

## Article Information

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# Insolvency Update - Victorian Courts taking active steps to review compliance with the Civil Procedure Act 2010 (Vic)

**A recent decision by the Court of Appeal in the Victorian Supreme Court indicates that the courts are increasingly prepared to take steps on their own motion to investigate**

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In the case of *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337 (27 November 2013) the Court of Appeal raised issue with the need for five senior counsel, six junior counsel and five firms of solicitors to appear on an application for leave to appeal an order declining security for costs for amounts totalling \$141,000 and the need to file 6 volumes of material, containing in excess of 2,700 pages, in support of that application.

Leave to appeal was ultimately denied. On its own motion, the Court required the practitioners involved in the application to make submissions as to whether they had breached their obligations under s24 of the *Civil Procedure Act 2010* (Vic) (Civil Procedure Act) by failing to ensure that costs incurred in the proceeding were reasonable and proportionate to the complexity and importance of the issues and the sums in dispute.

The Civil Procedure Act grants to the courts the power to take into consideration any breaches of the Civil Procedure Act when exercising any power in relation to a civil proceeding or when exercising its discretion as to costs in a civil proceeding.

### What did the Court decide?

The Court held that:

- Given the complexity of the matter and the nature of the proceeding in general, there was no specific breach of the Civil Procedure Act resulting from an over-representation of the parties.
- The filing of excessive materials in support of the application was a breach of section 24 of the Civil Procedure Act in that the costs of preparing those materials and the burden placed on the Court by having to deal with those materials were not reasonable and proportionate to the complexity and importance of the issues and the sums in dispute.

The Court took the view that:

- Legal practitioners must always give careful consideration to the level and the extent of the representation that is necessary for a party in a proceeding in order to meet their obligations under section 24 of the Civil Procedure Act.
- Even when a party to litigation specifically requests particular counsel, a solicitor still has an obligation to assess whether retaining that counsel may be a breach of s24 of the Civil Procedure Act in that the costs of retaining that counsel may not be reasonable and proportionate to the complexity and importance of the issues and the sums in dispute.
- Materials submitted in support of a party's position should be limited to documents necessary to the resolution of the issues identified, or any other matter relevant to the application, and should not include documents that are extraneous or repetitious and excessive.
- The objective of the Civil Procedure Act is to reform the culture of unnecessary expenditure in civil litigation and the Court will consider breaches of the overarching obligation to ensure that costs incurred in the proceeding were reasonable and proportionate to the complexity and importance of the issues and the sums in dispute when exercising its discretion in relation to costs.

The Court ultimately ordered that:

- The applicants pay the costs of the respondent for the failed application for leave to appeal.
- The solicitors for the applicants indemnify the applicants for 50% of the costs of the respondent incurred as a consequence of the excessive or unnecessary content of the application books.
- The solicitors for the applicant be disallowed recovery from the applicant of 50% of the costs relating to the preparation of the application books, and costs incidental thereto.
- The solicitors for the applicants were to provide the applicant with a copy of the orders made and a copy of the reasons for those orders.

### **Lesson for parties to litigation and their solicitors**

In the short time since this case was decided it has already been raised by judges in other proceedings before the Supreme Court. This indicates that judicial officers may be inclined to take a more active approach in relation to any perceived non-compliance with the overarching obligations under the Civil Procedure Act.

Parties to litigation in Victoria and their solicitors need to be aware of their obligations under the overarching provisions prescribed in the Civil Procedure Act and that the courts are prepared to use their powers to investigate and deal with perceived breaches of the Civil Procedure Act.

This may involve submissions having to be made to the court regarding the conduct of the party or solicitors, which will involve increased costs, and may result in cost orders being made against a party to the litigation or its solicitors, including possible orders for indemnity costs.

For further information on the Civil Procedure Act, please contact a member of our [Restructuring & Insolvency](#) team.