

CIVIL PROCEDURE ACT OBLIGATIONS AND SANCTIONS – RECENT JUDICIAL CONSIDERATION

Georgia Douglas
Barrister
Young's List



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Impact of the CPA

- Objectives of the CPA seek ‘not only to change the formal rules of proceedings, but also to change litigation culture itself’ (Dixon J – *Hudspeth No 8*)
- The CPA has ‘significantly recast the expression of the duties owed by solicitors, amongst others, to the court.’ (Dixon J – *Dura No 5*).



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Civil Procedure Act 2010 - overarching purpose

- ‘Overarching purpose’: to facilitate the just, efficient, timely and cost-effective resolution of the real issues in the parties’ dispute. (s7)



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Overarching obligations

- To act honestly (s17)
- To ensure claims/defences have a proper basis (s18)
- To only take steps to resolve or determine dispute (s19)
- To cooperate in the conduct of civil proceeding (s20)
- Not to mislead or deceive (s21)
- To use reasonable endeavours to resolve dispute (s22)
- To narrow issues in dispute (s23)
- To ensure costs are reasonable and proportionate (s24)
- To minimise delay (s25)
- To disclose existence of documents critical to resolution of dispute (s26)



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Who owes the obligations?

- Obligations upon lawyers, litigants, law firms, litigation funders and insurers (people who have to ability to control or influence the conduct of the proceeding): s10
- Some obligations apply to experts: honesty; cooperation; not to mislead or deceive; resolve issues in dispute; reasonable costs; act promptly and minimise delay.
- Section 13: obligations override inconsistent client instructions.
- Obligations 'may not be delegable' : per Dixon J in *Dura*.



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Proper basis obligations

- Section 18 (proper basis obligation) works in coordination with s.42, which requires a proper basis certificate to be filed.
- Certificate must be based on a reasonable belief as to the truth or untruth of the denial/non-admission.
- The proper basis must exist at the moment that a claim is made or responded to.
- Proper basis must exist on the basis of factual and legal material available to the person making the claim or response.
- Proper basis obligations have been focus of several cases for lawyers breach of CPA



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Sanctions for contravention

- Section 28 – Court may take contravention of overarching obligations into account when exercising any power, including costs questions.
- Section 29 – If breach of obligation, court may order person:
 - Pay legal costs of others arising from the breach
 - Pay legal costs of others in the proceeding generally
 - Pay compensation to any person materially contributed to by the contravention
 - Take steps to remedy contravention or not permit steps be taken
 - Any other order court considers in the interests of persons prejudicially affected



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Who can bring actions for breaches of obligations?

- Applications for orders under s.29 (sanctions and compensation) can be brought by:
 - Parties to the civil proceeding;
 - Any persons with a sufficient interest in the proceeding; and
 - On the court's own motion.
- The application must be brought before the conclusion of the finalisation the civil proceeding (s.30): *Kenny & Anor v Gippsreal Ltd* [2015] VSC 284 “finalisation” discussed – consent judgment was final despite minor outstanding costs issue and potential for appeal.



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Yara Australia Pty Ltd v Oswal [2013] VSCA 337

'Section 29 of the Act provides the Court with broader and more flexible powers than under the [General Civil Procedure Rules] or under its inherent jurisdiction.... These powers are intended to make all those involved in the conduct of litigation – accountable for the just, efficient, timely and cost effective resolution of disputes...Parliament has given the courts flexible means of distributing the costs burden upon and across those who fail to comply with their overarching obligations... A sanction may be imposed where... the legal practitioner acts on the instruction of his client in breach of the overarching obligations.'



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Yara Australia Pty Ltd v Oswal [2013] VSCA 337

- Leave to appeal from order setting aside security for costs order – total security sought approx \$140,000. 5 silks, 6 junior counsel and 5 solicitors firms representing parties in Ct of A. 6 lever arch folders of materials.
- Court concerned about over representation of counsel and unnecessary and voluminous material produced in comparison to the issues and quantum: breach of s.24 CPA?
- To examine if there has been a breach of an overarching obligation the court should determine 'by an objective evaluation of their conduct having regard to the issues and the amount in dispute in the proceeding.'



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Yara Australia Pty Ltd v Oswal [2013] VSCA 337

- Held:
 - Explanation for level of representation accepted and no breach of s.24 duty through representation by counsel.
 - However, breach of s.24 by solicitors through unnecessary and voluminous material produced in appeal books in comparison to the issues and quantum.
 - Each applicant's solicitor ordered to indemnify the applicant for 50% of respondent's costs caused by unnecessary content of application books.



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Hudspeth v Scholastic Cleaning (various rulings)

- PI jury trial surrounding a cleaner injured through slip and fall in a school bathroom.
- Cross-exam of plaintiff expert witness revealed failure to file/serve alternative versions of expert report. Key findings in reports differed, different defendants had received different reports from plaintiff solicitors.
- Cross-exam of expert uncovered a draft third expert report had been prepared to fill a forensic issue, but not filed or served during the trial.
- Judge led civil procedure inquiry of his own motion into conduct of expert, senior counsel and instructing solicitor.
- Were the plaintiff's lawyers aware of various expert reports? Had there been an attempt to avoid referring to various reports in evidence in chief of expert?
- *Judge led motion: had the practitioners breached s16, 17, 21 or 26 of the CPA?*
- NB: Duty not to mislead or deceive – covers conduct, whether or not that was the practitioners' intention.



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Hudspeth process of court led CPA motion

- Expert required to hand up file to the court for inspection in the midst of his evidence. Parties then given an opportunity to examine file.
- Judge made a direction after jury verdict that the parties attend court for directions and hearing of motion under s29 CPA.
- Relevant parties filed affidavits explaining their behaviour and actions taken in regard to the potential breaches.
- Contraveners were open to cross-exam but it did not occur.
- Judge waited to hand down findings until conclusion of appeal and rehearing process for primary judgment.



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Hudspeth v Scholastic Cleaning - appeal

- Plaintiff lost original jury trial, but successfully appealed and the matter was remitted to the trial judge who found in her favour.
- Primary judge found that the defendant obtained forensic advantage through plaintiff's representatives potential CPA breaches, this resulted in difficult costs/sanctions' considerations for CPA inquiry.
- Despite appeal, CPA inquiry continued and resulted in findings of contravention of overarching obligations by QC, solicitor and expert (*H v S Ruling No 8*).



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***Hudspeth* breach findings**

In relation to the third non-disclosed expert report:

- Section 21 – content of obligation informed by jurisprudence of s18 ACL [193]
- Section 26 – solicitor imputed with knowledge of critical documents in possession/custody of barrister
- QC breached paramount duty to court; and duty to disclose existence of a critical document (s26); and duty not to mislead or deceive in respect of the expert’s evidence (s21).
- Expert breached obligation not to engage in M & D conduct (s21).
- Solicitor breached paramount duty to court; and duty to disclose existence of a critical document (s26); and duty not to mislead or deceive in respect of the expert’s evidence (s21).



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***Hudspeth* – advocates’ immunity from suit eroded**

- Dixon J held (at [175]):
“While the advocate’s duty to not mislead the court may have been re-expressed in the Act, possibly without substantive change, immunity from suit has been eroded by the power under s29 to make any order the court considers appropriate in the interests of justice.”
- S.29: *‘is primarily compensatory rather than punitive.’*



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***Hudspeth*: sanctions ordered against lawyers and experts**

- Although plaintiff won appeal, her QC and solicitor bore 40% of appellate costs ordered against the respondents (*H v S* [2014] VSCA 78)
- Only person prejudicially impacted by the CPA breaches was plaintiff, so other parties could not recoup costs for breaches (*H v S Ruling No 9*).
- Expert ordered to pay apportioned costs of appeal (s29) – judge not persuaded that expert had limited control over what occurred with his reports.
- Each contravener ordered to pay 1/9th of the respondent's costs of responding to the court's motion



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***Hudspeth*- Lessons**

- Clarify that the expert's assumptions in report accord with the instructions/lay evidence.
- Consider carefully what may be considered a critical document – further draft expert reports definitely critical.
- Counsel's knowledge/possession of doc imputed to solicitor for the purpose of s.26.
- Section 29 CPA compensation orders will be greater in quantum if impact of breach has cost consequences for opponents.
- Advocates' Immunity eroded by s.29 costs orders.
- Sanctions ordered even when contraveners' client was ultimately successful.



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Dura (Australia) Constructions P/L v Hue Boutique Living P/L (No. 5) [2014] VSC 400

- Primary claim: construction dispute – defendant successful in claiming invalid termination of contract. Hue incurred \$3M legal costs in defence.
- Hue (defendant) filed a s29 CPA application against Dura’s solicitor, seeking that they pay some or all of Hue’s legal costs on the basis that the solicitors proceeded with a claim that was without a proper basis and ought reasonably have known no proper basis.
- Evidence: 2 affidavits from Hue’s solicitor and 2 from Dura’s solicitor – no cross examination.
- Dura’s lawyers argued could not answer proper basis allegations without waiving LPP.



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Issues with Dura’s expert evidence?

- Hue alleged that Dura’s expert evidence:
 - Was incompetently briefed to experts without the requisite expertise
 - The experts gave irrelevant opinions
 - The experts were withheld information that was fundamental to validly forming their opinions
 - was tainted by assistance of lay witnesses of Dura given to expert witnesses – not independent
 - Therefore not admissible and would not be supported by lay witnesses



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Expert evidence issues impacted proper basis

- Hue alleged that the expert evidence problems meant solicitors for Dura:
 - Unreasonably or improperly initiated and continued the proceeding, with no, or substantially no, prospects of success
 - Acted in willful disregard of known facts and law
 - Failed to give reasonable attention to the relevant law and facts
 - Breached overarching obligation to only make claims with a proper basis
 - Caused costs to be incurred without reasonable cause (\$3M+)



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Scope of proper basis obligations

- Dixon J held: proper basis obligations arise whenever ‘a substantive document is filed’ and upon the assertion of any ‘claim’ which can include allegations made at interlocutory applications, security for costs, for better discovery, objections, or even oral applications at trial. (at [87]-[88]).
- The proper basis obligation is not ongoing, it applies at the time the claim is made (at [89]).



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Common law principles when considering wasted costs

- A lawyer is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence plainly doomed to fail.
- A lawyer is not the judge of the credibility of the witnesses or the validity of the argument.
- If LPP hinders ability to rebut complaint, the court must make allowances and give practitioner benefit of the doubt.
- A client properly advised that a case is weak and likely to fail, may direct a lawyer to proceed and it is not ethically inappropriate for the lawyer to do so.



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Findings: CPA restrains common law wasted costs principles

- Hue alleged that Dura's lawyers could not identify relevant privileged communications which restrained it from providing a full explanation to the court.
- Inadequacy of solicitor's foundation for proper basis claims and LPP arguments:
- Dixon J: 'Having been Dura's solicitor since 2006, I would have expected that Mr Noble would be able to give evidence of the material facts and path of reasoning that demonstrated the basis for his beliefs as expressed in his affidavit' (at [24])
- (applying *Yara v Oswal*) Overarching obligations apply despite any instructions or wishes of the client. The obligation prevails above inconsistent instructions.
- The obligation not to make a claim without a proper basis under the CPA, the statutory regime constrains the common law principle that the lawyer must have the benefit of the doubt when unable to tell the full story.



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Findings against Dura's Lawyers

- Continuing a claim for provisional scaffolding, despite being on notice that Dura had not paid the amounts claimed was not a breach of proper basis obligations, but this entitled Hue to a wasted costs order for responding to the claim (\$113,092), to be paid by Dura's lawyers.
- Dura's expert evidence was poorly prepared but the conduct did not amount to a breach of overarching obligations or warrant a wasted costs order (at [237]).
- Similarly, problems with Dura's lay witnesses were somewhat excused due to limited resources. Conduct not so plainly unjustifiable to warrant wasted costs order.



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Brown v Guss [2015] VSC 57

- Testamentary dispute - Def alleged deceased lacked testamentary capacity and that earlier will procured by undue influence of plaintiff. Three wills 2007, Jan 2010 and April 2010. Def attempted to have April 2010 and 2007 wills quashed, in favour of Jan 2010 will.
- Defendant's solicitor (Guss Snr) filed voluminous evidence, that made little sense, included grievances about plaintiff and family. These allegations lengthened trial significantly and increased cost of litigation. Guss Snr solicitor and material witness.
- Plaintiff's lawyers alleged evidence of the defendants' witnesses was rejected because it was deliberately false. Alleged collusion of witnesses including Guss Snr as solicitor/witness.
- P alleged Guss as solicitor should be subject to indemnity costs order for breaches of obligations of honesty (s17), proper basis (s18), and not to mislead or deceive (s21).



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***Brown v Guss* [2015] VSC 57 - findings**

- Guss Snr used the proceeding to ventilate personal grievances against the plaintiff and did not act with the necessary independence of a solicitor by pursuing claim for his children's financial gain.
- *'There was not sufficient doubt or concern as to the issues relied on by the defendant such that they required investigation by way of evidence to be given and tested in court. In reality, it was unnecessary for there to have been a proceeding challenging the April 2010 will at all.'*
- Proceeding filed in 2011, but didn't reveal reliance on Jan 2010 will until amendments pleaded in November 2012 = abuse of process.
- No proper basis to claim – breach of s18(d) CPA.
- Regardless of intention, court was misled & deceived: breach of s21 of the CPA.
- **Guss Snr ordered to pay the plaintiff's costs of proceeding on indemnity basis.**



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***Gibb v Gibb* [2015] VSC 35**

- Deceased left entire estate valued at \$151,000 to twin children, who lived with ex-partner of deceased, to be accessed when they turn 25. Deceased's parents were trustees. Will gave trustees discretion to administer estate towards children's education or advancement.
- Mother of children brought Pt IV action on behalf of twins, seeking money for private health insurance and ballet, swimming and dancing lessons.
- Prior to bringing claim, the mother of children had made no request for this financial maintenance for these provisions to the trustees.



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***Gibb v Gibb* [2015] VSC 35 – McDonald J**

- If there was substance to plaintiff's allegations of inadequate provision, should have brought application for trustees to be removed under *Trustee Act*, but no evidence that trustees were acting with mala fides. Deceased had provided for entire estate to children – could not have done more.
- Trustees forced to spend \$26,000 defending unnecessary Part IV action. Plaintiff incurred \$57,394 in professional fees to solicitors and counsel.
- HELD: Pt IV action brought without proper basis in breach of s18 as no evidence to substantiate concern that children's educational and maintenance costs would not be paid.
- Those advising the plaintiff must have been aware of devastating cost burden of litigation on modest estate –breach of s24 requirement to keep costs reasonable.
- McDonald J launched s.29(1) motion to examine whether costs order should be made against plaintiff's solicitors. Defendants given opportunity to file s.29 order in their favour.



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***Kenny & Anor v Gippsreal Ltd* [2015] VSC 284**

- CPA Summons filed 2014, 2 years after consent judgment entered in Aug 2012.
- Consent judgment based on settlement deed entered on 1 March 2012.
- Solicitors of plaintiff corresponded with Gippsreal opposing entering judgment under deed of settlement, after months of opposition, consent orders eventually signed in Aug 2012.
- 2014: Solicitors for Gippsreal filed summons under s.29 of the CPA against barrister & solicitor acting for the plaintiff seeking costs incurred between 30 April 2012 and 7 August 2012 as a result of the opposition, on the grounds that judgment was opposed without a proper basis (breach of s.18 of CPA).
- Barrister and solicitor applied for summons to be struck out as incompetent or out of time under s.30 of CPA.
- HELD: Proceeding was finalised by consent judgment on 7 August 2012, and summons was incompetent as not made prior to finalisation of civil proceedings.

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Locker Group Pty Ltd V HEA Australia Pty Ltd [2015] VSC 752

- Winding up application, company wound up by third party creditor after substitution application.
- One week after winding up, company applied to have winding up set aside as it was served late with application in Perth. AsJ had not been informed by creditor of the late service of the company.
- Liquidators had incurred \$30,000+ in costs and expenses in the first week of winding up.
- HELD: At the time that the third party creditor applied for the winding up order it did not have a proper basis to do so (s18 CPA), as it knew it was in breach of the service obligations and did not bring this to the court's attention, failed to discharge its paramount duty. Third party creditor ordered to pay the reasonable remuneration and expenses of the liquidators (under s.29).

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Actrol Parts Pty Ltd v Coppi (No 3) [2015] VSC 758

- Plaintiff employer seeking breach of contract, breach of fiduciary duties, breach of confidence action against former employee. Prior to trial employer abandoned most claims and persisted with breach of contract claim with only prospect of nominal damages.
- Substantial expenses incurred by both parties, plaintiff: \$600K and \$300K for defendant.
- Plaintiff established right to order that there was a breach but only nominal damages of \$1.
- Defendant applied under s.28 and s.29 for a dismissal of proceeding after trial on grounds that there was breach of s.24 obligation to ensure reasonable and proportionate costs.
- HELD: Proceeding dismissed and continuance of proceeding considered an 'egregious breach' of CPA requirement to keep costs reasonable and proportionate. Plaintiff required to pay defendants costs on indemnity basis from beginning of proceeding.

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OTHER RECENT DECISIONS

- *Grech v Deak-Fabrikant (No 4)* [2016] VSC 35 – s.29 ordered against defendant to compensate other litigants for failing to show up for 6 days of trial and her combative behaviour resulting in the trial being prolonged with irrelevant evidence. Breach of s.19, 20, 23, 24 and 25. (Daly AsJ)
- *Re Manilo* [2015] VSC 733 – Barrister and solicitor required to make submissions to justify why they should be entitled to charge fees to a client who was illiterate and had limited intellectual capacity, and very low prospect of success. Judge concerned whether there was a proper basis to the proceedings. Plaintiff also found to have breached s.20 and 21 of CPA by interfering with a witnesses evidence. (McDonald J)
- *Batrouney v Forster (No 2)* [2015] VSC 541 – Receivers of law firm pursued action against former principal for double disbursement accounting issues. Deloitte expert report had shown no problem with the accounting. Action pursued anyway. HELD: Receivers breached s.18 and s24 of the CPA in pursuing action as failed to ensure costs were reasonable and proportionate and without proper basis. Required to pay costs on indemnity basis under s.29 and also required to refund any fees they charged for acting as receivers in pursuing the case against Forster.

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CPA Sanction Trends

- CPA encourages courts to be more willing to investigate and inquire as to legal practitioners' conduct in proceedings. More CPA cases: 26 (2015- now); 11 year (2014); 12 year (2013)
- LPP will not protect against a failure to explain proceeding without a proper basis.
- The CPA has 'pierced the veil' of advocates' immunity by imposing costs obligations on counsel and solicitors in litigation: *Hudspeth v Scholastic Cleaning No 8*.
- Experts not spared from sanctions under s.29, so they and their insurers should be on notice of their obligations.
- Ensure that if you are amending the assumptions relied on by an expert witness any supplementary report should be served immediately.
- Sanctions can be imposed under s.29 even if acting on instructions: *Yara v Oswal* at [20].
- A barrister's knowledge of critical documents will be imputed to solicitors if the barrister is acting within their retainer: *Hudspeth*.



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Georgia Douglas, Young's List

Areas of Practice:

- Professional Negligence & Liability
- Torts
- Insolvency
- Contractual, Building & Construction & Property
- Competition & Consumer Law
- Intellectual Property
- Judicial Review & Merits Review

