

ROZENBLIT v VAINER & ANOR (M114/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2017] VSCA 52

Date of judgment: 17 March 2017

This case concerns the power of the Supreme Court of Victoria to stay proceedings pending the payment of an interlocutory costs order under Rule 63.03(3) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* ('the Rules'). Rule 63.03 relevantly provides:

- (3) *Where the Court makes an interlocutory order for costs, the Court may then or thereafter order that if the party liable to pay the costs fails to do so—*
(a) *if that party is the plaintiff, the proceeding shall be stayed or dismissed;*

The appellant filed and served a writ and statement of claim in the Supreme Court of Victoria on 23 December 2013. By summons dated 29 August 2014, the appellant sought leave to file and serve an amended statement of claim. On 20 October 2014, Lansdowne AsJ refused the application for leave to amend and ordered that the appellant pay the respondents' costs of that day's hearing, and the costs of a directions hearing of 25 August, to be taxed immediately. By summons dated 10 November 2014, the appellant again sought leave to file and serve an amended statement of claim. On 15 December 2014, a costs registrar ordered by consent that the appellant pay the respondents \$22,000, pursuant to the order of Lansdowne AsJ of 20 October 2014, by 19 December 2014. That sum remains unpaid. In an affidavit affirmed on 19 June 2015, the appellant stated that he had no assets other than his personal possessions and his only income was from the aged pension. He said that he had not paid the costs because he had no way of doing so. He had consented to the order to avoid a 'pointless court fight' which he was likely to lose.

On 24 June 2015 Lansdowne AsJ made orders formally dismissing the summons of 10 November 2014 and ordering that the appellant pay the respondents' costs of the summons, to be taxed immediately. On 12 August 2015, a costs registrar ordered that the appellant pay the respondents \$28,000, pursuant to that order. On 17 July 2015, the respondents filed a summons seeking that the proceeding be stayed pursuant to Rule 63.03(3) of the Rules until the appellant paid the costs. On 16 December 2015, Lansdowne AsJ granted the appellant leave to file and serve an amended statement of claim but also granted the relief sought in the respondents' summons, ordering that the proceeding be stayed until the appellant paid the amounts owing to the respondents pursuant to the costs orders of 15 December 2014 and 12 August 2015. An appeal to a single judge (Cameron J) was dismissed on 4 August 2016.

The appellant's appeal to the Court of Appeal (Whelan, Kyrou & McLeish JJA) was dismissed. The Court held that the power to order a stay under Rule 63.03(3) is to be exercised according to the following principles:

- (a) a stay may only be ordered if it is the only fair and practical way of facilitating the just, efficient, timely and cost-effective resolution of the proceeding;
- (b) justice between the parties requires regard to be had to the interests of the party in whose favour the costs were ordered to be paid;
- (c) the parties' conduct of the proceeding to date, and in particular the reasons for which costs were ordered to be taxed immediately, are relevant to the exercise of the power;
- (d) a stay should not be ordered unless the conduct of the party in default warrants the condemnation inherent in such an order;
- (e) the power is not to be used simply as a means of enforcing payment of the costs in question unless there are grounds for concluding that the party in default is recalcitrant and is capable of remedying the default.

The Court considered that the fact that the orders had not been complied with was highly relevant, and the associate judge clearly addressed the central question whether there was any other practical way of doing justice between the parties. In doing so, she was not looking solely at compliance with the costs orders, but at the just disposition of the whole proceeding. She was conscious that a stay should only be ordered where the defaulting party's conduct called for condemnation. On a fair reading, the associate judge proceeded in accordance with the principles articulated above, and Cameron J was right to dismiss the appeal in that respect.

The ground of the appeal is:

- In circumstances where it is not alleged or found that the plaintiff has conducted a proceeding in a manner amounting to harassment or for a collateral purpose, and where it is not contested that the plaintiff lacks means sufficient to meet interlocutory costs orders made against him or her in favour of the defendant, it is not open, as a matter of law, to conclude that the only fair and practical way of ensuring justice between the parties is to make an order pursuant to Rule 63.03(3) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* or in exercise of the inherent jurisdiction, staying the proceeding.