

Risk video bites

Risk video bites – Personal cost orders

Presenter: Matthew Rose

LPLC has seen an increase in claims involving personal cost orders since the *Civil Procedure Act* was introduced in Victoria.

The Act codifies practitioners' paramount duty to the court and sets out overarching obligations when acting in civil proceedings. These obligations override your duty to act according to a client's instructions.

The courts have the power to award costs against practitioners for contravening the overarching obligations. These powers are arguably much broader than those in the court 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, not just on application by parties.

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
- failing to present sufficient evidence to support a claim
- presenting evidence that was irrelevant or not disclosed in time before trial
- and a client giving evidence when under cross-examination which differed from their earlier evidence and defeated their claim or defence.

In a recent case, a practitioner represented his son, who objected to a grant of probate of his grandmother's will. The son alleged that his grandmother lacked testamentary capacity and that the will was procured by his uncle's undue influence. The uncle, who was the executor and major beneficiary, put forward an earlier will in the alternative. However, the son alleged a will made in the intervening period in his favour was his grandmother's last valid will.

After a 10-day trial, the practitioner's son failed on all counts. When considering costs the judge found:

- the practitioner should have known the allegations of undue influence against the uncle had no proper basis

- the uncle had to deal with lengthy allegations that were not pursued at trial and affidavits that were not tendered into evidence
- the practitioner led no evidence of lack of testamentary capacity and did not challenge the earlier will at trial
- the practitioner should have concluded the intervening will was the product of his son's undue influence. Reliance on that will was a negotiating strategy in contravention of the *Civil Procedure Act*.

The practitioner was found to have breached several overarching obligations set out in the Act. The judge said the practitioner could not shelter behind counsel, especially as he knew the facts intimately. The practitioner and his son were ordered to pay the uncle's costs on an indemnity basis.

When acting in civil proceedings, always remember to:

- consider your client's instructions in light of the Act and inform your client about their obligations
- ensure your client's case has a proper basis and is supported by the evidence
- ensure pleadings are drawn accurately
- and ensure costs incurred are reasonable and proportionate to the complexity of the matter.