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' SUBMISSIONS

Filed on behalf of the respondents by
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Dated: 13 October 2017
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Part I: Certification

1. The respondents certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal raises the following issue: Is the discretion under rule 63.03(3) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**), or the inherent jurisdiction, limited by a rule that in the absence of a finding that a party has conducted litigation in a manner amounting to harassment or because of collateral purpose the court may not order a stay of a proceeding against a party who does not have means sufficient to meet interlocutory costs orders made against him or her.

Part III: Certification in respect of section 78B of the *Judiciary Act 1903* (Cth)

3. The respondents consider that no notice under s 78B is required.

Part IV: Statement of Material Facts in contest

4. The respondents accept the facts stated by the appellant, with the following clarification and additions:

   (a) The respondents understand that the appellant is aged 86.[1]

   (b) The appellant alleges that between 1983 and 1984 he invented certain tyre recycling technologies, and that upon arrival in Australia he sought a partner to assist him in commercialising the tyre recycling technologies.[2]

   (c) The appellant alleges that the first respondent voted in favour of the transfer of his shares, in respect of which he held a proxy. The respondents contend that the appellant had knowledge of, and consented to, the transfer of his shares.[3]

   (d) In refusing the second application by summons seeking leave to amend the statement of claim, the associate judge went further than simply finding that the draft pleading contained minor flaws, many of which were drafting matters that readily could be corrected.[4] Her Honour refused leave to add

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1 It was stated in the agreed summary for Court of Appeal that he was born on 22 July 1931.
2 Summary for Court of Appeal at [2].
3 Summary for Court of Appeal at [5].
4 Appellant's submissions at [14].

claims concerning the liquidation of VR Tek Global Pty Ltd (**VRT Global**) because of their poor drafting and refused to allow the addition of causes of action in respect of the operation of Polymeric Powders Pty Ltd on the basis that the deficiencies in the proposed pleading were so substantial that no causes of action were sufficiently shown.[5]

(e) The respondents obtained the following orders for costs against the appellant, both of which were accompanied by an order pursuant to rule 63.20.1 that the costs may be taxed immediately:

(i) Order of Lansdowne AsJ made 20 October 2014. This order concerned an oral application for leave to amend made at the directions hearing on 25 August 2014 and the application for leave to amend made by summons filed 29 August 2014;

(ii) Order of Lansdowne AsJ made 24 June 2015. This order concerned the application for leave to amend made by summons filed 10 November 2014, as well as the respondents' subpoena objections.

The costs orders extend to seven court dates between 25 August 2014 and 24 June 2015.

(f) After taxation of the costs was initiated the following orders were made:

(i) Consent order of Costs Registrar Ratcliffe made 15 December 2014 that the appellant pay the respondents the sum of $22,000 by 4:00pm on 19 December 2014. This is a net figure after an allowance of approximately $17,000 on account of the fact that the appellant sought $17,064.14 for the costs ordered upon dismissal of the respondents' counterclaim by consent.

(ii) Consent order of Costs Registrar Deviny made 12 August 2015 that the appellant pay the respondents the sum of $28,000.

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5 *Rozenblit v Vainer (No 2)* [2015] VSC 234 at [88], [89], [100].

Part V: Statement of applicable statutes

5. The appellant's statement of applicable constitutional provisions, statutes and regulations is correct, except to say that it is appropriate to add sections 7(1) and 8 of the *Civil Procedure Act 2010* (Vic) (***CPA***). These provisions are set out in Annexure A.

Part VI: Respondents' argument

Rule 63.03

6. Rule 63.03(3)(a) of the Rules provides:

> "(3) Where the Court makes an interlocutory order for costs, the Court may then or thereafter order that if the party liable to pay the costs fails to do so-
>
> (a) if that party is the plaintiff, the proceeding shall be stayed or dismissed."

7. The power in rule 63.03(3)(a) to dismiss or stay a proceeding where interlocutory costs are unpaid is conferred in broad and unfettered terms.

8. It is well established that a statutory provision conferring a broad power on a court or tribunal is generally not read down by the making of implications or imposing limitations that are not found in express words.[6]

9. Rule 63.03(3) contains no express limitation that it is available against a litigant who does not have means sufficient to meet interlocutory costs orders made against him or her only where that party has conducted litigation in a manner amounting to harassment or because of collateral purpose. There is no warrant for reading such limitations into the rule. By contrast with the approach taken in the courts below, such limitations would not be consistent with sections 7 and 8 of the CPA. Further, such limitations would severely limit the availability of the rule against a party who was unable to meet interlocutory costs orders.

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6 *The owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc.* [1994] HCA 54; (1994) 181 CLR 404 at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Wong v Silkfield Pty Limited* [1999] HCA 48; (1999) 199 CLR 255 at 260-261 [11] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

The Court of Appeal decision and Cox

10. It was appropriate that the Court of Appeal did not simply apply Dixon J's statement of principle in *Cox v Journeaux [No 2]* (1935) 52 CLR 713 (***Cox***).[7] In *Gao v Zhang* (2005) 14 VR 380 (***Gao***), Ormiston JA held that the power under rule 63.03(3) ought not be employed where the effect of it would be to put an end to the litigation unless the reason for making the order is serious and essentially the only practical way to ensure justice between the parties.[8] Ormiston JA held further that:

> "[A]t least for the present, if an order of this kind is to be made, there must be seen to have been some conduct on the part of the party in default which falls for condemnation to the extent of making so draconian an order."[9]

Ormiston JA drew on Dixon J's statement of principle in *Cox* in expressing the principles which his Honour considered to be applicable to applications under rule 63.03(3) and also in emphasising the seriousness of making a stay order.[10]

11. Whelan and McLeish JJA were of opinion that it is wrong to regard the 'basal principle' articulated by Dixon J in *Cox* as imposing some stricter test than that in *Gao*.[11] Their Honours considered that this would be to misconstrue the use to which Ormiston JA put the earlier case, which was to support his conclusion that the stay had to be the only fair way of protecting the interests of the other party.[12] Their Honours continued:

> "In any event, nothing in the 'basal principle' is inconsistent with the cautionary approach taken by Ormiston JA to the power now in issue. In each case, it is apparent that the interests of justice require that the exercise of the power be a last resort. That is because the conduct of the party in default has been such as to make it necessary in the interests of justice between the parties that the order be made. Inevitably, to use other language employed by Ormiston JA, such conduct will be conduct warranting 'condemnation' by the court in the form of a stay order."[13]

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7 Compare appellant's submissions at [32]
8 *Gao* at 385[15]. See also at 384[12].
9 *Gao* at 386[17].
10 *Gao* at 384[12].
11 *Rozenblit v Vainer* [2017] VSCA 52 (**Court of Appeal Reasons**) at [64].
12 Court of Appeal Reasons at [64].
13 Court of Appeal Reasons at [65].

12. The Court of Appeal applied *Gao* and, correctly, took into account developments since *Gao*:

(a) First, the introduction of rule 63.20.1 which provides that if an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the court orders that the costs may be taxed immediately.

(b) Secondly, the enactment of the *CPA*. Section 8(1)(c) of the *CPA* expressly requires the Court to seek to give effect to the overarching purpose in, *inter alia*, the exercise and interpretation of its powers under the rules of court. Section 7(1) states that the overarching purpose of the Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

These developments obviously post-date Cox, where Dixon J exercised the inherent jurisdiction to stop an action summarily because the plaintiff's case was clearly hopeless.[14]

13. The principles stated by the Court of Appeal in this case involve no dilution of the rule in *Cox*.[15] In summarising the applicable principles at subparagraphs 67(a)-(e) of their reasons, Whelan and McLeish JJA, with whom Kyrou JA agreed:

(a) Refined the key principle in *Gao* to take into account the factors mandated by s 7(1) of the CPA.

(b) Made the obvious point that one must also have regard to the interests of the party in whose favour the costs were ordered to be paid.

(c) Reiterated that the parties' conduct of the proceeding to date is relevant to the exercise of the power, and added, taking into account the introduction of rule 63.20.1, that the reasons for which costs were ordered to be taxed immediately is in particular relevant to the exercise of the power.[16]

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14 *Cox* at 720-721.
15 Compare appellant's submissions at [90].
16 As to this factor see also Court of Appeal Reasons at [60]-[61].

(d) Included the requirement in *Gao* that a stay should not be ordered unless the conduct of the party in default warrants the condemnation inherent in such an order.

(e) Reiterated that the power is not to be used simply as a means of enforcing payment of the costs in question unless there are grounds for concluding that the party in default is recalcitrant and is capable of remedying the default.[17]

The Court of Appeal also made plain that that the interests of justice require that the exercise of the power be a last resort.[18] This is consistent with *Gao* and with *Cox*.

14. The Court of Appeal concluded that on a fair reading, the associate judge proceeded in accordance with the principles articulated by it, and the judge was right to dismiss the appeal in that respect.[19] The associate judge did not act upon a wrong principle and there is no basis for reviewing her exercise of the discretion.[20] The appellant did not rely on *Cox* before the associate judge, instead, like the respondents, contending that the stay application was governed by the principles stated in *Gao*.

15. *Gao* does not hold that there must be harassment or collateral purpose before a proceeding brought by an impecunious litigant can be stayed pursuant to rule 63.03(3). Nor does *Cox*. In *Gao*, Ormiston JA considered that deliberate harassing of the other party might constitute conduct on the part of the party in default which falls for condemnation to the extent of making so draconian an order.[21] However, his Honour did not stipulate that harassment is a prerequisite for the making of an order under rule 63.03 against a party who does not have means sufficient to meet an interlocutory costs order.[22]

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17 Court of Appeal Reasons at [67].
18 Court of Appeal Reasons at [65].
19 Court of Appeal Reasons at [68].
20 *House v R* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.
21 *Gao* at 386[17].
22 See also AsJ Reasons at [82], [94].

16. In *Gao* Ormiston JA described as undoubtedly correct certain comments made by the primary judge in that case and by other judges about rule 63.03.[23] Ormiston JA stated:

> "In broad terms, it was said that the provisions of rule 63.03(3) are designed to overcome a defect in the jurisdiction of the court which was revealed by the Full Court decision in *Exell v Exell*[24] where it was held that under the inherent jurisdiction of the court to make an order such as the present it was necessary to show "exceptional circumstances", such as true abuse of process or the like. It followed, said the judge in the present case, ... that the restrictions imposed in *Exell* were intended to be overcome by the new rule and that consequently the court has a wide power to make an order for a stay, dismissal or striking out where orders for costs of interlocutory applications have remained unpaid."[25]

17. Acceptance of the conditions for the exercise of the power under rule 63.03(3) that are referred to in the special leave question would impermissibly narrow the circumstances to be examined on applications under the rule. An inquiry as to whether there has been harassment or collateral purpose focuses attention upon the intention of the party in default and thus ignores the fact that a party seeking to invoke the rule may suffer injustice due simply to the conduct of the other party or the result of that conduct, not its intention.[26] Conduct may seriously affect an opposing party, such as by causing substantial delay and wasted costs, notwithstanding that it does not amount to harassment or collateral purpose. The associate judge was well placed to assess all of the circumstances of this case. Her Honour conducted all of the hearings and directions hearings and had very detailed knowledge of this matter, its history and the conduct of the parties. Her Honour dealt with five applications for leave to amend; three by summons and two made orally. Her Honour saw fit to make orders for costs and, in the exercise of discretion, to order that they be taxable forthwith. There was no appeal against those orders.

18. There was no warrant for the associate judge being constrained to consider only whether the appellant had been guilty of harassment or collateral purpose.

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23 *Gao*, 383[9].
24 [1984] VR 1, especially at 8-9.
25 *Gao*, 383.
26 See AsJ Reasons at [94].

19. Several aspects of the applications for leave to amend are particularly noteworthy. First, the appellant allowed the litigation to progress through the close of pleadings, the completion of discovery and a second mediation before deciding to seek leave to amend and to bring a claim that it had previously been decided not to pursue.[27] A deliberate decision was made prior to the commencement of the proceeding to not bring a claim in respect of the liquidation of VRT Global.[28] In the absence of any explanation at all for the applications for leave to amend, including on oath, the associate judge pressed the appellant's counsel at the hearing on 2 September 2015 as to the reason for the application for leave to amend. Counsel explained that at the time when the pleadings were first drafted:

> "I in conjunction with my instructing solicitor took the view that it was too difficult from a technical/legal point of view to plead anything beyond the share allocation matter – sorry, the share transfer matter."

20. Secondly, the appellant made two oral applications for leave to amend. Both were rejected. The first oral application was made at the directions hearing on 25 August 2014. In the ordinary course one could expect that pre-trial directions would be made at the directions hearings following mediation. The associate judge adjourned that hearing due to the appellant's desire to amend and subsequently ordered that the appellant pay the costs of that directions hearing.[29]

21. Thirdly, the appellant made two applications by summons seeking leave to amend that were dismissed with costs taxable forthwith.

22. Fourthly, upon the determination of his third application by summons the appellant was granted conditional leave to amend.

23. Fifthly, at least 8 proposed amended statements of claim were produced in the period from August 2014 to the hearing before the associate judge on 2 September 2015.[30]

24. Sixthly, the applications were attended by administrative error. Shortly prior to the hearing of the first summons the appellant's solicitors sent a further iteration to the

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27 The first mediation was held prior to the commencement of the proceeding.

28 The appellant brought two claims, based on multiple causes of action. The first, which was abandoned as part of the amendments, related to the initial allocation of shares in VRT Global. The second relates to the transfer of the appellant's shares in VRT Global to the second respondent.

29 Order made 20 October 2014 at 3(b)]. See also at [4].

30 One of them is exhibit "DS-1" to the affidavit of Dmitry Shtifelman made 7 July 2015.

respondents' solicitors on which he subsequently did not rely at the hearing of that summons.[31] The first hearing of the appellant's third summons had to be adjourned because the proposed amended statement of claim that was exhibited to the affidavit in support was not the correct version.[32]

25. Seventhly, the period of 16 months following mediation on 13 August 2014 was taken up with the appellant's applications for leave to amend, with the latter part of that period including the respondents' application for a stay consequent upon the non-payment of costs orders. Save for the upholding of some minor subpoena objections raised by the respondents the proceeding otherwise did not progress at all during this period.

26. Eighthly, the amount of the unpaid costs is substantial. They total $50,000 on a standard basis, effectively $67,000 before taking account of the allowance of approximately $17,000 for costs ordered in respect of the respondents' counterclaim which, by consent, was dismissed with costs taxable immediately.

27. Ninthly, the appellant consented on 15 December 2014 to an order that he pay the respondents the sum of $22,000 by 4pm on 19 December 2014, thus creating a strong impression that he would pay the costs. The appellant then simply did not pay but there was no communication with the respondents' solicitors until they first wrote and then telephoned chasing payment.[33] In response to an attendance by the Sherriff the appellant's solicitors indicated that if this were persisted with they would seek instructions to obtain an injunction restraining the respondents' solicitors from instructing the Sherriff to attend further upon the appellant's premises.[34]

Applying Cox

28. Continuation of this proceeding would "clearly inflict unnecessary injustice upon the [respondents]."[35] That injustice consists of the respondents having to continue to defend a claim in circumstances where they have been put to very great delay and expense by the appellants repeated applications for leave to amend and

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31 AsJ Reasons at [96]; *Rozenblit v Vainer* [2014] VSC 510 at [5]-[7].
32 AsJ Reasons at [11], [96];
33 Affidavit of Mark Waters made 16 July 2015 at [15]-[17].
34 Affidavit of Mark Waters made 16 July 2015 at [19].
35 *Cox* at 720.

substantial costs orders made in their favour in relation to those applications have not been paid. Rule 63.03 is directed at such a situation.

29. Even if it is accepted that the conduct that the associate judge found fell for condemnation was historical in nature[36], the effect of the resulting delay and wasted costs continues. The appellant does not identify the "defect attending the proceedings".[37] If the defect was the statement claim, the grant of leave to amend was in effect conditional upon payment of the outstanding interlocutory costs.

30. The general rule that poverty is no bar to a litigant, which informs the approach to applications for security for costs[38], does not mean that the injustice of costs orders remaining unpaid is a *necessary* injustice. For so long as the substantial costs remain unpaid the injustice is actual, not contingent.[39]

Applying Cox more generally

31. *Cox* was not concerned with repetitive harassment or with unpaid orders for costs.[40]

32. Principles governing applications for dismissal or stay on inappropriate forum grounds or due to delay do not apply to applications under rule 63.03.[41] The rationale for summarily terminating "hopeless" cases is obvious. Correctly, the courts below did not embark on an assessment of merits in this case.

Access to justice and limitation of a right

33. The right of access to the courts is not unfettered. The appellant had access to the court for the resolution of his dispute with the respondents. In invoking the jurisdiction of the Supreme Court, the appellant made himself amenable to the rules of court and the provisions of the CPA. His right of access to the court operates within the framework of the rules of court and the provisions of the CPA.

34. As has been noted, rule 63.03(3) confers upon the court a broad discretion to stay or dismiss a proceeding where a party liable to pay an interlocutory costs order fails to do so. Consistently with the admonition for caution issued by Gaudron J in *Jago*

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36 Appellant's submissions at [47].
37 Appellant's submissions at [47].
38 Appellant's submissions at [49].
39 Compare, appellant's submissions at [50].
40 Compare, appellant's submissions at [55].
41 Compare, appellant's submissions at [57]-[58], [60].

v The District Court of NSW[42], the Court of Appeal held that the interests of justice require that the exercise of the power be a last resort.[43]

Costs orders

35. The Court of Appeal rejected any suggestion that the observations of Ormiston JA regarding debt collection can be put to one side as a result of the change in the rules.[44]

36. The interlocutory costs orders are not punitive.[45] In the exercise of her discretion the associate judge saw fit to make orders for costs and to order that they may be taxed forthwith. There was no appeal from those orders.

37. The fact that the power to order a stay under rule 63.03 is only enlivened when an order for costs has been made in the exercise of the court's discretion does not bring together 'uneasy bedfellows' and involves no 'mismatch'.[46] There is a discretion as to whether to order costs, a discretion as to whether to allow the costs to be taxed immediately, and a discretion in the event that application is made under rule 63.03.

38. Contrary to the appellant's submissions, Dixon J in *Cox* was not concerned with the concept of proportionality.[47]

39. As the appellant points out, the judge considered that exercise of the power under rule 63.03(3) carries different considerations to the power to stay an action as vexatious under the inherent jurisdiction.[48] Even if this statement is considered to be erroneous, this is immaterial. The Court of Appeal noted that the judge endorsed the associate judge's analysis of *Gao* and found no error in her approach to the discretion in rule 63.03(3).[49] The Court of Appeal treated the proposed grounds of appeal as taking issue with the associate judge's reasons and orders, even though in form they were directed to the fact that the judge upheld the stay order.[50] The Court of Appeal concluded that on a fair reading, the associate judge proceeded in

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42 (1989) 168 CLR 28 at 76.
43 Court of Appeal Reasons at [65] per Whelan and McLeish JJA; Kyrou JA agreeing at [85].
44 Court of Appeal Reasons at [68]; Compare, appellant's submissions at [69]-[70].
45 Compare, appellant's submissions at [52], [76], [79], [87].
46 Compare, appellant's submissions at [74].
47 Compare, appellant's submissions at [84].
48 *Rozenblit v Vainer* [2016] VSC 451 at [54].
49 Court of Appeal Reasons at [46].
50 Court of Appeal Reasons at [46].

accordance with the principles it articulated, and the judge was right to dismiss the appeal in that respect.[51]

40. It is not the case, as the appellant asserts, that proceedings can be stayed in circumstances where no injustice would be inflicted on the other party were they to continue.[52] The principles summarised by the Court of Appeal look to justice between the parties and to whether a stay is the only fair and practical way of facilitating the just, efficient, timely and cost-effective resolution of the proceeding.[53] These principles do not relegate the right of access to justice in the manner suggested by the appellant.[54]

Part VII: Argument on notice of contention or cross-appeal

41. Not applicable

Part VIII: Estimate of Time for oral argument

42. The respondents estimate that 1.25 hours will be required for the presentation of their oral argument

Dated: 13 October 2017

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51 Appeal Reasons at [68].
52 Appellant's submissions at [99].
53 Court of Appeal Reasons at [67].
54 Appellant's submission at [103].

Annexure A

Civil Procedure Act 2010 (Vic), s 7(1)

(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

Civil Procedure Act 2010 (Vic), s 8

(1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—

(a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or

(c) arise from or are derived from the common law or any procedural rules or practices of the court.

(2) Subsection (1) applies despite any other Act (other than the Charter of Human Rights and Responsibilities Act 2006) or law to the contrary.