

PERSONAL COST ORDERS AGAINST LAWYERS

What are they and what should I do if an application is made against me for a personal cost order?

A court may make a cost order that requires a legal practitioner to personally pay an order for costs, as distinct from an order that requires their client to pay costs.

A court's power to make a personal cost order against a legal practitioner is found within multiple pieces of legislation, including the *Civil Procedure Act 2010* (Vic) and the *Supreme Court Act 1986* (Vic).¹

Some examples of where an application has been made seeking that a legal practitioner be ordered to pay costs personally are:

- issuing a proceeding which contained allegations that lacked a proper basis
- applying for an adjournment of a trial on the morning it was listed to commence without sufficient justification
- failure to comply with a court order resulting in the dismissal of a proceeding
- lodging a caveat that lacked a clear and accurate statement of the caveator's estate or interest in the land
- signing a certificate of independent legal advice for a binding financial agreement, when no such advice had been provided.

A case study

Lawyer B acted for the parents in a family dispute with their children over the ownership of a residential property.

The matter proceeded to a trial and the parents were unsuccessful. The Court held that one of the children, Child A, was the owner of the property. Child A issued an application for costs against both the parents and Lawyer B. The parents had limited financial resources and were not able to pay any cost order made against them. The basis of the application against Lawyer B was that the parents had persisted with an allegation in the proceeding that was clearly bound to fail, being that a loan had been provided to the children secured by the residential property. It was alleged that it was objectively clear this allegation would fail after the provision of certain key information during discovery as well as in Calderbank letters sent on behalf of Child A to the Lawyer B. The allegation was ultimately withdrawn by Lawyer B on instructions from the parents, but only a few months before trial. Child A had incurred significant costs in defending the allegation up until that point.

It was asserted that the secured loan allegation had no proper basis and Lawyer B was in breach of his overarching obligations as set out in the *Civil Procedure Act 2010* (Vic) for persisting with the allegation.

On receipt of the application for a personal cost order, Lawyer B contacted the LPLC, which appointed a lawyer from their panel to assist with the defence of the application. The panel firm determined that Lawyer B could no longer act for the parents due to a conflict of interest arising from the defence that Lawyer B would need to raise in response to the personal cost order application. The parents were referred to a new lawyer.

There were documents in Lawyer B's file that would assist with the defence to the application, such as confidential communications between Lawyer B and the parents regarding the cause of action that was alleged to be hopeless. These communications were subject to client legal privilege which Lawyer B still needed to protect on behalf of his now former clients when preparing a response to the personal cost order application.

The panel lawyer assisted Lawyer B prepare an affidavit in response to the application which did not include any information that might be said to be subject to client legal privilege. Counsel was also retained to prepare submissions and appear at the hearing of the application.

The Court was ultimately not satisfied that:

- there was a basis to make a personal cost order against Lawyer B, as the Court was not privy to the details and circumstances of the communications between Lawyer B and the parents, which may have evidenced a proper basis for the allegation
 - the withdrawal of the allegation prior to trial did not necessarily mean it was doomed to fail as the parents may have simply decided to proceed with other stronger allegations in the proceeding, however the Court was unable to know one way or another due to the parents' legal privilege
- Not all personal cost order cases end so well.

It is important to bear in mind your obligations under the *Civil Procedure Act* and to notify LPLC promptly if a personal cost order is proposed. ■

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¹ S29(1) of the *Civil Procedure Act 2010* (Vic) and s24(1) of the *Supreme Court Act 1986* (Vic). See also Rule 63.23 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and s117(2) of the *Family Law Act 1975* (Cth), along with applicable case law.



TIPS

- If you receive a personal cost order application:
 - contact the claims examiners at the LPLC for assistance
 - consider the issue of client legal privilege before you provide any response to the application.
- If a prior client is making the application, it is possible they have waived privilege over some or all of the documents on the file. However, this is very much case dependent and any assessment of this issue should be done carefully.
- If the application is made by a third party (ie, non-client), consider whether you can continue to act for your client.