

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
TRUSTS, EQUITY AND PROBATE LIST

S CI 2016 02257

GEORGIA KRITSIDIMAS  
(IN HER CAPACITY AS EXECUTRIX OF  
THE DECEASED ESTATE OF ELIAS DIMITRAKAKIS)

Plaintiff

v

VASSILIOS DIMITRAKAKIS

Defendant

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JUDGE: Irving AsJ  
WHERE HELD: Melbourne  
DATE OF HEARING: 30 September 2021  
DATE OF JUDGMENT: 19 October 2021  
CASE MAY BE CITED AS: Kritsidimas v Dimitrakakis (No 2)  
MEDIUM NEUTRAL CITATION: [2021] VSC 677 (First Revision: 19 October 2021)

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PRACTICE AND PROCEDURE - Leave to discontinue and cost consequences - Where defendant seeks costs on indemnity basis or from plaintiff personally - Where defendant says plaintiff knowingly made false accusations, claim was misconceived and constituted a campaign of harassment - Special circumstances not found - *Supreme Court (General Civil Procedure) Rules 2015 (Vic) rr 25. 05, 63. 15 - Cohen v The State of Victoria & Ors (No 3) [2011] VSC 229.*

PRACTICE AND PROCEDURE - Release from implied undertaking not to use documents - 'Harman undertaking' - Where intended use of documents not established - Special circumstances not found - *Civil Procedure Act 2010 (Vic) ss 27(1), 27(3)(b) - Ubertas Funds Management Pty Ltd v PwC (release from implied undertaking) [2017] VSC 735 - Harman v Secretary of State for the Home Department [1983] 1 AC 280 - Hearne v Street (2008) 235 CLR 125.*

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APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms C F Gobbo of counsel	Douros Jackson Lawyers
For the Defendant	Mr J D Catlin of counsel	Marshalls & Dent & Wilmoth Lawyers

HIS HONOUR:

- 1 The plaintiff and the defendant are brother and sister. On 10 June 2016, the plaintiff commenced a proceeding against the defendant in which she alleged that the defendant misappropriated money belonging to their deceased father. After five years, following several attempts at pleading her case, several interlocutory hearings and three unsuccessful mediations, the plaintiff seeks to discontinue the proceeding.
- 2 There are presently two applications before the Court, the first issued by the plaintiff is to discontinue the proceeding, and the second, issued by the defendant, seeks release from obligations, arising under the *Civil Procedure Act 2010* (Vic) ('CPA'), limiting the use of documents he has obtained in the proceedings.
- 3 By operation of the rules of the Court, a party who discontinues a proceeding must pay the costs of the other party up until the date of the discontinuance. The defendant says that the proceeding should never have been brought and that the plaintiff is abandoning her case in order to avoid certain defeat; he seeks an order that the plaintiff pay his costs on an indemnity basis. This is resisted by the plaintiff, who says an order for costs on a standard basis is appropriate.
- 4 With respect to the second application, the defendant seeks an order that he be released from his obligation arising under s 27(1) of the CPA not to use the documents produced in this proceeding for a purpose other than in connection with the proceeding. Following the hearing of the application, the defendant filed a schedule of the documents the subject of his application.
- 5 For the reasons that follow I have decided that:
  - (a) the defendant's application for indemnity costs or costs against the plaintiff on a personal basis is refused. Except where costs have otherwise been ordered, the plaintiff, in her capacity as executrix of the deceased estate of Elias Dimitrakakis, is to pay the defendant's costs of the proceeding on a standard basis, with no portion of those costs to be allocated against any entitlement of the defendant as beneficiary; and

- (b) the defendant has failed to specify the purposes for which he seeks to be released from his obligation under s 27 and has not satisfied the Court that special circumstances exist to warrant or justify such release. His application for leave under s 27(3)(b) of the CPA is refused.

### **Background**

6 The factual background in which this dispute arises is helpfully summarised by Lansdowne AsJ in *Kritsidimas v Dimitrakakis* [2019] VSC 704 at paragraphs [7]-[10] and I gratefully adopt her Honour's summary.

7 In order to consider the appropriate award of costs in the first application, it is necessary to understand the procedural history of this proceeding.

8 The plaintiff's writ filed on 10 June 2016 attached an indorsement of claim alleging the defendant, after being made a signatory to his parents' 'Greek Bank Account' so that he could assist them with their banking needs, misappropriated approximately \$1.37m. The plaintiff says the family had a common understanding that the money in the Greek bank account was to be used to purchase land and build houses in Greece for the deceased's children and grandchildren. In the alternative, the plaintiff alleged the defendant had obtained the money unconscionably and by exerting undue influence on their vulnerable father. The indorsement of claim was signed by the plaintiff's then counsel.

9 On 13 December 2017, the defendant applied to:

(a) strike out the proceeding on the basis the plaintiff had failed to file a statement of claim within 30 days as required under rr 5.04 and 14.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('**Rules**') and alternatively,

(b) strike out the proceeding under:

(i) rule 23.02 of the *Rules* by which a Court may strike out a pleading, or part thereof, if it: (a) fails to disclose a cause of action, (b) is scandalous,

frivolous or vexatious, (c) may prejudice, embarrass or delay the fair trial of the proceeding, or (d) was otherwise an abuse of process; and

(ii) section 62 of the CPA by which a defendant may apply for summary judgment where the plaintiff's claim, or part thereof, has no real prospects of success.<sup>1</sup>

10 The defendant's application was supported by his affidavit sworn 16 November 2017<sup>2</sup> denying the plaintiff's allegations.

11 On 21 December 2017, the plaintiff filed a statement of claim broadly repeating the central allegation in the indorsement of claim. The statement of claim was signed by the plaintiff's solicitors and was drafted by her then counsel. On 24 January 2018, the plaintiff filed a proper basis certificate by which her solicitors certified that each allegation of fact in the statement of claim dated 21 December 2017 had a proper basis, as required under s 42 of the CPA.

12 The defendant's strike out/summary judgment application was referred to Lansdowne AsJ for hearing. On 30 April 2018, Lansdowne AsJ struck out the plaintiff's statement of claim and, over the objections of the defendant, allowed the plaintiff to file an amended statement of claim. Her Honour further ordered the plaintiff to pay the defendant's costs of the hearing and the preparation of his application and an affidavit in support on a standard basis. By the time this application was ultimately heard, the defendant had filed seven additional lengthy affidavits in support of his application. However, the Court noted that an application to strike out a statement of claim does not require nor permit reliance on affidavit material; accordingly, the Court did not order the plaintiff to pay the defendant's costs of preparing this additional material.

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<sup>1</sup> Although s 62 of the CPA provides a process for a defendant to apply for summary judgment in respect of a claim that has no real prospect of success, the order sought by the defendant in the summons was for strike out under r 23.02 of the Rules and s 62 of the CPA.

<sup>2</sup> Filed with the Court on 13 December 2017.

- 13 On 18 May 2018, the defendant filed a summons seeking orders that he replace the plaintiff as executor of their deceased father's estate. The defendant's summons also sought, in the alternative, an order for the plaintiff to transfer the remaining property gifts under their father's Will to the defendant, and that his costs of his summons be paid by the plaintiff on an indemnity basis.
- 14 On 27 September 2018, the plaintiff filed a summons seeking orders that the defendant provide discovery in relation to numerous bank accounts and without limitation, any bank account held by the defendant jointly with, or as signatory, for their father.
- 15 On 11 October 2018, Lansdowne AsJ ordered the defendant to make further discovery in relation to the bank accounts and to pay the plaintiff's costs of her summons on a standard basis. Her Honour also ordered the plaintiff to file an amended statement of claim by 19 November 2018. The defendant was ordered to pay the plaintiff's costs of and incidental to the plaintiff's summons filed 27 September 2018.
- 16 On 22 November 2018, the plaintiff filed an amended statement of claim, the practical effect of which was to replead the plaintiff's cause of action against the defendant as arising from breach of agreement, breach of fiduciary duties and breach of trust (rather than relying on unconscionable conduct and undue influence).
- 17 On 29 November 2018, Lansdowne AsJ heard the defendant's application to remove the plaintiff as executor and for orders that the plaintiff distribute the gifts under their father's Will. At that hearing, the defendant indicated that if he was successful on his application to have the plaintiff removed, he would not press the second limb of his application for strike out/summary judgment, which remained outstanding<sup>3</sup>. By his written submissions, the defendant also sought an accounting of income and expenses in respect of certain properties in his father's estate.

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<sup>3</sup> *Kritsidimas v Dimitrakakis* [2019] VSC 704, [3]-[4].

- 18 On 21 January 2019, the defendant filed his defence. The defendant denied the allegations of misappropriation, contending that the bank accounts in question were joint accounts and that the real estate transfers were gifts from his father made at a time he was mentally sound.
- 19 On 23 October 2019, the Court delivered its judgment, refusing the defendant's application to remove the plaintiff as executor, however ordering the plaintiff to transfer to the defendant certain gifts of real estate in accordance with their father's Will, and to account to the defendant for rent and outgoings in respect of the estate.
- 20 On 11 November 2019, the Court made orders giving effect to its judgment dated 23 October 2019. The Court did not make costs orders other than to reserve the defendant's costs of the appearance on 11 November 2019.
- 21 On 29 November 2019, the plaintiff filed a notice of change of solicitor, by which her current solicitors came on the record.
- 22 On 16 December 2019, the Court made further orders giving effect to its judgment of 23 October 2019. In respect of the defendant's application to remove the plaintiff and for distribution of the real estate under his father's Will, the Court:
- (a) ordered the plaintiff to pay the defendant's costs of his application on a standard basis in her capacity as executor, provided that no portion of those costs were to be allocated as against any entitlement of the defendant as beneficiary; and
  - (b) the application was otherwise dismissed.
- 23 On 28 January 2020, the plaintiff filed a summons seeking an extension of time to comply with an order made by the Court on 11 November 2019.
- 24 On 5 February 2020, the defendant filed a summons seeking orders that the plaintiff transfer the sums of \$307,557 and \$18,892 into the defendant's solicitor's trust

account, being the defendant's portion of rent on the property gifts under their father's Will.

25 The Court made orders on 5 February 2020:

- (a) extending time for the plaintiff to comply with the order made 11 November 2019;
- (b) directing the plaintiff to transfer the sum of \$296,449 to the defendant's solicitor's trust account;
- (c) otherwise dismissing the plaintiff's and defendant's summonses with no order as to costs; and
- (d) referring the proceeding to mediation.

26 On 13 March 2020, the Court made orders extending the time for the defendant to file any summons arising out of the information provided by the plaintiff on affidavit accounting for rent and outgoings in respect of the real estate gifts. The Court ordered, by consent, that there be no order as to costs.

27 On 27 April 2020, the Court, with the consent of the parties, extended the time for the parties to complete mediation. Again, by consent, the Court ordered that there be no order as to costs.

28 On 7 September 2020, the defendant filed a report by an independent accounting expert, John Rundell.

29 On 22 October 2020, the Court further extended the time for the parties to complete mediation. The order was made by consent and included no order as to costs.

30 At a directions hearing held on 5 February 2021, the Court was informed the mediation had commenced and was ongoing. The Court extended the time for the mediation and ordered each party to provide a trial summary by 12 March 2021. Costs were reserved.

31 On 18 March 2021, the Court again extended the time for completion of mediation and extended the time for the parties to provide their trial summaries to 12 April 2021. By consent of the parties, costs were reserved.

32 At the directions hearing held on 23 April 2021, the plaintiff sought leave to discontinue the proceeding. The defendant sought indemnity costs and release from his obligation not to use documents produced in this proceeding for a purpose other than in connection with this proceeding.

33 This is the context in which the two applications come before the Court.

### **Costs on discontinuance**

34 The defendant requests that if the Court grants the plaintiff leave to discontinue, it also orders the plaintiff personally pays the defendant's costs of and incidental to the proceeding on an indemnity basis.

35 The plaintiff does not oppose an order that she, in her capacity as executrix of the deceased's estate, pay the defendant's costs of the proceeding (where they have not already been ordered) on a standard basis, with no portion of those costs to be allocated against any entitlement of the defendant as beneficiary. However she opposes any order for costs on an indemnity or personal basis.

### **Legal principles**

36 Rule 25.05 of the Rules states:

Where a proceeding, counterclaim or claim by a third party notice is discontinued, or where part of a proceeding, counterclaim or third party notice is withdrawn, liability for costs shall be determined in accordance with Rule 63.15.

37 Rule 63.15 provides:

#### Discontinuance or withdrawal

Unless the Court otherwise orders, a party who discontinues or withdraws part of a proceeding, counterclaim or claim by third party notice shall pay the costs of the party to whom the discontinuance or withdrawal relates to the time of the discontinuance or withdrawal.



38 The principles relevant to the making of an order for costs to be paid on an indemnity basis are well known. In *Cohen v The State of Victoria & Ors (No 3)*,<sup>4</sup> J Forrester J summarised them thus:

The principles relevant to the making of an order of costs on an indemnity, rather than on a party/party basis have been the subject of much judicial scrutiny. Of particular significance are the decisions of Sheppard J in *Colgate-Palmolive v Cussons*, and Harper J in *Ugly Tribe Co Pty Ltd v Sikola*. It is helpful, here, to set out what is said by Harper J in *Ugly Tribe*:

In seeking costs on an indemnity basis, the first defendant is asking the Court to depart from its usual course: *Spencer v Dowling*. Special circumstances must be present to justify such a departure: *Australian Electoral Commission v Towney (No. 2)*. These include:

- (i) The making of an allegation, known to be false, that the opposite party is guilty of fraud: *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*.
- (ii) The making of an irrelevant allegation of fraud: *Thors v Weekes*.
- (iii) Conduct which causes loss of time to the Court and to other parties: *Tetijo Holdings Pty. Ltd v Keeprite Australia Pty Ltd*.
- (iv) The commencement or continuation of proceedings for an ulterior motive: *Ragata Developments Pty Ltd v Westpac Banking Corp*.
- (v) Conduct which amounts to a contempt of court: *EMI Records Ltd v Ian Cameron Wallace Ltd*.
- (vi) The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law: *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) Branch (No. 2)*.
- (vii) The failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial: *National Australia Bank v Petit-Breuilh (No. 2)*.

The categories of special circumstances are not closed: *Tetijo Holdings*, supra. The cases must not, therefore, be read “in an endeavour to establish a set of inflexible guidelines which should thereafter be determinative of the manner in which the Court’s discretion is to be exercised [for this] would be to fetter the Court’s discretion”: *National Australia Bank v Petit-Breuilh*.

<sup>4</sup> [2011] VSC 229.

At the same time, the courts should, I think, be astute to avoid a wilderness of single instances. Even worse would be the creation of different regimes in different courts, especially as between the Federal Court and a State Supreme Court. This would encourage the undesirable practice of forum shopping, as well as the almost equally undesirable spectre of frequent post-trial applications for costs to be awarded on some special basis (ie on other than the usual party and party basis).

According to Winneke, P. in *Spencer's* case:

It is well recognised that there is occurring an ever increasing gap between party/party costs and those actually incurred . . . This has continued notwithstanding expressions of view by individual Judges that it is capable, in today's circumstances, of working injustice: see, for example, per Rogers J (as he then was) in *Qantas Airways Ltd. v. Billingham Corp.* The practice is designed to reflect a compromise between the interests of successful and unsuccessful litigants. As Handley, JA observed in *Cachia v Hanes* the practice is also adopted to provide an 'important spur to settlement'. Sheppard J. in *Colgate-Palmolive Co v Cussons Pty Ltd* at 233 restated the practice and pointed out: 'This has been the settled practice for centuries in England. It is a practice which is entrenched in Australia. Either legislation . . . or a decision of an intermediate court of appeal or of the High Court would be required to alter it'.

The compromise about which Winneke P spoke is perhaps justifiable on the basis that potential litigants must not be unnecessarily discouraged from bringing their disputes to the courts. After all success can seldom be guaranteed, if only because - where the facts are in dispute, as they generally are - it is seldom possible to predict with certainty what findings of fact will be made. In these circumstances, an honest plaintiff or defendant might be discouraged from bringing or defending a claim were an adverse result to be followed by an order that the losing party indemnify, or go close to providing an indemnity to, the successful party against the latter's costs.

The position changes where a litigant acts dishonestly in the litigation, or where the rights and privileges of a litigant are flouted or abused. Then, the rationale for refusing to order that the losing party indemnify an opposite party against that party's costs is less compelling. Indeed, costs are more frequently if not invariably awarded on an indemnity or like basis (such as that of solicitor/client) where findings of dishonesty or serious misconduct have been made against the party ordered to pay.<sup>5</sup>

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<sup>5</sup> Ibid [10] (citations omitted).

### **Submissions of the parties**

39 The defendant submitted that an award of indemnity costs was justified because:

- (a) the plaintiff had knowingly made false accusations of fraud against the defendant;
- (b) the plaintiff's case was hopelessly misconceived and a properly advised client should not have commenced the proceeding;
- (c) the proceeding was part of the plaintiff's campaign of harassment of the defendant; and
- (d) the evidence showed the plaintiff had abused the office of executor.

40 The defendant's counsel made extensive submissions on the lack of merit of the plaintiff's case, mostly by reference to the terms of the original statement of claim, the amended statement of claim and affidavit material filed by the parties.

41 The defendant's submissions in relation to the plaintiff's alleged misconduct in the administration of the estate focussed on the length of time taken to obtain probate, the absence of a tax return for 2021 and on the plaintiff's delegation of her responsibilities as executor to her brother Frank. The defendant alleges that his investigations into the handling of his father's estate suggests that Frank has misappropriated funds.

42 The plaintiff's counsel submitted:

- (a) an assessment of the merits of the case is not permitted on the authorities;
- (b) there is no evidence before the Court of misappropriation of funds from the estate by Frank;
- (c) the defendant did not apply to strike out the amended statement of claim despite alleging it was misconceived, bound to fail and harassing; and
- (d) the affidavits filed by the defendant were all filed in the various interlocutory

applications, such that the defendant's trial summary, was the first time the plaintiff became aware of the witnesses the defendant intended to rely upon at trial.

43 I am not satisfied that special circumstances exist to justify the Court departing from the ordinary operation of r 63.15.

44 First, as the authorities make clear, an assessment of the merits of the case, absent a hearing in which the evidence is tested, is neither possible nor appropriate.

45 Second, many of the defendant's complaints were raised during interlocutory hearings before Lansdowne AsJ and orders for costs made. For example, in relation to:

(a) the plaintiff's allegations that the defendant had misappropriated funds, her Honour stated:

I find on the basis of her own evidence and that of her siblings that not only do they believe that the defendant has taken financial advantage of their ailing father to their disadvantage and against the Deceased's prior expressed intentions, but they also believe that the defendant isolated the Deceased and withheld information from their father so that he died believing that Frank had defrauded him, that the plaintiff and other family members apart from the defendant had abandoned him, and other matters to their discredit. Their evidence is that this is a matter of great distress to them.<sup>6</sup>

(b) the defendant's allegations of the plaintiff's delay in obtaining probate, her Honour considered the delay in obtaining probate may have been attributable, at least in part, to the defendant's delay in providing her with information about the deceased's bank accounts to which he was also a signatory;<sup>7</sup>

(c) the animosity between the parties, her Honour said:

It is not possible in this application to determine disputes of fact. However, the dislike expressed by the plaintiff and the siblings who

<sup>6</sup> *Kritsidimas v Dimitrakakis* [2019] VSC 704, [57].

<sup>7</sup> *Ibid*, [44]-[46].

support her towards the defendant, and his dislike of them, is plain on the face of their respective affidavits. This is not a case where allegations of bad feelings, or sufficient bad feeling, is disputed and a full consideration of the allegation with the benefit of seeing he witnesses in person and cross-examination is required.<sup>8</sup>

- (d) the plaintiff's failure to transfer the gifts *in specie* to the defendant, her Honour found that this conduct would justify her removal as executor. Her Honour also formed the view that it was not appropriate to appoint the defendant executor and that the estate did not have sufficient funds to appoint an independent executor. It was for this reason that her Honour ordered the plaintiff to transfer the *in specie* gifts of real estate to the defendant and to account for rental income received by the estate from those gifts.<sup>9</sup>

46 Third, a number of costs orders have already been made; none on an indemnity basis. It appears the question of costs in respect of matters that are not already the subject of extant costs orders are predominantly costs in relation to the mediation and the preparation of the trial summary.

47 Fourth, the parties have not run the litigation with an eye on minimising costs. For example, both parties filed affidavits on the defendant's application to strike out the statement of claim filed 13 December 2016, when the authorities clearly state that the Court shall not have regard to affidavit evidence on a pleading dispute. Further, the defendant did not obtain Court orders for the filing of expert evidence prior to obtaining and filing the expert report.

48 Except where costs have otherwise been ordered, the plaintiff, in her capacity as executrix of the deceased estate of Elias Dimitrakakis, is to pay the defendant's costs of the proceeding on a standard basis, with no portion of those costs to be allocated against any entitlement of the defendant as beneficiary.

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<sup>8</sup> Ibid, [59], see also [22].

<sup>9</sup> Ibid [83]-[86].

**Release from s 27(1) CPA obligations**

49 By summons dated 16 September 2021, the defendant seeks leave pursuant to s 27(3)(b) of the CPA to be released from his obligation provided in s 27(1) of the CPA not to use the documents produced in this proceeding for a purpose other than in connection with this proceeding.

50 Mr Alex Di Blasi is the defendant's solicitor. He swore an affidavit on 10 May 2021 in which he states that the parties have made extensive discovery in the proceeding and have filed detailed affidavits and expert reports. Mr Di Blasi says that there are a number of issues relating to the administration of the deceased's estate that remain unresolved, including:

- 31.1 the repayment of the 'Loan - I & M Dimitrakakis' ("Rodia Loan") to the Deceased's Estate;
- 31.2 unidentified drawings from the Deceased's Estate's accounts as identified by John Rundell's Report, totalling \$397,503 [as at 30 June 2019];
- 31.3 the transfer of funds from the Deceased's Estate's Account #3 [Account No. ending ####-##08] to an account held in the name of Frank and Theresa Dimitrakakis [Account ending ##24] made on 17 July 2015 in the sum of \$112,158.63 and on 22 July 2015 in the sum of \$109,058.65, without any proper explanation;
- 31.4 monies to be paid by the Dimitrakakis Family Trust (Frank) to the Deceased's Estate in the sum of \$230,581 [as at 30 June 2019];
- 31.5 the distribution of residual monies held in trust account of Douros Jackson (being \$357,980.75) and in the Deceased's ANZ bank accounts #1 and #2 (being \$34,907.13 as at 14 April 2021);
- 31.6 the recovery of commission improperly levied and collected by Jeffawey Rentals in respect of real property forming part of the Deceased's Estate; and
- 31.7 the Executrix's failure to properly account to the Deceased's Estate (including her failure to lodge a tax return for FYE 30 June 2020 on behalf of the Estate, which, in turn, has hindered the defendant's ability to lodge his income tax return for that financial year and subsequent year).<sup>10</sup>

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<sup>10</sup> Affidavit of Alex Di Blasi sworn 10 May 2021 [31].

51 The defendant seeks to be released from what is commonly referred to as the Harman Undertaking<sup>11</sup> in relation to documents 'which relate to the above extant issues'.<sup>12</sup>

52 The plaintiff does not concede that the issues identified by Mr Di Blasi are unresolved and neither consents nor opposes the defendant's release from the Harman Undertaking. The plaintiff says, however, that if such a release is given, all parties to the proceeding should be released.

53 In *Ubertas Funds Management Pty Ltd v PwC (release from implied undertaking)*<sup>13</sup> Macaulay J explained:

Section 27 of the *Civil Procedure Act 2010* (the Act) imposes an obligation upon any person who receives information or documents provided by another person involved in a civil proceeding, as a result of compulsory disclosure processes (see s 26 of the Act), not to use the information or documents other than in connection with the civil proceeding (the s 27 obligation).

The s 27 obligation is a statutory manifestation of a similar, longstanding common law obligation, taken to be an implied undertaking made to the Court, notably recognised in the UK in *Harman v Secretary of State for Home Department*<sup>14</sup> and in Australia, for example, in *Hearne v Street*.<sup>15</sup>

54 In canvassing the relevant principles, Macaulay J said:

The nature of the common law implied undertaking was explained in *Hearne*,<sup>16</sup> Hayne, Heydon and Crennan JJ:

Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton*

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<sup>11</sup> *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; [1982] 2 WLR 338; [1982] 1 All ER 53.

<sup>12</sup> Affidavit of Alex Di Blasi sworn 10 May 2021 [32].

<sup>13</sup> [2017] VSC 735.

<sup>14</sup> [1983] 1 AC 280.

<sup>15</sup> [2008] HCA 36 (06 August 2008) (Gleeson CJ, Kirby, Hayne, Heydon and Crennan JJ); 235 CLR 125; 82 ALJR 1259; 248 ALR 609.

<sup>16</sup> *Ibid*, 154-155 [96] (citations omitted).

*Piller* order, witness statements served pursuant to a judicial direction and affidavits.

Hayne, Heydon and Crennan JJ also stated in *Hearne* that the importance with which the courts have viewed the obligation is indicated by the fact that although it can be released or modified by the court, that dispensing power is not freely exercised, and will only be exercised where special circumstances appear.<sup>17</sup>

.....

In *Barrow v McLearn*<sup>18</sup> Beach J was prepared to proceed on the basis that the authorities that govern the release of a common law implied undertaking also govern the application of s 27(3)(b) of the Act, the Court's release of a s 27 obligation. For the reasons his Honour gave, I am similarly prepared to proceed on that basis.

In *Australian Securities & Investments Commission v Marshall Bell Hawkins Limited*<sup>19</sup>, Merkel J observed:

Generally, a party applying for the modification or release of the undertaking should:

- specify the documents in respect of which the modification or release is sought;
- specify the purpose for which the modification or release is sought; and
- satisfy the Court that the special circumstances relied upon by the party warrant or justify the modification or release sought.

The requirements of specificity in respect of the documents to be used and the purpose for which they are to be used is appropriate because the implied undertaking should only be modified or released to the extent that it is in the interests of the administration of justice or in the public interest to do so. Thus, the modification or release should be no greater than is necessary or appropriate to meet the interests of the administration of justice or the public interest. Further, in determining whether to exercise its discretion to grant the modification or release sought, it will usually be necessary for the Court to identify with precision the documents to be released and the purpose of that release.

In *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*<sup>20</sup>, Wilcox J amplified 'special circumstances', saying:

For 'special circumstances' to exist it is enough that there is a special

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<sup>17</sup> Ibid, 158-160 [107], following *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at [37].

<sup>18</sup> [2012] VSC 134, [23].

<sup>19</sup> [2003] FCA 833, [12]-[13] (citations omitted).

<sup>20</sup> (1992) 38 FCR 217, 225.



feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.

These observations have been cited with approval in many cases.<sup>21</sup>

55 In *Barrow v McLearnon*<sup>22</sup>, Beach J examined some of the authorities on 'special circumstances':

While this dicta of Wilcox J's has been followed in many cases, in *Ambridge Investments Pty Ltd v Baker & Ors (No 3)*<sup>23</sup>, Vickery J<sup>24</sup> said:

"However, in approaching a determination as to whether 'special circumstances' are present in a particular case, consistently with the applicable case law as it has developed to this point, I would vary a little the formulation of Wilcox J in *Springfield*, to arrive at the following test: 'special circumstances' may arise where there are special features (or a special feature) of the case which afford good reason for modifying or releasing the undertaking, being circumstances which are of sufficient gravity to override the private and public interest in protection of the confidentiality of a person's private documents which are required by law to be produced to a court.

Vickery J went on:<sup>25</sup>

However, an important consideration in weighing the various factors

<sup>21</sup> The following list was collected by John Dixon J in *Ah Choo Teo v Pacific Media Group Pty Ltd* [2016] 626, n15: *Fortis Business Holdings LLC v Commonwealth Bank of Australia* [2009] VSC 274, *Rowe v Silverstein* [2008] VSC 572, *Love v Roads Corp* [2006] VSC 501, *Citicorp Life Insurance Ltd v Lubransky* [2005] VSC 101, *Playcorp Ltd v Tyco Industries Inc* [2000] VSC 440, *Nicholls v Hertslet* [2016] FCA 655, *Construction Forestry Mining and Energy Union (CFMEU) v North Goonyella Coal Mine Pty Ltd* [2013] FCA 1444, *Re Allco Finance Group Ltd (recs and mgrs apptd) (in liq)*, *Gothard v Fell* (2012) 203 FCR 236, *Seeley International Pty Ltd v Cintrio Pty Ltd* [2011] FCA 712, *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 6)* [2010] FCA 1009, *Michael Wilson & Partners Ltd v Nicholls* [2007] NSWSC 317, *Moran v Schwartz Publishing Pty Ltd (No 4)* [2015] WASC 328.

<sup>22</sup> [2012] VSC 134.

<sup>23</sup> [2010] VSC 545.

<sup>24</sup> *Ibid*, [33].

<sup>25</sup> *Ibid*, [35].

which may enliven the discretion are also matters of a public interest character. They will include the likely contribution of the document in question to achieving justice in the second proceeding and the public interest in ensuring that all relevant material is before a court to enable it to properly discharge its function. The Victorian Charter of Human Rights<sup>26</sup> by s 24(1) reinforces the common law right of a party to a fair criminal or civil trial. Denial of relevant documents could compromise the exercise of this critically important right and deny justice to an accused or a litigant. If this was to occur, the public interest in furthering the administration of justice could be compromised or negated.

In *Laen Pty Ltd v At the Heads Pty Ltd & Ors*<sup>27</sup>, Davies J said:<sup>28</sup>

First, the purpose of the implied undertaking is to protect against the misuse of material produced under coercion of the Court's processes, not to prevent a party's access to justice. If the proposed use is for the purposes of other proceedings, the Court's power in relation to its own proceedings will provide the necessary protection against misuse. The existence of the implied undertaking cannot fetter or restrict the Court's power in relation to its own processes in proceedings instituted before it. Nor can it operate as an estoppel against the use of the processes of the Court in that other proceeding. The mere fact of commonality of subject matter may be sufficient to establish that the party has a legitimate forensic purpose for the use of the material in the second proceeding, but the test is not commonality of subject matter. Generally, use in a subsequent proceeding would not be an improper use of material previously obtained subject to an implied undertaking, unless that material was obtained in the first proceeding for an ulterior purpose. There is no suggestion in this case that Laen had any improper motive in obtaining the disclosure to it in the first proceeding of the documents in question.<sup>29</sup>

56 In this case, the defendant has filed a list of documents for which the release is sought, which can broadly be summarised as amounting to any and all documents filed by both parties in the proceeding. Clearly, these documents were not all obtained by the defendant as a result of a compulsory disclosure process.

<sup>26</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 24(1).

<sup>27</sup> [2011] VSC 315.

<sup>28</sup> *Ibid*, [10] (footnotes omitted).

<sup>29</sup> See further *Riddick v Thames Board Mills Limited* [1974] 1 QB 881; *Prudential Assurance Co Limited v Fountain Page Limited* [1991] 1 WLR 756; *Griffiths & Beerens v Duggan (No 2)* [2008] VSC 230; *Citicorp Life Insurance Limited v Lubransky* [2005] VSC 101, [63]-[65] wherein Hargrave J added to the list of factors referred to by Wilcox J "The extent to which the information contained in the documents under consideration has entered the public domain"; and *Fortis Business Holdings LLC v Commonwealth Bank of Australia* [2009] VSC 274.

57 While the defendant has specified the issues that he says remain unresolved, importantly, he has not specified the purpose for which the release is sought other than a reference in oral submissions to a possibility that the defendant may wish to pursue litigation in relation to the further administration of the estate or his allegations of misappropriation by Frank. He has not indicated, for example, a definite intention to commence other proceedings in relation to all or some those issues, the nature of those proceedings or how the documents would be used.

58 In my view the defendant's application is misconceived or at best premature. The defendant seeks to be released from documents including those he himself has filed, or that have been relied upon in interlocutory hearings and referred to in the judgment of Lansdowne AsJ. At least one document was filed by the defendant without being the subject of an order compelling the document be filed. The defendant has not articulated with any real specificity the purpose for which the documents are intended to be used. He has not demonstrated that 'special circumstances' exist for the Court to grant leave under s 27(3)(b) of the CPA. His application must be dismissed.

59 I will hear from the parties on the question of costs of these applications.