HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

BORIS ROZENBLIT APPELLANT

AND

MICHAEL VAINER & ANOR RESPONDENTS

Rozenblit v Vainer
[2018] HCA 23
13 June 2018
M114/2017

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 17 March 2017 and in their place order that:*

    (a) the appeal be allowed with costs; and

    (b) the orders of Cameron J made on 10 August 2016 be set aside and in their place it be ordered that:

        (i) the appeal be allowed with costs; and

        (ii) in respect of the orders of Lansdowne AsJ made on 22 December 2015:

            (A) Orders 1, 6, 7 and 8 be set aside;

            (B) Order 2 be amended to delete the words "On payment of these amounts" and to add, after "within 14 days", the words "of the date of the final orders of the High Court of Australia in Matter No M114 of 2017"; and

(C) it be ordered that the defendants pay the plaintiff's costs in relation to the defendants' summons filed 17 July 2015 on a standard basis.

3. The respondents pay the appellant's costs.

On appeal from the Supreme Court of Victoria

Representation

J G Korman for the appellant (instructed by the appellant)

R M Garratt QC with M G McNamara for the respondents (instructed by CIE Legal)

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CATCHWORDS

Rozenblit v Vainer

Practice and procedure – Victoria – Stay of proceeding – Where appellant commenced proceeding in Supreme Court of Victoria – Where appellant made applications for leave to file and serve amended statement of claim – Where applications refused with costs taxed immediately – Where costs unpaid because appellant impecunious – Where appellant made further application – Where leave to amend statement of claim granted but proceeding stayed under Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 63.03(3) until interlocutory costs orders paid – Whether primary judge erred in making order to stay proceedings.

Words and phrases – "conduct which falls for condemnation", "costs taxed immediately", "impecunious", "interlocutory costs order", "only practical way to ensure justice between the parties", "stay of proceeding", "strong grounds".

Civil Procedure Act 2010 (Vic), ss 7, 8, 9, 65C, 65E.
Supreme Court Act 1986 (Vic), ss 24, 25.
Supreme Court (General Civil Procedure) Rules 2015 (Vic), rr 63.03(3), 63.20.1.

1 KIEFEL CJ AND BELL J. The background facts and relevant statutory provisions are set out in the reasons of Gordon and Edelman JJ. We need only refer to some of them for the purposes of these reasons.

2 The appellant brought proceedings in the Supreme Court of Victoria in which he alleged that the first respondent had fraudulently and without his knowledge or consent transferred shares owned by him to the second respondent. He applied, unsuccessfully, on two occasions for leave to amend his statement of claim and was ordered to pay the respondents' costs. It was further ordered that the costs be taxed immediately, a course which is permitted by r 63.20.1 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) ("the Rules"). The appellant did not pay the costs.

3 The appellant applied a third time to amend, to add a claim which concerned the conduct of the respondents in placing the company in which the shares were held into voluntary liquidation. The primary judge, Lansdowne AsJ, observed that the amendment sought reflected the case the appellant had wished to advance at the outset, but had not on legal advice[1]. Although the respondents' objections to the amendment were overruled, unconditional leave to amend was not granted. An order was made staying the proceedings until the costs the subject of the orders were paid. There was no issue between the parties that the appellant's financial circumstances were such that he could not pay the costs.

Rule 63.03(3)

4 The application for the stay of the proceedings was brought by the respondents pursuant to r 63.03(3) of the Rules, which provides:

> "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."

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1 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [60], [61].

5 Rule 63.03(3)[2] was considered by the Court of Appeal in *Gao v Zhang*[3]. Ormiston JA, with whom Vincent JA agreed, observed that the rule had been designed to overcome a limitation in the inherent jurisdiction of the court with respect to ordering a stay of proceedings. It did not necessarily follow, his Honour said, that whenever costs remain outstanding an order for a stay should be made[4]. Merely because the power to stay appears in a specific rule cannot deny the importance of looking to the consequences of such an order for the party affected[5].

Rule 63.20.1 and the CPA

6 At the time *Gao v Zhang* was decided there was no rule which required an order of the court to permit immediate taxation of an order for costs. This changed with the introduction of r 63.20.1, which provides that interlocutory costs are not taxable until the proceeding has concluded unless the court orders otherwise. After *Gao v Zhang*, the *Civil Procedure Act* 2010 (Vic) ("the CPA") was also enacted. Rules 63.20.1 and 63.03(3) are now required[6] to further the "overarching purpose" of the CPA, which is to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute"[7]. A court is required to further that purpose when making any order or giving any direction by having regard to matters such as the just and timely determination of the civil proceeding[8], the efficient conduct of the business of the court[9] and the efficient use of judicial and administrative resources[10].

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2 Supreme Court (General Civil Procedure) Rules 1996 (Vic).

3 (2005) 14 VR 380.

4 *Gao v Zhang* (2005) 14 VR 380 at 383 [9].

5 *Gao v Zhang* (2005) 14 VR 380 at 384 [12].

6 *Supreme Court Act* 1986 (Vic), s 25(1)(ab).

7 *Civil Procedure Act* 2010 (Vic), s 7(1).

8 *Civil Procedure Act* 2010 (Vic), s 9(1)(a), s 9(1)(f).

9 *Civil Procedure Act* 2010 (Vic), s 9(1)(c).

10 *Civil Procedure Act* 2010 (Vic), s 9(1)(d).

7 The Court of Appeal[11] (Whelan and McLeish JJA, Kyrou JA concurring) confirmed what had been said in *Gao v Zhang*, that a stay should not be ordered simply to give effect to an interlocutory costs order that is taxable immediately[12]. *Gao v Zhang* should, however, be understood in the context of the change to the rules. The risk that r 63.03(3) might be employed as a means of routine debt collection is now reduced by reason of r 63.20.1, which requires an order if costs are to be taxed immediately. At the same time, the making of an order for immediate taxation under that rule indicates that the case is unusual. It follows that the court's reasons for making the order under r 63.20.1 must be taken into account on an application for a stay[13].

8 The Court of Appeal recognised that the CPA requires that the courts give effect to its overarching purpose when exercising their power under the Rules. It acknowledged that the grant of a stay represents the extreme case where the real issues in dispute are not to be resolved at all, pending payment of the outstanding costs.

Stay orders and the fundamental principle

9 In *Gao v Zhang*[14], Ormiston JA said that where a stay order may deny justice to the party affected by it, it ought not to be employed unless it is the only fair way of protecting the interests of the party seeking the order. This was said by his Honour to reflect the "basal principle" stated by Dixon J in *Cox v Journeaux [No 2]*[15].

10 The fundamental principle to which Dixon J referred in *Cox v Journeaux*[16] is that, generally speaking, a person is entitled to submit a bona fide claim for determination by the courts. A litigant is entitled to a determination unless to allow the claim to proceed would amount to an abuse of process or would clearly inflict unnecessary injustice on the party seeking the stay, in which case the proceeding should be halted.

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11 *Rozenblit v Vainer* [2017] VSCA 52.

12 *Rozenblit v Vainer* [2017] VSCA 52 at [61].

13 *Rozenblit v Vainer* [2017] VSCA 52 at [61].

14 (2005) 14 VR 380 at 384 [12].

15 (1935) 52 CLR 713 at 720; [1935] HCA 48.

16 (1935) 52 CLR 713 at 720.

11 It does not follow from the continuing acceptance of this fundamental principle that the right or entitlement of a person to initiate an action is to be understood to be at large. In *Batistatos v Roads and Traffic Authority (NSW)*[17] it was pointed out that any such entitlement is subject to the operation of the applicable procedural and substantive law administered by the courts. In *Aon Risk Services Australia Ltd v Australian National University* ("*Aon*") it was observed[18] that it is more accurate to say that parties have the right to invoke the jurisdiction and the powers of the courts in order to seek a resolution of their dispute.

12 *Cox v Journeaux* should not be understood to state a presumptive rule against the making of a stay order. In *Cox v Journeaux*, Dixon J held that the power to stay could and should be exercised when to allow an action to proceed would impose hardship which may be avoided without risk of injustice to a plaintiff, or when to permit an action to proceed would clearly inflict unnecessary injustice on the defendant[19]. Those statements of principle reflected the circumstances there present. The plaintiff in truth had no cause of action, as Dixon J found[20]. It followed that there could be no injustice to the plaintiff in staying his action and denying him a determination of it; on the other hand, not to do so would have put the defendants to unnecessary trouble and expense.

13 In stating the fundamental principle as relevant to the making of a stay order, Dixon J has been understood, correctly in our view, to point to the grave consequences which may follow the exercise of the power[21]. Importantly, it follows from what his Honour said in *Cox v Journeaux* that where the consequence of a stay order is the effective termination of the proceedings, there must be strong grounds for its exercise.

14 *Cox v Journeaux* did not involve considerations as to whether the manner of the conduct of the proceedings by a party might warrant the exercise of a power to order a stay. In *Gao v Zhang*, Ormiston JA said that where the conduct of the defaulting party is relied upon it must amount to conduct "which falls for

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17 (2006) 226 CLR 256 at 280 [65]; [2006] HCA 27.

18 (2009) 239 CLR 175 at 212-213 [96]; [2009] HCA 27.

19 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720.

20 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 718.

21 See eg *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 19.

condemnation" in order to warrant making an order as draconian as one for a stay[22].

15 In *Gao v Zhang*[23], Ormiston JA observed that when an order for a stay is made in the context of costs rules, regard would be necessary to the conduct of the proceedings. It might be expected that there would be a series of orders for costs in interlocutory applications which did not involve the genuine resolution of disputes necessary to be resolved before the matter goes to trial. The pursuit of appeals from essentially peripheral issues may evidence an effective harassing of the other party of a kind which may justify bringing the litigation to an end. Conduct of this kind could warrant condemnation by an order for a stay of proceedings[24].

16 The conduct in *Gao v Zhang* satisfied that description. There had been a series of orders made in related interlocutory applications which appeared of less and less merit and more and more ill-conceived as they proceeded up through the appellate levels to this Court[25]. Ormiston JA held that the judge hearing the applications for stay could fairly have concluded that the defaulting party's persistent harassment of the other party should not be permitted unless and until the costs were paid.

17 The Court of Appeal in this case did not doubt that the principle referred to in *Cox v Journeaux*, which was applied in *Gao v Zhang*, remained relevant to the exercise of the power to stay. Whelan and McLeish JJA observed[26] that the potential consequences of a stay remain as profound as ever and the exercise of the power should be a last resort. In the view of the Court of Appeal, the primary judge was conscious of the requirement that a party's conduct must be such as to warrant condemnation by the court when her Honour made the order to stay the proceedings.

The making of the stay order

18 The primary judge described aspects of the appellant's conduct of the proceedings as requiring condemnation. In this regard, her Honour identified the

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22 *Gao v Zhang* (2005) 14 VR 380 at 386 [17].

23 (2005) 14 VR 380 at 386 [17].

24 *Gao v Zhang* (2005) 14 VR 380 at 386 [17].

25 *Gao v Zhang* (2005) 14 VR 380 at 386-387 [18].

26 *Rozenblit v Vainer* [2017] VSCA 52 at [62].

many changes the appellant made to his pleading and the errors and confusion which had been associated with his application[27]. The appellant had failed to disclose his financial circumstances in a timely way. Her Honour also pointed to the appellant's attitude towards the respondents' attempts to enforce the costs orders[28].

19 Other aspects of the appellant's conduct were said by her Honour to warrant criticism[29]. They were the absence of an explanation on oath as to the current, third, application for leave to amend and the fact that he allowed the matter to progress through various interlocutory steps before making plain his wish to amend. The latter deserved criticism, her Honour said, because it caused delay and wasted costs[30].

20 Her Honour concluded at this point that reason had been shown, by reference to the appellant's conduct, for exercising the power to stay. In considering factors which tended against its exercise[31], her Honour acknowledged that the appellant was said to be so impecunious that a stay would prevent him litigating his claims[32]. The evidence did not suggest to her Honour that the respondents had been so seriously financially prejudiced by the non-payment of the costs orders that their ability to conduct their defence would be compromised[33]. The financial disparity between the parties was even more marked because the respondents had been jointly engaged in a commercial enterprise with the appellant when the alleged wrongful conduct occurred, her Honour observed[34].

21 It is clear that these matters weighed heavily with her Honour, but ultimately did not outweigh the matters tending towards the grant of a stay[35] for

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27 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [95]-[96].

28 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [102], [113].

29 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [97], [98].

30 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [117].

31 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [105]-[108].

32 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [107].

33 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [107].

34 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [108].

35 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [108].

the reasons which her Honour then listed[36]. The first concerned the appellant's financial resources. Earlier in her reasons her Honour had discussed the possibility that the appellant might have some financial resources, from which he had funded disbursements in the litigation[37]. Her Honour now expressed herself to be satisfied that such an inference could be drawn and that the appellant had chosen not to disclose these resources[38]. The second matter might be seen to be connected with the first. It was that the amount of the costs unpaid was not insignificant and that the appellant had not put forward a proposal for their payment. If he failed in his claims, the respondents would have no prospects of recovering the further costs associated with the new claim[39]. The final factor to which her Honour referred was the appellant's attitude to the payment of the costs orders[40].

The CPA and stay orders

22 The Court of Appeal was undoubtedly correct when it said that a stay should not be ordered under r 63.03(3) simply to give effect to a costs order made under r 63.20.1. A liability for costs may be a precondition for the exercise of the power under r 63.03(3), but there is more for a court to consider in exercising its discretion under the rule, especially where the effect of a stay order may be the practical termination of the proceedings.

23 It is necessary when considering whether to make any order, including an order for a stay, to give consideration to the overarching purpose of the CPA and the means by which it might be achieved[41]. But the stated purpose of the CPA, "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute"[42], is more readily identified with the manner in which a dispute is to progress to its ultimate resolution by the court. It does not speak directly to the possibility that a dispute might not be determined at all.

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36 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [108]-[110], [113].

37 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [71].

38 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [109].

39 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [110].

40 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [113].

41 *Civil Procedure Act* 2010 (Vic), s 9(1).

42 *Civil Procedure Act* 2010 (Vic), s 7(1).

24 There is nothing in the CPA or the Rules which suggests that the principles which inform the exercise of the power to stay proceedings arising from the inherent jurisdiction of the courts should not be applied to the exercise of the same power given by r 63.03(3). In the absence of such an indication, it is to be inferred that these well-established principles are intended to apply. The principles are consistent with the overarching purpose of the CPA, for the concern of them both, where possible, is the resolution of the dispute between the parties by the court. The requirement that, in principle, a party should not be denied a determination of his or her dispute unless there are strong grounds for doing so is not inconsistent with the overarching purpose.

25 It has been recognised that the manner of the conduct of proceedings might provide grounds for a stay. Any assessment of such conduct will require consideration to be given to the matters identified as relevant to achieving the purpose of the CPA. It is by reference to such facts that the purpose of the CPA may assume particular importance in some cases. But in every case where a stay which may effectively terminate a proceeding is sought, consideration must be given to the general principles and to whether the nature and effect of the conduct in question provides strong grounds for the making of the order.

The appellant's conduct – strong grounds?

26 Before turning to the characterisation of the appellant's conduct as necessitating an order for a stay, it is necessary to say something about the appellant's ground of appeal. It claims that where a plaintiff has not conducted a proceeding in a manner amounting to harassment, and it is not contested that the plaintiff does not have the means to meet interlocutory costs orders, it is not open to the court to stay proceedings.

27 It could not be contended that a party's impecuniosity is relevant to and can detract from a finding of conduct of the kind referred to in *Gao v Zhang*. At most, a person's impecuniosity may explain what might otherwise be thought to be recalcitrant behaviour in not paying costs the subject of an order. The principal difficulty with the appellant's contention is that the discretion to order a stay, under r 63.03(3) or otherwise, is not confined to conduct amounting to harassment. It extends to any conduct which, when assessed overall, is considered sufficiently serious in its nature and effect to warrant the proceedings being brought to an end.

28 It is this consideration which warrants a comparison between the conduct identified as relevant in the present case and that in *Gao v Zhang*. Here, the appellant's conduct was not persistent and it could not be described as harassment. There may have been changes to the appellant's pleading but there were only two unsuccessful applications to amend and no attempt to pursue them further. The third application to amend had merit. No doubt the respondents and

the primary judge may have been frustrated by aspects of the appellant's conduct and the errors, confusion and the delay that it caused. His attitude, obviously enough, was a cause of irritation. But it was not found that his conduct was so inefficient or so productive of delay that it had a serious impact upon the progress of the proceeding or that the costs occasioned by it caused real prejudice to the respondents.

29 The reference by Ormiston JA in *Gao v Zhang* to conduct which "falls for condemnation" by the making of an order for a stay was a statement of conclusion. It referred to conduct which was sufficiently egregious to warrant such an order. An order for a stay is not justified by attributing these words to conduct of a different kind and magnitude without more. It is not obvious that the appellant's conduct compels such a conclusion and it is telling that in the reasons given for the stay in the present case, conduct warranting criticism appears to be equated with conduct warranting condemnation. The appellant's conduct may have warranted some criticism, indeed it attracted an order for immediate taxation, but that does not elevate it to the status of conduct of which Ormiston JA spoke.

30 The gravity of an order which may bring proceedings to an end before their resolution by a court requires that the conduct be commensurately serious. At critical points in the reasoning with respect to the making of the stay order, this appears to have been lost sight of.

31 What was said in *Aon*, albeit in the context of applications for amendment, is a useful reminder of the usual tolerances in litigation. It was there observed[43] that some degree of delay and some wasted costs are inevitably associated with amendments. The pursuit of statutory objectives similar to those of the CPA does not mean that an application for amendment will be refused. It is the extent of the delay and costs, together with any prejudice that might be caused, which is relevant to the grant or refusal of permission to a party to alter its case.

32 The Court of Appeal identified as relevant to an application for a stay the reasons why the court had ordered costs be taxed immediately, because such an order is not usual. Clearly an order under r 63.20.1 should be made for good reason and not as a matter of course when an order for costs is made on a failed application. Here, the basis for the order was said to be the manner in which the applications for leave to amend had been conducted, the delay occasioned and the fact that on the second occasion the appellant foreshadowed a third

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43 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214 [102].

application[44]. This is in large part the same conduct which was said to found the stay order. Those reasons can add nothing further to explain the basis for that order.

Financial resources

33 The making of the stay order did not in the end depend solely upon questions of the conduct in question. Even if the appellant's conduct of the litigation could be said to provide some warrant for the order for a stay, there were other matters which were influential to, if not decisive of, the outcome. Chief amongst them was the primary judge's view that the appellant had other financial resources which he had not disclosed to the respondents and to the Court. This view was expressed despite the fact that the appellant had given evidence as to his means and he was not cross-examined upon it. The respondents accepted that he was unable to pay the costs. It was not open to the primary judge to speculate as to whether the appellant was being candid. The primary judge's discretion under r 63.03(3) must be taken to have miscarried.

Alternative means

34 If a stay order is contemplated and its effect may be to bring the proceedings to an end it is necessary that all reasonable alternatives to such an order be investigated. As the reasons of Keane J and of Gordon and Edelman JJ show, there was an alternative course open, to grant leave to amend conditioned on payment of the costs orders. In the event, as seems likely, that they were not paid the respondents would be protected from the further expenses associated with the new claim, but the appellant would not be denied a determination on his existing claims. But in our view this point was not reached. There was no sufficient basis to consider the making of a stay order.

Orders

35 We agree with the orders proposed by Gordon and Edelman JJ.

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44 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [101].

36 KEANE J. Rule 63.03 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) ("the Rules") 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;
>
> (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."

37 At the forefront of the argument for the appellant, Mr Rozenblit, was the contention that it is not open to a court to stay a proceeding, in reliance on r 63.03(3) of the Rules, where a plaintiff has failed to pay costs pursuant to an interlocutory order, in circumstances where the plaintiff is impecunious and has not conducted the proceedings in a manner amounting to harassment or for a collateral purpose.

38 I gratefully adopt the summary by Gordon and Edelman JJ of the issues and arguments which arise in the appeal. I wish to state why, in my view, the discretion conferred by r 63.03(3) of the Rules is not subject to the limitation for which Mr Rozenblit contended; and why, notwithstanding that view, I agree with Gordon and Edelman JJ that the appeal must be allowed.

The scope of r 63.03(3)

39 To argue, as Mr Rozenblit did, that, as a matter of law, r 63.03(3) cannot be invoked to stay proceedings by an impecunious plaintiff that have not been conducted in a manner that amounts to harassment or for a collateral purpose is to fail to appreciate that the discretion conferred by the rule is not so confined. That the rule is not subject to such a limitation is apparent from the text of the provision itself.

40 Of course, it may readily be accepted that the discretion must be exercised judicially, having regard to the considerations material to its exercise by reason of its subject matter and purpose. In this regard, it is evident from the terms of r 63.03(3) that it contemplates the making of orders the purpose of which is to protect a party from the burden of ongoing litigation by a party who has failed to

discharge costs orders that have been made against him or her in circumstances where the court that made the order has concluded that the justice of the case requires that these costs be paid forthwith. An obvious example of a case where an order of that kind might be made is where one party has, without reasonable cause, put the other party to wasted expenditure in circumstances in which that other party should not be required to wait until the completion of the litigation for reimbursement. That would be so especially where there is reason for concern that the delinquent party has engaged in a cynical exercise of attempting to exhaust the innocent party's financial ability to prosecute the litigation to a conclusion on its merits; but such an order might be appropriate to protect the innocent party even if the other party was not acting cynically. This example is but one illustration of the power of the court to protect litigants against delinquent behaviour by another party to ensure that the offending party does not reap the rewards of its delinquency. The point for present purposes is that the exercise of the discretion conferred by r 63.03(3) must be informed by an appreciation of the protective purpose of orders for costs of this kind.

41 It has long been accepted that an order for costs in favour of a party adversely affected by the manner in which litigation is conducted may be a necessary[45] means of preventing injustice resulting from the consequences of incompetence or inefficiency falling short of deliberate harassment or the pursuit of a collateral purpose on the part of an opposing litigant. The decision of this Court in *Aon Risk Services Australia Ltd v Australian National University*[46] was a reminder that inefficiency or incompetence in the conduct of litigation may unjustly burden the other parties to the litigation, and the administration of justice itself. That decision made it clear, to the extent that clarity was necessary, that orders for costs will not always be sufficient to prevent injustice occasioned by inefficiency or incompetence in the conduct of litigation. The broader point for which *Aon Risk* is presently relevant is that injustice in the conduct of litigation cannot be justified by invoking the interests of justice.

42 Litigation is sufficiently stressful and expensive for all concerned[47] without the unnecessary aggravations of additional cost, stress, distraction and delay occasioned by inefficiency, incompetence or sheer disregard of the rules. To the extent that the contention advanced on behalf of Mr Rozenblit reflects an

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45 Cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154-155; [1997] HCA 1.

46 (2009) 239 CLR 175; [2009] HCA 27.

47 As Learned Hand famously said: "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." See "The Deficiencies of Trials to Reach the Heart of the Matter", in Rosenberg et al, *Lectures on Legal Topics*, (1926) 87 at 105.

assumption that inefficiently or incompetently conducted litigation, and the waste in terms of time and money inflicted upon the other party or parties, is nevertheless consistent with the promotion of access to justice because the end may ultimately justify the means, that assumption must be rejected. Inefficient or incompetent conduct of litigation may cause injustice even if it is not intended to do so. Litigation that is conducted inefficiently, incompetently or in disregard of the rules by one party is no less oppressive to the other party because it is not intended to be oppressive. And it is no less oppressive because the litigant who engages in such conduct is impecunious.

43 Rule 63.03(3) allows a court to stay proceedings in order to ensure that the defendant has the benefit of protective orders previously made in his or her favour. Where it appears to the court that the plaintiff's failure to pay the costs is due simply to recalcitrance on his or her part, it may be expected that a stay will readily be granted. On the other hand, where the failure of the plaintiff to pay is the result of that party's impecuniosity, the prospect that an order under r 63.03(3) will defeat a just claim is a consideration that weighs heavily against the making of an order. In *Cox v Journeaux [No 2]*[48], Dixon J described as "in general paramount" the principle that "a claim honestly made by a suitor for judicial relief must be investigated and decided in the manner appointed".

The discretion miscarried

44 As Lansdowne AsJ, Cameron J and the Court of Appeal all rightly appreciated[49], the potentially serious consequences of the exercise of the discretion to make an order under r 63.03(3) against an impecunious plaintiff mean that a stay should be granted as the "only practical way to ensure justice between the parties."[50]

45 In two respects, the approach to the resolution of this issue adopted by Lansdowne AsJ (and affirmed on appeal) was flawed. First, her Honour was distracted by a concern that Mr Rozenblit might actually not be impecunious, and might therefore be able to continue to prosecute his proceedings. Her Honour was concerned by the circumstance that Mr Rozenblit had been able to fund his case thus far. In particular, her Honour considered that it was not just that Mr Rozenblit should be able to rely on what might have been undisclosed

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48 (1935) 52 CLR 713 at 720; [1935] HCA 48.

49 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [80]; *Rozenblit v Vainer (No 4)* [2016] VSC 451 at [47]; *Rozenblit v Vainer* [2017] VSCA 52 at [59].

50 *Gao v Zhang* (2005) 14 VR 380 at 385 [15].

resources to prosecute his case but decline to use them to pay the respondents, the Vainers, the costs that had been ordered against him[51].

46 In this regard, it is apparent that Lansdowne AsJ was distinctly sceptical of Mr Rozenblit's evidence that he was unable to pay the orders for costs. That scepticism was significant because of its tendency to detract from the weight properly to be accorded to the consideration that the stay order would bring Mr Rozenblit's proceedings to an end. The exercise of her Honour's discretion should not have been affected in this way. There was no basis for any scepticism as to Mr Rozenblit's evidence of his impecuniosity or as to its effect upon his ability to pursue his claims should the order for a stay be made. Mr Rozenblit's evidence that he was unable to pay the orders for costs against him was unchallenged in cross-examination. No attempt was made to suggest that the circumstance that he had been able to prosecute his case to that point was inconsistent with his evidence of his inability to meet the orders for costs. The only conclusion fairly open was that a stay order under r 63.03(3) would result in the termination of his proceedings. The discretion whether or not to make the order should have been exercised without any reservations concerning the effect of making the order.

47 Secondly, another, less draconian, order might well have been made to ensure justice between the parties. The inefficiency, delay and wasted expenditure of concern to Lansdowne AsJ was substantially, even if not entirely, associated with his inefficient pursuit of the amendments to the statement of claim. Leave to amend could have been conditioned on the payment of the costs wasted by the amendment. If those costs were not paid, Mr Rozenblit would not have been able to pursue the claim raised by the amendment, and the Vainers would have been substantially protected against the expenses wasted as a result of the inefficient conduct of the litigation in that regard by Mr Rozenblit. Importantly, Mr Rozenblit would have been at liberty to pursue the claim he had originally made, and the further pursuit of that claim would not, of itself, occasion any injustice to the Vainers.

48 It may be said that such an order was not proposed by either party, but that circumstance did not relieve the courts below of the responsibility of ensuring that Mr Rozenblit should not be shut out from pursuing his case if there was another way of ensuring justice between the parties, and even though it did not represent the preferred position of either party.

49 For these reasons, I conclude that the discretion conferred by r 63.03(3) miscarried, and that the Court of Appeal erred in failing to correct that miscarriage of justice.

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51 *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [109].

Orders

50 I agree with the orders proposed by Gordon and Edelman JJ.

51 GORDON AND EDELMAN JJ. The appellant, Mr Boris Rozenblit, brought proceedings in the Supreme Court of Victoria against the respondents. By three separate summonses, Mr Rozenblit sought leave to amend his statement of claim. Leave was twice refused and resulted in orders that the respondents' costs be taxed immediately. Subsequently, orders were made, by consent, to fix the costs, without the need for taxation ("the Costs"). The Costs were never paid.

52 On the third occasion that Mr Rozenblit sought leave to amend his statement of claim, the respondents sought to have the proceeding stayed under r 63.03(3)(a) of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) ("the 2015 SCR")[52], pending payment of the Costs. Rule 63.03(3)(a) empowers the Court to stay a proceeding where the Court has made an interlocutory order for costs to be taxed immediately, and those costs have been fixed, but remain unpaid. Mr Rozenblit's third application for leave to amend was granted on condition that the proceedings be stayed until Mr Rozenblit paid the Costs.

53 This appeal concerns the exercise of the discretion under r 63.03(3)(a) of the 2015 SCR. The question is whether, in the particular circumstances of this proceeding, it was open for the Court to permit Mr Rozenblit to amend his claim but on condition that the proceedings were stayed until he paid the Costs. As will be seen, the discretion miscarried. The Court could not be satisfied that granting a stay of the proceedings pending payment of the Costs was the "only practical way to ensure justice between the parties"[53].

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52 The Court of Appeal of the Supreme Court of Victoria referred to the Supreme Court (General Civil Procedure) Rules 2005 (Vic) ("the 2005 SCR"). That was an error. At the time the respondents' summons for dismissal was filed in the Supreme Court (17 July 2015), the rules in effect were the 2005 SCR. After the hearing of the respondents' summons but before judgment was handed down by Lansdowne AsJ (in December 2015), those rules were revoked and replaced by the 2015 SCR: see r 1.03 of, and Sched 1 to, the 2015 SCR. However, nothing turns on this legislative change as r 63.03(3) was, and remains, in identical terms immediately before, and subsequent to, the introduction of the 2015 SCR: see *Rozenblit v Vainer (No 3)* [2015] VSC 731 at [74]. It is common ground that the 2015 SCR were and remain the relevant rules.

53 *Gao v Zhang* (2005) 14 VR 380 at 385 [15]. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 277 [53], 280 [65], 281-282 [70]-[71]; [2006] HCA 27.

Legislative framework and applicable principles

54 It is important to recall that the default position on the question of costs is to be found in r 63.20.1 of the 2015 SCR: if an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the Court orders that the costs may be taxed immediately.

55 Rule 63.03(3)(a) then provides:

> "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 discretion in r 63.03(3)(a) is not exercised at large. It is to be exercised by reference not only to the applicable legislative framework but also to its broader context and purpose.

56 The applicable legislative framework includes the 2015 SCR, the *Supreme Court Act* 1986 (Vic) ("the Supreme Court Act") and the *Civil Procedure Act* 2010 (Vic) ("the CPA Vic"). A proceeding to which the 2015 SCR apply must, despite anything in the Supreme Court Act or any other Act, be commenced and conducted in accordance with those Rules and not otherwise[54].

57 The power under s 25 of the Supreme Court Act to make the 2015 SCR includes the power, amongst others, to make rules "furthering the overarching purpose" set out in the CPA Vic and the conduct of civil proceedings in accordance with the principles set out in the CPA Vic[55].

58 The CPA Vic, enacted in 2010[56], applies to all civil proceedings in Victoria[57] subject to some specified exceptions which presently may be put to one side. The overarching purpose of the CPA Vic, and of the 2015 SCR, is to

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54 s 3(4) of the Supreme Court Act; r 1.01(1) of the 2015 SCR.

55 s 25(1)(ab) of the Supreme Court Act.

56 In operation from 1 January 2011.

57 s 4(1) of the CPA Vic.

"facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute"[58].

59 In making any order or giving any direction in a civil proceeding, a court shall further that overarching purpose by having regard to, amongst other things, the just determination of the civil proceeding[59], the efficient conduct of the business of the court[60], the efficient use of judicial and administrative resources[61] and the timely determination of the civil proceeding[62].

60 Part 4.5 of the CPA Vic addresses the court's powers as to costs. Section 65C, in that Part, relevantly provides that:

> "(1) In addition to any other power a court may have in relation to costs, a court may make any order as to costs it considers appropriate to further the overarching purpose.
>
> (2) Without limiting subsection (1), the order may—
>
> (a) make different awards of costs in relation to different parts of a proceeding or up to or from a specified stage of the proceeding;
>
> (b) order that parties bear costs as specified proportions of costs;
>
> (c) award a party costs in a specified sum or amount;
>
> (d) fix or cap recoverable costs in advance."

An order under s 65C(1) may be made at any time in a proceeding and in relation to any aspect of a proceeding, including, but not limited to, any interlocutory proceeding[63].

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58 s 7(1) of the CPA Vic.

59 s 9(1)(a) of the CPA Vic.

60 s 9(1)(c) of the CPA Vic.

61 s 9(1)(d) of the CPA Vic.

62 s 9(1)(f) of the CPA Vic.

63 s 65C(3) of the CPA Vic.

61 Section 65E relevantly states that nothing in Pt 4.5 limits any power the Supreme Court may have to award costs in a proceeding under s 24 of the Supreme Court Act or any rules of the Court[64], limits the Supreme Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction[65] or limits any other powers of the Supreme Court or any other court arising or derived from the common law or under any other Act, rule of court, practice note or practice direction[66].

62 As is apparent, the 2015 SCR are influenced by, and to varying degrees restate, the characteristics of the Court's inherent power to stay or dismiss a proceeding. It is therefore necessary to say something about that inherent power that the courts retain to stay or dismiss a proceeding for abuse of process[67]. The principles relating to the inherent power inform not only the content but also the proper construction of the 2015 SCR, including the construction of r 63.03(3)(a).

63 What amounts to abuse of process for the purposes of the inherent power is not restricted to "defined and closed categories"[68]. In *Cox v Journeaux [No 2]*[69], Dixon J described the limits on the inherent power as follows:

> "The inherent jurisdiction of the Court to stay an action as vexatious is to be exercised only when the action is clearly without foundation and when to allow it to proceed would impose a hardship upon the defendants which may be avoided without risk of injustice to the plaintiff. The principle, in general paramount, that a claim honestly made by a suitor for judicial relief must be investigated and decided in the

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64 s 65E(1)(a)(i) of the CPA Vic.

65 s 65E(2)(a) of the CPA Vic.

66 s 65E(2)(c) of the CPA Vic.

67 See *Batistatos* (2006) 226 CLR 256 at 263-265 [5]-[8].

68 *Batistatos* (2006) 226 CLR 256 at 267 [14] quoting *Ridgeway v The Queen* (1995) 184 CLR 19 at 75; [1995] HCA 66. See also *Hamilton v Oades* (1989) 166 CLR 486 at 502; [1989] HCA 21; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25-26, 47-48, 74; [1989] HCA 46; *Walton v Gardiner* (1993) 177 CLR 378 at 393-395; [1993] HCA 77; *Rogers v The Queen* (1994) 181 CLR 251 at 255; [1994] HCA 42; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 28 [74]-[75]; [2005] HCA 12.

69 (1935) 52 CLR 713 at 720; [1935] HCA 48.

> 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."

64 *Cox* was primarily concerned with whether to allow a claim to proceed when the claim was without merit. Subsequent cases[70], adopting Dixon J's statement, have observed that references to this passage of Dixon J's reasons, or to similar passages from other cases[71], were not intended to question the extent of the inherent power of the courts to grant a stay of proceedings in the interests of justice; rather, those references merely emphasised the *gravity* of an exercise of the power to grant such a stay.

65 As this Court has said, the power to grant a stay exists to enable a court to "protect itself from abuse of its process thereby safeguarding the administration of justice"[72]. The power can be exercised at any time from the institution, and until the conclusion, of proceedings[73]. The injustice may arise from the taking of steps, or the failure to take steps, as well as delay, in the conduct of the proceedings[74]. And the injustice may "transcend the interest of any particular party to the litigation"[75].

66 The powers to stay a proceeding, or to dismiss a proceeding without trial, are both powers which, if exercised, in one way or another "deny justice to the

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70 See *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 19; *Gao* (2005) 14 VR 380 at 384 [12].

71 See, eg, *Cohen v Rothfield* [1919] 1 KB 410 at 416-417; *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 at 398.

72 *Batistatos* (2006) 226 CLR 256 at 266 [12].

73 *Batistatos* (2006) 226 CLR 256 at 265 [9], 266-267 [14]-[15].

74 *Batistatos* (2006) 226 CLR 256 at 267 [15].

75 *Batistatos* (2006) 226 CLR 256 at 266 [12].

party affected and ought not to be employed unless it is the *only* fair way of protecting the interests of the party seeking such an order"[76] (emphasis added).

67 In *Batistatos v Roads and Traffic Authority (NSW)*, this Court reinforced, and restated, what Dixon J had said in *Cox*: that only if the proceeding would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party, should a proceeding be stayed or dismissed[77].

68 Dixon J's statement in *Cox* was adopted and followed by the Court of Appeal of the Supreme Court of Victoria in *Gao v Zhang*[78] in considering the exercise of power under r 63.03(3) of the Supreme Court (General Civil Procedure) Rules 1996 (Vic), which was in materially identical terms to the current rule.

69 Ormiston JA (with whom Vincent JA agreed) recognised that unless the purpose of an order granting a temporary stay was to "force a wealthy, or at least not impecunious, but recalcitrant litigant to pay … then the power should be treated as one which will have the effect of bringing to an end litigation without the benefit of a trial to which a litigant is ordinarily entitled"[79].

70 His Honour cautioned that orders staying proceedings where there are outstanding costs orders should ordinarily be made only in extremely limited circumstances, namely where "the court believes or at least has reason strongly to suspect that the party refusing to pay the orders for costs is being *recalcitrant* and will in fact pay the order if it is forced to do so"[80] (emphasis added). As his Honour said, "[i]f a party is clearly shown to be impecunious, then a court cannot act to grant even a temporary stay order under r 63.03(3) except upon the understanding that it will thereby be bringing the litigation effectively to an end"[81].

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76 *Gao* (2005) 14 VR 380 at 384 [12] citing *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720. See also *Batistatos* (2006) 226 CLR 256 at 277 [53], 280 [65], 281-282 [70]-[71].

77 *Batistatos* (2006) 226 CLR 256 at 277 [53], 281 [71] citing *Cox* (1935) 52 CLR 713 at 720.

78 (2005) 14 VR 380 at 384 [12].

79 *Gao* (2005) 14 VR 380 at 385 [15].

80 *Gao* (2005) 14 VR 380 at 385 [13].

81 *Gao* (2005) 14 VR 380 at 385 [15].

71 His Honour added that the reason for making such an order must be *serious* and the making of the order must be "essentially the only practical way to ensure justice between the parties"[82]. In that sense, his Honour considered that for an order to be made in circumstances where there is an impecunious plaintiff, there "must be seen to have been some conduct on the part of the party in default which falls for condemnation to the extent of making so draconian an order"[83].

72 *Batistatos*, like *Gao*, recognises that in the exercise of the power to stay a proceeding – regardless of whether that power appears in a specific rule or is to be found in the inherent power of the court – it is necessary to have regard to the consequences of such an order. The consequence of a stay, whether a permanent stay or even a seemingly temporary stay, is serious; it "shuts a party out of court"[84]. That consequence demonstrates the gravity of an exercise of the power, and the need for the existence of proper grounds for its exercise[85]. Proper grounds include, but are not limited to, the institution of proceedings for an improper purpose, as well as proceedings that are frivolous, vexatious or oppressive[86]. It is unnecessary and undesirable to lay down a hard and fast definition as to what constitutes proper grounds[87].

73 The overarching purpose of the CPA Vic, and the obligation for a court to give effect to and further that overarching purpose[88], reinforce that the power exists to enable a court to protect itself from abuse of its processes in order to safeguard the administration of justice, and that that purpose may "transcend the interest of any particular party to the litigation"[89].

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82 *Gao* (2005) 14 VR 380 at 385 [15].

83 *Gao* (2005) 14 VR 380 at 386 [17].

84 *Gao* (2005) 14 VR 380 at 384 [12].

85 See, eg, *Rochfort* [1972] 1 NSWLR 16 at 19.

86 *Batistatos* (2006) 226 CLR 256 at 265 [9], 266-267 [14] quoting *Ridgeway* (1995) 184 CLR 19 at 74-75. See also *Hamilton* (1989) 166 CLR 486 at 502; *Jago* (1989) 168 CLR 23 at 25-26, 47-48, 74; *Walton* (1993) 177 CLR 378 at 393-395; *Rogers* (1994) 181 CLR 251 at 255; *D'Orta-Ekenaike* (2005) 223 CLR 1 at 28 [74]-[75].

87 *Batistatos* (2006) 226 CLR 256 at 267 [14] quoting *Ridgeway* (1995) 184 CLR 19 at 74-75.

88 ss 7-9 of the CPA Vic.

89 *Batistatos* (2006) 226 CLR 256 at 266 [12].

74 The CPA Vic requires the court to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute"[90]. In making any order, the court is to further that overarching purpose by having regard to, amongst other things, the just determination of the civil proceeding[91], the efficient conduct of the business of the court[92], the efficient use of judicial and administrative resources[93] and the timely determination of the civil proceeding[94].

75 In modern litigation, not only must the court seek to give effect to[95], and further[96], the overarching purpose, but overarching obligations imposed by the CPA Vic also apply in all civil proceedings and throughout the conduct of proceedings, to each party, to each legal practitioner, to each law practice and to certain third parties who fund the proceedings[97]. Each of those participants[98] must comply with the overarching obligations[99], so as to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute". Those obligations include a requirement to cooperate in the conduct of civil proceedings[100] and to ensure costs are reasonable and proportionate[101].

76 The overarching obligations do not displace the need for the court to safeguard the administration of justice in the context of ordering a stay for abuse of process. Rather, the obligations recognise that passive participation in

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90 s 7(1) of the CPA Vic.

91 s 9(1)(a) of the CPA Vic.

92 s 9(1)(c) of the CPA Vic.

93 s 9(1)(d) of the CPA Vic.

94 s 9(1)(f) of the CPA Vic.

95 s 8 of the CPA Vic.

96 s 9 of the CPA Vic.

97 ss 10 and 11 of the CPA Vic.

98 s 10(1) of the CPA Vic.

99 ss 16-27 of the CPA Vic.

100 s 20 of the CPA Vic.

101 s 24 of the CPA Vic.

litigation is no longer an option. There has been a "culture shift"[102]. It is therefore not surprising that in the conduct of modern litigation, there may well be circumstances where the granting of a stay is the only practical way to ensure justice between the parties even though the conduct was not intended to be oppressive. This does not displace or alter the primary consideration of the courts to safeguard the administration of justice. Rather, it underscores that considerations of efficiency and cost are relevant aspects of the inquiry. With those considerations in mind, it is necessary to assess what occurred in this litigation and, especially, to address the particular disputed issue[103] that was before the Court – the third application for leave to amend the statement of claim.

History of the litigation

77 Mr Rozenblit was born in 1931 in the former Soviet Union, now Ukraine. He migrated to Australia in 1994. He lives with his wife in government housing. Neither he nor his wife has any appreciable assets. Their sole income is from Centrelink and a smaller pension from Russia.

78 In 2006, Mr Rozenblit and the first respondent, Mr Michael Vainer, entered into an oral agreement and a written Heads of Agreement to jointly develop and commercialise tyre recycling technologies. Mr Rozenblit alleged he invented the technologies.

79 The VR Tek Unit Trust was established in 2006, pursuant to the Heads of Agreement. VR Tek Global Pty Ltd was incorporated in 2009. Mr Rozenblit held units in the Trust and shares in VR Tek Global. VR Tek Global was placed into voluntary liquidation in November 2012.

80 By a writ and statement of claim filed in the Supreme Court of Victoria on 23 December 2013, Mr Rozenblit alleged, relevantly, that his shares in VR Tek Global were transferred to the second respondent, Mr Alexander Vainer (the first respondent's father), fraudulently and without Mr Rozenblit's knowledge, approval or consent and for no consideration.

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102 See, eg, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 at 1436; [1998] 2 All ER 181 at 191; *Securum Finance Ltd v Ashton* [2001] Ch 291 at 306-309 [28]-[34]; *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 at 496 [85]-[87], 500 [99]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 217 [112]-[113]; [2009] HCA 27.

103 *Aon* (2009) 239 CLR 175 at 205-206 [71], [73]-[74].

81 After pleadings had closed, Mr Rozenblit sought leave to amend his statement of claim.

82 On 29 August 2014, Mr Rozenblit filed his first summons seeking leave to amend his statement of claim in order to, among other things, insert new causes of action arising from the liquidation of VR Tek Global, the thrust of which was that the respondents were not authorised to place VR Tek Global into voluntary liquidation[104]. Five iterations of a proposed amended statement of claim were served on the respondents prior to the summons being returned. Leave to amend was refused by Lansdowne AsJ on 20 October 2014 and her Honour ordered that the costs be taxed immediately. Costs were subsequently fixed, by consent, in the sum of $22,000 on 15 December 2014.

83 On 10 November 2014, Mr Rozenblit filed a second summons seeking leave to file and serve an amended statement of claim. Leave was refused by Lansdowne AsJ on 24 June 2015 and her Honour ordered that costs be taxed immediately. Costs were subsequently fixed by consent in the sum of $28,000 on 12 August 2015.

84 On the third occasion that Mr Rozenblit sought leave to amend his statement of claim, the respondents sought to have the proceeding dismissed or stayed under r 63.03(3)(a) of the 2015 SCR, pending payment of the costs fixed on 15 December 2014 and 12 August 2015, namely the Costs.

85 Before Lansdowne AsJ, Mr Rozenblit provided sworn evidence that he was unable to meet the Costs due to his limited means[105]. He was not cross-examined.

86 Lansdowne AsJ accepted that Mr Rozenblit's attempts to amend his statement of claim were genuine and went to the heart of the case he wished to bring. Her Honour found that there was no evidence that Mr Rozenblit's intention was to harass or vex the respondents by his applications or the way he had conducted the proceeding.

87 Importantly, Lansdowne AsJ also found that Mr Rozenblit was so impecunious that a stay of the proceeding until payment of the Costs would effectively terminate the proceeding and "prevent [Mr Rozenblit] from litigating

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104 *Rozenblit v Vainer* [2014] VSC 510 at [22]-[29]; see generally at [17]-[34].

105 *Rozenblit (No 3)* [2015] VSC 731 at [65].

his claims entirely"[106], and that the respondents were not so seriously financially prejudiced that the refusal of a stay would prevent them defending the claims[107].

88 Lansdowne AsJ stayed the proceeding until Mr Rozenblit paid the Costs and further ordered that, on payment of those Costs, Mr Rozenblit had leave to file and serve his amended statement of claim.

89 Lansdowne AsJ considered herself bound to apply the principles set out by the Court of Appeal of the Supreme Court of Victoria in *Gao* in the exercise of the discretion under r 63.03(3), and considered that *Gao* set down "two essential requirements"[108] that must be met for the exercise of the power. First, the reason for the exercise of the power to stay the proceedings must be "serious" and the exercise of the power the "only practical way to ensure justice between the parties" and, second, there must have been some "conduct on the part of the party in default which falls for condemnation to the extent of making so draconian an order" in addition to the non-payment of costs[109].

90 As noted earlier, her Honour considered that Mr Rozenblit's attempts to amend his statement of claim were genuine and went to the heart of the case he wished to pursue. Her Honour acknowledged that there was no evidence that Mr Rozenblit's intention was to harass or vex the respondents.

91 However, her Honour considered that *Gao* did not require the party seeking the stay to show "intentional harassment or conduct amounting to contemptuous disregard of court orders"[110]. Rather, the conduct needed to be such that it would fall for condemnation as a consequence of the manner of its exercise, or its result, not its intention. As a result, her Honour concluded that Mr Rozenblit's conduct required condemnation, irrespective of his genuine desire to expand the scope of his claims.

92 This conclusion was as a result of, among other things, three factors: first, the sheer number of applications for leave to amend made by Mr Rozenblit and the number of iterations of amendments within each of those applications,

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106 *Rozenblit (No 3)* [2015] VSC 731 at [106].

107 *Rozenblit (No 3)* [2015] VSC 731 at [107].

108 *Rozenblit (No 3)* [2015] VSC 731 at [80].

109 *Rozenblit (No 3)* [2015] VSC 731 at [79]-[80] quoting *Gao* (2005) 14 VR 380 at 385 [15], 386 [17].

110 *Rozenblit (No 3)* [2015] VSC 731 at [94].

without proper explanation; second, Mr Rozenblit's almost "wanton disregard"[111] for the prejudice suffered by the respondents; and third, the substantial delay occasioned by the applications.

93 As to the exercise of power being the *only* practical way to do justice between the parties, her Honour considered that there were a number of significant factors that weighed against the exercise of the power, including that a stay of the proceedings would effectively terminate the proceedings and prevent Mr Rozenblit from litigating his claims, and that there was no evidence that the respondents' financial position would have prevented them from conducting their defence. Lansdowne AsJ also considered the financial disparity between the parties to be relevant in circumstances where it was alleged that the respondents' conduct had resulted in Mr Rozenblit being excluded from the commercialisation of his invention.

94 However, on balance, her Honour concluded that these factors did not outweigh the need to grant a stay to do justice between the parties. Her Honour identified five factors in support of that conclusion. First, Mr Rozenblit had clearly funded his case to that point. Her Honour considered it "not just"[112] for Mr Rozenblit to call on his, possibly undisclosed, resources for the conduct of his case but fail to use them to meet his obligations to the respondents. Second, the sum outstanding – $50,000 – was "not inconsiderable"[113]. Third, even if the non-payment of costs would not prevent the respondents from conducting their case, the risk of continued delay would impact them. Fourth, Mr Rozenblit gave no indication of a way to pay the Costs other than through the fruits of the litigation (were he ultimately successful). Fifth, Mr Rozenblit's attitude in refusing to pay the Costs was an "indignant assertion of his own rights, with cavalier disregard for the rights of the [respondents]"[114].

95 As already noted, Lansdowne AsJ ordered that the proceeding be stayed until Mr Rozenblit paid the Costs. Her Honour considered that leave to amend the statement of claim was justified in the circumstances, but that it would not be just to all of the parties to make the amendment conditional upon the payment of the Costs, as this would leave Mr Rozenblit the option of refraining from amending his statement of claim, leaving the Costs unpaid. Therefore, instead,

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111 *Rozenblit (No 3)* [2015] VSC 731 at [69].

112 *Rozenblit (No 3)* [2015] VSC 731 at [109].

113 *Rozenblit (No 3)* [2015] VSC 731 at [110].

114 *Rozenblit (No 3)* [2015] VSC 731 at [113].

her Honour ordered that first the Costs must be met and only thereafter could Mr Rozenblit amend his statement of claim.

96 On appeal to a single judge of the Supreme Court, Cameron J held that Lansdowne AsJ had not fallen into error in the test that she applied[115].

97 Mr Rozenblit appealed to the Court of Appeal of the Supreme Court of Victoria. One of his appeal grounds was that Lansdowne AsJ had failed to apply the so-called "basal principle" (as Ormiston JA in *Gao* described it[116]) said to derive from the reasons of Dixon J in *Cox*. That "basal principle" was said to be to the effect that a suit should only be stayed when to permit it to proceed would amount to an abuse of jurisdiction or would clearly inflict unnecessary injustice upon the opposing party[117].

98 The plurality (Whelan and McLeish JJA, Kyrou JA delivering short concurring reasons) observed that it would be wrong to read the "basal principle" from *Cox* as imposing some stricter test than *Gao*, which it considered the leading authority. Instead, their Honours observed that "[i]n each case, it is apparent that the interests of justice require that the exercise of the power be a last resort"[118]. The plurality also recognised that the grant of a stay where there is an impecunious plaintiff is an extreme case in which the dispute is not resolved but suspended and, accordingly, such an order should only be made "when there is no other fair and practical way of ensuring justice between the parties"[119].

99 The plurality then went on to summarise what it considered to be the principles relevant to the power to order a stay under r 63.03(3), in the following terms[120]:

> "(a) a stay for failure to satisfy an order for costs in an interlocutory matter 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*;

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115 *Rozenblit v Vainer (No 4)* [2016] VSC 451.

116 (2005) 14 VR 380 at 384 [12].

117 *Gao* (2005) 14 VR 380 at 384 [12] citing *Cox* (1935) 52 CLR 713 at 720.

118 *Rozenblit v Vainer* [2017] VSCA 52 at [65].

119 *Rozenblit* [2017] VSCA 52 at [62].

120 *Rozenblit* [2017] VSCA 52 at [67].

(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." (emphasis added)

100 As the plurality stated, the question the Court was required to ask itself, and answer, was whether, in the circumstances of the case, there was *no other* fair and practical way of ensuring justice between the parties than granting a stay of the proceedings.

101 The Court of Appeal concluded that there was no other way to do justice between the parties. That was an error. What was missing from the formulation of principles (although it was acknowledged elsewhere[121]) was consideration of the fact that a stay would have the effect of permanently halting Mr Rozenblit's claim.

Two applications

102 Lansdowne AsJ had two applications to hear and determine: Mr Rozenblit's third application for leave to amend his statement of claim and the respondents' application for a stay or dismissal of the proceedings for non-payment of the Costs. The two applications were heard at the one time. That is not surprising. But each application raised different considerations.

103 The first question was whether Mr Rozenblit was to be granted leave to amend his statement of claim. It was common ground that, at the time of the application, Mr Rozenblit had a genuine claim, properly pleaded.

104 If, as it would appear from the reasons for judgment, Lansdowne AsJ had taken the view that there were discretionary reasons to provide leave to amend only on *condition*, then in order not to shut Mr Rozenblit out of making his claim, one course would have been to grant leave on terms that the costs thrown

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121 *Rozenblit* [2017] VSCA 52 at [40].

away by the amendment the subject of the third application be paid. Of course, they are not the Costs. They are different costs, incurred at a different time and not the subject of any previous interlocutory costs order.

105 Consideration and resolution of the summons for leave to amend did not and does not address the respondents' summons for a stay or dismissal of the proceeding pending payment of the Costs. There is no dispute that the application by the respondents for an order under r 63.03(3)(a) could be made. The question was whether, in the circumstances just outlined, it was open to the Court to exercise its discretion and dismiss or stay the proceeding. In short, it was not.

106 Mr Rozenblit's evidence to the effect that he did not have the means to pay the Costs was not contested. The effect, in those circumstances, is that a stay would bring the proceedings to an end, proceedings where Mr Rozenblit had a genuine claim that was properly pleaded. It was neither found, nor even alleged, that Mr Rozenblit's case amounted to an abuse of jurisdiction. Indeed, Lansdowne AsJ considered that Mr Rozenblit's attempts to amend his statement of claim were genuine, and went to the heart of the case he wished to bring. The case was not conducted in a manner amounting to harassment or for a collateral purpose. And there was no evidence that Mr Rozenblit's intention was to harass or vex the respondents by the applications that he made.

107 There was also no evidence that the respondents were so seriously financially prejudiced that the refusal of a stay would prevent them from defending the claims.

108 The court's task in considering what is necessary to ensure that there is "justice between the parties" is both retrospective and prospective. The court must assess the likely conduct of the parties, and any injustice that may arise if the matter were to proceed, rather than solely the past conduct that could be said to fall for condemnation. That is not to say that there will not be circumstances in which the historical conduct of a party demonstrates to the court that the proceeding is an abuse of jurisdiction or would inflict injustice. *Gao* is one such example: the plaintiff's conduct was clearly in the nature of "harassment" as a consequence of numerous interlocutory applications, each addressing very minor procedural matters and having relatively little merit.

109 That is not the position here. Mr Rozenblit's conduct – although undesirable, and the cause of delay and frustration to the Court and the respondents – cannot be said to provide any foundation for a finding that he was pursuing a frivolous or vexatious claim, or that the respondents would suffer unnecessary hardship if the proceedings continued.

110 The fact that r 63.03(3) only arises for consideration once the Court has already decided that a party's conduct justifies an order that interlocutory costs be taxed immediately[122] does not change the Court's task. The fact that the Court had previously been willing to order that interlocutory costs be taxed indicates unsavoury conduct. But the grant of a stay does not necessarily follow such an order.

111 The Court, when considering an application for a stay, must decide afresh (as part of considering whether to exercise the discretion to grant the stay) whether the conduct of an impecunious party is so extreme as to justify bringing the proceedings to an end, and whether so ending the claim is the only way to do justice between the parties. The effective end of a proceeding is a far more significant consequence for a party than an order that interlocutory costs be paid forthwith.

112 It follows that the conduct justifying the grant of a stay will necessarily be more worthy of condemnation than the conduct justifying the making of an interlocutory costs order to be paid forthwith. While historical conduct may assist the Court's inquiry, it does not necessarily provide a final answer.

113 In this case, the grant of the stay has prevented Mr Rozenblit from pursuing a claim honestly made. There were insufficient grounds for such an order. The result was not the only fair and practical way to ensure justice between the parties.

Conclusion and orders

114 For the foregoing reasons, the appeal should be allowed. The orders of the Court should be:

1. Appeal allowed.

2. Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 17 March 2017 and in their place order that:

   (a) the appeal be allowed with costs; and

   (b) the orders of Cameron J made on 10 August 2016 be set aside and in their place it be ordered that:

      (i) the appeal be allowed with costs; and

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122 r 63.20.1 of the 2015 SCR.

(ii) in respect of the orders of Lansdowne AsJ made on 22 December 2015:

(A) Orders 1, 6, 7 and 8 be set aside;

(B) Order 2 be amended to delete the words "On payment of these amounts" and to add, after "within 14 days", the words "of the date of the final orders of the High Court of Australia in Matter No M114 of 2017"; and

(C) it be ordered that the defendants pay the plaintiff's costs in relation to the defendants' summons filed 17 July 2015 on a standard basis.

3. The respondents pay the appellant's costs.