IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M114 of 2017

BETWEEN:

BORIS ROZENBLIT
Appellant

and

MICHAEL VAINER
First Respondent

ALEXANDER VAINER
Second Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I:

1 The respondents certify that this outline is suitable for publication on the internet.

Part II:

2 The Supreme Court has inherent jurisdiction, and express power under r 23.01, to stay a proceeding for abuse of process. A proceeding conducted in a manner amounting to harassment or for a collateral purpose can be stayed as an abuse of process; in fact, abuse of process does not require a finding of misconduct or moral delinquency.[1]

3 Rule 63.03 was introduced in 1986 to overcome the need for exceptional circumstances before a stay could be granted for non-payment of costs, identified in *Exell v Exell* [1984] VR 1 at 9. The rule is not conditioned on the existence of abuse of process. To read into it the special leave question elements is to render the rule otiose. It is not to be glossed. The wisdom which cautions against confining abuse of process to defined categories of conduct[2] is apposite to r 63.03(3) too.

4 The discretion conferred by r 63.03(3) is to be exercised "in the context of the common law adversarial system as qualified by changing practice", to borrow the phrase used by French CJ in *Aon.*[3] Consistently, below the principle distilled in *Gao* ("essentially the only practical way to ensure justice between the parties"[4]) was re-formulated *post* the enactment of the *Civil Procedure Act 2010* (Vic) and *post Aon* (as "the only fair and

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1 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-266 [10], 266-267[14], 281 [69]-[70], 299[138]; *Katauskas, infra,* at 93 [27]-[28].
2 *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at 93 [27]-[28].
3 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at 189 [24].
4 *Gao v Zhang* (2005) 14 VR 380 at 385 [15].

practical way of facilitating the just, efficient, timely and cost-effective resolution of the proceeding") at [69(a)] of its reasons; AB246.

5 The exercise of the procedural power in *Aon* shut the ANU out from bringing further claims; ACT r 21(2) considered in *Aon* is comparable in text and purpose with the *CPA* provisions applicable in Victoria (since *Gao*). The learning in *Aon* is applicable too.

6 *Aon* affirms: (1) that in discretionary procedural decisions the court is concerned not only with justice between the parties, but also the public interest in the proper and efficient use of limited public resources[5] and the maintenance of confidence in the administration of justice[6]; (2) that the strain, uncertainty and delay imposed by the way in which litigation is conducted are relevant factors to be taken into account in the exercise of judicial discretions[7]; (3) that an order for costs is not to be treated as a panacea for cost, strain, uncertainty and delay attributable to an application or its consequence[8]; (4) that judicial discretions are only to be exercised, in the bulk of situations, on the basis of candid, ample affidavit material[9]; (5) that a "just resolution" is not an abstract concept focussed only on ultimate outcomes, but is a practical notion which takes into account that "speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings"[10]; and (6) that a party has a right to bring proceedings, but thereafter, in seeking the just resolution of the dispute, the parties do not have a right to agitate the issues they want, only a sufficient opportunity to do so[11].

7 This special leave question is to be answered "Yes" and appeal dismissed for the reasons that: (1) Rule 63.03(3) is not to be glossed. (2) On such an application the candour of an impecunious respondent as to how the litigation has been funded and is expected to be funded to judgment, including identifying any non-party who is supporting the litigation, and the terms of that support[12] is very relevant. (3) The stress and uncertainty of ongoing litigation that cannot come to an early resolution; the consequent misallocation of limited public resources; the continuing burden of costs

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5 *Aon* at 188-189 [23], 211 [93], 212 [94], 217 [111].
6 *Aon* at 195 [35].
7 *Aon* at 192 [30], 214 [100]-[101].
8 *Aon* at 190 [25], 213 [98]-[99], 214 [100]-[101], 217-218 [114].
9 *Aon* at 215 [103], 216 [106].
10 *Aon* at 213 [98], 215 [105], 217-218 [114].
11 *Aon* at 214-215 [102], 217 [111]-[112].
12 A defaulting party who hides such information shields a non-party from identification and accountability, namely, hides the person essentially responsible for the litigation and who may stand to benefit from it.

which should not have been incurred and remain unrecompensed in the face of court order, are relevant matters. (4) The criteria for appellate intervention laid down in *House v The King* are not met.

8 The plaintiff provided inadequate information about his resources; there was no evidence as to how the litigation had been funded, or how the expert evidence required for particularisation[13] or the remaining interlocutory steps or the trial could be funded[14]. *Ex facie* the interlocutory steps could not be completed, yet the plaintiff did not depose that there would be no trial if a stay was granted. The alternative was the strain, cost, uncertainty and wasted resources of a proceeding which languished indefinitely.

9 In *Batistatos* this Court recognised, with due regard to *Cox v Journeaux [No 2],* that a litigant's right to a trial is not absolute, but qualified by the body of procedural law administered by the court[15], which has evolved considerably in recent decades.

10 The gloss contemplated by the special leave question negates the significance of costs orders taxable immediately; requiring that such costs go unpaid without consequence is apt to bring the administration of justice into disrepute among right-thinking people.

11 As *Gao* teaches, a stay order is not to be made lightly. However, the wider context is not to be overlooked: the non-payment of costs may found an act of bankruptcy[16] and lead to a sequestration order - a statutory stay - unless the trustee in bankruptcy assumes responsibility for the conduct of the bankrupt's case[17]. Thus, at further expense, and in another court, the innocent litigant may procure a statutory stay or at least the accountable further conduct of the litigation by a responsible party. Non-payment of costs by a company may found an application for its winding up, in which case a liquidator must personally assume responsibility for any further conduct of the claim[18].

Dated: 9 February 2018

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Rodney M. Garratt QC
Senior counsel for the respondents

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13 The Court records the plaintiff's intention and the need for expert evidence at [32], [34] and [57] of *Rozenblit v Vainer (No 3)*; see AB111, 112, 119-120.

14 See [70] and [71] of *Rozenblit v Vainer (No 3)* at AB123-4.

15 *Batistatos, (supra)* at 280 [65], 281-282 [71].

16 *Bankruptcy Act 1966* (Cth), s. 40(1)(g); s. 41.

17 Ibid, s. 60(2).

18 *Corporations Act 2001* (Cth), sections 459E, 459F, 459C, 459P, 467.