

to the contempt application on an INDEMNITY basis, including reserved costs, under SCA s 24 and SCR r 63.23.

RATIO: Where a lawyer's conduct repeatedly delays or aborts proceedings through failure to advise clients properly, prepare evidence, or address separate-representation issues, the court has power under r 63.23 to make a PERSONAL costs order against the lawyer on an indemnity basis — irrespective of the client's solvency.

LECTURER: Lecturer named this case "much more egregious" than the typical scenario. The r 63.23 power existed long before the CPA ss 28-29 framework — they now operate in parallel, with significant overlap. A practitioner facing a hearing failure can be hit under EITHER the rules or the CPA.

PROCEDURAL FAIRNESS: r 63.23 PROCEDURE: court must give the lawyer reasonable opportunity to BE HEARD before making the order (r 63.23(3)). So Stevenson got a hearing where he could explain himself before the costs order was made. Same procedural fairness applies under CPA s 29.

10. EXCEPTION 3 — WIN OVERALL, LOSE ON ISSUES

10.1 Issues-based costs orders

Thurin v Krongold Constructions (Aust) Pty Ltd (No 2) [2022] VSCA 252

FACTS: Multi-issue building dispute. The successful party won on some issues but lost on others, and the unsuccessful issues actually took up the majority of trial time.

HELD: Court of Appeal departed from the general rule and apportioned costs on an ISSUES BASIS rather than awarding the winner all their costs.

RATIO: At [12]: "Pursuant to s 24(1) of the Supreme Court Act 1986, the Court has a broad costs discretion. In exercising its discretion, the Court is entitled to look to the realities of the litigation and it will attempt to do 'substantial justice' between the parties. Accordingly, while the general position is that costs should follow the event, such an order may not be appropriate in every case. In particular, where there is a MULTIPLICITY OF ISSUES, and MIXED SUCCESS has been enjoyed by the parties, the Court may take a PRAGMATIC APPROACH in framing the order for costs, taking into consideration the success (or lack of success) of the parties on an issue basis."

LECTURER: Lecturer: "the court basically said in these kinds of cases, it will look at the REALITIES of the litigation, and attempt to do SUBSTANTIAL JUSTICE between the parties." Two phrases worth quoting verbatim in an exam answer.

EXAM TIP: When a party wins on the bottom line but lost most of their actual time and money on dead-end arguments, ALWAYS raise Thurin v Krongold — argue for an issue-based apportionment under SCA s 24(1). This is favoured terrain for defendants who effectively lose but ran a tight defence on the losing issues.

11. EXCEPTION 4 — PUBLIC INTEREST & PROTECTIVE COSTS ORDERS

11.1 Successful public-interest litigant — indemnity costs

- ☐ Is personal service impracticable (NOT merely inconvenient)? (Amos Removals)
- ☐ What is the proposed alternative method? Will it actually reach D?
- ☐ If D is actively avoiding service → strong ground for substituted service (Chen)
- ☐ If social media is proposed → likely denied (Flo Rida) unless you can confirm the account belongs to D
- ☐ Application is made ex parte, by summons, supported by affidavit

Chen v Blockchain Global Ltd (No 2) [2022] VSC 92

FACTS: A debt recovery proceeding where the plaintiff engaged a process server to serve the writ at the defendant's residential address in Point Cook. The process server went there, no one was home. Later, a man who looked like the defendant (matching his LinkedIn photo) entered the house and refused to answer the door. A friend named Candace claimed she knew the defendant but would not accept service.

HELD: The court was satisfied that personal service was impracticable and granted an order for substituted service.

RATIO: The applicant's affidavit must detail the specific steps taken to effect personal service before the court will order an alternative method.

NB: LECTURER INSIGHT: Key procedural points about substituted service applications:

The application is made by summons supported by an affidavit setting out the steps taken

The application is ex parte (the defendant is not present in court): "If you can't find the defendant to serve, you're not expected to find them to serve your substituted service application on them too"

Usually the court orders a bundle of alternative steps, and once those are done, service is deemed to have been effected

Service via Social Media

MKM Capital v Corbo [2008] Fam CA 518 (cf. Flo Rider example)

FACTS: The concept of service by social media. In a related example, in May 2012, the District Court of NSW permitted the promoter of the Fat as Butter festival to serve a statement of claim on Flo Rider via Facebook, after Flo Rider failed to appear at the festival despite having been paid a \$55,000 performance fee.

HELD: The court made the order for substituted service by Facebook.

RATIO: However, the Court of Appeal took issue with the fact that substituted service via Facebook assumed Flo Rider personally operated his Facebook page, which he did not. There was a lack of understanding that serving via a celebrity's social media page would not effectively bring the proceedings to the defendant's attention.

In *Coachair*, the breadth of the search terms (37,507 keywords) was reduced by McDonald J to comply with ss 23-24 CPA — the obligation to narrow issues and ensure costs are proportionate.



EXAM SCRIPT

- In order to [EVIDENCE FACTS], [P] will want to apply for a search order to preserve evidence (r 37B.02). Search orders are highly intrusive, made ex parte, and only granted in extreme circumstances (Adani).
- Per r 37B.03, with utmost candour (Practice Note 4.1), [P] must use Form 37BA supported by an affidavit showing: (1) strong prima facie case; (2) serious loss if order not made; (3) evidence D possesses important material; (4) real possibility D will destroy it.
- Execution must be supervised by an independent solicitor (r 37B.06). If digital evidence is involved, an ICE should also be appointed (Practice Note cl 4.6).
- [P] must give usual undertaking as to damages and undertake to pay IS's reasonable costs (r 37B.03(3)).
- The search order must be served together with summons, supporting material, transcript of oral allegations, and originating motion (r 37B.08(1)(b)).
- Note CPA proportionality — if search terms are overbroad, court may narrow them (*Coachair*; ss 23-24 CPA).

AUTHORITIES:

Anton Piller KG v Manufacturing Processors & Ors [1976] Ch 55

FACTS: P sought an order to enter D's premises and inspect documents relating to infringement of copyright and breach of confidential information (industrial espionage). Application made ex parte.

HELD: Order granted. Lord Denning confirmed the court has jurisdiction to make such orders even though they are not search warrants — they operate by ordering the respondent to consent to entry, with contempt of court as the sanction for refusal.

RATIO: A search order does not authorise forced entry. It brings pressure on the respondent to permit entry by ordering them to do so — refusal is contempt. The order is available where there is a strong prima facie case, real risk of serious damage, and clear evidence the respondent holds material likely to be destroyed.

Coachair Pty Ltd v Mifsud & Anor [2018] VSC 481

FACTS: Ex parte search order obtained on a strong prima facie case that Mifsud