Article Information

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Service: Dispute Resolution & Litigation

The Civil Procedure Act strikes back – subpoenas and indemnity costs

The recent Supreme Court of Victoria decision of Naumovski & Ors v Ugrinovski & Ors (Naumovski) in which Justice Zammit found that breaches of the overarching obligations set out in the Civil Procedure Act had occurred.

This decision shows that the Civil Procedure Act is becoming a powerful rule book governing the conduct of civil proceedings. If litigants do not follow it, then they do so at their peril.

The *Civil Procedure Act 2010* came into operation on 1 January 2011 and was introduced to "…provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute." The Court of Appeal in the case of *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337 fired a warning shot over the bow of the profession. On its own motion, it found that there had been breaches of the overarching obligations following an unsuccessful application for leave to appeal. The decision in *Yara* was the starting point of the courts using the Act to discipline litigants and practitioners for behaviour that does not enhance the administration of justice. The decision in Naumovski is the most recent example of the Supreme Court applying the remedial provisions of the Act and provides a useful reminder to participants in civil proceedings of the types of conduct that will no longer be tolerated.

Naumovski concerned civil proceedings commenced by originating process in the Supreme Court in September 2014. In November 2014 the proceeding was listed for trial in March 2015. The parties were to provide reasonable discovery without any orders being made. Between 1 and 17 December 2014 the plaintiffs issued five subpoenas. The first defendant, Ugrinovski, objected to the subpoenas and a non-party also objected to the subpoena served on it. Ugrinovski's lawyers, wrote to the plaintiffs' solicitors, and indicated that the subpoenas were an attempt by the plaintiffs to circumvent discovery from third parties and were otherwise an abuse of process. The subpoenas were 70 pages long. No response was received to this or five subsequent letters and emails.

Objections to the subpoenas were listed for hearing on 6 February 2015. On the day prior to the objections hearing, the plaintiffs provided significantly amended subpoenas and filed their written submissions. The objections hearing was adjourned until 16 February 2015 to enable the plaintiffs to file and serve a reply and defence to counterclaim so that the relevance of the documents sought could be tested. That court document was filed five days late, and on the morning of the hearing. On 11 February 2015 the plaintiffs indicated they no longer opposed the subpoenas being set aside, leaving the only issue for determination on the adjourned date being the question of costs.

The first defendant and the non-party submitted that the plaintiffs were in breach of four sections of the Act, being:

- sections 19 (the overarching obligation to only take steps to resolve or determine the dispute)
- section 20 (the overarching obligation to co-operate in the conduct of civil proceedings)
- section 23 (the overarching obligation to narrow the issues in dispute)
- section 24 (overarching obligation to ensure costs are reasonable and proportionate) and each party sought an order for indemnity costs.

Justice Zammit found that the plaintiffs breach section 19 of the Act and section 20 of the Act, noting in particular the failure to respond to correspondence sent by the first defendant. Justice Zammit, while not making findings in relation to a breach of sections 23 and 24 of the Act, was critical of the plaintiffs' conduct having regard to the overarching obligations set out in those sections.

Her Honour then turned to the question of indemnity costs. The exercise of the discretion to award costs over and above the ordinary is exceptional and is generally reserved for cases where the losing party has engaged in unmeritorious, deliberate, high minded or other improper conduct such as to justify the Court showing its disapproval. Her Honour found that the first defendant and the non-party repeatedly raised legitimate concerns about the scope of the subpoenas and other than the provision of amended subpoenas (and one reply to the non-party) no response was ever received from the plaintiffs. This was, according to her Honour, the precise conduct which the Act requires the Court to exert control over. The plaintiffs were ordered to pay the first defendant and the non-party's costs on an indemnity basis.

Participants in civil proceedings should be increasingly mindful of the operation of the Act following the Court of Appeal decision in *Yara*. The decision in Naumovski, following in the footsteps of *Yara*, indicates in plain and unambiguous terms that courts in Victoria will take parties to task for conduct that is seen to be in breach of the overarching obligations set out in the Act. In this particular case, considerable care and attention was necessary when filing lengthy and comprehensive subpoenas. The ultimate vice – and the lesson for participants in civil proceedings – was the plaintiffs' election to ignore correspondence in the face of a challenge to the subpoenas filed, not provide an explanation for their conduct in amending the subpoenas and then, in practical terms, abandoning them.

For more information, please contact Senior Associate, Ben Hartley.