MAKING IT PERSONAL

Litigators who breach their obligations are at risk of a personal cost order.

The LPLC has seen an increase in the number of claims involving personal cost orders since the *Civil Procedure Act 2010* (Vic) was introduced. The Act codifies practitioners' paramount duty to the court and sets out overarching obligations when acting in civil proceedings. It also gives the courts power to award costs against practitioners for contravening the overarching obligations.

These powers are different from those available in the court rules such as rule 63.23 of the Supreme Court (*General Civil Procedure) Rules 2005* which allows for costs against a practitioner where costs have been incurred improperly, without reasonable cause or wasted by failure to act with reasonable competence and expedition. The powers under the Act for ordering cost sanctions are arguably much broader than under the rules and are characterised as penalties rather than compensation. The courts have shown a willingness to inquire about possible breaches under the Act on their own motion as well as on application by the parties.

Consequently, practitioners need to be mindful of all their overarching obligations, set out at s17-26, and the overarching purpose of the Act, which is to facilitate the just, efficient, timely and cost-effective resolution of disputes.

It is also important to note that these obligations override a practitioner's duty to act according to a client's instructions.

Claims involving personal cost orders

Situations where practitioners have been exposed to personal cost orders include:

- pleading causes of action of no merit;
- bringing a claim against the wrong party;
- failing to verify a key fact such as ownership of an asset or registration of a company plaintiff;
- failing to present sufficient evidence to support a claim;
- presenting evidence from a purported expert where the witness was not sufficiently qualified, the evidence was not relevant or was not disclosed in time before trial; and
- a client presenting a different story or new details when under cross-examination which resulted in wasted time and cost for all parties.

In one claim, a practitioner acted for a defendant who was sued for a debt. The money was borrowed to purchase a motorcycle which had caught fire and been destroyed. The practitioner issued third party proceedings against the motorcycle dealership and manufacturer.

The client settled with the manufacturer before trial but subsequently lost against the lender plaintiff and the dealership. The dealership applied for its costs on an indemnity basis to be paid 20 per cent by the client and 80 per cent by the practitioner, arguing:

- time was wasted preparing for trial where most of the claims were abandoned
- time was wasted in court by the defendant unsuccessfully trying to qualify the expertise of a witness and calling another witness for a matter not in dispute
- the defendant had not filed a proper basis certificate, not provided adequate further and better particulars, and had filed the purported expert's report late
- there was no proper basis for the proceeding because the evidence showed the only explanation for the fire was the fault of the manufacturer.

The magistrate concluded the defendant had an 'overwhelmingly hopeless evidentiary position' and ordered the practitioner pay 60 per cent of the dealership's costs on an indemnity basis.

In *Hudspeth v Scholastic Cleaning & Ors* [2014] VSCA 78 the plaintiff's expert witness provided two reports and at trial gave evidence on the opinions expressed in those reports. During the trial it became apparent the second report was an altered version of the first and the defendants had not been alerted to the alterations. Cross-examination also revealed the existence of a third report which had not been made available to the court or the defendants. Senior counsel had instructed the expert directly to provide the third report.

On appeal, the court held there had been a mistrial and ordered the senior counsel and instructing lawyer to each indemnify their plaintiff client for 40 per cent of the costs of the appeal.

The matter was remitted to Dixon J, who entered judgment for the plaintiff. However he found the senior counsel, instructing lawyer and expert breached their overarching obligations regarding the third report and made cost orders against each of them. ■

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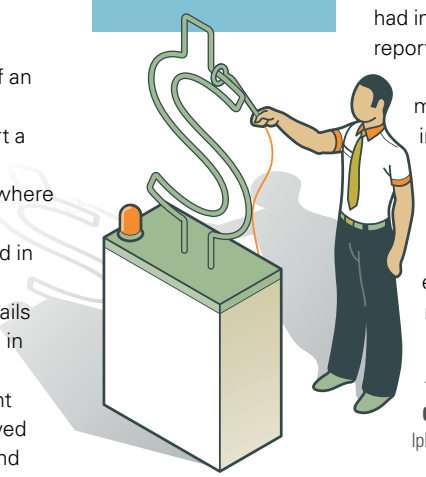
SNAPSHOT

- Clients' instructions must always be considered in light of the Act and clients should be informed of their obligations.
- Practitioners need to ensure their client's case has a proper basis and is supported by the evidence, and that pleadings are drawn accurately.
- Practitioners must use reasonable endeavours to ensure costs incurred are reasonable and proportionate to the complexity of the matter.
- Practitioners should always retain control of a case's conduct, including communications between counsel, experts and clients.



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