

# *Civil Procedure Act* 2010 - overarching purpose

• 'Overarching purpose' : to facilitate the just, efficient, timely and cost-effective resolution of the real issues in the parties' dispute. (s7)



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# Overarching obligations To act honestly (s17) To ensure claims/defences have a proper basis (s18) To only take steps to resolve or determine dispute (s19) To cooperate in the conduct of civil proceeding (s20) Not to mislead or deceive (s21) To use reasonable endeavours to resolve dispute (s22) To ensure costs are reasonable and proportionate (s24) To minimise delay (s25) To disclose existence of documents critical to resolution of dispute (s26)

## Who owes the obligations?

- Obligations upon lawyers, litigants, law firms, litigation funders and insurers (people who have to ability to control or influence the conduct of the proceeding): s10
- Some obligations apply to experts: honesty; cooperation; not to mislead or deceive; resolve issues in dispute; reasonable costs; act promptly and minimise delay.
- Section 13: obligations override inconsistent client instructions.
- Obligations 'may not be delegable' : per Dixon J in Dura.





# Sanctions for contravention

- Section 28 Court may take contravention of overarching obligations into account when exercising <u>any power</u>, including costs questions.
- Section 29 If breach of obligation, court may order person:
  - Pay legal costs of others arising from the breach
  - Pay legal costs of others in the proceeding generally
  - Pay compensation to any person materially contributed to by the contravention
  - Take steps to remedy contravention or not permit steps be taken
  - Any other order court considers in the interests of persons prejudicially affected



# Who can bring actions for breaches of obligations?

• Applications for orders under s.29 (sanctions and compensation) can be brought by:

- Parties to the civil proceeding;
- Any persons with a sufficient interest in the proceeding; and
- On the court's own motion.
- The application must be brought before the conclusion of the finalisation the civil proceeding (s.30): *Kenny & Anor v Gippsreal Ltd* [2015] VSC 284 "finalisation" discussed consent judgment was final despite minor outstanding costs issue and potential for appeal.



# Yara Australia Pty Ltd v Oswal [2013] VSCA 337

'Section 29 of the Act provides the Court with broader and more flexible powers than under the [General Civil Procedure Rules] or under its inherent jurisdiction.... These powers are intended to make all those involved in the conduct of litigation – accountable for the just, efficient, timely and cost effective resolution of disputes...Parliament has given the courts flexible means of distributing the costs burden upon and across those who fail to comply with their overarching obligations... <u>A</u> <u>sanction may be imposed where... the legal practitioner acts on the instruction of his</u> <u>client in breach of the overarching obligations... '</u>

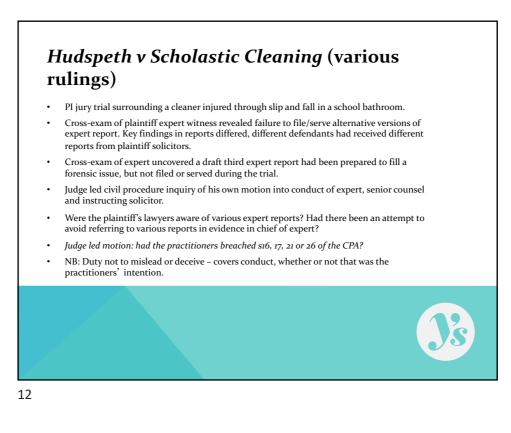


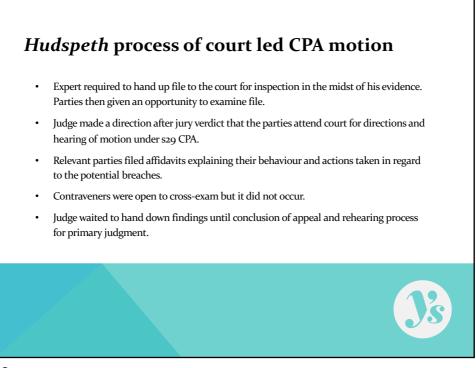
# Yara Australia Pty Ltd v Oswal [2013] VSCA 337

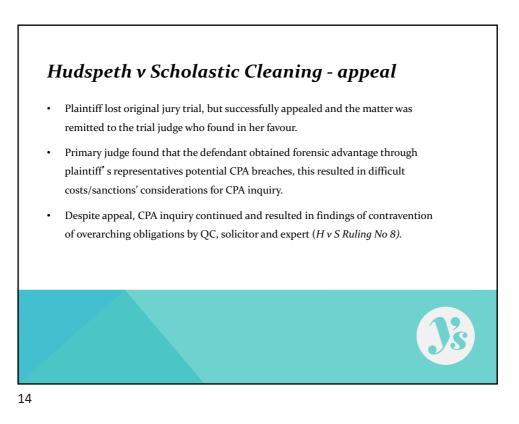
- Leave to appeal from order setting aside security for costs order total security sought approx \$140,000. 5 silks, 6 junior counsel and 5 solicitors firms representing parties in Ct of A. 6 lever arch folders of materials.
- Court concerned about over representation of counsel and unnecessary and voluminous material produced in comparison to the issues and quantum: breach of s.24 CPA?
- To examine if there has been a breach of an overarching obligation the court should determine 'by an objective evaluation of their conduct having regard to the issues and the amount in dispute in the proceeding.'











# *Hudspeth* breach findings

In relation to the third non-disclosed expert report:

- Section 21 content of obligation informed by jurisprudence of s18 ACL [193]
- Section 26 solicitor imputed with knowledge of critical documents in possession/custody of barrister
- QC breached paramount duty to court; and duty to disclose existence of a critical document (s26); and duty not to mislead or deceive in respect of the expert's evidence (s21).
- Expert breached obligation not to engage in M & D conduct (s21).
- Solicitor breached paramount duty to court; and duty to disclose existence of a critical document (s26); and duty not to mislead or deceive in respect of the expert's evidence (s21).



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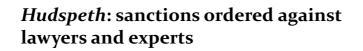
# *Hudspeth* – advocates' immunity from suit eroded

• Dixon J held (at [175]):

"While the advocate's duty to not mislead the court may have been re-expressed in the Act, possibly without substantive change, immunity from suit has been eroded by the power under s29 to make any order the court considers appropriate in the interests of justice."

• S.29: 'is primarily compensatory rather than punitive.'





- Although plaintiff won appeal, her QC and solicitor bore 40% of appellate costs ordered against the respondents (*H v S* [2014] VSCA 78)
- Only person prejudicially impacted by the CPA breaches was plaintiff, so other parties could not recoup costs for breaches (*H v S Ruling No 9*).
- Expert ordered to pay apportioned costs of appeal (s29) judge not persuaded that expert had limited control over what occurred with his reports.
- Each contravener ordered to pay 1/9<sup>th</sup> of the respondent's costs of responding to the court's motion

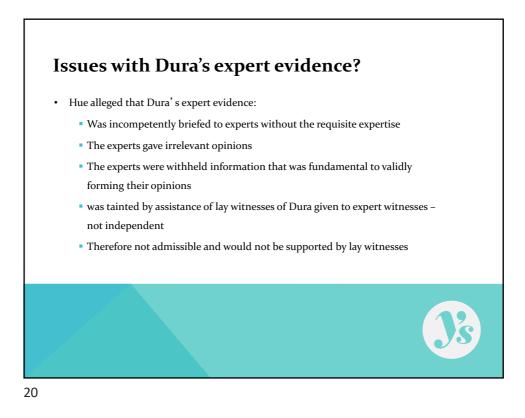


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### Dura (Australia) Constructions P/L v Hue Boutique Living P/L (No. 5) [2014] VSC 400

- Primary claim: construction dispute defendant successful in claiming invalid termination of contract. Hue incurred \$3M legal costs in defence.
- Hue (defendant) filed a s29 CPA application against Dura's solicitor, seeking that they pay some or all of Hue's legal costs on the basis that the solicitors proceeded with a claim that was <u>without a proper basis</u> and ought reasonably have known no proper basis.
- Evidence: 2 affidavits from Hue's solicitor and 2 from Dura's solicitor no cross examination.
- Dura's lawyers argued could not answer proper basis allegations without waiving LPP.

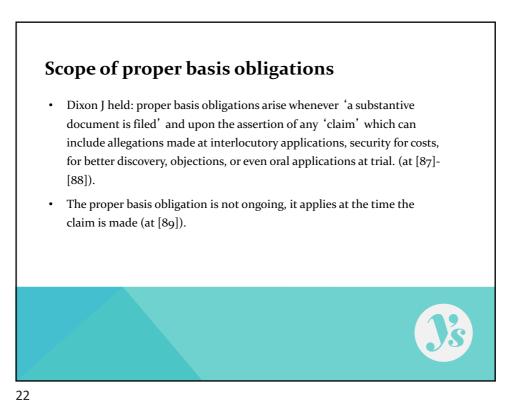




# Expert evidence issues impacted proper basis

- Hue alleged that the expert evidence problems meant solicitors for Dura:
  - Unreasonably or improperly initiated and continued the proceeding, with no, or substantially no, prospects of success
  - Acted in willful disregard of known facts and law
  - Failed to give reasonable attention to the relevant law and facts
  - Breached overarching obligation to only make claims with a proper basis
  - Caused costs to be incurred without reasonable cause (\$3M+)

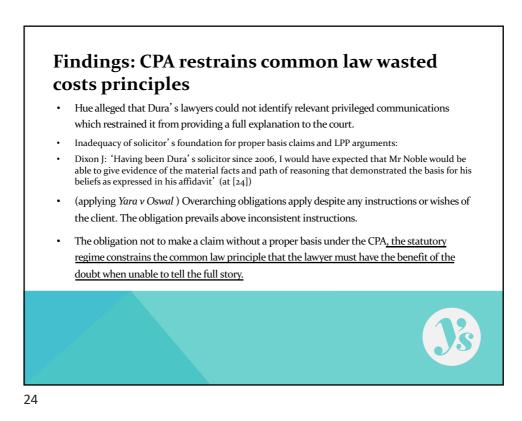




# Common law principles when considering wasted costs

- A lawyer is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence plainly doomed to fail.
- A lawyer is not the judge of the credibility of the witnesses or the validity of the argument.
- If LPP hinders ability to rebut complaint, the court must make allowances and give practitioner benefit of the doubt.
- A client properly advised that a case is weak and likely to fail, may direct a lawyer to proceed and it is not ethically inappropriate for the lawyer to do so.

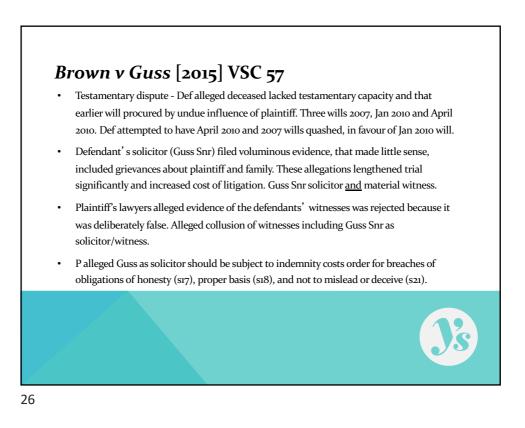


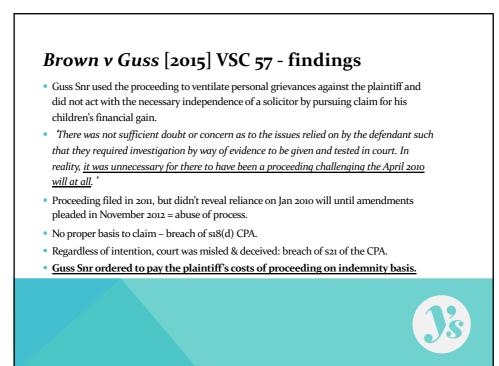


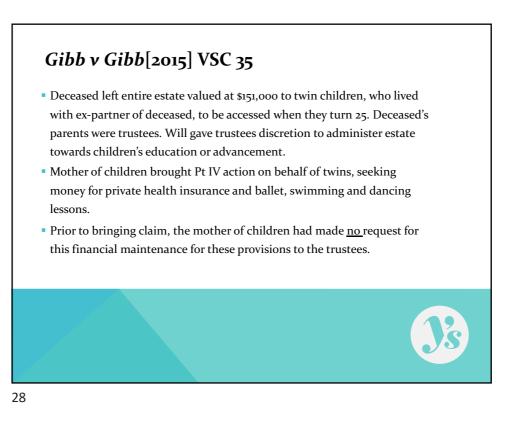
# Findings against Dura's Lawyers

- Continuing a claim for provisional scaffolding, despite being on notice that Dura had not paid the amounts claimed <u>was not a breach of proper basis</u> obligations, but this entitled Hue to a wasted costs order for responding to the claim (\$113,092), to be paid by Dura's lawyers.
- Dura's expert evidence <u>was poorly prepared</u> but the conduct <u>did not amount to a</u> <u>breach of overarching obligations</u> or warrant a wasted costs order (at [237]).
- Similarly, problems with Dura's lay witnesses were somewhat excused due to limited resources. Conduct not so plainly unjustifiable to warrant wasted costs order.









# Gibb v Gibb[2015] VSC 35 - McDonald J

- If there was substance to plaintiff's allegations of inadequate provision, should have brought application for trustees to be removed under *Trustee Act*, but no evidence that trustees were acting with mala fides. Deceased had provided for entire estate to children – could not have done more.
- Trustees forced to spend \$26,000 defending unnecessary Part IV action. Plaintiff incurred \$57,394 in professional fees to solicitors and counsel.
- HELD: Pt IV action brought without proper basis in breach of si8 as no evidence to substantiate concern that children's educational and maintenance costs would not be paid.
- Those advising the plaintiff must have been aware of devastating cost burden of litigation on modest estate –breach of s24 requirement to keep costs reasonable.
- McDonald J launched s.29(1) motion to examine whether costs order should be made against plaintiff's solicitors. Defendants given opportunity to file s.29 order in their favour.





### Locker Group Pty Ltd V HEA Australia Pty Ltd [2015] VSC 752

- Winding up application, company wound up by third party creditor after substitution application.
- One week after winding up, company applied to have winding up set aside as it was served late with application in Perth. AsJ had not been informed by creditor of the late service of the company.
- Liquidators had incurred \$30,000+ in costs and expenses in the first week of winding up.
- HELD: At the time that the third party creditor applied for the winding up order it did not have a proper basis to do so (s18 CPA), as it knew it was in breach of the service obligations and did not bring this to the court's attention, failed to discharge its paramount duty. Third party creditor ordered to pay the reasonable remuneration and expenses of the liquidators (under s.29).



# Actrol Parts Pty Ltd v Coppi (No 3) [2015] VSC 758 Plaintiff employer seeking breach of contract, breach of fiduciary duties, breach of confidence action against former employee. Prior to trial employer abandoned most claims and persisted with breach of contract claim with only prospect of nominal damages. Substantial expenses incurred by both parties, plaintiff: \$600K and \$300K for defendant. Plaintiff established right to order that there was a breach but only nominal damages of \$1. Defendant applied under s.28 and s.29 for a dismissal of proceeding after trial on grounds that there was breach of s.24 obligation to ensure reasonable and proportionate costs. HELD: Proceeding dismissed and continuance of proceeding considered an 'egregious breach' of CPA requirement to keep costs reasonable and proportionate. Plaintiff required to pay defendants costs on indemnity basis from beginning of proceeding.

### **OTHER RECENT DECISIONS**

- Grech v Deak-Fabrikant (No 4) [2016] VSC 35 s.29 ordered against defendant to compensate other litigants for failing to show up for 6 days of trial and her combative behaviour resulting in the trial being prolonged with irrelevant evidence. Breach of s.19, 20, 23, 24 and 25. (Daly AsJ)
- Re Manilo [2015] VSC 733 Barrister and solicitor required to make submissions to justify why they should be entitled to charge fees to a client who was illiterate and had limited intellectual capacity, and very low prospect of success. Judge concerned whether there was a proper basis to the proceedings. Plaintiff also found to have breached s.20 and 21 of CPA by interfering with a witnesses evidence. (McDonald J)
- Batrouney v Forster (No 2) [2015] VSC 541 Receivers of law firm pursued action against former principal for double disbursement accounting issues. Deloitte expert report had shown no problem with the accounting. Action pursued anyway. HELD: Receivers breached s.18 and s24 of the CPA in pursuing action as failed to ensure costs were reasonable and proportionate and without proper basis. Required to pay costs on indemnity basis under s.29 and also required to refund any fees they charged for acting as receivers in pursuing the case against Forster.



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# Georgia Douglas, Young's List

## **Areas of Practice:**

- Professional Negligence & Liability
- Torts
- Insolvency
- Contractual, Building & Construction & Property
- Competition & Consumer Law
- Intellectual Property
- Judicial Review & Merits Review

