

Harnessing the power of the *Civil Procedure Act 2010*

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1

SCOPE & PURPOSE

Scope: *Civil Procedure Act 2010 (Vic)*
2 recent Victorian Supreme Court cases
Discovery obligations pursuant to Order 29 of the
Supreme Court (General Civil Procedure) Rules 2015
The categories identified in *Masters v Cameron*
(whether agreement is intended to be binding)

Purpose:

1. Understand the Court's powers under the CPA
2. Examine circumstances where powers exercised
3. Highlight useful authorities for future reference

2

OVERVIEW

Refresh on key concepts: * Overarching purpose & obligations
* Active case management
* Powers of the Court

Case study 1: Procedural failure (discovery obligations)
Ren & Ors v Sinicorp Pty Ltd & Ors [2021] VSC 728

Case Study 2: Substantive failure (no prospect of success)
Ledlin v Harperway Pty Ltd [2021] VSC 745

3

KEY TAKEAWAYS

- The **scope** of the Court's powers under the CPA is **broad**.
- The **application** of the Court's powers under the CPA should be **specific**.
- Although courts are mindful about costs associated with onerous discovery orders, **parties must take discovery obligations very seriously**.
- Courts are prepared to summarily dismiss claims for non-compliance with discovery obligations or no reasonable prospect of success.
- Consider the effect of legal authorities prior to commencing a proceeding – no guarantee the case will make it to a final hearing.

4

OVERARCHING PURPOSE

- To facilitate the **just, efficient, timely and cost-effective resolution** of the **real issues in dispute**. (s.7)
- A court **must** seek to give effect to the overarching purpose (s.8)
- The **objects** that the court may have regard to: (s.9(1))
 - **just determination** of the proceeding;
 - public interest in **early settlement** by agreement;
 - **efficient conduct** in the business of the court;
 - **efficient use** of judicial and administrative **resources**;
 - **minimising delay** and timely determination of the proceeding; and
 - dealing with the proceeding in a manner **proportionate to the complexity or importance** of the issues and the **amount** in dispute.

5

OVERARCHING PURPOSE

- The **matters** that the court may have regard to: (s.9(2))
 - compliance with (mandatory & voluntary) **pre-litigation processes**;
 - reasonable endeavours to **resolve or limit issues** by agreement;
 - **promptness** in conducting the proceeding;
 - compliance with **overarching obligations**;
 - **prejudice** to be suffered as a result of any proposed order;
 - **public importance** of issues / desirability of judicial determination; and
 - extent of parties' **benefit of legal advice** and representation.

6

OVERARCHING OBLIGATIONS

- **Paramount duty** to further the administration of justice (s.16)
- Act honestly (s.17)
- Proper basis (s.18)
- Only take steps to resolve or determine a dispute (s.19)
- Co-operate (s.20)
- Not to mislead or deceive (s.21)
- Use reasonable endeavors to resolve the dispute (s.22)
- Narrow the issues in dispute (s.23)
- Ensure costs are reasonable and proportionate (s.24)
- Minimise delay (s.25)
- Disclose the existence of critical documents (s.26)
- Protection and use of information and documents disclosed (s.27)

7

OVERARCHING OBLIGATIONS

To whom do they apply?

- Every party to a civil proceeding (s.10(1)(a))
- Legal practitioners (or other reps) & law practices (s.10(1)(b)&(c))
*despite obligation to act in accordance with client instructions (s.13(2))
- Persons providing financial or other assistance to a party (s.10(1)(d))
*includes insurers and litigation funders
- Expert witnesses (s.10(3))
*except for ss. 18, 19, 22 & 26
- **Do not** apply to lay witnesses (s.10(2))
- Prevail over any legal, contractual or other obligation (s.12)

8

ACTIVE CASE MANAGEMENT

- The Court's case management may be achieved by: (s.47(3))
 - giving directions;
 - identifying issues;
 - disposing summarily of issues;
 - encouraging the parties to cooperate or settle;
 - controlling the progress of a civil proceeding;
 - limiting the time for the hearing;
 - striking out or limiting any claim or defence; or
 - dismissing a proceeding (in whole or in part).

9

POWERS OF THE COURT

- For the purposes of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose, the Court may give any direction or make any order it considers appropriate. (s.47(1))
- If a person contravenes a direction or order made under Part 4.2, the Court has a wide range of sanction powers available, including to: (s.52)
 - dismiss a proceeding (in whole or in part);
 - strike out or limit any claim or defence;
 - disallow or reject any evidence; and
 - direct a person to pay the costs of another party or person.

10

BREACHING OBLIGATIONS

- Can be taken into account by a court when exercising any power, including costs discretion. (s.28)
- May result in specific sanctions including: (s.29)
 - payment of legal costs (may be enforceable immediately);
 - order compensation for loss (including potentially payment of interest);
 - order to take steps to remedy the contravention;
 - order not permitting a party to take a step in the proceeding.
- Sanctions on Court own motion or application by party or interested person.
- Applications must be made before proceeding finalised (extension possible if applicant not aware of the breach). (ss.30 & 31)

11

CASE STUDY 1

Ren & Ors v Sinicorp Pty Ltd & Ors [2021] VSC 728

- Associate Justice Matthews
- 12 November 2021

Relevant Parties:

- First Plaintiff (**Ms Ren**) and Second Plaintiff (**Ms Pan**)
- First Defendant (**Sinicorp**) - Developer Company

12

20 apartments at 21 Cambridge Street, Box Hill VIC 3128



<https://www.realestate.com.au/sold/property-apartment-vic-box+hill-135764378>

13

WHAT IS THE CASE ABOUT?

Plaintiffs' Claim:

- Plaintiffs → Contracts of Sale
 - Specific performance
 - Declarations
 - Damages



Sinicorp's Defence and Counterclaim:

- No authority to enter Contracts of Sale
 - Former director = Ms Liu, who is the mother of the Second Plaintiff
- Plaintiffs did not pay Sinicorp money for Contracts of Sale → no consideration
 - Declaration that Contracts of Sale were unenforceable
- **Counterclaim** - conspiracy between former director and the Plaintiffs to enter into backdated Contracts of Sale for apartments below market value

Plaintiffs' Defence to Counterclaim:

- Deny allegations and contend that no factual basis is pleaded to support them

<https://www.realestate.com.au/sold/property-apartment-vic-box+hill-107569776>

14

DISCOVERY REFRESHER

Dixon J in *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666:

'The proper discharge of discovery obligations...has long been recognised as fundamental to the goal of a just, efficient, timely and cost-effective quelling of disputes' (at [112])

What documents have to be discovered? (r. 29.01.1(3))

Documents which, *after a reasonable search*, a party is aware of and which:

- that party relies on or adversely affect the party's own case;
- adversely affect or support another party's case.

A party can only discover a document that they know exists...

- 'a reasonable search' will depend on the nature and complexity of the proceeding, the number of documents involved, the ease and cost of retrieving a document, and the significance of any document (r. 29.01.01(5))

How is discovery 'made'?

- Affidavit of documents listing discovered documents with a right of inspection over those documents (but for privileged documents)

15

DISCOVERY DISPUTE HISTORY

- Discovery issues spanned over 6.5 years – between 2014-2021, the Plaintiffs had filed 9 AOD
- in **2014**, Sinicorp served notices of default of discovery on the Plaintiffs
 - in early **2015**, the Plaintiffs were ordered to file affidavits stating whether specific categories of documents were in their possession
 - Court recorded that many other documents ought to have come into existence
 - in **2018**, the Plaintiffs were ordered to state their position re each category of documents that Sinicorp contended existed or ought reasonably to exist (second time)
 - in early **2019**, Plaintiffs ordered to file further affidavits regarding the status of certain documents (largely those in 2015 orders)
 - in **September 2019**, Plaintiffs were again ordered to discover particular documents
 - in **December 2020**, the Court heard Sinicorp's application for XXN of the Plaintiffs re discovery obligations → Court noted that 'a further order for discovery would be futile'
 - in **February 2021**, Plaintiffs were cross-examined on their various affidavits of documents
 - in **June 2021**, Sinicorp filed a summons seeking an order dismissing of the Plaintiffs' claims and defence to counterclaim, pursuant to s 56(2)(j) of the CPA

16

APPLICATION UNDER s.56 CPA

s. 56(1) – a court may make any order or give any direction it considers appropriate if the court finds there has been:

- a) failure to comply with discovery obligations;
- b) failure to comply with any order / direction of the court re discovery;
- c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.

s. 56(2)(j) – a court may make an order or give directions... dismissing any part of the claim or defence of a party who is responsible for any conduct referred to in s 56(1).

Matthews ASJ comments re s 56:

- Jurisdictional threshold = must be satisfied that conduct in s 56(1)(a) - (c) has occurred
 - but it is not necessary to show that specific documents exist but have not been discovered

17

SUMMARY OF FINDINGS s.56(1)

- Severity of the Plaintiffs' non-compliance described as 'the very antithesis of efficiency, timeliness and cost-effectiveness'
- Both Plaintiffs engaged in s 56(1) conduct:
 - failed to comply with discovery obligations
 - engaged in conduct intended to delay, frustrate or avoid discovery
 - numerous documents in Plaintiffs' possession were deliberately not discovered
- The Plaintiffs contravened their overarching obligations
- The Court is entitled to assume that the Plaintiffs were properly advised of discovery obligations and overarching obligations

18

HODGSON V AMCOR FACTORS

Affirmed *Hodgson v Amcor* factors guiding the Court's discretion, and found:

- contravening conduct had a 'profound effect' on resolution of the proceeding
- delay was 'inordinate and inexcusable'
- history of non-compliance and that non-compliance is continuing
- contravening conduct has prejudice Sinicorp (unfairness at trial)
- the discovery disputes have taken up considerable judicial resources
- Plaintiffs' explanations lack veracity and reasonableness
- evidence suggests contravening conduct was intentional
- no alternative lesser sanction would be equally efficient
- contravening conduct has rendered it impossible to conduct a fair trial
- proper discovery has not been secured by other means

19

DECISION TO STRIKE OUT

- Court struck out Plaintiffs' claims against Sinicorp and defences to counterclaim
- Observed requirement to give effect to the overarching purpose:
'Caution needs to be taken to ensure that, in exercising its powers under s 56 of the CPA, the Court considers what is appropriate in the circumstances of the case, having regard to the conduct of the relevant parties, and what is consistent with the overarching purpose of the CPA. In exercising its powers, the Court must seek to give effect to the overarching purpose...' [247]
- Proportionality is fundamental - the Court's discretion is not 'at large'
- Strike out should only ordered in a 'clear case' and when sanction ordered is the least necessary to achieve appropriate case management
- Party does not need to *intend* to default to be subject to strike out: 'contumelious conduct or intentional default is **not** required before an order dismissing a proceeding or striking out a defence **is** made for default of discovery obligations' (at [102])

20

CASE STUDY 2

Ledlin v Harperway Pty Ltd [2021] VSC 745

- Associate Justice Ierodiaconou
- 15 November 2021

Overview:

- Vendor (Defendant) markets commercial property for sale through agent.
- 'Letter of Intent' signed by Vendor and prospective purchaser (Plaintiff).
- Purchaser contends that:
 - the terms of the Letter of Intent were legally binding;
 - alternatively, Vendor misrepresented its intent to be bound; and
 - Vendor is estopped from denying it is bound by Letter of intent.

21



22

KEY EVENTS

- Purchaser makes offer to purchase the property (\$8.55m).
- Ongoing negotiations.
- Purchaser pays \$5,000 refundable deposit.
- Both parties sign 'Letter of Intent' (proposed purchase price \$9m).
- Vendor's solicitors send unsigned contract of sale and vendor statement.
- Purchaser signs contract of sale and returns to Vendor.
- Vendor rejects Purchaser's offer and refuses to sign contract of sale.
- Purchaser issues writ in Supreme Court, seeking specific performance.
- Purchaser makes new offer to purchase property for \$10.8m.
- Vendor makes application for summary judgment.

23

THE LETTER OF INTENT

- Clause 1 – Purpose
- **Clause 2 – Status**
- Clause 3 – Principal Terms of Understanding [**\$9m purchase price**]
- Clause 4 – Confidentiality and Non-Disclosure
- Clause 5 – Due Diligence [**within 45 days**]
- Clause 6 – Exclusivity [**45 days for non-refundable \$5,000**]
- Clause 7 – Good Faith [**negotiate to complete transaction**]
- **Clause 8 – Definitive Agreements**
- Clause 9 – Costs [**each party bear own**]
- Clause 10 – Governing Law [**Victoria**]

24

THE LETTER OF INTENT

- **Clause 2 – Status**

This letter is a statement of intent only. It is not intended to create binding legal relations or form part of any legally binding contract or representation having legal effect except for this paragraph 2 and paragraphs 4 (Confidentiality and Non-Disclosure), 5 (Due Diligence), 6 (Exclusivity), 7 (Good Faith), 8 (Definitive Agreements), 9 (Costs) and 10 (Governing Law) which are intended to be legally binding.

25

THE LETTER OF INTENT

- **Clause 8 – Definitive Agreements**

If the transaction proceeds, our lawyers will prepare the formal definitive agreement in respect of the transaction which will contain terms usual for a transaction of the same nature.

Neither party will have any liability to the other for deciding not to execute any definitive agreement.

26

THE SUBSTANTIVE ISSUES

- **Was the Letter of Intent intended to be legally binding?**

- The categories identified by the High Court in *Masters v Cameron**:

- a) parties intend to be immediately bound but propose a proper and more complete formal contract to a similar effect to the earlier agreement;
- b) parties intend to be immediately bound but require the execution of a formal document and intend no departure from the terms of the earlier agreement; or
- c) parties do not intend to be bound until they execute a formal contract.

* *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353 at 360

27

THE SUBSTANTIVE ISSUES

- Is it necessary / appropriate to have regard to extrinsic matters?
- The principles set out by the High Court in *Mount Bruce Mining**:
 - Rights and liabilities of parties under a contract are determined objectively, by reference to its text, context and purpose.
 - What would reasonable businessperson understand terms to mean?
 - Ordinarily, construction is possible by reference to contract alone.
 - If an expression is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances **cannot** be adduced to contradict its plain meaning.

* *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37 at [46]-[51]

28

SUMMARY JUDGMENT

- A defendant may apply to the court for summary judgment on the ground that a plaintiff's claim or part of that claim has no real prospect of success. (s.62)
- The Court may give summary judgment if satisfied that a claim has no real prospect of success. (s.63(1))
- The Court may give summary judgment: (s.63(2))
 - a) on the application of a plaintiff;
 - b) on the application of a defendant; or
 - c) on the court's own motion.

29

RELEVANT PRINCIPLES

- The party responding to the application must:*
 - 'show cause' to satisfy Court that there is a question to be tried, or some other reason for the trial of its claim; and
 - place before the Court (in summary form) all evidence relied upon.
- In exercising its powers, the Court must consider that:**
 - the test is whether the respondent to the application has a 'real' as opposed to a 'fanciful' chance of success; and
 - the power to terminate proceedings summarily should be exercised with caution and only if clear that there is no real question to be tried.

* *Hausman v Abigroup Contractors Pty Ltd* [2009] VSCA 288

** *Lysaght Building Solutions Pty Ltd v Blanka Pty Ltd* [2013] VSCA 158

30

THE OUTCOME

- Purchaser's claim had no real prospects of success.
- Letter of Intent unambiguous: no intention to be immediately bound.
- Good faith obligation did not oblige Vendor to execute the contract of sale.
- No basis for alleged breach of due diligence obligation.
- Negotiated outcomes recorded in Letter of Intent = no misrepresentation.
- No public interest or other reason for matter to proceed to trial (s.64 N/A).
- Inconsistent with CPA to allow a futile claim to proceed to trial.

31

KEY TAKEAWAYS

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32



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33
