



LEGAL
PRACTITIONERS'
LIABILITY
COMMITTEE

Professional responsibility in court and settlement negotiations

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Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

- Must not knowingly make a false statement to an opponent in relation to the case (including its compromise) (r 22.1)
- Must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false (r 22.2)
- Must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact (r 30.1)

Australian Consumer Law

- Must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive (s 18)
 - Intention to mislead or deceive not necessary to establish liability
 - Failing to speak up can be misleading in context

Civil Procedure Act 2010

- Must act honestly at all times (s 17)
- Overarching obligations:
 - to cooperate (s 20)
 - not to engage in conduct which is misleading or deceptive or likely to mislead or deceive (s 21)
 - to use reasonable endeavours to resolve dispute (s 22)

Legal Services Commissioner v Mullins [2006] LPT 012

- Tribunal rejected argument that there was a tacit assumption the parties would rely exclusively on their own information
- Tribunal found that the barrister knowingly misled the defendant's insurer and its lawyers
- Barrister found guilty of professional misconduct
- Instructing solicitor who relied on the barrister's advice found to have committed the same professional misconduct – *Legal Services Commissioner v Garrett* [2009] LPT 12

Legal Practitioner's Complaints Committee and Fleming [2006] WASAT 352

- Informal will
- No mention of the informality when negotiating with the deceased's siblings
- Siblings argued they had been misled as to the existence of a will that was valid on its face
- Tribunal found that the practitioner was the 'moving force' in the other side's misconception
- Practitioner found guilty of unprofessional conduct

Lessons

- Misleading and deceptive conduct if:
 - you rely on information you provided to the other side that is no longer accurate
 - the other side appears to be relying on such information and you do not inform them that the information is no longer accurate

Puffery and posturing in negotiations

- A representation with respect to any future matter made without reasonable grounds is taken to be misleading (s 4 Australian Consumer Law)

Solicitor's duty to disclose

- Must pass on to a client and use all information which is material to the client's interests
 - regardless of the source of that information
 - unless the solicitor knows that the information has been accidentally, unlawfully, improperly or surreptitiously obtained
 - (taken from Law Institute of Victoria's Ethics Guidelines on Inadvertent Disclosure)

Legal Profession Uniform Conduct (Barristers) Rules 2015

- Must not disclose or use confidential information obtained in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:
 - (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality and who does not give the information confidentially to the barrister; or
 - (b) the person has consented to the barrister disclosing or using the information (r 11.4)

Civil Procedure Act 2010 — overarching obligations

s 16 Paramount duty

s 17 Act honestly

s 18 Proper basis

s 19 Only take steps to resolve or determine dispute

s 20 Cooperate in the conduct of civil proceeding

s 21 Not to mislead or deceive

s 22 Use reasonable endeavours to resolve dispute

s 23 Narrow the issues in dispute

s 24 Ensure costs are reasonable and proportionate

s 25 Minimise delay

s 26 Disclose existence of documents

s 27 Protection and use of information and documents disclosed under overarching obligation in s 26

Personal cost orders — legislation

- Federal Court Rules 2007, r 40.07
- Federal Circuit Court Rules 2001, r 21.07
- Supreme Court (General Civil Procedure) Rules 2005, r 63.23
- County Court Civil Procedure Rules 2008, r 63A.23
- ***Civil Procedure Act 2010, ss 28 and 29***

Yara Australia Pty Ltd & Ors v Oswal

[2013] VSCA 337

- Application for leave to appeal orders regarding security for costs between \$22,000 and \$86,000
- Seven counsel for the applicants, three of them senior
- Six lever arch folders running to over 2,700 pages
- Affidavits contained old statements of claim, 'swathes' of emails and materials from interstate proceedings
- Much of the affidavit material 'was either peripheral to the application or entirely unnecessary'

Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd

- At first instance judgment for the defendants
- The court proposed, on its own motion, to consider whether any order under s 29(1) should be made
- Appeal allowed and proceedings remitted, with cost orders against senior counsel and solicitors for the plaintiff at trial — [2014] VSCA 78
- Expert, senior counsel and solicitors found to have breached their overarching obligations — [2014] VSC 567
- Plaintiff succeeded in the remitted proceedings. Cost orders against the expert, senior counsel and instructing solicitors — [2014] VSC 622

On appeal — [2014] VSCA 78

- Mistrial on the basis of expert evidence and three separate versions of expert's report
- Senior counsel for plaintiff instructed expert directly to amend report, resulting in a third version which was never served
- Instructing solicitors claimed they never received this version

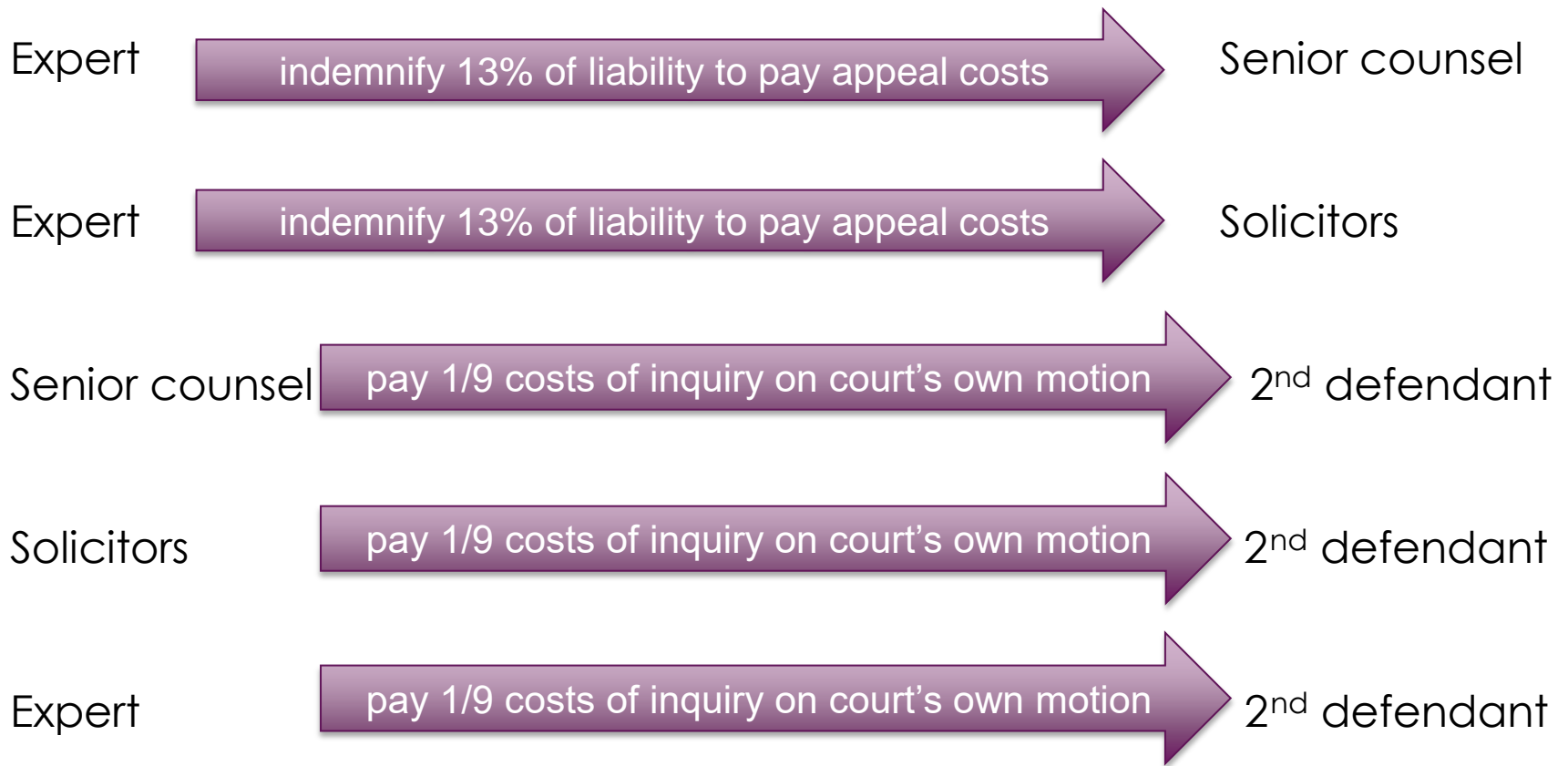
Costs of appeal — [2014] VSCA 78

- Court's power to order costs arises pursuant to r 63.23 of the Supreme Court Rules **or** s 29 of the *Civil Procedure Act*
- Senior counsel and instructing solicitors each ordered to:
 - indemnify the second respondent for 40% (80% total) of its liability to pay the appellant's costs of the appeal
 - pay the appellant 50% of any costs and disbursements she did not recover from the second respondent
- Senior counsel and instructing solicitors' costs and disbursements disallowed

When remitted to Dixon J — [2014] VSC 567

- Senior counsel and instructing solicitors had breached their obligations under the *Civil Procedure Act* by failing on the day of trial, or soon thereafter, to disclose to the defendants the third version of the expert's report
- Expert also breached his overarching obligations

Dixon J cost orders — [2014] VSC 622



- Junior counsel not implicated in the conduct

Lessons

- Be mindful of your obligations under the *Civil Procedure Act* in the preparation and conduct of a case
- Clients' instructions must always be considered in light of the *Civil Procedure Act* — overarching obligations prevail over any duty or obligation to a client where inconsistent (s 13)
- Obtain and record clear instructions — when acting for more than one party, seek instructions from all of them
- Inform clients about the overarching obligations
- Ensure your client's case has a proper basis and is supported by the evidence
- Ensure pleadings are drawn accurately

Lessons — continued

- Use reasonable endeavours to ensure costs incurred are reasonable and proportionate to the complexity of the matter
- Courts may look at factors such as representation and volume and relevance of material filed in assessing whether practitioners have complied with their obligations
- Retain control of the conduct of a case, including communications between counsel, experts and clients