



Costs Orders in Interlocutory Applications, Employment & Industrial List, Supreme Court of Victoria

The Hon. Associate Justice Ierodiaconou*

Remarks of the Honourable Associate Justice Ierodiaconou at the Industrial Bar CPD:
Second Annual Employment Law Update Victorian Bar.

Tuesday, 13 March 2018.

Introduction

1. Colleagues, members of the profession and other supporters, good afternoon. I would like to begin by acknowledging the traditional custodians of the land on which we meet today. I offer my respects to their elders, past and present, and extend respect to those with Aboriginal and Torres Strait Islander heritage here today.
2. Thank you to the Industrial Bar Association for this invitation to engage with you. Today I will be discussing costs orders in the context of interlocutory applications in the Employment & Industrial List of the Supreme Court of Victoria ('the List'). I do not propose to discuss all costs issues but rather to highlight some of particular relevance in the List.

Costs of Interlocutory Applications

3. I will begin with reference to some general principles concerning costs in the Supreme Court. These principles are also relevant to the costs of interlocutory applications. They have been usefully outlined by Derham AsJ:

Under s 24 of the *Supreme Court Act 1986* the power to award costs is in the discretion of the Court. Whilst the discretion is absolute and unfettered, it has to be exercised judicially, that is, not by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation. In the exercise of the discretion, practices or guidelines have developed. These practices are not legal rules that confine the exercise of the discretion.

*Associate Justice of the Supreme Court of Victoria. I would like to thank my Associate, Kalina Sobczak, for her editorial assistance.

Although costs are in the discretion of the Court, there is a settled practice (sometimes called a general rule) that in the absence of good reason to the contrary, a successful litigant should receive his or her costs. It is not, however, a legal rule devised to control the exercise of the discretion.

It is relevant to observe that the purpose of a costs order is to compensate the successful party for the costs incurred, and not to punish the unsuccessful party. That purpose is a guide to the exercise of the discretion.¹

4. This general rule is in contradistinction to the federal industrial relations and State anti-discrimination jurisdictions in which many of you also practice. They are jurisdictions in which parties generally bear their own costs. That is a consequence of the relevant statutes in those jurisdictions that provide for costs to be the exception rather than the general rule.² As I will later reference, the application of the federal statute in the Supreme Court jurisdiction is perhaps the elephant in the room.

Civil Procedure Act 2010

5. Reference must also be made to the *Civil Procedure Act 2010* ('the CPA'). Section 24 of the CPA imposes an overarching obligation on parties and legal practitioners to 'use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.' This is consistent with the overarching purpose of the CPA to 'facilitate the just, efficient, timely and cost- effective resolution of the real issues in dispute.'³ These obligations apply to interlocutory applications as well as trials.⁴
6. Where all matters in an interlocutory application resolve except for costs, and a party wishes to press ahead with the hearing solely to obtain a determination of costs, query whether that could breach the principle of proportionality and

¹ *Timbercorp Finance Pty Ltd (In Liq) v Allan (Costs)* [2016] VSC 633 [13]-[15].

² *Fair Work Act 2009 (Cth)*, s 611 and see ss 375B, 400A, 570, 779A for relevant exceptions; *Victorian Civil and Administrative Tribunal Act 1998*, s 109.

³ Section 7(1) CPA.

⁴ Section 11 CPA.

therefore s 24 of the CPA. There may be a real prospect that the costs of the hearing exceed the amount of costs in dispute.

7. As Bell J observed in *Actrol Parts Pty Ltd v Coppi (No 3)*⁵, s 24 of the CPA 'strongly discourages conducting litigation by reference to the old principle that the ends justifies the means'.⁶ In that case, an employer pursued nominal damages against a former employee and was held to have unreasonably refused settlement offers. Bell J held that the employer had breached s 24 and consequently dismissed the proceeding and ordered it pay the former employee's costs on an indemnity basis. Bell J held this power of dismissal could be exercised at any stage in the proceeding.⁷
8. In *Yara Australia Pty Ltd v Oswal*⁸ ('*Yara v Oswal*'), the Court of Appeal observed that s 24 of the CPA may be breached by the over-representation of counsel. The observations were made in circumstances where seven counsel, three of them senior (of whom two appeared for the same party), appeared for the applicants on an interlocutory application, namely a security for costs application.

The scope of s 24 is not rigidly defined, but it plainly includes an obligation to ensure that parties are not over-represented. The applicants and their legal practitioners had an obligation to use reasonable endeavours to ensure that the costs of the applicants' legal representation were reasonable and proportionate.

The second reading speech to the Act identifies the practice of unnecessarily briefing two barristers as a procedural issue that needs redress. 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

⁵ 49 VR 573.

⁶ Ibid [60].

⁷ Ibid [27].

⁸ 41 VR 302.

themselves be for a small amount, but that have significant precedent or public interest value.⁹

9. In the circumstances of that case, particularly the importance and complexity of the interlocutory application, and that the oral submissions of lead counsel narrowed the issues in dispute, there was no breach of s 24 of the CPA.¹⁰ However, the Court of Appeal stated:

In order to comply with the particular overarching obligation in s 24, the legal practitioners — solicitors and counsel — who act for or on behalf of a party or who are asked to so act, must always give careful consideration to the level and the extent of the representation that is necessary for a party in a proceeding. Even where a party provides informed instructions to their legal practitioners that they wish particular counsel to be briefed, the legal practitioners who act on their behalf have an overriding duty to consider whether, having regard to the matters set out in s 24 and any other relevant circumstances, the engagement of particular counsel will contravene the Act. 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.¹¹

10. Section 24 of the CPA may also be breached by the filing of excessive material. Such a finding was made by the Court of Appeal in *Yara v Oswal*.

We are unpersuaded by the applicants' contention that the expenses incurred in respect of this applications must be seen in the context of the litigation as a whole, which will require both parties to incur very substantial legal fees. 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.

The Act's objective is the reform of the culture of unnecessary expenditure on civil litigation. Parliament has intended that this reform can only be achieved by holding parties to account for undesirable civil litigation practices that are unfortunately too common. The court was burdened with excessive material. The applicants and the respondents were burdened with the costs of that material. There has been a breach of the overarching obligation to ensure the costs are reasonable and proportionate by including in the application books voluminous material that was extraneous or repetitious and excessive.¹²

11. The orders made by the Court of Appeal in *Yara v Oswal* included the following:

...

⁹ Ibid [33] [34].

¹⁰ 41 VR 302 [37]

¹¹ Ibid [36].

¹² Ibid [51]- [52] (underline added).

Each applicant pay the respondent's costs of the application.

Each applicant's solicitor indemnify the applicant for 50% of the respondent's costs incurred as a consequence of the excessive or unnecessary content of the application books.

The applicant's solicitor be disallowed recovery from the applicant of 50% of the costs relating to the preparation of the application books, and costs incidental thereto.

The costs ordered by these orders may be taxed immediately.¹³

12. Part 2.4 of the CPA also imposes sanctions for contravening the overarching obligations. This includes wide-ranging powers to make costs orders.¹⁴ There are both compensatory and punitive elements to those powers.¹⁵
13. The Court has, of course, long held the power to impose costs orders on a solicitor / client or indemnity basis where special circumstances are established. These powers are recognised in Court rules.¹⁶

Cost Presumptions in Court Rules

14. I will now discuss a number of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules') that contain presumptions about costs in interlocutory applications.

Presumption: interlocutory costs in proceeding where order is silent or costs reserved

15. If the Court does **not** make an order for the costs of an interlocutory application, the presumption is now that they will be costs in the proceeding. This is a change from the previous presumption that each party bore their own costs. The change was brought about by the introduction in 2012 of Rule 63.20. It provides:

¹³ 41 VR 302 [61].

¹⁴ Ss 28, 29 CPA.

¹⁵ 49 VR 573 [110].

¹⁶ *Supreme Court (General Civil Procedure) Rules 2015*, rr 63.23, 63.28, 63.30.1. See also *Yara v Oswal* 41 VR 302 [56]-[57].

63.20 Interlocutory application

Where an interlocutory or other application is made in a proceeding and –

- (a) no order is made on the application; or
- (b) the order made is silent as to costs –

the costs are the parties' costs in the proceeding, unless the Court otherwise orders.

16. As a corollary of this rule, there is also now a presumption that the reserved costs of interlocutory applications are in the proceeding. Rule 63.22 provides:

63.22 Costs reserved

Where by order of the Court the costs of any interlocutory or other application, or of any step in a proceeding, are reserved, the reserved costs are the parties' costs in the proceeding, unless the Court otherwise orders.

Presumption: costs of amendment in proceeding

17. I wish to now discuss amendments to pleadings and costs. The Victorian Law Reform Commission's '*Civil Justice Review Report*' in 2008 ('the VLRC Report') made many recommendations which were subsequently adopted in the CPA.
18. The VLRC Report considered the costs of pleadings and disputes concerning them. It referred to a number of submissions by the Victorian Bar and others:
- 'significant resources are devoted to interlocutory fights about pleadings – for example, sufficiency of pleadings, whether a claim should be allowed to stand at all, amendment of pleadings and compliance with the rules'
 - 'the cost of interlocutory proceedings to enforce compliance is significant, inefficient and not productive to bringing about an early resolution of the dispute'
 - 'interlocutory fights take place at the formalistic level and do not deal with the substance of the issues'.¹⁷

¹⁷

Victorian Law Reform Commission, *Civil Justice Review: Report*, 4 March 2008, Chapter 12, 715.

19. Subsequently, r 63.17 was introduced. It provides:

Where a pleading is amended (whether with or without leave) the costs of and occasioned by the amendment and the costs of any application for leave to make the amendment are the parties' costs in the proceeding, unless the Court otherwise orders.

20. That is, the presumption is that the costs of amendment are now in the proceeding.

Presumption: costs are not immediately taxed

21. The VLRC Report made reference to submissions received on interlocutory costs orders:

During consultations, it was suggested to the commission that the present process for the 'routine' taxation of interlocutory costs orders is expensive to the parties, unduly burdensome to the court and in many cases ultimately a waste of time because most cases are settled on terms whereby the interlocutory costs orders are either waived or are otherwise irrelevant to the terms of settlement... Moreover, enforcement can be a problem for impecunious parties and can be used as a strategic forensic weapon by deep pocketed parties.

On the other hand, the fact that such orders are normally enforceable during the interlocutory stages can curtail inappropriate interlocutory behaviour.¹⁸

22. In 2013, Rule 63.20.1 was introduced. It provides:

If an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the Court orders that the costs may be taxed immediately.

23. That is, the presumption is that costs are not to be taxed immediately. Again, the Court retains a discretion to order otherwise.¹⁹

¹⁸ Victorian Law Reform Commission, Chapter 11, 680.

¹⁹ The circumstances when the demands of justice may require a departure from the ordinary rule were outlined in *Clayton Utz v Dale (No 3)* [2013] VSC 593 [65], and more recently by Hargrave J (as he then was) in *Fanissa Pty Ltd & Anor v Versace & Anor* [2016] VSC 416 [25]-[33].

Presumption: party seeking time extension pays costs

24. Another presumption is that the party applying for an extension or abridgement of time fixed by the Rules or an order, pays the other party's costs of and occasioned by the application. Rule 63.14 states:

63.14 Extension or abridgement of time

Where a party applies for an extension or abridgement of any time fixed by these Rules or by any order fixing, extending or abridging time, that party shall, unless the Court otherwise orders, pay the costs of and occasioned by the application.

25. Of course, in practice, and consistently with parties' obligations under the CPA, the experience in our List is parties usually come to an agreement about applicable time frames so as to minimise costs. Providing there is good reason for the extension, these consent orders are usually made 'on the papers'.

Presumption: party that discontinues / withdraws pays costs

26. For completeness, there is a long established presumption that arises in the event of discontinuance or withdrawal. That is, that a party who discontinues shall pay the costs of the other party. It is reflected in r 63.15:

Unless the Court otherwise orders, a party who discontinues or withdraws part of a proceeding, counterclaim or claim by third party notice shall pay the costs of the party to whom the discontinuance or withdrawal relates to the time of the discontinuance or withdrawal.

27. To date, unilateral withdrawal or discontinuance in our List has been rare. Discontinuance usually occurs after settlement.

Costs orders and Interlocutory Injunctions

28. Proceedings in the List regularly begin with an application for an interlocutory injunction being filed with, or soon after, the originating process.
29. There may be a series of applications for interlocutory injunctions. Rule 63.19 of the Rules deals specifically with that situation. It states:

Where the Court grants an interlocutory injunction and afterwards grants a further interlocutory injunction continuing the first injunction with or without

modification, an order as to the costs of the further injunction shall, unless the Court otherwise orders, include the costs of the first injunction.

30. Accordingly, the presumption is that where a second or subsequent interlocutory injunction continues the first injunction (with or without modification), the costs of that subsequent injunction include the costs of the first injunction.
31. Another issue which arises is where costs in an interlocutory application are reserved, and the plaintiff obtains an interlocutory injunction, but is ultimately unsuccessful at trial. This issue arose in *Crowe Horwath (Aust) Pty Ltd v Loone (No 4)*.²⁰ McDonald J held (at [6]) that the defendant was entitled to an order that the plaintiff pay his costs in respect of the interlocutory injunction application.

The fact that [the plaintiff] obtained an interlocutory injunction is not determinative of who should be liable to pay the costs of the interlocutory proceedings. Ultimately, [the defendant] succeeded in establishing that [the plaintiff] repudiated his contract with the consequence that the restraint was unenforceable. Having succeeded on this key issue, [the defendant] established an entitlement to damages for breach of contract. Costs should follow the event. Consequently, [the defendant] is entitled to costs in respect of the interlocutory application...

Disclosure of Costs and Mediation

32. On the subject of costs and interlocutory matters, legal practitioners should bear in mind their obligations under section 177 of the Legal Profession Uniform Law, contained in Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic).

177 Disclosure obligations regarding settlement of litigious matters

- (1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed—

²⁰ [2017] VSC 656.

- (a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay); and
 - (b) a reasonable estimate of any contributions towards those costs likely to be received from another party.
- (2) A law practice retained on behalf of a client by another law practice is not required to make a disclosure to the client under subsection (1), if the other law practice makes the disclosure to the client before the settlement is executed.

33. A regular order contained in referrals to judicial mediation is:

The legal practitioners for the parties shall provide to the mediator and to each other prior to the commencement of the mediation, a reasonable estimate of:

- (a) their costs and disbursements on a standard basis in relation to the proceeding up to and including the mediation;
- (b) the length of the trial; and
- (c) their anticipated costs and disbursements on a standard basis in relation to the trial.

Application of s 570 of the *Fair Work Act*

34. I have been discussing the Rules. I now wish to briefly mention an issue which has yet to be decided. It concerns the application of s 570 of the *Fair Work Act 2009* (Cth). As you know, it provides:

- (1) A party to proceedings (including an appeal) in a court (including of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.
- (2) The party may be ordered to pay the costs only if:
 - (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
 - (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
 - (c) the court is satisfied of both of the following:
 - (i) the party unreasonably refused to participate in a matter before the FWC;
 - (ii) the matter arose from the same facts as the proceedings.

35. How this provision affects our jurisdiction is yet to be determined. In *Adidem Pty Ltd v Cowdery* [2014] VSC 533 at [31], McDonald J stated:

There will be no order as to costs. During the course of the proceedings I raised with the parties the potential impact of s 570 of the *Fair Work Act* upon the power of the Supreme Court to order costs pursuant to s 24 of the *Supreme Court Act 1986*. Shortly after the conclusion of the proceedings, I was informed by each of the parties that, if successful in the appeal, no order for costs would be sought.

36. Many of you will be familiar with *Melbourne Stadiums Limited v Sautner* (2015) 317 ALR 665. In that decision, the Full Court of the Federal Court held at [157] that:

There was a single proceeding which was commenced and prosecuted to judgment in the County Court. Mr Sautner made claims under the *Fair Work Act* and at common law. The claims under the *Fair Work Act* were “matters” within the meaning of s 570(1) of the *Fair Work Act*. The proceeding was, as a result, a proceeding in relation to a matter arising under that Act. Section 570(1) operated to preclude the court from ordering MSL (“another party to the proceedings”) to pay any costs incurred by Mr Sautner in prosecuting his claims unless he could satisfy the court that one of the exceptions, provided for in s 570(2), applied.

Practical Suggestions - Summary

37. In conclusion, I offer the following three suggestions:
- 1) Consider the application of the CPA. It may be relevant to whether the Court exercises its discretion to order costs.²¹
 - 2) Before deciding to make an application for the costs of an interlocutory application, carefully consider the presumptive rules discussed above. If you decide to proceed with the application, you will need to explain why the Court should ‘otherwise order’.
 - 3) If the proceeding concerns claims made under the *Fair Work Act 2009 (Cth)*, consider whether the appropriate costs orders at an interlocutory stage are to reserve costs.

²¹ See, for example: *Crowe Horwath (Aust) Pty Ltd v Lawson* [2017] VSC 118.

38. I make a final observation. Costs disputes have likely been a feature of litigation since the *Statute of Westminster* introduced the entitlement to recover costs in 1275.²² If the last 700 years or so is any guide, they will continue to be of vital importance to those you represent and therefore an important skill to have in your armoury.
39. I wish you all a healthy and fruitful year ahead. Thank you.

²² Victorian Law Reform Commission, Chapter 11, 658.