Update - Summary Judgment Under the Civil Procedure Act 2010 (Vic)

In a previous Practice Note I discussed the Victorian Court of Appeal case of *Manderson M & F Consulting v Incitec Pivot Limited*[3](“*Manderson*”).

This case dealt with the new test for summary dismissal of claims and defences under s 63 of the *Civil Procedure Act 2010* (Vic).

Generally, s 63 provides a Court may dispose of a civil proceeding summarily if satisfied a claim or defence, or part thereof, has ‘no real prospect of success.’

In my previous Practice Note I raised some issues concerning the approach the Court of Appeal had taken in interpreting s 63. The main issue was that via s 63 Parliament was clearly seeking to liberalise the common law test which had previously been applied to summary judgment.

Despite this, in *Manderson* (and in another case, *Karam v Palmone Shoes Pty Ltd*[1]*)* the Court of Appeal had taken the view that the test for summary had not been significantly altered by the *Civil Procedure Act* and the old line of authority was applicable.

However, since my previous Practice Note there has been a shift in the Court of Appeal’s position regarding the proper test to be applied to a summary judgment application. The recent case of *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd*[2] (“*Lysaght*”) specifically dealt with the proper test to be applied when determining an application for summary judgment in a civil proceeding pursuant to s 63 of the *Civil Procedure Act*.[3]

Warren CJ and Nettle JA wrote a joint judgment and on the question of the proper test to be applied observed:-

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[1] [2012] VSCA 97
[2] [2013] VSCA 158
[3] Ibid at [1]

> It follows that, for the present purposes, the test under s 63 of the Civil Procedure Act should be construed as one of whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success; that the 'real chance of success' test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test; and that, as the law is at present understood, the real chance of success permits of the possibility that there may be cases, yet to be identified, in which it appears that, although the respondent's case is not 'hopeless' or 'bound to fail', it does not have a real prospect of succeeding.[4]

Their Honours went on to clarify that it is incorrect to say there is no difference between the test applied before the *Civil Procedure Act* and the test under s 63, which should be viewed as more liberal.[5] In conclusion Warren CJ and Nettle JA answered the questions posed for consideration as follows:-

a) the test for summary judgment under s 63 of the Civil Procedure Act 2010 is whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success;

b) the test is to be applied by reference to its own language and without paraphrase or comparison with the 'hopeless' or 'bound to fail test' essayed in *General Steel*;

c) it should be understood, however, that the test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test essayed in *General Steel* and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;

d) at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the

[4] Ibid at [29]
[5] Ibid at [32]

> application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action **(**and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.

This list of answers should serve practitioners well in terms of a checklist of considerations when deciding whether to make an application for summary judgment.

It is also worth emphasising that the points made in *Manderson* regarding defects in pleadings still have application. That is, just because pleadings are defective doesn't necessarily mean there is a strong case for summary judgment, bearing in mind the respondent can still go on affidavit regarding their defence and the defect can be cured by amendment of the pleadings.

The purpose of s 63, rightly or wrongly, was in part to help the Courts dispose of unmeritorious claims at an early stage and relieve some of the burden on Court lists. Therefore, as a final point I do want to note some pertinent observations made in Neave JA's judgment. Her Honour was largely in agreement with the majority judgment, however, did go on to observe the following regarding the cautious approach to summary judgment emphasised by the majority:-

> In sub-paragraph (d) of [35] Warren CJ and Nettle JA observe that the power of summary dismissal 'should be exercised with caution.' It goes without saying that courts must consider applications for summary dismissal with appropriate care. That is inherent in the nature of a process which may deprive a plaintiff of the ability to pursue a claim or a defendant of an ability to argue a defence.
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> Nevertheless I am concerned that undue emphasis on the caution with which a court must exercise the power of summary dismissal runs the risk of reinforcing the historical approach to summary dismissal and may result in the legislative liberalisation of the test in s 63 having little impact in practice. That approach would be inconsistent with the objective of reforming the law relating to summary judgment, expressed in s 1(2)(e) of the Civil Procedure Act, and with the requirement that the Court give effect to the over-arching purposes of that Act, imposed by s 8.

> In my opinion the power of summary dismissal should be exercised consistently with the over-arching purposes of the Civil Procedure Act 2010 and having regard to the fact that, if granted, it will deprive the relevant party of the opportunity to pursue their claim or defence.

I will attempt to keep practitioners updated on developments as the interpretation of s 63 will undoubtedly continue to get attention from the Courts and in particular the Court of Appeal.

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