IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TESTATORS FAMILY MAINTENANCE LIST

Not Restricted

S ECI 2020 00928

IN THE MATTER of Part IV of the *Administration and Probate Act 1958*

- and –

IN THE MATTER of the Will and Estate of CHARLES OWEN FITZGERALD (deceased)

SHERREE ANYA VOSS-LASSETTER — Plaintiff

v

DENE CAMERON PIACUN (who is sued as Executor of the Will of CHARLES OWEN JAMES FITZGERALD, deceased) — Defendant

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JUDICIAL REGISTRAR:	Englefield JR
WHERE HELD:	Melbourne
DATE OF HEARING:	18 August and 22 October 2020
DATE OF JUDGMENT:	26 November 2020
CASE MAY BE CITED AS:	Re Fitzgerald; Voss-Lassetter v Piacun
MEDIUM NEUTRAL CITATION:	[2020] VSC 784

DISCOVERY – Where a plaintiff seeks discovery of documents in respect of potential lifetime transactions of the deceased – Grounds for discovery in a family provision application – Whether special circumstances required to be shown – *Dinakis & Zurcas v Zurcas & Ors* [2013] VSC 79 applied – Application refused.

SUMMARY DISMISSAL – Whether the plaintiff's claim is vexatious, frivolous or abuse of process and whether summary dismissal should be granted on those grounds – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 23.01 – Application refused.

SUMMARY DISMISSAL – Summary judgment on the Court's own motion – Small estate – Impact of legal costs of the parties on the existing size of the estate – No real prospect that the plaintiff can obtain further provision from the estate – *Administration and Probate Act 1958* (Vic) pt IV – *Civil Procedure Act 2010* (Vic) s 63(2)(c) – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 22 – Proceeding summarily dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Rickards, solicitor	Rickard Legal
For the Defendant	Mr J Catlin	PVP Legal

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JUDICIAL REGISTRAR:

Introduction

1 The plaintiff is a 68-year-old daughter of Charles Owen Fitzgerald (in the will called Charles Owen James Fitz-Gerald), deceased ('**deceased**'). The deceased died on 11 March 2019, aged 91 years. The plaintiff, who has significant financial need and is in poor health, seeks further provision from his estate, pursuant to pt IV of the *Administration and Probate Act 1958* (Vic) ('***Act***'). The estate is valued in the probate inventory at just $59,796.23. By his last will made 14 September 2015 ('**Will**'), the deceased left the plaintiff and three others $10,000 each and the residue of his estate to the defendant and his partner, Karen Rae Fougere ('**Karen**'). Karen is also a daughter of the deceased.

2 By the plaintiff's summons issued on 7 July 2020 ('**discovery application**'), orders were sought, in addition to the defendant personally paying the plaintiff's costs of the discovery application on a 'special costs basis', that the defendant provide the plaintiff with the following documents:

1. All documentation and information in relation to the administration of the deceased's affairs for the three (3) years prior to his death, including copies of all powers of attorney made by the deceased and details of his assets and bank accounts for the same period;

2. The will files for the deceased's wills made 14 April 2014 and 14 September 2015;

3. All medical reports and materials relating to the deceased for the period commencing two (2) years prior to his penultimate Will made 14 April 2014;

4. For the period ten (10) years prior to the deceased's death, details of all monies and payments by the deceased to both Karen Fougere and Dene Piacun, including gifts, loans, payments and financial support.

3 By summons issued by the defendant on 20 July 2020 ('**dismissal application**'), orders were sought that the proceeding be dismissed under r 23.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('***Rules***') and that the plaintiff pay the defendants costs of the proceeding and the dismissal application.

4 Without objection, both summonses were heard on 18 August 2020, with the discovery application heard first. The dismissal application was adjourned part-heard to give both parties an opportunity to prepare further written submissions regarding summary judgment under s 63 of the *Civil Procedure Act 2010* (Vic) ('***CPA***').

After receipt of the parties' further submissions, the Court gave the parties an opportunity to request a relisting of the proceeding for oral submissions solely on the issue of summary judgment under s 63 of the *CPA*. On 22 October 2020, at the plaintiff's request, further oral submissions were made.

5 For the reasons that follow, I dismiss both the discovery application and the dismissal application and, in lieu, give summary judgment to the defendant, on the Court's own motion, under s 63(2)(c) of the *CPA*.

Summary of the Plaintiff's Material[1]

6 As this is a summary dismissal application, the plaintiff's material[2] must be treated as accepted and taken at its highest. For the purposes of the unique circumstances of the applications in this proceeding, I will accept the plaintiff's affidavit in respect of the discovery application on the same basis.

7 The plaintiff was born in New Zealand, and was one of four children to the deceased's marriage to the plaintiff's mother. The plaintiff's childhood was unhappy. The deceased and the plaintiff's mother separated in late 1973.

8 In 1975, the deceased, at the age of 56, moved to Australia and found work as a truck driver. The deceased lived in various locations in metropolitan and regional Victoria until, in 2012 or 2014, he commenced living with Karen and the defendant. In 2015, the deceased moved into an aged care facility. The plaintiff says the deceased

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1 Affidavit of the Sherree Anya Voss-Lassetter sworn 17 June 2020 ('**Plaintiff's Affidavit**'); Plaintiff's position paper filed 20 July 2020 ('**Position Paper**'); Affidavit of Michael Rickards affirmed 20 July 2020 ('**Affidavit of Costs and Disbursements**'); Affidavit of Michael Rickards affirmed 6 July 2020 ('**Affidavit in Support of the Plaintiff's Summons**').

2 Plaintiff's Affidavit (n 1); Position Paper (n 1).

"owned a number of different houses where he resided" but she is not sure if he owned the house that he lived in when he was in Bentleigh.[3]

9 In 1979, at 24 years of age, the plaintiff came to Australia.

10 The plaintiff had long periods of limited or no contact with her siblings, however, between April and "about Christmas" 2013, at the invitation of Karen, the plaintiff came to Melbourne and lived with Karen and the defendant. At the end of 2013, the plaintiff went to Cyprus for a holiday for around three or four months. Karen informed the plaintiff shortly before the plaintiff was due to return that the plaintiff could no longer reside with them. The plaintiff did not find stable accommodation again until April or May 2015.

11 Once the deceased was in residential aged care, except for one occasion, the plaintiff was denied access to the deceased because Karen, as the plaintiff 'understands it', was then his 'power of attorney' and advised the facility who could see him. On the one occasion that the plaintiff saw the deceased in aged care, he complained to her about the care but said he could not complain to Karen because he was afraid she might abandon him. He also told the plaintiff that he had given financial support to her sisters and was going to give her $10,000. The plaintiff afterwards received a cheque for only $5,000 payable from the deceased's bank account. The cheque was 'written out' by Karen and, the plaintiff 'believes', it was signed by her too.

12 The plaintiff currently resides in rental accommodation in Perth. She has part-time employment in the retail industry and receives a part-aged pension and rent assistance. The plaintiff has a number of serious health problems and is in great financial need. The plaintiff has been married six times and has at least one adult child.

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3 Plaintiff's Affidavit (n 1), [35].

13 The plaintiff 'alleges' that, 'based on her own knowledge of the deceased's assets during his life', the assets of the estate should be greater than what is disclosed in the inventory.[4] As stated by paragraph 60 of her affidavit:

> I had always understood that my father had significant assets. I believe this because of the fact that he had always worked. He had also owned property over his life and he had also received a number of workers compensation payments in relation to work injuries and also a substantial payment in relation to a negligence action against the Alfred Hospital in relation to botched surgery.

14 Paragraph 64 of the plaintiff's affidavit is headed "Possible Wastage of Owen's Assets" and reads:

> I hold concerns which I have wanted investigated in relation to the possible dissipation and wastage of my father's assets over a period of time, thereby resulting in him having a very small deceased estate. I require an investigation to be carried out in relation to my father's finances for the period of time that Karen was his attorney for the purposes of the deceased estate.

15 After paragraphs detailing actions taken by her solicitors and the responses from the estate legal representatives, the plaintiff states at paragraph 96:

> Due to the failure of the estate and my father's attorney, my sister Karen, to provide the requested information and documents, I was left with no choice but to issue proceedings against the estate seeking provision for me pursuant to Part IV of the *Administration and Probate Act* 1958. Those proceedings were issued on 24 February 2020.

16 As can be seen from the excerpts, the plaintiff's affidavit contains opinions and hearsay material. At times, the plaintiff's affidavit is uncertain and at other times, argumentative. In total, 39 paragraphs deal in detail with the actions of the plaintiff's solicitor and correspondence regarding disclosure. All 104 pages of the 28 exhibits to the plaintiff's affidavit are copies of solicitors' communications some of which include privileged material. For the purposes of the applications, I accept that this correspondence was sent and received in the form in which it is exhibited. None of the assertions of fact or law expressed in any of the emails or letters exhibited to the plaintiff's affidavit are accepted or given any weight in this judgment. The plaintiff needs to support the discovery application and to resist the dismissal

[4] Position Paper (n 1), [3].

application by direct evidence, not exhibits of correspondence prepared on her instructions.

17 The plaintiff's solicitor filed an affidavit on 20 July 2020, estimating their costs and disbursements up to and including mediation at $30,000. It is noted that they commenced their correspondence with the estate in mid-2019 and continued it until the issuing of the discovery application.

Discovery Application: Introduction

18 The plaintiff seeks discovery of the deceased's will files as they may contain a record of the deceased's instructions regarding his assets as at 2014 or 2015.[5] The medical files are sought as they might reveal whether the deceased had lost decision making capacity during his lifetime and, if so, whether this loss of capacity coincided with any transactions adverse to the deceased and, if so, then any such transactions may be subject to challenge on behalf of the estate.[6] The bank accounts are sought as they may reveal withdrawals of 'significant funds.'[7]

19 In essence, the discovery application is aimed at uncovering evidence relating to potential transactions that may have occurred during the deceased's life and grounds to dispute any such transaction, or, alternatively, it may reveal assets that were held by the deceased at the date of his death that were not disclosed in the probate inventory. The result of which may increase the size of the estate and improve the merit of the plaintiff's TFM claim.[8]

20 The defendant submits that *Dinakis & Zurcas v Zurcas & Ors* ('***Dinakis***')[9] requires the plaintiff to meet a test of 'special circumstances' in order to justify an order for discovery in a TFM claim, which she has failed to do.[10] The defendant also asserts a lack of any evidence to substantiate the proposition that the estate is actually larger

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5 Transcript of Proceedings (Supreme Court of Victoria, S ECI 2020 00928, Englefield JR, 18 August 2020), 5 ('**18 August Transcript**').
6 Ibid, 10 [22-31].
7 Ibid, 10 [22-31].
8 Ibid, 7-8.
9 [2013] VSC 79 ('***Dinakis***').
10 Submissions of the Defendant, 17 August 2020, [1] ('**First Defendant's Submissions**').

than shown in the inventory.[11] Further, the defendant submits that the cost of a discovery process in this estate is disproportionate.[12]

Discovery and TFM Proceedings: Principles

21 Part 4.3 of the *CPA* sets out a regime of disclosure and discovery that both support and expand the power of the Court in the *Rules of Court*.[13] There is flexibility and firmness to the process which, if ordered, is compulsory. Section 26 of the *CPA* adds the overarching obligation of continuous disclosure of any documents that are critical to the resolution of the dispute. Above it all is s 7 of the *CPA*, imposing on the other sections of the *CPA* and the *Rules of Court*, the purpose of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. The Court is bound to give effect to this purpose. These principles set the modern parameters of discovery in civil litigation.

22 Order 29 of the *Rules* deals with discovery and inspection of documents and limits discovery to writ proceedings, except for discovery ordered under r 29.07(2) or particular discovery under r 29.08. Therefore, these are the sub-rules that relate to a TFM claim, which in Victoria is commenced by originating motion. The scope of discovery that may be ordered under r 29.07 is limited, by r 29.01.1(3), to the following documents:

(a) documents on which the party relies;

(b) documents that adversely affect the party's own case;

(c) documents that adversely affect another party's case; and

(d) documents that support another party's case.

23 Particular discovery by r 29.08 is available where it appears to the Court, from evidence, or from the nature or circumstances of the case, or from any document filed in the proceeding, that there are grounds for a belief that some document or

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11 Ibid, [3].
12 Ibid, [6].
13 *Civil Procedure Act 2010* (Vic) s 59 (***'CPA'***).

class of document relating to any question in the proceeding may be or have been in the possession of a party.

24 That is, discovery should not be ordered in a TFM claim unless it can be established that the discovery sought relates to substantial issues in the proceeding as presently framed.[14] For example, the Court will not order discovery relating to the financial position of a beneficiary, where that beneficiary does not put their financial position into issue.[15]

25 This is not as to say discovery on financial matters will not be ordered where appropriate. For example, discovery may be ordered in respect to issues relating to valuation of assets held in an estate.[16] At times, this extends to financial documents relating to businesses, including farms, whether underlying assets are held by the estate directly or via shares in a private company or units in a unit trust. Although there is a limit to such discovery where the expense and delay is disproportionate to the utility of the materials sought to be discovered.[17]

26 It may be noted that unlike other civil litigation, at the hearing of a TFM claim the Court has an independent power to 'inquire fully' into the estate of the deceased and for that purpose may:

(a) summon and examine such witnesses as may be necessary; and

(b) require the Legal Personal Representative ('**LPR**') to furnish full particulars of the estate.[18]

27 This is not an independent investigation of transactions made during the lifetime of a deceased person to ascertain if any might be voidable, but a power to order proper and full disclosure of the size of the net estate at the time of the trial, including

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14 *Dinakis* (n 9).

15 *Harris v Bennett (No 3)* (2004) 8 VR 425.

16 For the Legal Personal Representative's obligation to put evidence of valuation before the Court see: *Goodman v Windeyer* (1980) 144 CLR 490, 508-9 and *Blore v Lang* (1960) 104 CLR 124, 138.

17 *Clarke & Ors v Edwards* [2012] SASC 213; *Blair v Blair* [2002] VSC 131, [2 - 3], *Dinakis* (n 9), [35]; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 29.01.1(5) ('***Rules***').

18 *Administration and Probate Act 1958* (Vic) s 94(a), (b) ('***Act***').

reliable valuations of real property, shares in private companies or uncommon assets and details of alleged liabilities (including, if necessary, legal costs incurred). This ensures the Court has all relevant evidence regarding the size of the estate (including its liabilities) as required by pt IV of the *Act*. This power of the Court is in addition to the duty of the executor and counsel representing the estate at trial to fully and properly present evidence of the value of the estate.[19]

28 In *Dinakis,* Digby J said at [11]:

> Both the plaintiffs and the defendants expressly recognise in their submissions that in a proceeding such as this, commenced by originating motion in relation to testator's family maintenance-related relief, discovery will not be ordered unless the applicant for discovery can establish that the discovery sought *relates to a question in the proceeding* and special circumstances exist which justify the making of the orders sought. In this regard both the plaintiffs and the defendants cite Lord Greene in *Re Borthwick*[20] where Lord Greene MR described the jurisdiction of the court in connection with discovery applications in family provision proceedings as follows:[21]
>
> > The jurisdiction, of course, is a peculiar one, and anyone familiar with it knows that if the procedure were to be abused and not kept under proper control, it might lead to litigation of the greatest acrimony and the threshing out of a lot of irrelevant material which would not be in the public interest.
>
> [emphasis added and citations included]

29 However, although Digby J accepted the combined position of the parties regarding *Re Borthwick* in respect of 'special circumstances' for discovery in a TFM claim,[22] the application for discovery in *Dinakis* was dismissed essentially on relevance. That is, the discovery application did not relate to the substantive issues in the proceeding.[23] Further, the nature and extent of the discovery was disproportionate given the substantive issues in dispute.[24]

30 In other Australian jurisdictions, a 'special circumstances' requirement arising from

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19 *Re Newell deceased* (1932) 49 WN (NSW) 181, 182; *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639, 654.
20 [1948] Ch 645.
21 Ibid, 468.
22 *Dinakis* (n 9), [40].
23 Ibid, [25]-[34], [38]-[40].
24 Ibid, [35].

Re Borthwick may not be applied to family provision disclosure or discovery procedures. Indeed, in Queensland and South Australia, the courts will order disclosure relating to 'facts in issue' in family provision cases unless cause is shown to the contrary.[25]

31 In England, following amendments to its civil litigation regime after *Re Borthwick*, the court now has 'wide powers' to order disclosure in family provision claims, including before proceedings are commenced or with respect to assets which 'may' form part of the estate if orders were made to that effect when the substantive application is heard[26], as well as disclosure of information regarding assets for the purposes of a freezing order application.[27]

The Discovery Application: Analysis

32 The plaintiff argued that 'special circumstances' existed that justified the making of discovery orders as sought, while the defendant argued an absence of 'special circumstances', each relying on or seeking to distinguish *Dinakis* and *Re Borthwick*. The core question of relevance was lost, and neither party sought to define the 'special circumstances'. Discovery in TFM claims cannot be resisted by seeking to rely *Re Borthwick* as an additional hurdle that would deny discovery, even of relevant documents, unless some undefined 'special circumstance' were established. However, the absence of any independent knowledge of a deceased person's lifetime finances cannot be 'special circumstances' which then warrants discovery orders without any need to deal with the limits on discovery imposed by the *Rules* and the *CPA*.

33 The discovery application fails as none of the material sought by the discovery application relates to a 'substantial issue in the proceeding as presently framed'

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25 *Re Greenhalgh* [1982] Qd R 99, 103; *In the Matter of the Will of Carter* (1974) 62 LSJS 159.

26 See *Inheritance (Provision for Family and Dependants) Act* 1975 (UK), s 8-13. This is similar, albeit not identical, to the notional estate provisions in New South Wales, where assets held outside an estate may, in certain circumstances, be liable to meet family provision orders.

27 Nasreen Pearce, A Practitioner's Guide to Inheritance Act Claims, (Wildy, Simmonds and Hill Publishing, 3rd ed, 2017), 298.

rather than due to the absence of 'special circumstances'.[28]

34 First, this application seeks evidence of potential lifetime transactions, including the deceased's medical condition at the time of any such transactions, in order to explore whether or not a *separate* cause of action may exist regarding any such transaction for the benefit of the estate. This is almost akin to an application for preliminary discovery under O 32 of the *Rules*, which is available on limited grounds including where the applicant has exhausted all reasonable inquiries and the respondent has or had documents "relating to the question whether the applicant has the right to obtain the relief".[29] Of course, the plaintiff in any separate proceeding challenging lifetime transactions for the benefit of the estate would be the LPR for the estate. Therefore, preliminary questions of grounds for removal of the executor and standing may arise.

35 Alternatively, the plaintiff's discovery application seeks to uncover assets held by the deceased at the date of death but not disclosed by the inventory. Such a breach of fiduciary duty, if it occurs, may warrant limited discovery orders and removal of the executor, in a separate proceeding.[30] Again, the plaintiff would need to show standing and grounds for any such removal application.

36 This conclusion may appear to thwart TFM claims in situations where viable claims may exist to overturn lifetime transactions. However, a clear alternative exists. For example, in *Mataska v Browne*[31], a woman, aged 89 and in palliative care, sold her home and purchased another house jointly with a daughter. By her will, that daughter was the executor and sole beneficiary. After the woman's death, another daughter, who had a *prima facie* TFM claim, obtained a limited grant of administration *ad litem* for the purposes of seeking to recover the real property for the estate. Ordinarily, only a beneficiary with a proper interest in the estate has standing to seek the removal of a LPR or a limited grant. However, the unique

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28 *Dinakis* (n 9), [25], [34].

29 *Rules* (n 17) r 32.05.

30 *Wales v Wales* [2013] VSC 569, [37]- [83] these principles being endorsed by the Court of Appeal in *Wales v Wales* [2014] VSCA 101, [34].

position of a TFM claimant with *prima facie* merit (who, if the estate is expanded and they succeed in their case, will effectively become a beneficiary) can, in certain circumstances, be sufficient standing.[32]

37 Of course, not every potential TFM claimant has a proper basis to obtain orders regarding the administration of an estate. In noting this alternative, I am not reaching any conclusions regarding whether or not the plaintiff might have succeeded in having a claim commenced in the Court that challenged lifetime transactions or the inventory for the benefit of the estate.

38 Further, the making of any allegation regarding lifetime transactions or omissions from an inventory that raise questions of fraud or unconscionability imposes serious ethical duties on practitioners and carries additional costs consequences if unsuccessful. Such allegations should not be raised obliquely by way of a discovery application in another proceeding. I note again that unsupported assertions regarding a possibility of improper past actions by any person are not accepted by the Court in these applications.

39 However, all of this, including if any of it were viable, lies well beyond the scope of the current proceeding. In this proceeding, the issue in dispute is further provision for the plaintiff from the estate, not the removal of the defendant as executor or the commencement of a cause of action for the estate in respect to lifetime transactions or non-disclosure of assets in the inventory. Discovered documents, or any information obtained from them, can only be used in the proceeding for which they were discovered, unless leave is granted.[33] A party, or legal practitioner, who breaches this obligation commits contempt of Court.[34] The Court may impose restrictions on inspection and other conditions to protect the integrity of its processes. A discovery application should be made in the proceeding to which it relates.

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31 [2013] VSC 62.
32 Ibid, [50], [53].
33 *CPA* (n 13) s 27(1); *Hearne v Street* (2008) 235 CLR 125 (‘***Hearne***’); *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.
34 *CPA* (n 13) s 27(2); *Hearne* (n 33).

40 Finally, for an estate of this size, the discovery application is disproportionate.[35] In *Volunteer Fire Brigades Victoria v CFA (Discovery Ruling)*, J Forrest J explained that:

> The overriding consideration of the CPA is to ensure that the parties receive a fair trial i.e. 'a just resolution' to use the words of the CPA. However, a fair trial is not a perfect trial. It is, rather, the best trial that a court can provide to the parties within reason and in proportion to the issues in dispute and the court's resources. Accordingly, demands for discovery of documents which are peripheral to the central issues cannot be entertained. The Court is obliged to focus on the central issues as best it can be determined at this point in the litigation.[36]

The Discovery Application: Conclusion

41 The classes of documents sought by the plaintiff do not relate to any question in the TFM claim, so the discovery application cannot be allowed.

Summary Dismissal

Dismissal Application

42 Prior to May 2015, Order 23 of the then *Rules of Court* enabled an application for summary judgment on the basis that a proceeding "does not disclose a cause of action." Commencing 4 May 2015, O 22 of the *Rules* was amended to provide a new process for summary judgment. Part 3 of O 22 now exclusively deals with summary judgment applications by defendants under s 62 of the *CPA*. At this time, r 23.01 of the *Rules* was also amended to remove "does not disclose a cause of action" as a basis for giving summary judgment for a defendant. Now, r 23.01 only allows a proceeding, or any claim in a proceeding, to be summarily dismissed if it is scandalous, frivolous, or vexatious or is an abuse of process. The defendant's dismissal application is made under the current formulation of r 23.01.

43 The terms vexatious and 'abuse of process' have not been fixed with precise or distinct definitions at common law. Vexatious may include frivolous or a sham or made in bad faith. It is also an abuse of process to bring a claim in bad faith or for an improper purpose. That is, unless the predominant purpose of bringing a

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35 *Dinakis* (n 9), [35].
36 [2016] VSC 573, [34].

proceeding is legitimate, the proceeding is an abuse of process and is liable to be stayed.[37]

44 The defendant has no material to support a finding of bad faith, sham or improper purpose. An improper purpose is a purpose to use a proceeding as a means of obtaining some advantage for which that proceeding is not designed.[38] If the intention of the plaintiff is to obtain additional provision from this estate, it is a legitimate TFM claim in this sense. As noted above, the discovery application was a misguided attempt to expand the size of the estate for the benefit of the plaintiff in her claim for further provision.

45 To put it another way, the only legitimate purpose for bringing a proceeding is to vindicate legal rights or immunities by judgment or settlement. The plaintiff seeks further provision, albeit from a larger estate than appears in the inventory, as an adult child of the deceased who is in severe financial need. It is difficult to grant summary dismissal of such a claim as vexatious or an abuse of process. It is important to remember that the defendant is seeking summary dismissal of the proceeding, not merely responding to the discovery application.

46 It appears that the defendant was essentially seeking a determination that the proceeding is vexatious and an abuse of process in the sense that it is hopeless or bound to fail. The older cases tell us that it is a 'vexation' to the defendant to continue proceedings that are useless and futile[39] and it is also an abuse of process to run a 'groundless claim'.[40] The central thrust of the defendant's submissions is a general lack of merit because of the smallness of the estate. However, it is clear that following the amendments to the *Rules of Court*, all 'lack of merit' summary judgment applications **must** be made under the *CPA*.

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37 *Williams v Spautz* (1992) 174 CLR 509, 533 and 543 ('***Spautz***').

38 *Varawa Howard Smith Company Ltd* (1911) 13 CLR 35, 91; *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509, 524; and *Spautz* (n 37), 526-7.

39 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 85 per Latham CJ ('***Dey***').

40 Ibid, 91 per Dixon J.

47 There was no explanation given by the defendant as to why his application was made under O 23 of the *Rules* rather than O 22 of the *Rules* and the *CPA*. None of the authorities regarding summary dismissal under the *CPA* were put in the defendant's first written submissions. However, the defendant's first submissions contain the following:

> 11. It could also be dismissed under s. 64(2)(c) of the Court's own motion.

48 That submission was a reference to s 63(2)(c) of the *CPA*, but contained a typographical error and did not name the *CPA*. Section 63(2)(c) empowers the Court to give summary judgment for the defendant on its own motion, if satisfied that it is desirable to summarily dispose of the proceeding, where it is also satisfied that the proceeding 'has no real prospect of success' in accordance with s 63(1) of the *CPA*.

49 Among other problems for the defendant in raising the *CPA* in a written submission and at the first hearing[41] is that the test for summary judgment under s 63 is be more liberal than the earlier test of 'hopeless' or 'bound to fail.' That is, more favourable to the defendant.[42] In *Wheelahan & Anor v City of Casey & Ors (No 3)*,[43] it was accepted that the 'no real prospect of success' test 'may in some circumstances extend to cases not regarded as sufficiently hopeless to warrant striking out under the [then applicable] Rules'[44] On the other hand, as observed in *Mandie v Memart Nominees Pty Ltd*:[45]

> 45 According to *Lysaght*: a prospect which is not 'real' is 'fanciful'; although the 'no real prospect of success' test in s 63(1) of the CP Act is more liberal than the common law test of 'hopeless' or 'bound to fail', there may not be much difference between them in practice; and, properly understood, a real question to be tried is one which realistically might result in the respondent to an application for summary judgment succeeding in the proceeding. [46] [citation included]

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41 18 August Transcript (n 5), 19-20.
42 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 ('***Lysaght***').
43 [2011] VSC 15.
44 Ibid, [8].
45 [2016] VSCA 4.
46 *Lysaght* (n 43), 37 [23]–[24], 38–9 [27]–[29], 40 [35].

50 The plaintiff was entitled to sufficient notice of the intention of the Court to consider giving summary judgment of its own motion under the *CPA* to enable her to prepare her response, even if the plaintiff has little prospect of producing any additional material or further arguments.[47] It is fundamental to procedural fairness that persons potentially affected by a decision are on notice of the issues with sufficient time to give a fair opportunity to be heard on those issues.[48] Under O 22 of the *Rules*, a plaintiff would not receive less than 14 days' notice of an application to dismiss under the *CPA*.

51 Therefore, in fairness, the first hearing of the dismissal application was adjourned.[49] Orders were made at that time for an exchange of further submissions limited to the question of dismissal of the proceeding pursuant to s 63 of the *CPA*. After the exchange of submissions, and with the invitation of the Court, the plaintiff elected to have a further oral hearing on this question.

Summary Judgment Principles under the *CPA*

52 Summary judgment is available under s 63 of the *CPA* where a claim has no real prospect of success, whether on the application of a plaintiff or defendant or of the "court's own motion, if satisfied that it is desirable to summarily dispose of the proceeding". The power to summarily dismiss should be exercised with exceptional caution[50] but consistently with the Court's own obligations to give effect to the over-arching purposes of the *CPA*.[51] A number of cases speak of the need for particular caution before summarily dismissing a TFM claim.[52] Family provisions cases can involve significant degree of discretion which generally weighs against summary judgment. Nonetheless, summary judgment must be given in a TFM, where it has no real prospect of a favourable exercise of discretion, or is 'bound to fail'. Hodgson

47 *Shaw v Yarranova Pty Ltd and Anor* [2014] VSCA 48, [27]
48 *Turco v Mortgage Ezy Australia Pty Ltd* [2020] FCA 1181, [50].
49 The discovery application was fully heard and reserved on 18 August 2020.
50 *General Steel Industries Inc v Commissioner for Railways (NSW) and Ors* (1964) 112 CLR 125; *Dey* (n 39), 91-2 per Dixon J; *Lysaght* (n 43) [35], per Warren CJ and Nettle JA; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99.
51 *Lysaght* (n 43) [41], per Neave JA.
52 *Warren v McKnight* (1996) 40 NSWLR 390, 396 ('***Warren***'); *El-Zaouk v Draybi* [2010] NSWSC 1001, [16-25], [28], [32]; *Wolff v Deavin* [2012] NSWSC 1315, [35-8]; *Jackson v Newns* [2011] VSC 32, [11] ('***Jackson***'); *IMO the Will and Estate of William James Milburn* [2014] VSC 229, [34].

J in *Warren v McKnight*[53] said:

> I do not think the *Family Provisions Act 1982* should be read as precluding the application of summary judgment provisions. ... However, in a matter in which so much is at large, and so much subject to discretion, I would accept that it would be in rare cases that the application of the summary judgment provision would be appropriate.

Small Estate Argument

53 The defendant essentially submits that as the estate is less than $60,000, this proceeding should not have been commenced, even referring to a 'duty' on plaintiffs to avoid disputes in small estates. However, a link between the smallness of the estate and a finding that there is no real prospect of success is required.

54 The Court has an obligation to consider TFM claims, even where the estate is small. Goff LJ in *Re Coventry (deceased)*[54], said:

> [a]pplications in small estates should be discouraged, because costs tend to become wholly disproportionate to the end in view, although, of course that does not mean that an application cannot be made in a small estate, nor that when made it should not be duly considered on its merits.

55 A claim against an apparently insolvent estate was dismissed at first instance and on appeal in *Ellis v Leeder*[55]. However, Dixon, Williams and Kitto JJ said that 'if the Court thinks that a TFM claim is justified, it should seek ways to give effect to it'.[56] Their Honours held that a TFM claim should only be refused where it is clear that it is impossible to make an effective order. This case involved a widow of a long marriage bringing a claim against an estate that appeared insolvent due to land tax and a substantial debt owed to the executor. The executor, who was the sole beneficiary under the will, was a younger woman with whom the deceased spent his weekends. By the time the case reached the High Court the widow had been evicted from the residence held in the estate and it was ready for sale. Fresh evidence emerged that the residence may have been worth more than what was shown on the inventory and the widow sought to admit that fresh evidence. Their Honours were

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53 *Warren* (n 53), 396.
54 [1979] 3 ALL ER 815, 820-1.
55 (1952) 82 CLR 645.
56 Ibid, [9].

not convinced of the validity of executor's debt, describing it as 'doubtful'. Further, their Honours (Webb J separately agreeing) were of the view the entire estate should have gone to the widow and reducing the executor to the position of a creditor who needs to prove her debt 'if she can'. This decision was overturned by the Privy Council on the question of the High Court accepting the fresh evidence.[57]

56 TFM claims are sometimes made where the estate appears small (or even insolvent) but superannuation death benefits, payments from related trusts or companies or other benefits may be payable to an estate. A TFM claim must be issued within six months of the grant of probate, so it is not uncommon that such a TFM claim is issued but not progressed while a related claim is run in the Trusts, Equity and Probate ('**TEP**') List of this Court, the result of which may affect the size of the estate. In such circumstances, until the TEP proceeding is finalised an application for summary dismissal of the TFM claim would fail.

57 It is not enough for the defendant to simply state that the estate is small. A bald finding that the estate is valued at less than a certain amount, whether $60,000 or any other arbitrary figure, cannot result in summary judgment for a defendant despite clear evidence of financial need by an eligible plaintiff. The Court must be satisfied that it is 'impossible' to make an 'effective order' before it can be satisfied the claim has no real prospect of success.

The Plaintiff's *CPA* submissions

58 The plaintiff, on the other hand, essentially submits that discovery should be ordered and the dismissal application should be adjourned until after discovery is completed.[58] However, as discussed above, the process of discovery, by itself, does not create enforceable rights regarding assets not presently held in the estate. Further, this submission implies that the plaintiff accepts that if the discovery process verified the inventory, summary judgment should be granted.

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57 *Leeder v Ellis* (1952) 86 CLR 64.

58 Transcript of Proceeding (Supreme Court of Victoria, S ECI 2020 00928, Englefield JR, 22 October 2020), 8, [21-31].

Merits of Summary Judgment under the *CPA* for the Defendant

59 As discussed already, the plaintiff has not taken any steps which, if successful, might increase the size of the estate. It is the combination of the smallness of the estate and the absence of any extant process that might increase the size of the estate that deprives the plaintiff's claim of merit.

60 This is a very small estate. At the first hearing on 18 August 2020, the estate was said to be reduced to approximately $56,000 by various liabilities. After the legacy of $10,000 for the plaintiff under the Will, approximately $46,000 is left in the estate for legal costs, any further provision that might be ordered for the plaintiff and any remaining benefits for the other beneficiaries. The Court can only order provision from the 'net estate', after liabilities.[59] Except in particular circumstances, the defendant is entitled to his costs from the estate, which will have been increased by these applications.[60] Therefore, if the total amount of legal costs ordered from the estate upon a successful completion of the plaintiff's claim exceeds $46,000 from the commencement of this proceeding to the end of the trial, there would be no estate for further provision for the plaintiff.

61 Whatever the legal costs might be, once residue is exhausted, the plaintiff's $10,000 legacy would abate rateably with the other three $10,000 legatees. In such circumstances, the plaintiff would need an order for further provision to even hold on to the value of the $10,000 legacy left to her by the Will. Every step the plaintiff takes in this proceeding increases the risk that her legacy abates. As her legacy abates, the merits of her action diminish further.

62 This analysis does not involve any consideration of discretionary or evaluative factors involved in the final determination of a TFM claim. That is, I give no consideration to the complex issues that arise when considering whether or not the plaintiff may succeed in obtaining an order for further provision based on, among other things, moral duty, financial need or the competing claims of the other beneficiaries. This is pure 'number crunching'. The inevitability of legal costs

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59 *Act* (n 18), s 91A(2)(c).
60 *Rules* (n 17) r 63.26.

destroys the viability of the claim. This claim is counterproductive. Therefore, I am unconstrained by the additional caution that arises in summary dismissal of TFM claims, as I am not dismissing the proceeding based on any evaluative or discretionary determination.

63 The impact of future legal costs on the available estate gives a 'certain demonstration of the outcome of the litigation, and not an assessment of the prospects of success'.[61] Even with a favourable judgment, the plaintiff will not receive more than $10,000, therefore she has no real prospect of succeeding in obtaining further provision from her father's estate. This claim must be dismissed.

The Summary Dismissal Conclusion

64 The defendant has not satisfied the Court that the proceeding should be dismissed pursuant to his dismissal application.

65 However, while there is uncertainty as to the final amount of costs that might be incurred by both sides and, if the plaintiff were to succeed, what might be ordered from the estate, I am satisfied that, if this matter were permitted to continue, the total legal costs of both sides from commencement to the end of trial of this TFM claim may equal or exceed $46,000 (or $23,000 per side, including the costs of these applications). In such circumstances, I am satisfied that the plaintiff's claim has no real prospect of success and that it is desirable to give judgment for the defendant pursuant to s 63(2)(c) of the *CPA*.

Conclusion

66 Within 14 days of this judgment, the parties are to forward draft Orders giving effect to these reasons. If the parties are unable to agree, including on the question of costs, a further hearing can be arranged.

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61 *Jackson* (n 53), [6].