Form 27E – Appellant's Reply
(rule 44.05.5)

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M114 of 2017

BETWEEN:

BORIS ROZENBLIT
Appellant

and

MICHAEL VAINER
First Respondent

and

ALEXANDER VAINER
Second Respondent

APPELLANT'S AMENDED REPLY

Part I:

1. The appellant certifies that this submission is in a form suitable for publication on the Internet

Part II:

2. Two fundamental propositions lie at the heart of this appeal. Firstly, the rule in *Cox v Journeaux* is the principle that governs the exercise of the discretion to permanently stay proceedings. Secondly, access to justice is a fundamental common law right, not to be abrogated in the circumstances of this case absent harassment or collateral purpose.
3. This Reply analyses the respondents' position in relation to each of these propositions, as that arises from their submissions.

THE DISCRETION TO ORDER A STAY SHOULD BE GUIDED BY THE RULE IN *COX v JOURNEAUX*

4. The respondents' position in relation to this proposition is equivocal.
5. On the one hand, they submit, that *Cox v Journeaux* does not govern the discretion to stay proceedings: either because it never did so, being ousted by application of principles of

Boris Rozenblit
C/- Ilana Melnikov, 31/86-88 Beach Rd Sandringham Vic 3191
Telephone: 0411 604 087
No Fax
Email: ilana@invest2day.com.au

statutory construction[1], or because it no longer does, with the advent of Rule 63.20.1 and the *Civil Procedure Act 2010* (Vic)[2].

6. On the other hand, and perhaps alternatively, the respondents submit that the rule was in fact applied by the Court of Appeal through a set of principles which "involve[d] no dilution of the rule in *Cox*"[3]. The *prima facie* inconsistency between this proposition and the lack of any obvious unnecessary injustice that would be inflicted on the respondents if the case were to proceed, is explained in three ways:
   a. Firstly, it is said that *Cox* does not hold that there must be harassment or collateral purpose before a proceeding can be stayed. The pre-requisite conditions expressed in that case are broader, and the circumstances identified by the Court at first instance as justifying a permanent stay fall within them[4];
   b. Secondly, if the proceedings were allowed to continue, unnecessary injustice would in fact be clearly inflicted upon the respondents who would have to "continue to defend a claim in circumstances where they have been put to very great delay and expense."[5] The effect of the resulting delay and wasted costs is said to continue.[6]
   c. Thirdly, despite the general rule that the doors of the court are not shut to impecunious litigants, the injustice of costs orders remaining unpaid is not a necessary injustice. Neither is it true to say that any injustice arising from an unpaid interlocutory costs order is contingent rather than actual[7].
7. These propositions are now examined

IS IT IMPERMISSIBLE FOR RULE 63.03(3) TO BE "READ DOWN" ?

8. The authorities cited by the respondents stand for the proposition that provisions conferring jurisdiction or granting powers to a court should not be read down by making implications or imposing restrictions not expressly stated. *Shin Kobe Maru*[8] applied this proposition to the court's jurisdiction to determine "proprietary maritime claims". The plurality held that it was not appropriate to read down the statutory words so as to exclude claims relating to ownership of vessels from that jurisdictional field.

---

[1] Respondent's Submissions [8]-[9]
[2] Respondent's Submissions [10], [12]
[3] Respondent's Submissions [13]
[4] Respondent's Submissions [18]-[27]
[5] Respondent's Submissions [28]
[6] Respondent's Submissions [29]
[7] Respondent's Submissions [30]
[8] *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* [1994] HCA 54; (1994) 181 CLR 404 at 421

9. In *Wong v Silkfield*[9], the court refused to narrowly construe the class of people having "the same interest" for purposes of determining the scope of the jurisdiction to hear class actions.
10. This appeal is not concerned with jurisdictional issues. No party suggests that Rule 63.03.3 does not confer power on the Supreme Court to stay the proceedings, and in any event, the Supreme Court has always been vested with that power, in the inherent jurisdiction to control its own process.
11. This appeal is, rather, concerned with the exercise of discretionary power. Discretions may be described as unfettered but that description is apt to mislead, because the judicial exercise of every discretion is fettered by the familiar guidelines set out in *House v The King*[10].
12. The guidelines require, among other things, that in exercising discretionary power the court must act on correct principles. The appellant contends that the correct principle in relation to the exercise of the discretion to stay proceedings (whatever the source of the power) is the rule in *Cox v Journeaux*.

HAS *COX v JOURNEAUX* BEEN SUPERSEDED BY THE DEFAULT RULE THAT INTERLOCUTORY COSTS ARE NOT TAXED FORTHWITH, AND BY THE *CIVIL PROCEDURE ACT 2010* (VIC) ?

13. The appellant dealt with this proposition in his submissions[11]. The respondents have not responded to the arguments raised there.
14. As for the introduction of Rule 63.20.1, whereby interlocutory costs are only taxed forthwith in exceptional circumstances, the appellant's position is that ~~the fact that~~ although a litigant may be guilty of "unsatisfactory conduct", that does not (without more) justify abrogation of fundamental common law rights. It is only when conduct has the potential to interfere with another person's enjoyment of that person's rights that access to justice may be denied.
15. Courts are constrained by the principle of legality, whether exercising the discretion to stay proceedings, or in implementing the *Civil Procedure Act 2010* (Vic) (***CPA***) "overarching purpose" of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute[12].
16. Furthermore, parliament has expressly recognised in s 8(2) of the *CPA,* that courts must not seek to give effect to the overarching purpose where that would be inconsistent with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[13]

---

[9] ~~*Cox v Journeaux (No 2)* (1935) 2 CLR 713 ("*Cox v Journeaux*")~~ *Wong v Silkfield Pty Limited* (1999) 199 CLR 255 , [11]
[10] *House v The King* (1936) 55 CLR 499 at 504-505
[11] Appellant's submissions [69-87], [88-93]
[12] *Civil Procedure Act 2010* (Vic) s 7(1)
[13] The right of access to justice is a human right protected by the *Charter* (s 24)(1)

DOES *COX v JOURNEAUX* MANDATE HARASSMENT OR COLLATERAL PURPOSE AS A NECESSARY PRECONDITION TO THE STAY OF PROCEEDINGS ?

17. The rule in *Cox v Journeaux* makes no express mention of harassment as a precondition to the permanent stay of proceedings.
18. Might there be, in the abstract, some form of conduct other than harassment that would clearly inflict an unnecessary injustice if a proceeding were to continue, when interlocutory costs orders have not been paid due to impecuniosity?
19. The question is academic because empirically no other form of conduct has been identified in the authorities, by the courts below, or by the respondents. This is so *a fortiori* in the light of the rider in *Gao* that the conduct in question should warrant 'condemnation'.[14]
20. For purposes of deciding this appeal, it is enough to recognise that the conduct identified by the court at first instance as justifying imposition of an effectively permanent stay[15] would not clearly inflict an unnecessary injustice. The court had granted (conditional) leave to amend, and there was now no relevant reason the matter could not be allowed to proceed.

IS "HAVING BEEN PUT TO DELAY AND EXPENSE" A FORM OF FUTURE INJUSTICE ?

21. The logical flaw in this proposition is expressed by the mismatch of tenses: the verb "having" in conjunction with a past participle refers to a past event: one which, by definition, has already occurred. A future event, by definition, has not yet occurred. The proposition is internally inconsistent.
22. Practically speaking, whatever the perceived injustice suffered by the respondents, those "injustices" are now part of history. They cannot be erased by stopping the proceedings. Allowing the appellant's suit to proceed will not add to those historical "injustices".
23. There is, of course, a circumstance in which wasted costs can be a factor which gives rise to injustice if the suit is permitted to proceed: where the other party is hampered in the preparation of its case by the unpaid costs order[16]. But the Associate Judge made a finding of fact that this was not the case in these proceedings.[17]

IS THE INJUSTICE ARISING FROM UNPAID INTERLOCUTORY COSTS ORDERS AGAINST IMPECUNIOUS LITIGANTS NEITHER NECESSARY NOR CONTINGENT ?

---

[14] *Gao v Zheng,* 386 [17]
[15] Appellant's submissions n 30
[16] See *Gao v Zheng,*
[17] *Rozenblit v Vainer & Anor (No 3)* [2015] VSC 731, [107]

24. Once the principle that impecuniosity should not bar access to justice is accepted, it must follow as a necessary incident of that principle, that a defendant otherwise entitled to its costs will be deprived of its entitlement should an unsuccessful plaintiff have no ability to satisfy that order. In a system that refuses to stifle litigation by demanding security for costs in advance from individual resident litigants unable to provide such security, the spectre of "injustice" arising from unpaid costs orders is necessarily real[18].

25. The respondents have not explained why the "injustice" (if indeed there is injustice) arising from unpaid costs orders against impecunious resident plaintiffs is not a "necessary" injustice.

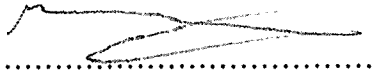
26. Until the proceedings have been determined and final costs orders made, it is generally impossible to know whether unpaid interlocutory costs orders will ultimately be satisfied. In this case, it is still unknown whether the respondents will ultimately be deprived of the benefit of the interlocutory costs orders. If the appellant succeeds at trial, it is likely that the two unpaid interlocutory costs orders will be offset and thus effectively discharged. If there were an injustice suffered by the respondents on account of the current outstanding debt, that injustice has only been contingently and not clearly inflicted.

ACCESS TO JUSTICE IS A FUNDAMENTAL COMMON LAW RIGHT

27. The respondents' submissions are silent on this point. So too is the majority judgment in the Court of Appeal decision.

28. This is a troubling aspect of this case.

Dated: 27 October 2017; Amended 1 November 2017



.....

JONATHAN KORMAN
Counsel for the appellant

Phone: (03) 9225 7935
Fax: (03) 9225 8485
Email: jkorman@vicbar.com.au

[18] But note that the existence of "no cost" jurisdictions supports the proposition that it is not necessarily unjust for a successful litigant to be deprived of his or her costs.