Form 27A – Appellant's submissions
(rule 44.02.2)

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 SUBMISSIONS

Part I:

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

Part II:

2. The appeal raises for determination the following issue:
   a. is it open, as a matter of law, to conclude that the only fair and practical way of ensuring justice between the parties is by staying a proceeding brought by a plaintiff who lacks means sufficient to meet interlocutory costs orders made against him, where he has not conducted those proceedings in a manner amounting to harassment or for a collateral purpose?

Part III:

3. The appellant does not consider any notice should be given in compliance with section 78B of the *Judiciary Act 1903*.

Part IV:

4. The reasons for judgment of the associate judge are reported as *Rozenblit v Vainer & Anor (No 3)* [2015] VSC 731.
5. The reasons for judgment of the trial judge are reported as *Rozenblit v Vainer & Anor (No 4)* [2016] VSC 451.

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

6. The reasons for judgment of the Court of Appeal are reported as *Rozenblit v Vainer* [2017] VSCA 52.

Part V:

7. The appellant is aged 85. He is a pensioner, lives in subsidised housing, and speaks little English.
8. The appellant and first respondent entered into an oral agreement and written heads of agreement to develop and commercialise tyre recycling technologies that had been invented by the appellant while he was a resident of Ukraine.
9. VR Tek Global Pty Ltd (**VR Tek Global**) was incorporated on 13 August 2009 to further this objective. The appellant along with other entities held shares in VR Tek Global.
10. At a meeting of members of VR Tek Global in late 2011, it was resolved that the appellant, among others, would transfer his shares in VR Tek Global to the second respondent, who is the first respondent's father. The first respondent voted in favour of this transfer on behalf of entities he controlled and also on behalf of the appellant, in respect of whom he said that he held a proxy. The appellant contends that the transfer took place without his knowledge or consent.
11. On 23 December 2013, the appellant filed and served a writ and statement of claim in the Supreme Court of Victoria.
12. On 25 August 2014, following discovery and mediation, he made an oral application for leave to file and serve an amended statement of claim seeking to enlarge the basis of his claim.
13. The associate judge directed that the application be made on summons, which it was, four days later. On 20 October 2014, the application was refused on the basis that the pleaded cause of action was bad at law. A costs order, to be taxed immediately, was made against the appellant.
14. By summons dated 10 November 2014, the appellant again sought leave to serve an amended statement of claim. On 24 June 2015, the associate judge refused leave to amend. Her Honour found the draft pleading contained minor flaws, many of which were drafting matters which could readily be corrected.[1] A second costs order, also taxable immediately, was made against the appellant.
15. The associate judge said that she had ordered that the interlocutory costs be taxed forthwith largely because the appellant's conduct of his applications to amend had given

[1] *Rozenblit v Vainer and Anor (No 3)* [2015] VSC 731 per Lansdowne AsJ ("AsJ Reasons"), [50].

rise to delay and additional costs, and because the appellant had foreshadowed a third application for leave to cure the drafting deficiencies that the associate judge had identified.

16. On 24 June 2015, the appellant orally applied for leave to file an amended pleading that sought to cure the identified drafting deficiencies. The associate judge again ordered that such application be made on summons. A summons was filed on 7 July 2015.
17. On 17 July 2015, the respondents filed a summons seeking a stay.
18. On 16 December 2015, the associate judge published reasons in which she 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 interlocutory costs orders. Orders giving effect to those reasons were made on 22 December 2015.
19. The appellant appealed the stay to a judge of the Trial Division. The appeal was dismissed on 10 August 2016[2]. He then appealed to the Court of Appeal. That appeal was dismissed on 17 March 2017[3].

Part VI:

INTRODUCTION

20. An impecunious plaintiff was unable to pay interlocutory costs orders and the proceedings he brought were stayed pursuant to rule 63.03(3) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**). The common law provides that a proceeding honestly brought must not be stayed unless its continuance would cause injustice to the opposite party. In this case, continuance of the proceeding would not cause injustice to the opposite party. The Court of Appeal held that a stay for failure to satisfy an order for costs in an interlocutory matter may not be ordered under Rule 63.03(3) unless "it is the only fair and practical way of facilitating the just, efficient, timely and cost-effective resolution of the proceeding". But it upheld the stay.
21. It was not contested that the appellant lacked means sufficient to meet the interlocutory costs orders. Neither is it alleged or was it found that the appellant had conducted the proceeding in a manner amounting to harassment or for a collateral purpose.
22. The appellant contends that the Court of Appeal ought to have applied the common law rule, allowed the appeal and set aside the stay. He contends that in the circumstances it

---

[2] See *Rozenblit v Vainer (No 4)* [2016] VSC 451 ("Trial judge Reasons")
[3] See *Rozenblit v Vainer* [2017] VSCA 52 ("Court of Appeal Reasons")

was not open to the Court of Appeal, as a matter of law, to conclude that the only fair and practical way of ensuring justice between the parties was to stay the proceedings.

23. These submissions address, in turn:

A. The Court of Appeal decision, including a statement of the rule of law the appellant argued below and argues before this Court ought to have been applied

B. The error which the appellant submits infected the Court of Appeal decision

C. The outcome had the rule been applied to the current case

D. The relevance of the rule to the appellant's argument by reference to its applications

E. Analysis of the rationale for the rule

F. Discussion of three issues arising from the Court of Appeal's reasons for decision:

i. Is there generally a nexus between the reason for imposing an unpaid costs order and the discretion to stay proceedings?

ii. Should statutory changes and modern attitudes to the primacy of case management considerations affect the principles controlling the discretion to stay proceedings?

iii. Should the rule in *Cox v Journeaux* be confined to the exercise of the Court's inherent jurisdiction to control its own process?

A. THE COURT OF APPEAL DECISION

24. The appellant's first ground of appeal before the Court of Appeal was:

> The primary judge erred in failing to find that the Associate Judge acted on a wrong principle in failing to apply the "basal principle" that a suit should be stopped only when to permit it to proceed would amount to an abuse of jurisdiction or would clearly inflict unnecessary injustice upon the opposite party[4]

25. The principle referred to was that stated by Dixon J in *Cox v Journeaux*[5]:

> The principle, in general paramount, that a claim honestly made by a suitor for judicial relief must be investigated and decided in the manner appointed, must be observed. A litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender. *It is only when to permit it to proceed would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party that a suit should be stopped.*[6] (emphasis added)

---

[4] Application for leave to appeal to Court of Appeal, at [6]: Proposed grounds of appeal
[5] *Cox v Journeaux (No 2)* (1935) 2 CLR 713 ("*Cox v Journeaux*")
[6] *Cox v Journeaux*, 720

26. In *Gao v Zhang*[7], Ormiston JA said the power to stay a proceeding ought not to be employed unless it was "the only fair way of protecting the interests of the party seeking such an order". He described the rule in *Cox v Journeaux* as, in that context "the basal principle, frequently adopted."[8]

27. The Court of Appeal recognised *Gao v Zhang* as the leading case[9], but warned that it had to be understood in the context of a changed statutory environment[10]. While interlocutory costs had been immediately taxable at the time *Gao v Zhang* was decided, that position had later changed by introduction of r 63.20.1, which provided that interlocutory costs were not to be taxed until completion of the proceeding, unless "the Court has already decided that something in the conduct of the proceeding" warranted an order that interlocutory costs be taxed forthwith[11]. The Court of Appeal's view was that as a result of the introduction of r 63.20.1 the Court's reasons for making the orders had to be taken into account in deciding whether a proceeding should be stayed.[12].

28. The Court of Appeal said that its analysis of the effect of the changes to the rules of court affecting disposition of interlocutory costs was consistent with "another relevant development" since *Gao v Zhang* was decided: enactment of the *Civil Procedure Act 2010* (Vic) (***CPA***), which required the Court, when exercising its power under the Rules, to facilitate the "just, efficient, timely and cost-effective resolution of the real issues in dispute".

29. The Court of Appeal set out five principles that guide the exercise of the discretion to order a stay under r 63.03(3).[13] None of those principles required that a proceeding honestly brought should not be stayed or dismissed unless continuance of the action would cause injustice to the opposite party.

30. The first and, arguably, guiding principle[14] provides that a stay for non-payment of an interlocutory costs order may only ordered if it is "the only fair and practical way of facilitating the just, efficient, timely, and cost-effective resolution of the proceeding"[15]. The principle appears to be an amalgam of Ormiston JA's formulation – "the only fair

---

[7] *Gao v Zhang* (2005) 14 VR 380.
[8] *Gao v Zhang* (2005) 14 VR 380, [12].
[9] Court of Appeal Reasons [56].
[10] Court of Appeal Reasons [60].
[11] Court of Appeal Reasons [61].
[12] Ibid.
[13] Court of Appeal Reasons [67].
[14] The remaining 4 reasons might be viewed as epexegesis of the first: *Rozenblit v Vainer & Anor* [2017] HCATrans 167 at line 409 per Nettle J.
[15] Court of Appeal Reasons [67]

way of protecting the interests of the party seeking such an order"[16] and the "overarching purpose" of the *CPA* – "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute"[17].

31. The Court found that the associate judge had proceeded in accordance with the five principles it had articulated,[18] upheld her decision and dismissed the appeal.

B. THE ERROR – *COX v JOURNEAUX* WAS NOT APPLIED

32. The appellant contends that the Court of Appeal was bound by this Court's decision in *Cox v Journeaux.* It ought to have either stipulated that the rule in *Cox v Journeaux* governs the exercise of the discretion to order a stay, or, alternatively, required that the articulated principles (and the first principle in particular) be applied so as to give effect to that rule.

33. It is unclear from the Court of Appeal's reasons[19] whether that Court took the view that the associate judge had correctly applied *Cox v Journeaux* or whether it accepted the trial judge's finding[20] that *Cox v Journeaux* had no application and should be distinguished.

34. The appellant contends that the Court of Appeal erred on either account. *Cox v Journeaux* cannot be distinguished, and its correct application would have prevented a stay being ordered. Therefore, in the circumstances of this case, the Court of Appeal ought to have found that the associate judge's discretion miscarried because she acted on a wrong principle[21]. Had the discretion been exercised in accordance with the rule in *Cox v Journeaux* the proceeding could not have been stayed.

35. Stated more expansively, the sole ground of this appeal is that 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 staying the proceeding.

C. THE OUTCOME HAD THE RULE BEEN CORRECTLY APPLIED

---

[16] *Gao v Zhang* (2005) 14 VR 380, [12].
[17] *CPA* s 7(1).
[18] Court of Appeal Reasons [68].
[19] Despite the fact that the headnote identifies as an issue addressed in the reasons, "Whether judge erred by failing to apply *Cox v Journeaux [No 2]* (1935) 52 CLR 713, 720"
[20] Trial judge Reasons, [54]-[55]
[21] *House v the King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ

Threshold conditions satisfied

36. The threshold conditions referred to in paragraph 21 above are satisfied.

37. First, it is not contested that the appellant lacked means sufficient to meet the interlocutory costs orders.

38. The appellant swore two affidavits. The respondents did not seek to cross examine him on either. In the first affidavit, the appellant deposed:

> I have not paid the costs order that was made against me because I have no way of doing so.[22]

39. In the second,[23] he deposed that he and his wife were aged pensioners, and also received a small pension from Russia. They lived in a house rented from the Department of Health and Human Services. Other than their personal belongings, their only asset was combined savings of $2,242.

40. Counsel for the respondents accepted before this Court that at the time the associate judge made her order, her Honour knew there was uncontested evidence that the appellant had not the money with which to pay the costs order[24].

41. Second, it is not alleged and was not found that the appellant conducted the proceeding in a manner amounting to harassment or for a collateral purpose.

42. At first instance, the associate judge found:

> I accept the submission put on behalf of the plaintiff that his attempts to amend his statement of claim have been genuine, and go to the heart of the case he wishes to bring. There is no evidence that his intention has been to vex or harass the defendants by those applications, or by the manner of their conduct.[25]

43. This much was accepted, as well, by counsel for the respondents, who agreed that the appellant was not acting otherwise than out of a well-intentioned sense of achieving justice according to law, and said, "it was not suggested that he was seeking to somehow improperly and deliberately vex or harass my clients."[26]

Stay order was effectively permanent

44. The starting point of the discussion in this case is recognition that the exercise of the discretion to stay proceedings until an interlocutory costs order is satisfied, in circumstances where the affected party lacks means sufficient to meet those orders, has the effect of bringing the proceedings to an end without a trial.[27]

---

[22] Affidavit of Boris Rozenblit dated 19 June 2015, [8].
[23] Supplementary affidavit of Boris Rozenblit dated 23 July 2015.
[24] *Rozenblit v Vainer & Anor* [2017] HCATrans 167 at lines 549, 556-558.
[25] AsJ Reasons, [94].
[26] *Rozenblit v Vainer & Anor* [2017] HCATrans 167 at lines 467-9.
[27] *Gao v Zhang* (2005) 14 VR 380 , [15]. This was recognised by the associate judge: AsJ Reasons [106].

Application of the rule in Cox v Journeaux requires assessment of the effect of continuation of the proceedings.

45. In the present circumstances, where no abuse of process is alleged, the question that arises when applying *Cox v Journeaux* is whether continuation of the proceeding would clearly inflict unnecessary injustice on the respondents. The answer, of course, is necessarily informed by past conduct and other historical factors[28]. But the question looks to the future. It requires an assessment of what is likely to occur if the proceeding continues.

46. The associate judge identified six instances in which the "manner of exercise" of the appellant's conduct, or its result, fell for "condemnation".[29] Five related to the manner in which the appellant conducted his applications for leave to amend.[30] The sixth was the appellant's failure to disclose his impoverished financial circumstances in a timely way and his taking "unjustified umbrage" at the respondents' attempts at enforcement.[31]

47. The six instances of conduct which the associate judge found fell for condemnation were historical in nature. At the time the stay was ordered, the appellant had been granted leave to file and serve his amended statement of claim.[32] Several months before the stay was ordered, he had fully disclosed his financial circumstances.[33] The "defect attending the proceedings" (other than non-payment of the costs orders) had been "eliminated or remedied" [34].

48. Where an interlocutory costs order taxed immediately remains unpaid, continuance of the action may cause injustice to the opposite party if that party is "financially inconvenienced to the extent that it may not be able properly to prepare its case". [35] Absent the requisite evidence, this should not be assumed to be the case,[36]and, in the absence of any such evidence, the associate judge inferred it was not .[37]

---

[28] Court of Appeal Reasons [66].
[29] AsJ Reasons [94].
[30] AsJ Reasons [95]-[100]: the instances were (1) the way the applications for leave to amend were conducted – the number of iterations of the proposed statement of claim and the number of applications to amend, including oral applications (but see Court of Appeal Reasons [70]-[71] and [77]); (2) administrative error; (3) absence of explanation for application for leave to amend until pressed by the court to provide one; (4) allowing litigation to progress through discovery and mediation before an application for leave to amend was made; (5) unintended but nevertheless real delay resulting from the plaintiff's applications.
[31] AsJ Reasons [102].
[32] AsJ Reasons [118]; See also Orders of the Honourable Lansdowne AsJ made 22 December 2015.
[33] Affidavit of Boris Rozenblit dated 19 June 2015, [8]; Affidavit of Boris Rozenblit dated 23 July 2015.
[34] *Jago v The District Court of NSW* (1989) 168 CLR 28, 77 ("*Jago*") per Gaudron J.
[35] *Gao v Zhang* (2005) 14 VR 380 [16].
[36] Ibid.
[37] AsJ Reasons [107].

49. To the extent that there is an injustice in a defendant being unable to recoup costs ordered against an impecunious plaintiff, that is an injustice that is regarded by the common law as a *necessary* injustice, the price of allowing poor and rich equal access to justice[38].

50. Further, any injustice arising from unpaid interlocutory costs orders is contingently inflicted: those costs orders will only be left unsatisfied if the applicant loses the proceeding. If the applicant succeeds, the respondent's unpaid costs orders will likely be satisfied by offsetting those costs against any award made against them.

51. Thus, even if the potential for an unpaid costs order were to be regarded as a form of injustice, continuation of the case would not *clearly* inflict *unnecessary* injustice on the respondents. Rather, it would *contingently* inflict a *necessary* injustice.

Applying *Cox v Journeaux* more generally

52. The rule in *Cox v Journeaux* will not permit a stay to be ordered merely because a punitive costs order remains unpaid. Rather, the discretion to permanently stay proceedings is enlivened only when it is clear that the other party will suffer unnecessary injustice if the proceedings are allowed to continue.

53. Ormiston JA observed, in *Gao v Zhang,* that "ordinarily" before making an order to stay proceedings pursuant to rule 63.03(3), "there would be a series of orders for costs and they usually would be of a kind which did not involve the genuine resolution of disputes relating to interlocutory matters which have to be resolved before the matter can go to trial".[39]

54. Outside the ordinary run of repetitive improperly brought interlocutory actions, there are no doubt less common forms of misconduct which might be expected to continue, and to give rise to unnecessary injustice to the other party.

55. *Cox v Journeaux* establishes the proposition that before an honestly brought proceeding can be permanently stayed because punitive costs orders remain unpaid, there must always be some form of repetitive harassment and it must always be clear to the court that the harassment will continue unless the suit is stayed.

D. APPLICATIONS OF THE RULE IN *COX v JOURNEAUX* TO IMPOSITION OF A STAY

[38] *Cowell v Taylor* (1885) 31 Ch D 34 at 38 per Bowen LJ who said that the principle that poverty is no bar to a litigant has been the rule both at law and in equity from "time immemorial"
[39] *Gao v Zhang* (2005) 14 VR 380 [17]

56. The principle that proceedings should not be stayed unless their continuance will cause injustice to the other party has been applied in a range of circumstances.

Inappropriate forum

57. The same considerations as those set out in *Cox v Journeaux* apply in relation to applications for dismissal or stay on inappropriate forum grounds. Deane J, in *Oceanic Sun Line Special Shipping Co Inc v Fay,*[40] approved Scott LJ's statement of principle in *St Pierre v South American Stores*[41] that in such cases "the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him". Deane J clarified that the principle should be understood as referring to the objective effect of continuation of the proceedings in the local courts: "oppressive" should be understood as meaning seriously and unfairly burdensome, prejudicial or damaging, while "vexatious" should be understood as meaning productive of serious and unjustified trouble and harassment.[42]

58. Applications of the principle look to the injustice to the opposite party that would arise if the proceeding were to continue.

"Hopeless" cases

59. The principle in *Cox v Journeaux* was stated in the context of an exercise of the court's inherent jurisdiction to stay an action as vexatious. Dixon J described the plaintiff's case as "clearly hopeless";[43] to allow it to proceed "would impose a hardship upon the defendants which may be avoided without risk of injustice to the plaintiff"[44]. In *Dey v Victorian Railways Commissioners,*[45] Latham CJ said, "If the court is of the opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile".[46] Barwick CJ agreed with this statement in *General Steel Industries Inc v Commissioner for Railways (NSW).*[47]

---

[40] *Sun Line Special Shipping Co Inc v Fay,*(1988) 165 CLR 197, 246-247.
[41] *St Pierre v South American Stores,* [1936] 1 KB 382, 398.
[42] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 247. Deane J relied upon the authority of *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners* (1908) 6 CLR 194, 200-201. See also *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559.
[43] *Cox v Journeaux (No 2)* (1935) 52 CLR 713, 721 per Dixon J.
[44] *Cox v Journeaux (No 2)* (1935) 52 CLR 713, 720 per Dixon J.
[45] *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.
[46] *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 84 (per Latham CJ), 91-92 (per Dixon J).
[47] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130 (per Barwick CJ.

Delay

60. In *Batistatos v Road Traffic Authority of NSW*[48] the majority applied both *Cox v Journeaux* and *Oceanic,* upholding the dismissal of a negligence claim commenced 29 years after the relevant accident occurred, on the ground that the "burdensome effect upon the defendants of the situation that has arisen by lapse of time" was so serious that a fair trial would not be possible.[49]

Harassment

61. The Victorian Court of Appeal, in *Gao v Zhang,* upheld a stay of proceedings pursuant to rule 63.03(3) in response to the plaintiff's deliberate harassing of the opposite party by frequent litigation of minor interlocutory points, which "can no longer be permitted to continue".[50]

E. THE RATIONALE FOR THE RULE IN *COX v JOURNEAUX*

Access to justice is a fundamental right

62. The common law has long been defensive of the universal right of access to the courts[51].
63. The closing words of Chapter 29 of the *Magna Carta*[52] promise:

> We will sell to no man, we will not deny or defer to any man either justice or right.[53]

64. Specifically, "we will not deny" – *nulli negabimus* – has been interpreted as a reference to the stopping of suits or proceedings[54].
65. Both Australian and English common law recognise the right of access to the courts as a "fundamental right", sometimes described as having a "constitutional character".[55]

---

[48] *Batistatos v Road Traffic Authority of NSW* (2006) 226 CLR 256 ("*Batistatos*") [53], [69]-[71] per Gleeson CJ, Gummow, Hayne and Crennan JJ.
[49] *Batistatos* [69].
[50] *Gao v Zhang* (2005) 14 VR 380, [17]. See also [19].
[51] *Batistatos* [159] per Kirby J.
[52] 25 Edward 1 (1297). The statement appears in chapter 40 of the 1215 version.
[53] Cited in *Jago v The District Court of NSW* (1989) 168 CLR 28 (*"Jago"*), 62 per Toohey J. For an extended discussion of this statement see *Jago,* 66-67 per Toohey J
[54] *Jago* 66, per Toohey J, citing Thomas Madox, *History and Antiquities of the Exchequer,* 2nd ed. (1769) vol 1, p 455.
[55] *R v Lord Chancellor, ex parte Witham* [1998] QB 575, 585; [1997] 2 All ER 779, 788; *R v Secretary of State for the Home Dept, ex p Leech* [1994] QB 198, 210; [1993] 4 All ER 539, 548; *Raymond v Honey* [1983] 1 AC 1, 13; [1982] 1 All ER 756, 760; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492-493 [32] per Gleeson CJ; *Momcilovic v The Queen* (2011) 245 CLR 1, 177 [444] per Heydon J.

66. In *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd,*[56] Lord Diplock said:

> "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant." [57]

67. In *Re Queensland Electricity Commission: Ex parte Electrical Trades Union of Australia*[58] Deane J said

> [The] "prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is 'amenable to the jurisdiction' of the courts and other public tribunals".[59]

68. Gaudron J said in *Jago v The District Court of NSW*[60] that because the grant of a permanent stay of proceedings abrogated a prima facie right to have the court's jurisdiction exercised, the power had to be used "sparingly, with the utmost caution", and was confined to "exceptional cases".[61] The essential characteristic of such cases, it is submitted, is that their continuation will clearly inflict unnecessary injustice on the opposite party.

F. THREE ISSUES ARISING FROM THE COURT OF APPEAL'S REASONS FOR DECISION

(i) NEXUS BETWEEN REASONS FOR IMPOSING A COSTS ORDER AND DISCRETION TO ORDER A STAY

69. The trial judge cited with approval[62], the associate judge's finding that:

> The earlier need to discourage routine debt collection no longer applies. Indeed, arguably, it would defeat the intention of an order that cost be taxable immediately unless there was an effective sanction for non-payment.[63]

70. The Court of Appeal did not go as far. It stated that the power to order a stay should not be employed "simply as a means of enforcing the costs order in question"[64], but

---

[56] *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909.
[57] *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909, 977, cited in *Unity Insurance Brokers Pty. Ltd. v. Rocco Pezzano Pty. Ltd.* (1998) 192 C.L.R. 603, 623 per Gummow J.
[58] (1987) 72 ALR 1. This case is not reported in the CLR series.
[59] *Re Queensland Electricity Commission: Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1, 12.
[60] *Jago v The District Court of NSW* (1989) 168 CLR 28 (*"Jago"*), 76 per Gaudron J.
[61] Ibid.
[62] Trial judge Reasons [44]; see also [63].
[63] AsJ Reasons [103]

nevertheless warned that as a result of the introduction of r 63.20.1, the Court's reasons for making order for immediate taxation had to be taken into account.[65] The Court of Appeal cited *Setka v Abbott*[66] in this context – a case which explained that an order for immediate taxation could, relevantly, be made where "the party against whom the substantive order was made was guilty of unsatisfactory conduct – described variously as 'unreasonable' or 'reprehensible' or as involving a want of 'competence and diligence'.

A fundamental error: two incompatible jurisdictions

The costs jurisdiction

71. The costs jurisdiction is entirely a creature of statute. Although the costs discretion is not unfettered, it is exceptionally broad[67]. Costs orders are seldom appealed, and for good reason: appealable error will rarely be demonstrated[68].

72. Importantly, the discretion is guided by a principle which expressly recognises their potentially punitive role. Devlin J formulated the guiding principle of the discretion as follows:

> No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not be deprived of his cots, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some misconduct."[69]

73. McHugh J, in *Oshlack v Richmond River Council*[70] explained the types of misconduct that could give rise to a punitive costs order:

> "Misconduct" in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; prosecutes the matter solely for the purpose of increasing the costs recoverable; or obtains relief which the unsuccessful party had already offered in settlement of the dispute[71]. *(citations omitted)*

Stay orders in aid of costs orders: confusing privileges and rights

74. Rule 63.03(3) brings together two uneasy bedfellows: it enlists the discretion to order a stay in support of the discretion to order costs. The same mismatch potentially arises in

---

[64] Court of Appeal Reasons [60]
[65] Court of Appeal Reasons [61]
[66] *Setka v Abbott [No 2]* [2013] VSCA 376 [27] per Warren CJ, Ashley and Whelan JJA
[67] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 95 [63] and 96[65]
[68] *Gao v Zhang* (2005) 14 VR 380 [16]; cf Trial judge Reasons [60]
[69] *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873, 874 cited in *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [69]
[70] *Oshlack v Richmond River Council* (1998) 193 CLR 72
[71] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [69]

other states and federally, pursuant to the exercise of a general power to order a stay, whether that power arises under the rules of court, or exists in the court's inherent jurisdiction, as a response to unpaid interlocutory costs orders[72].

75. There is little ground in common between the two discretions: the only instances of the variegated forms of disentitling conduct that justify an adverse costs order, that will also satisfy the rule in *Cox v Journeaux* are abuse of the court's process and persistent harassment of the other party, which clearly will not abate absent a permanent stay.

Withdrawal of a privilege

76. Conceptually, the erroneous notion that a permanent stay can be imposed in order to enforce punitive costs orders can be attributed to an understanding of access to justice as a privilege and not a right.

77. Different considerations apply to the withdrawal of a privilege and the abrogation of a right.

78. Privileges can be granted as rewards or inducements. They can be withdrawn as punishments for disentitling behaviour.

79. The benefit of a costs order is a privilege. Disentitling conduct is penalised by withdrawal of that privilege, or by creation of a disbenefit by grant of the privilege to the opposing party. Of the recognised purposes of punishment[73], those relevant to the imposition of punitive costs orders are the shaping of behaviour specific and general deterrence, and retribution for disentitling conduct.

80. Where a litigant lacks the means to pay the ordered costs, the order will remain unsatisfied. In these circumstances (and, in particular, where the party with the benefit of unpaid costs orders can't or won't enforce them) an effectively permanent stay may supply or even amplify the sought after impact in terms of general deterrence[74] and retribution.

81. For this reason, if access to justice is taken to be a privilege, it makes very good sense to withdraw that privilege as a further punitive response in circumstances where costs

---

[72] See [99] below, and the footnotes therein

[73] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 per Mason CJ, Brennan, Dawson, and Toohey JJ: the recognised purposes of punishment are protection of society, deterrence of the offender (specific) and of others who might be tempted to offend (general), retribution and reform.

[74] Specific deterrence in relation to the future conduct of the proceedings is obviously irrelevant if the proceedings have been brought to a halt. But it may have a role to play in relation to any future proceedings involving the same litigant.

orders penalising disentitling conduct remain unpaid. This was the approach taken by the associate judge[75], the trial judge[76], and the Court of Appeal[77].

Limitation of a right

82. The approach taken by the courts below is flawed because access to justice is a fundamental right and not a privilege. An altogether different methodology must be followed to determine if and when a limitation can be imposed upon the exercise of fundamental rights.

83. Where a social or policy imperative conflicts with the untrammelled exercise of a fundamental right, that conflict is resolved by determining the least rights-infringing limitation that will allow the imperative to be achieved. This is accomplished by determining what limitation that will be "proportional", or "reasonably appropriate or adapted"[78] to the end in mind.

84. This was the task that Dixon J undertook in *Cox v Journeaux.* The importance of the rule there declared, lies in the fact that it constitutes a definitive statement of the circumstances in which imposition of a permanent stay will constitute a proportionate, or reasonably appropriate and adapted limitation on the right to have "a claim honestly made by a suitor for judicial relief ... investigated and decided in the manner appointed"[79].

85. If, with the passage of time, the rule in *Cox v Journeaux* has come to be seen as a statement of the common law right of access to justice, that right can now be seen as part of what Hanna Wilberg has described as the group of common law rights which are concrete and specific in scope, and which incorporate justified limits in their definition. The common law supplies, in the case of this group of rights, not just a statement of the right itself, but a statement of the circumstances in which the right may be abrogated[80].

86. This analysis is useful in understanding the application of the principle of legality[81] – the presumption against statutory abrogation of common law rights - to the construction of statutes granting a discretion to permanently stay proceedings. The principle does not

---

[75] AsJ Reasons [103]
[76] Trial judge Reasons [44], [60], [63]
[77] Court of Appeal Reasons [66]
[78] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [424]-[478] per Kiefel J
[79] *Cox v Journeaux,* 720
[80] Wilberg, H. (2017) "Common law rights have justified limits: Refining the 'Principle of Legality'". In D. Meagher, M Groves (eds), *The principle of legality in Australia and New Zealand* (pp 139-165) Federation Press, at pp147-151.
[81] *Potter v Minahan* (1908) 7 CLR 277, 304 per O'Connor J; *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] per French CJ.

require that such statutes be construed in a manner consistent with unfettered access to justice. Rather, the principle of legality requires the discretion be guided by the rule as stated in *Cox v Journeaux.*

87. Drawing the threads of this discussion together, it can be seen that focussing on questions relevant to the imposition of punitive costs orders, such as the seriousness of the impugned conduct, and whether and to what extent that conduct merited condemnation will tend to lead the court into error. The focus, instead, should be on an assessment of the likely future course of events should the suit be permitted to proceed.

10

(ii) CHANGING ATTITUDES TO THE PRIMACY OF CASE MANAGEMENT

88. The Court of Appeal referred to the enactment in 2010 of the *CPA*, which requires Victorian courts to seek to give effect to the "overarching purpose" of the Act: facilitation of the just, efficient, timely and cost-effective resolution of the real issues in dispute.[82] The associate judge and the Court of Appeal took the view that the *CPA* supported the "robust exercise of the power conferred by r 63.03(3)."[83]
89. The statutory changes reflect the increasing emphasis on case management principles in modern times, no doubt the result of increased demand for judicial services on the one
20 hand, and a greater emphasis on the rational use of economic resources on the other. The shift in attitudes between 1997 and 2009 was reflected in this Court's decision in *Aon Risk Services Australia Limited v Australian National University*[84].
90. Does the *CPA,* or the changing spirit of the times, mandate dilution of the rule in *Cox v Journeaux* ?
91. As for the changed statutory environment, the civil procedure legislation employs general language which allows a "constructional choice" to avoid encroachment on the fundamental common law right propounded in the rule in *Cox v Journeaux.* The principle of legality ensures that civil procedure legislation cannot be construed as allowing case management principles to trump that right. That, it appears, was the
30 intention of parliament: s 8(2) provides that Courts must give effect to the overarching

---

[82] *CPA* ss 7(1), 8(1).
[83] AsJ reasons [104]; Court of Appeal reasons [68], n 64.
[84] *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, which overruled *Queensland v LJ Holdings Pty Ltd* (1997) 189 CLR 146 at 154-155. The latter decision stood as authority for the proposition that "justice is the paramount consideration" in determining applications to amend.

purpose, despite any other Act – other than the *Charter of Human Rights and Responsibilities Act 2006*[85].

92. A lot of water has, of course, flowed under the bridge since 1935. Today's *zeitgeist* is no doubt characterised by increased concerned with economic rationalisation and the efficient allocation of resources, and, in particular, public resources. But the post-war era also ushered in a heightened awareness of the importance of human rights, including the right of access to the courts, and this, too, is a hallmark of modern times. On balance, it cannot be said that Dixon J's statement of the rule is any less relevant today than it was in 1935.

10 93. Ultimately, however, this is a non-issue. Unless a litigant is conducting proceedings in a manner that will cause unnecessary injustice to the other party should the case proceed, or is using the proceedings for an alien purpose – in either of which case proceedings can be stayed if necessary - Courts have the means at their disposal to ensure that any defect attending proceedings which prevents them being prosecuted in a just, efficient, timely and cost-effective manner can be eliminated or remedied without the need to bring proceedings to an untimely end.

20 ***(ii) SHOULD THE RULE IN COX v JOURNEAUX BE CONFINED TO THE EXERCISE OF THE COURT'S INHERENT JURISDICTION?***

94. The trial judge held that *Cox v Journeaux* should be confined to the exercise of the discretion to stay proceedings arising under the Court's inherent jurisdiction:

> The case before this court arises from a statutory power granted by the *Rules* which carries different considerations. A distinction should therefore be drawn[86].

95. The Court of Appeal did not disturb this aspect of the trial judge's reasons, even though the submission that her Honour had erred in making this finding, was before it[87].

96. The notion that *Cox v Journeaux* can be distinguished when the discretion that is
30 exercised arises under a statutory power must be rejected.

97. Firstly, the source of the power has no relevant effect on its exercise. Even if it were correct to say that the considerations that guide the discretion to stay proceedings have

---

[85] The *Charter* at s 24(1) recognises the right of a party to a civil proceeding to have the proceeding determined by a competent, independent and impartial court or tribunal after a fair and public hearing.
[86] Trial Judge Reasons, [54].
[87] Written case for the Applicant (Court of Appeal), [11]-[14]

been affected by introduction of Rule 60.20.1, that would be so whether the Court chose to order a stay in its inherent jurisdiction or pursuant to Rule 63.03(3).

98. Secondly, *Gao v Zhang* applied *Cox v Journeaux* in the context of a stay ordered pursuant to Rule 63.03(3). The trial judge erred in finding that this was not so[88]. While the Court of Appeal did not disturb the trial judge's finding, the respondents now appear to accept that the *Gao v Zhang* did in fact apply *Cox v Journeaux*[89].

99. Thirdly, the result of the trial judge's finding is that in those jurisdictions where the power to order a stay arises generally under the court rules[90] or, as in Victoria, under a specific rule of court, proceedings can be stayed in circumstances where no injustice would be inflicted on the other party were they to continue. In New South Wales and Queensland, however, where the power arises only pursuant to the court's inherent jurisdiction[91], it remains the case that a proceeding genuinely brought can only be stopped only where its continuation will clearly inflict an unnecessary injustice on the other party.

CONCLUSION

100. Kyrou JA stated below that:

> [T]he outcome of this case should not be seen as signalling a softening of the courts' traditional reluctance to shut out a genuine plaintiff by granting a stay of a proceeding based on his or her non-compliance with an interlocutory costs order.[92]

101. But that traditional reluctance found concrete expression in the common law rule that a proceeding honestly brought should not be stayed or dismissed unless continuance of the action would cause injustice to the opposite party, a rule the Court of Appeal has decided should no longer govern the operation of r 63.03(3).

102. The immediate effect of the Court of Appeal's failure to apply that rule as a threshold principle was to validate the associate judge's decision to shut the appellant – a man who her Honour found had no intention to vex or harass the respondents and was making genuine attempts to amend his statement of claim – out of court.

---

[88] Trial Judge Reasons [55]. This conclusion is inescapable from a fair reading of *Gao v Zhang* (2005) 14 VR 380 [12]. The headnote of the authorised report describes *Cox v Journeaux* as applied, not distinguished.
[89] *Rozenblit v Vainer & Anor* [2017] HCATrans 167 at lines 361-366, 648
[90] Eg Rule 40(1)(g), *Australian Capital Territory Court Procedures Rules 2006* (ACT); Order 4A rule 2(2)(v) and Order 59 rule 8(8), *Rules of the Supreme Court 1971* (WA); Rule 192, *South Australia Supreme Court Rules 2006* (SA); Rule 5.21(a), *Federal Court Rules 2011* (Cth).
[91] Both states have adopted the UCPR which makes no provision for a general power to order a stay.
[92] Court of Appeal Reasons [85] per Kyrou JA

103. The wider effect is the risk that now exists, that the fundamental right of access to justice will be relegated to the status of "an uncertain privilege which could be withheld at any time on unconfirmed and largely unexaminable discretionary grounds".[93]

Part VII:

104. *Supreme Court (General Civil Procedure) Rules 2015,* Rule 63.03(3)

63.03 Time for costs order and payment

...

(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;

(b) if that party is a defendant, the defendant's defence shall be struck out.

(4) In paragraph (3) –

defendant includes any person against whom a claim is made in a proceeding;

plaintiff includes any person who makes a claim in a proceeding.

105. These provisions are still in force in the form set out above at the date of making these submissions.

Part VIII:

106. The appellant seeks the following orders:

1. The appeal be allowed.
2. Orders 2 and 3 of the orders of the Court of Appeal made on 17 March 2017 be set aside.
3. The orders of Honourable Justice Cameron made on 10 August 2016 be set aside.
4. Orders 1, 2 and 6 of the orders of the Honourable Associate Justice Lansdowne made on 22 December 2016 be set aside, and:
   (a) in place of Order 2 it is ordered that the plaintiff may file and serve within 14 days of the date of these orders an amended statement of claim in the form of Exhibit A tendered in the proceedings as amended in Court on 2 September 2015 to correct the particulars to paragraph 83.a; and
   (b) in place of Order 6 it is ordered that the defendant pay the plaintiff's costs of the defendants' summons filed 17 July 2015 on a standard basis.

---

[93] *Re Queensland Electricity Commission; ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1, 13 per Deane J.

5. The defendants pay the plaintiff's costs of:

   (a) this appeal;

   (b) the appeal to the Supreme Court of Victoria Court of Appeal; and

   (c) the appeal to the trial division of the Supreme Court of Victoria.

Part IX:

107. The appellant estimates 2 hours will be required for presentation of his oral argument.

Dated: 22 September 2017

.....

JONATHAN KORMAN
Counsel for the appellant

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