Summary judgment applications – proceed with caution

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Introduction

1. The *Civil Procedure Act* 2010 (Vic) commenced on 1 January 2011. One of its aims was to substantially reform the way litigation was conducted in the State of Victoria.

2. One of the key reforms of the *Civil Procedure Act*, according to the Second Reading Speech[1], was the liberalisation of the test for summary judgment, empowering Courts to dispose of unmeritorious claims and defences summarily.

3. The Explanatory Memorandum to the *Civil Procedure Bill* explained:

> The Bill reforms the procedure for the earlier determination of disputes, including liberalising the test for the summary disposal of unmeritorious claims and defences. This will help the courts to remove at an early stage cases where a party has no real prospect of success.

4. Section 1(2)(e) of the *Civil Procedure Act* provides that one of the purposes of the *Civil Procedure Act* was to "reform the law relating to summary judgment."

[1] Attorney-General Robert Hulls, *Second Reading –Civil Procedure Bill*, 24 June 2010

5. However, practitioners should be mindful that, despite the liberalised test, it remains a difficult task to have claims or defences dismissed summarily.

Civil Procedure Act

6. Section 63 of the *Civil Procedure Act* provides:

> (1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.
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> (2) A court may give summary judgment in any civil proceeding under subsection (1) –
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> (a) on the application of a plaintiff in a civil proceeding;
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> (b) on the application of a defendant in a civil proceeding;
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> (c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

7. The power to give summary judgement is subject to the discretion the Court has, pursuant to s 64 of the *Civil Procedure Act*, to allow a matter to proceed to trial, despite there being no real prospect of success, if:

> (a) the matter should not be disposed of summarily because "it is not in the interests of justice to do so"; or
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> (b) "the dispute is of such a nature that only a full hearing on the merits is appropriate."

Court Rules

8. Pursuant to r 22.04(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)("the Court Rules") an application by a plaintiff for summary judgment under the *Civil Procedure Act* is made by summons supported by an affidavit –

    (a) verifying the facts on which the claim or the part of the claim to which the application relates is based; and

    (b) stating that in the belief of the deponent the defence to the claim or the defence to the relevant part of the claim –

        (i) has no real prospect of success; or

        (ii) has no real prospect of success except as to the amount of the claim or as to the amount of the relevant part of the claim.

9. Rule 22.04(2) of the Court Rules provides that where a statement in a document tends to establish a fact within paragraph (1), and at the trial of the proceeding the document would be admissible to verify the fact, the affidavit under paragraph (1) may set forth the statement.

10. Pursuant to r 22.04(3) of the Court Rules, an affidavit under r 22.04(2)(1) may contain a statement of fact based on information and belief if the grounds are set out and, having regard to all the circumstances, the Court considers that the statement ought to be permitted.

11. Once the application for summary judgment has been filed and served, pursuant to r 22.05 of the Court Rules, "[t]he defendant may show cause

against the application by affidavit or otherwise to the satisfaction of the Court". The affidavit filed by the defendant may also contain a statement of fact based on information and belief if the grounds are set out.

12. I note that the Court may order that any party or the maker of any affidavit:

    (a) to attend and be examined and cross-examined; or

    (b) to produce any documents, or copies of or extracts from those documents.[2]

13. There are also similar provisions in the Court Rules[3] where a defendant makes an application for summary judgment under the *Civil Procedure Act*.

14. In *Hausman & Anor v Abigroup Contractors Pty Ltd*[4] ("*Hausman*"), the Court of Appeal identified what is required of the affidavit material on an application for summary judgment. The statement of principle in *Hausman* remains good law, despite the amendments to the Court Rules.[5] The Court of Appeal in *Hausman,* relevantly, held:

    (a) if the applicant for summary judgment is the plaintiff, it needs to file an affidavit which verifies the facts necessary to establish a good cause of action[6];

[2] r 22.07(1) *Supreme Court (General Civil Procedure) Rules 2015* (Vic)
[3] See rr 22.16 – 22.23 *Supreme Court (General Civil Procedure) Rules 2015* (Vic)
[4] [2009] VSCA 288
[5] *Grahame v Bendigo Bank* [2021] VSCA 222 at [28]
[6] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [60]

(b) if the application for summary judgment is properly made, there will be judgment for the applicant unless the respondent shows cause against the application to the satisfaction of the court[7];

(c) while an affidavit in opposition to an application for summary judgment need not set out, in chapter and verse, every detail of the respondent's position, it is expected that it will provide some basic evidentiary foundation for whatever response is being made[8];

(d) the court should not be required to trawl through the respondent's material in an effort to see whether there can be constructed from that material an answer to the application for summary judgment[9];

(e) it is for the respondent to point to some material, whether legal or factual, that provides and arguable response to the applicant's claim or defence[10];

(f) the respondent must do this, even if it is the applicant who must ultimately discharge the burden of persuading the court that there is no issue that warrants trial and summary judgment should be ordered[11];

[7] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [62]
[8] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [48]
[9] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [55]
[10] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [55]
[11] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [55]

(g) the respondent is required to use reasonable diligence to put before the court, albeit in a summary form, all the evidence relied upon in response[12];

(h) an affidavit in opposition to an application for summary judgment must provide sufficient particulars to enable the respondent's case to be properly understood[13];

(i) a bald denial by a respondent defendant that they are not indebted to a plaintiff will not suffice[14]; and

(j) an affidavit filed by a respondent defendant should, as far as practicable, deal specifically with the plaintiff's claim and the facts set out in the supporting affidavit to establish that claim, and state clearly and concisely what the defence is, and identify the facts relied upon in support of that defence.[15]

The test for summary judgment

15. The leading authority regarding the proper test to be applied when determining an application for summary judgement pursuant to s 63 of the *Civil Procedure Act* is *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd*[16] ("*Lysaght*").

16. In *Lysaght,* Warren CJ and Nettle JA (Neave JA agreeing) held:

[12] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [64]
[13] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [65]
[14] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [65]
[15] *Hausman & Anor v Abigroup Contractors Pty Ltd* [2009] VSCA 288 at [65]
[16] [2013] VSCA 158

> It follows that, for present purposes, the test under s 63 of the Civil Procedure Act should be construed as one of whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success; that the 'real chance of success' test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test; and that, as the law is at present understood, the real chance of success test permits of the possibility that there may be cases, yet to be identified, in which it appears that, although the respondent's case is not 'hopeless' or 'bound to fail', it does not have a real prospect of succeeding.[17]

17. Their Honours went on to clarify that it is incorrect to say there is no difference between the test applied before the *Civil Procedure Act* and the test under s 63 of that Act which should be viewed as more liberal.[18]

18. Warren CJ and Nettle JA identified the following four principles as applicable to the test for summary judgement:

    a) the test for summary judgment under s 63 of the Civil Procedure Act 2010 is whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success;

    b) the test is to be applied by reference to its own language and without paraphrase or comparison with the 'hopeless' or 'bound to fail test' essayed in *General Steel*;

[17] *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158 at [29]
[18] *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158 at [32]

c) it should be understood, however, that the test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test essayed in *General Steel* and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;

d) at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action **(**and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.[19]

19. These four principles should serve practitioners well in terms of a checklist of considerations when deciding whether to make an application for summary judgment.

20. However, Neave JA's judgement in *Lysaght* is also of interest. As already noted, the purpose of s 63, rightly or wrongly, was to help the courts dispose of unmeritorious claims at an early stage and relieve some of the burden on court lists. In *Lysaght,* Neave JA made some pertinent observations on this

[19] *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158 at [35]

issue. Her Honour was largely in agreement with the majority judgment, however, did go on to observe the following regarding the cautious approach to summary judgment emphasised by the majority:

> In sub-paragraph (d) of [35] Warren CJ and Nettle JA observe that the power of summary dismissal 'should be exercised with caution.' It goes without saying that courts must consider applications for summary dismissal with appropriate care. That is inherent in the nature of a process which may deprive a plaintiff of the ability to pursue a claim or a defendant of an ability to argue a defence.
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> Nevertheless I am concerned that undue emphasis on the caution with which a court must exercise the power of summary dismissal runs the risk of reinforcing the historical approach to summary dismissal and may result in the legislative liberalisation of the test in s 63 having little impact in practice. That approach would be inconsistent with the objective of reforming the law relating to summary judgment, expressed in s 1(2)(e) of the Civil Procedure Act, and with the requirement that the Court give effect to the over-arching purposes of that Act, imposed by s 8.
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> In my opinion the power of summary dismissal should be exercised consistently with the over-arching purposes of the Civil Procedure Act 2010 and having regard to the fact that, if granted, it will deprive the relevant party of the opportunity to pursue their claim or defence.[20]

[20] *Lysaght Building Solutions Pty Ltd (T/A Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158 at [40]-[42]

21. Despite the concerns identified by Neave JA in *Lysaght*, it is fair to say that the Court of Appeal has continued to emphasize a cautious approach to summary judgment. For example, in *D'Aquino & Ors v Trovatello & Ors*[21], the Court of Appeal, having noted that the test under s 63 of the *Civil Procedure Act* was more liberal, observed the following in the context of an application for summary judgement on the basis that a limitation period had expired:

> [I]t remains the case that, in interlocutory proceedings, insufficient is often known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify coming to the conclusion that the claims of the plaintiff have no real prospect of success by reason of limitation of actions defences.
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> I am confirmed in that view by the more general observation of Hayne, Crennan, Kiefel and Bell JJ in Spencer to the effect that the power to dismiss an action summarily is not to be exercised lightly.[22]

Analysis

22. I make the following general observations:

    (a) The courts continue to take a cautious approach to summary judgment applications;

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[21] [2015] VSCA 78

[22] *D'Aquino & Ors v Trovatello & Ors* [2015] VSCA 78 at [49] – [50] per McLeish JA with whom Warren CJ and Ashley JA agreed.

(b) It is important to identify the specific cause of action or defence relied upon which is said to have no real prospect of success. Just because pleadings are deficient doesn't necessarily mean there is a strong case for summary judgment; bearing in mind the respondent to a summary judgement application can still go on affidavit regarding the merits of their claim or defence and the defect in the pleading can be cured by amendment of the pleading; and

(c) Where a case requires resolution of facts by the court after viva voce evidence, it is an almost impossible task to persuade a court to dismiss a proceeding summarily.

23. Again generally, the stronger cases for summary judgement are usually those cases which do not require resolution of facts by the court and:

(a) turn on matters of relatively straightforward legislative or contractual interpretation, the outcome of which will determine the parties' substantive rights in the proceeding;

(b) involve statutory defences or bar to actions, including limitation periods;

(c) involve questions of standing or jurisdiction;

(d) there is binding authority on point which makes all or part of a party's case untenable;

(e) issue estoppel exists between the parties; or

(f) where, before a trial, affidavit material on which a party intends to rely to make its case has been filed; thereby putting a court in the position where it can look beyond the pleadings and assess the evidence on which a claim or defence relies and, ultimately, determine whether it has 'no real prospects of success.'

24. The benefits of having a case disposed of summarily in your client's favour are obvious; it is quicker and cheaper than going to trial. However, there are potential downsides to bringing an unsuccessful application for summary judgement, including:

(a) an adverse costs order (although, some courts have adopted the position that the costs of an unsuccessful application for summary judgment should be 'costs in the cause');

(b) the party bringing the application for summary judgment is required to put evidence on affidavit, creating the potential that there will be inconsistent evidence given at the trial; that the affidavit will be used for cross-examination at the trial; and, by going on affidavit and prosecuting the application, putting the other-side on notice about the strengths and weaknesses of your case or their case; and

(c) losing credibility with the court, the opposing party and/or your client if the application for summary judgment is misconceived.

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