

## Practitioners' Obligation to Keep Costs Reasonable and Proportionate – Court of Appeal Update

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### ***Introduction***

In *Yara Australia Pty Ltd & Ors v Oswal*<sup>1</sup> the Court of Appeal<sup>2</sup> has emphasised the overarching obligation on practitioners and parties to ensure the costs incurred in civil proceedings are reasonable and proportionate to the complexity of the case and the amount in dispute.

The matter initially came before the Court of Appeal as an application for leave to appeal a decision of Whelan J in which he had set aside an order of an Associate Justice for security for costs. The Court of Appeal refused the application for leave. After refusing leave, the Court of Appeal asked the parties to address it on whether any party had breached the overarching obligation in s24 of the *Civil Procedure Act*<sup>3</sup> (the Act) to use reasonable endeavours to ensure the costs incurred in the proceeding were reasonable and proportionate to the complexity and importance of the issues and the amount in dispute.

### ***Conduct of the Application for Leave to Appeal***

The application for leave to appeal was heard in one day. Beyond the notices of appeal and written cases the parties filed between them six lever arch folders of material. The parties were also represented by a raft of counsel and instructing solicitors, including five senior counsel, six junior counsel and five firms of solicitors.

The applicants, however, were only seeking relatively small amounts by way of security, the most significant amount being \$86, 361.00. It was in this context that the Court of Appeal sought submissions pursuant to s 29(2)(b) of the Act as to whether there had been a breach of one or more

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<sup>1</sup> [2013] VSCA 337

<sup>2</sup> Constituted by Redlich & Priest JJA and Macaulay AJA who wrote a joint judgment

<sup>3</sup> 2010 (Vic)

of the overarching obligations.<sup>4</sup> The Court of Appeal also noted that to date the Act's regime and the obligations had not been considered in any great detail at the appellate level and therefore undoubtedly the Court of Appeal was keen to offer some guidance on these matters.<sup>5</sup>

#### ***Discussion of Obligation to Ensure Costs are Reasonable and Proportionate***

In its judgment the Court of Appeal laid down a number of tests which should be applied by the inferior courts in determining whether the Act has been contravened.

For example, in determining whether the parties have met their obligations under s 24 of the Act, a 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.'<sup>6</sup>

But of course the overarching obligations also extend to solicitors and counsel, and the Court of Appeal has clearly signalled, consistent with the Act, in particular s 13, that a practitioner cannot hide behind their client's instructions to avoid their overarching obligations. The question of whether counsel or a solicitor has breached their overarching obligation to use reasonable endeavours to ensure costs are reasonable and proportionate

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.<sup>7</sup>

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<sup>4</sup> *Yara Australia Pty Ltd & Ors v Oswal* [2013]VSCA 337 at 4

<sup>5</sup> Ibid at 5

<sup>6</sup> Ibid at 13

<sup>7</sup> Ibid at 14

On the issue of representation, the Court of Appeal also noted the responsibility of both counsel and solicitors to ensure the extent and level of their client's representation are reasonable and proportionate.<sup>8</sup>

### ***Sanctions for Contravening the Act***

If there is a contravention of one or more of the overarching obligations s 29 of the Act confers on courts broader and more flexible powers than previously existed under the court Rules.<sup>9</sup> Although it is a somewhat lengthy passage, it is worth practitioners noting the following discussion from the judgment

The Court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates. In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes that burden may have the effect of compensating a party. It may take the form of a costs order against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which they would otherwise be entitled. The Act is clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their obligations. Moreover, the power to sanction is not confined to cases of incompetence or improper conduct by a legal practitioner. Where there is a failure by the practitioner, whether solicitor or counsel, to use reasonable endeavours to comply with the overarching obligations, it will be no answer that the practitioner acted upon the explicit and informed instructions of the client. A sanction may be imposed where, contrary to s 13(3)(b), the legal practitioner acts on the instruction of his or her client in breach of the overarching obligations.

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<sup>8</sup> Ibid at 15

<sup>9</sup> Ibid at 18

Section 28(2) enables a court, in exercising its discretion as to costs, to take into account any contravention of the overarching obligations. In our view, the enactment of s 29 together with s 28(2) imbues the Court with broad disciplinary powers that may be reflected in the costs orders that are made. The Court is given a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.

The Act does not merely reaffirm the existing inherent powers of the court but provides a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck.<sup>10</sup>

The Court of Appeal also suggested that, even if none of the parties to a proceeding allege a contravention of the Act, judges of their own volition should invite oral submissions on the issue if appropriate after concluding reasons for judgment.<sup>11</sup>

### ***Outcome***

In the end the Court of Appeal determined that the representation at the application for leave was reasonable and proportionate.<sup>12</sup> However, it determined that at least half of the material filed by the applicants was excessive or unnecessary to the application for leave.<sup>13</sup> Consistent with this view, the orders made by the Court of Appeal included that the applicant's solicitor:-

- (a) indemnify the applicant for 50% of the respondent's costs incurred as a consequence of the excessive or unnecessary content of the application books; and
- (b) be disallowed recovery from the applicant of 50% of the costs relating to the preparation of the application books, and costs incidental thereto.<sup>14</sup>

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<sup>10</sup> Ibid at 20-22

<sup>11</sup> Ibid at 27

<sup>12</sup> Ibid at 39

<sup>13</sup> Ibid at 51

<sup>14</sup> Ibid at 61