, a party can only put forward a claim or defence that has "no real prospect of success" then, as a matter of case management, judgment should be entered. The result of good case management is that proceedings may be disposed of at varying stages, whether it be by consent or as a result of a combination of all or some of case management, appropriate dispute resolution and summary dismissal. Effective processes of this kind together with insistence on substantive compliance with the pre-litigation requirements should discourage commencement and prosecution of cases with little or no merit.

The giving of summary judgment is never a power to be exercised lightly in a liberal democratic society where the rule of law and access to the courts are among its crucial foundations. Care must be taken, especially when summary disposal might be seen by parties as an oppressive tactic for the purpose of, either or both, preventing the other

[26] See *Civil Procedure Act 2010* (Vic) s 63(1).

party having a chance to put its claim or defence properly or as a means of increasing the costs burden on the other party in the hope that it will be forced to discontinue.

The Victorian Law Reform Commission's *Civil Justice Review Report* also raised the issue that summary disposal of cases may inhibit developments in the law – hence the thought provoking comment, "one can only speculate on what may have happened in the development of tort law if the plaintiff's claim in *Donoghue v Stevenson*[27] had been summarily dismissed."[28] In my view, this concern is outweighed by the benefits to individual parties and the community to be gained as a result of effective case management. First, if an important point of law is raised, the judge may decide that, in all the circumstances, summary disposition is not appropriate, even though the test for summary disposition is satisfied, and that the matter should proceed to trail; exercising the discretion in this respect provided by section 64. Secondly, the overwhelming majority of disputes are settled prior to trial. It would seem very difficult to justify discouraging this simply for the purpose of maintaining proceedings which may assist in the development of the law - for the community at the expense of the parties. Additionally, many disputes that are settled prior to the issuing of proceedings, at mediation, or are determined by arbitration, raise issues that could contribute to the development of the law – which, incidentally, may make them easier to settle unless parties are particularly adventurous. Of course this does not mean that these appropriate dispute resolution methods should not be encouraged. Thirdly, litigants will still be able to appeal a summary judgment to the Court of Appeal, which keeps open an avenue of law making. Fourthly, a summary disposition application may include arguments on significantly unsettled law. If a party's case relies on a development of the law in these circumstances the judge may find this of significance in deciding whether a claim or defence has "no real prospect of success", or whether the discretion should be exercised in favour of a trail in any event.

Flexibility and proportionality of procedures is one of the key elements in successful case management in pursuit of the overarching purpose. The courts in hearing summary judgment applications should adapt the procedure to match the complexity of the dispute. If a summary judgment application has been made in a complex and costly case, it may be appropriate to give significant time to the summary judgment

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27 [1932] AC 562.

28 VLRC, "Civil Justice Review Report", Report No. 14 (2008) page 355 at 10.7.

application. The court may ultimately determine that the proceeding or defence has "no real prospect of success" and dispose of the proceeding and avoid wasted costs. In this vein, Lord Hobhouse, in *Three Rivers DC v The Governor and Company of the Bank of England (No. 3),* made the following comment:[29]

> ''The volume of documentation and the complexity of the issues raised on the pleadings should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sorts of case which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties."

Similarly, Lord Roskill, in *Ashmore v Corporation of Lloyd's,* said: [30]

> "The Court of Appeal appear to have taken the view that the plaintiffs were entitled of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible … Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn …"

In a small case there may be a point of law or construction that could be determined rather quickly.

It is also important to note that a summary judgment does not need to apply to the whole of a claim or defence. Parties might be encouraged to make summary judgment applications to dispose of aspects of a claim or defence that are thought to have no real prospect of success. This approach is obviously more efficient than waiting for judgment at trial and then applying for costs and is likely to be more flexible than using procedures for the purpose of stating and deciding preliminary, separate, questions.[31]

A further benefit of a more robust approach to summary judgment applications is that it will provide a major incentive to parties to properly consider and formulate their claims as early as possible, or they will know that they are at risk of having judgment entered against them. This spectre is also likely to strengthen the force of the pre-litigation requirements of the Act and assist in preventing them becoming just another

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29 [2003] 2 AC 1 at [156] to [157].

30 [1992] 1 WLR 446

31 For example, under rule 47.04 of the *Supreme Court Rules*.

formal and expensive step in the litigation process. It will also help to avoid situations such as that which arose in *Aon Risk Services v Australian National University*[32] (*"Aon"*) where a party attempted to amend its claim after the trial had already begun, which required an adjournment of the trial. As I have said previously,[33] the facts in *Aon* are not especially helpful when discussing efficient case management. The case is most useful for the judicial statements of the High Court on the importance of case management and the need to take into account of the interests of the community and other litigants in the efficient use of judicial resources. For example, the Chief Justice said:[34]

> "In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed."

The *Civil Procedure Act* with its overarching purpose, overarching obligations and specific case management principles have made it clear that the considerations that the Chief Justice stressed are to be regarded as critical issues in the administration of the civil justice system. The new summary judgment provisions if applied and interpreted with this in mind should be a useful tool in achieving the objects of the Act.

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32 (2009) 239 CLR 175

33 Justice Clyde Croft, "Aon and its implications for the Commercial Court", a paper presented at the Commercial Court CPD and CLE Seminar – *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What does this mean for litigation and how will it affect trial preparation? (19 August 2010).

34 *Aon* (2009) 239 CLR 175 at 182 per French CJ.