

Form 27F – Outline of oral submissions

(rule 44.08.2)

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M114 of 2017

BETWEEN:

BORIS ROZENBLIT

Appellant

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and

MICHAEL VAINER

First Respondent

and

ALEXANDER VAINER

Second Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

The appellant certifies that this outline is in a form suitable for publication on the Internet

Part II:

Outline of the propositions the appellant intends to advance in oral argument

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- 1. The threshold circumstances referred to in the sole ground of appeal exist and are uncontroversial.¹**

- *Materials supporting the existence of the circumstances will be identified.*

- 2. The court of appeal erred in failing to find, as a matter of legal principle - application of the principle of legality in support of the common law right of access to justice - that it was not open to the associate judge to exercise her discretion to stay the proceedings²**

- *The common law right of access to the courts is, for purposes of this case, more accurately stated as a right to seek justice by access to the courts. There is no right to access the courts for any other purpose.*

¹ Appellant's Submissions [36]-[43]

² Appellant's Submissions [62]-[68]; Appellant's Reply [15]. Note that the oral submissions further develop and therefore depart from, the argument in Appellant's Submissions [82]-[86] and Appellant's Reply [19]-[20]

- *The principle of legality requires statutes, such as r 63.03(3), to be interpreted so as not to abrogate the right to seek justice by access to the courts.*
- *The rule in Cox v Journeaux provides that a stay may be ordered only where a party is accessing the courts for a purpose other than the just resolution of a controversy.*
- *The reference to a “unnecessary injustice” in the rule in Cox v Journeaux is a reference to an injustice that arises as a result of the use of the court for a purpose other than seeking judicial determination of a controversy – in other words, for a collateral purpose or to harass the other party.*
- *Recognition that Cox v Journeaux is concerned with the scope of the right of access to the court, rather than with the circumstances in which such a right can be abrogated, means that questions of proportionality are not relevant to this case.*

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3. The court of appeal erred in failing to find, on the basis of binding authority, that it was not open to the associate judge to exercise her discretion to stay the proceedings.³

- *The Court of Appeal left undisturbed Cameron J's holding that Cox v Journeaux should be confined to cases where a stay is ordered in the court's inherent jurisdiction.*
- *The Court of Appeal erred in failing to overturn Cameron J's holding. It ought to have found that the rule stated in Cox v Journeaux governs the exercise of the discretion to stay proceedings irrespective of the source of that discretionary power.*

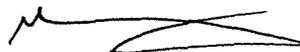
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4. The Court of Appeal set out five principles governing the exercise of the discretion in Rule 63.03(3), in paragraph 67 of the reasons for decision. If those principles led to error, the source of the error should be identified.⁴

- *Subparagraph 67(d) should be clarified to state that the only conduct which can give rise to a stay pursuant to r 63.03(3) is conduct which involves harassment of the other party or the institution of proceedings for a collateral purpose, and which falls for condemnation.*

Dated: 8 February 2018

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JONATHAN KORMAN
Counsel for the appellant

³ Appellant's Submissions [32]-[34]; [51]-[55]; [94]-[99]

⁴ Appellant's Submissions [30]-[31]