Summary Judgment Under the Civil Procedure Act 2010 (Vic)

The *Civil Procedure Act* 2010 (Vic) commenced on 1 January 2011 and aimed to substantially reform the way litigation was conducted in the State of Victoria.

One of the key reforms of the Act, according to the Second Reading Speech,[1] was the liberalisation of the test for summary judgment, empowering Courts to dispose of unmeritorious claims and defences summarily.

However, practitioners should be mindful that despite the liberalised test it remains a difficult task to have claims or defences dismissed summarily.

Section 63 of the Act provides that a Court may make an order for summary judgment in a civil proceeding if satisfied a claim or defence, or part thereof, has 'no real prospect of success.'

This power is subject to the discretion the Court has to allow a matter to proceed to trial despite there being no real prospect of success, if:-

(a) the matter should not be disposed of summarily because "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."[2]

The Victorian Court of Appeal decision of *Manderson M & F Consulting v Incitec Pivot Limited*[3]("*Manderson*") highlights the inherent problem Courts face when determining an application for summary dismissal in the absence of evidence in the adversarial context of a trial. This decision also makes it clear that flaws in pleadings are not of themselves ground for summary dismissal.

Manderson came before the Court of Appeal (constituted by Redlich JA and Judd AJA) as an application for leave to appeal from a judgment of the Commercial Court dismissing the plaintiff's

claim and ordering it pay the defendant's costs. The trial judge had dismissed the proceeding having determined the statement of claim did not disclose a cause of action and, further, the whole of its claim had 'no real prospect of success' within the meaning of s 63 of the Act.

As the Court of Appeal noted, the proceeding brought by the applicant had a chequered history.[4] This history included eleven versions of the statement of claim. It also included various applications to strike out the statement of claim and for leave to amend the statement of claim. When the plaintiff sought leave to file and serve a further amended statement of claim the defendant made an application that the proceeding be dismissed or permanently stayed.

The plaintiff claimed that the defendant had misused its confidential information. A key problem which the plaintiff had faced with its statement of claim was correctly identifying or defining the confidential information which it alleged was misused.[5] Moreover, the trial judge identified other issues with the statement of claim and its failure to plead the defendant's use or disclosure of the confidential information, an essential element of the cause of action upon which it relied.[6]

The appeal raised questions regarding the trial Judge's decision to invoke the inherent power of the court and s 63 of the Act to summarily dismiss the proceeding. The Court of Appeal, in discussing the inherent authority of courts to dismiss a proceeding, cited authority with approval which pre-dates the Act.[7] Specifically it cited Ormiston JA in *State Electricity Commission of Victoria v Rabel*[8], "...in order to dismiss summarily an action at a preliminary stage, it must be 'very clear indeed' that the action is 'absolutely hopeless' or 'so clearly untenable that it cannot possibly succeed."

The Court of Appeal then went on to cite *Day v Victorian Railways Commissioners* [9] where Dixon J explained the inherent jurisdiction to dismiss an action was one which should be sparingly exercised and only in very exceptional cases.

After discussing these authorities the Court of Appeal went on to conclude:-

> In our opinion, notwithstanding very apparent inadequacies in the form of the pleading, it was not appropriate to finally dismiss the plaintiff's claim on this basis. The plaintiff may at trial, with the assistance of evidence persuade a court that its conceptual framework constitutes confidential information capable of protection. It cannot be said that the plaintiff's case in that regard was absolutely hopeless or so clearly untenable that it could not possibly succeed.[10]

The Court was clearly discussing the inherent jurisdiction of courts to dismiss proceedings when citing these authorities. However, it is difficult to see the utility of discussing the common law tests which applied before the Act. In creating the new test in s 63 the Parliament was clearly seeking to liberalise the common law test which had been previously applied.

In any event, the Act was discussed separately in the judgment. Their Honours specifically noted their difficulty in understanding how s 63 of the Act was invoked by the trial Judge in the context of a dispute over the adequacy of pleadings.[11] The Court of Appeal cited with approval the discussion of Croft J in *JBS Southern Aust Pty Ltd v Westcity Group Holdings Pty Ltd*[12] of s 63 and its background. In particular, that "an inquiry as to whether a case has 'no real prospects of success' involves considerations extending beyond an analysis of the sufficiency of the statement of claim to plead a cause of action."[13] If there any doubts the proper course is to require a full trial of the claim.[14]

More recently the Court of Appeal has stated:

> Since the coming into force of s 63 of the Civil Procedure Act 2010, the test for summary judgment in favour of a plaintiff in a civil proceeding has been whether a defence or part of it 'has no real prospect of success'. In terms, it is a little different to the criterion under Rule 22.02 of the *Supreme Court (General Civil Procedure) Rules 2005*, of whether the defendant has no defence. But the change in terms was not intended to establish a new or different test; rather to express more accurately the way in which the rule had been interpreted by the courts. It remains, as the High Court said in *Fancourt v Mercantile Credits Ltd*,[13] that the power to order summary judgment is to be exercised sparingly and not 'unless it is clear that there is no real question to be tried'. Accordingly, we agree

> with the judge that the Magistrate correctly identified the test for summary judgment as being that it should only be granted if it is clear there is no real question to be tried.[15]

However, this statement appears to be in direct conflict with Attorney-General Hulls' position in the Second Reading Speech that the previously applied test was being liberalised.

In any event, given the Court of Appeal's indication as to s 63 and its irrelevancy to disputes over the adequacy of pleadings and, that if there are doubts as to whether a claim or defence has 'no real prospects of success' the proper course is a full hearing of the matter, it is difficult to see what impact the liberalised test will have on the court lists.

It is most likely s 63 of the Act will find application in proceedings where, before a trial, affidavit material on which a party intends to rely to make its case has been filed. Thereby putting a court in the position where it can look beyond the pleadings and assess the evidence on which a claim or defence relies and, ultimately, determine whether it has 'no real prospects of success.'

Alternatively it may be a tactical device by which one party makes an application for summary dismissal and forces the other side to respond via affidavit in opposition forcing it to show its hand so to speak.

It can be said that Victorian courts will continue to take a very cautious approach to summary dismissal notwithstanding the liberalised test.

* The original version of this summary was first published in the *Journal of Civil Litigation and Practice* in July 2012.

**A more recent case than *Manderson* on summary judgment under the *Civil Procedure Act 2010* (Vic) which has been handed down by the Court of Appeal is *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd*[1] ("*Lysaght*"). *Lysaght* marked a shift or

[1] [2013] VSCA 158

reanalysis of principle and I have subsequently done further updated case note on the Greens' List Blog discussing it.

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[1] Attorney-General Robert Hulls "Second Reading –Civil Procedure Bill" 24 June 2010
[2] *Civil Procedure Act* 2010 (Vic), s 64
[3] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444
[4] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444 at [3]
[5] *Manderson M & F Consulting v Incitec Pivot Limited (No2)* [2011] VSC 205 at [39]
[6] *Manderson M & F Consulting v Incitec Pivot Limited (No2)* [2011] VSC 205 at [45]
[7] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444 at [19]-[20]
[8] *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 108 at [109]
[9] *Day v Victorian Railways Commissioners* [1949] 78 CLR 62 at [9]-[92]
[10] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444 at [21]
[11] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444 at[27]
[12] *JBS Southern Aust Pty Ltd v Westcity Group Holdings Pty Ltd* [2011] VSC 476
[13] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444 at [32]
[14] *Manderson M & F Consulting v Incitec Pivot Limited* [2011] VSCA 444 at [32]
[15] Karam v Palmone Shoes Pty Ltd & Anor [2012} VSCA 97 at 28

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