

BEWARE INADVERTENT BREACHES

Keep your overarching obligations under the Civil Procedure Act front of mind.

The *Civil Procedure Act 2010* (Vic) has had a significant impact on disputes and litigation in Victoria since its inception. Among other things, the Act has encouraged the willingness of courts to investigate and inquire as to the conduct of practitioners in proceedings, including on the court's own motion.

Some practitioners might consider their risk of contravening overarching obligations under the Act to be low. However, LPLC has seen an increase in claims involving applications for personal cost orders, and recent cases show that inadvertent and innocent breaches can quite readily occur, with serious and wide-ranging consequences for both practitioners and their clients.

A refresher

Sections 16 through 27 inclusive of the *Civil Procedure Act* set out the overarching obligations that apply to parties and their lawyers in the conduct of court proceedings. If there is a breach of the overarching obligations, s29 provides that the court may make any order it considers appropriate in the interests of justice, including:

- an order that the person pay legal costs or other expenses of any person arising from the contravention
- an order that the person compensate any person for any financial or other loss which was materially contributed to by the contravention, and
- any other order the court considers is in the interests of persons prejudicially affected by the contravention.

The overarching obligations range from ensuring that claims and defences have a proper basis (s18), to not engaging in conduct which is misleading or deceptive or likely to mislead or deceive (s21) and ensuring that costs are reasonable and proportionate (s24).

Case example

Practitioners acted for a plaintiff who was based overseas in an application for a freezing order against the assets of the defendant. At the hearing, the usual undertaking as to damages were provided by the plaintiff based on instructions provided to their lawyers.

However, more was required to fulfil the plaintiff's disclosure obligations to the court. In particular, the relevant court practice note provided that:

"An applicant for a freezing order without notice is under a duty to make full and frank disclosure of all materials to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia."

The practitioners did not check the practice note and seek instructions from the plaintiff on what assets it had in the jurisdiction and did not make any disclosure to the court in this respect. It was not

TIPS

- Always keep front of mind the overarching obligations at sections 16 through 27 inclusive of the *Civil Procedure Act*, which apply to clients and their lawyers in the conduct of court proceedings.
- Breaches of your overarching obligations can have potentially serious and wide-ranging consequences for parties and their lawyers.
- Carefully check the requirements of different court practice notes in the various jurisdictions and specialist list or else risk breaching the Act.
- Extra care is required in ex parte applications to make full and frank disclosure of all material facts even if adverse to the client's case.

a matter raised by the presiding judge at the hearing and simply slipped through the cracks. Although inadvertent, this was a breach of the requirements of the relevant court practice note.

It later came to light that the plaintiff did not have assets in the jurisdiction and the defendant sought personal costs orders against the plaintiff's lawyers alleging breaches of the *Civil Procedure Act*. The lawyers were said to have breached the requirement not to mislead or deceive under s21, and s16 (the paramount duty to the court to further the administration of justice). The matter ultimately resolved by a negotiated settlement.

Key takeaways

The case is a good reminder for practitioners to be diligent in checking the specific requirements of court practice notes in different jurisdictions and specialist court lists, or else risk possible *Civil Procedure Act* breaches. Even in the same court, different lists may have different expectations as to the conduct of proceedings.

The case also highlights that practitioners can inadvertently fall foul of their obligations to not mislead or deceive under the *Civil Procedure Act*, especially in the context of ex parte applications. A person's intention and knowledge are irrelevant when determining whether they have breached s21. Rather, the objective test to be applied is

whether their conduct has induced or is capable of inducing error.

Where applications are made ex parte, applicants and their lawyers have a special duty to make full and fair disclosure of all facts which are material to the determination of their entitlement to the orders being sought. This duty extends to disclosing facts which are contrary to the applicant's interests, and to making proper inquiries about those facts before a hearing. Parties will not be excused from disclosure on the basis that they were not aware of the importance of those facts. ■

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