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VICTORIAN COURTS

G Nash KC

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Updated content has been provided by **Gerard Nash**:

Orders 64–85

Updated:

- There is no common law right of appeal. See *O'Bryan v Lindholm* [2024] VSCA 130, at [CPR64.0.40]
- This decision does not sit easily with the subsequent decision of the Court of Appeal. See *O'Bryan v Lindholm* [2024] VSCA 130, at [CPR64.0.1040]
- When assessing whether there are “special grounds”, the three considerations were not the only matters that needed to be addressed. See *University of Wollongong v Metwally* (1984) 158 CLR 447, at [CPR64.0.1120]
- An appeal was dismissed in relation to negligent driving. See *Norman v Transport Accident Commission* [2024] VSCA 123, at [CPR64.0.1280]
- An inference may properly be drawn against an appellant who fails to give evidence of his or her means. See *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd* [2024] NSWCA 128, at [CPR64.0.1520]
- The Court of Appeal was “not persuaded that the granting of security for costs would stifle [the appellant’s] claim”. See *Swarcbord v Charboard Investments Pty Ltd* [2024] VSCA 92, at [CPR64.0.1520]

Updated content has been provided by **Sandra Karabidian** and **John Leung**:

Orders 11–25

Updated:

- The courts do not take an unduly technical or restrictive approach to the pleadings. See *Victorian WorkCover Authority (t/as Worksafe Victoria) v White* [2021] VSC 458, at [CPR21.01.140].
- When considering whether to grant default judgment, the courts confined themselves to the facts alleged in the statement of claim. See *Phonographic Performance Ltd v Maitra* [1998] 2 All ER 638; *Young v Thomas* [1892] 2 Ch 134, at [CPR21.01.160].
- This is a discretion that will not be exercised readily. See *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73, at [CPR21.01.260].

New:

- **Application to set aside default judgment**, has been inserted, at [CPR21.07.20].

Orders 26–40

- The length of time the admission was left open by the party seeking to withdraw it may be a determining factor to refuse leave in one case but cannot be a firm rule. See *Bodycorp Repairers Pty Ltd v Maisano (No 3)* [2013] VSC 244, at [CPR36.01.40].

- The party opposing the amendment bears the evidential onus on the question of prejudice. See *ACN002693843 Box Pty Ltd v Australian Corrugated Box Co Pty Ltd* [2013] VSCA 223, at [CPR36.01.60].
- The primary question for the court “always remains whether the proposed amendment would be in the interests of justice”. See *Grahame v Bendigo and Adelaide Bank Ltd* [2021] VSCA 222, at [CPR36.01.100].
- The principles regarding the interaction between r 36.01(6) and s 34(1) of the *Limitations of Actions Act 1958* were summarized. See *Willmott Forests Ltd (in liq) v Armstrong Dubois Pty Ltd* [2016] VSC 61, at [CPR36.01.140].
- The relevant time to assess whether a party has made a mistake in the name of a party is at the time the proceeding commenced. See *PD Enterprise Ltd v Pacific Brands Clothing Pty Ltd* [2012] VSC 494, at [CPR36.01.150].
- The Master of the Rolls observed that “the slip rule power is not a power granted to the trial judge as such”. See *R v Cripps; Ex parte Muldoon* [1984] 2 All ER 705 at 710, at [CPR36.07.40].
- The balance of convenience favouring the granting of the order is not a distinct requirement. See *Rozenblit v Vainer* [2019] VSCA 164, at [CPR37A.05.20].
- The alleged conduct was said to support an inference of danger of dissipation. See *Fernandez v Cohrs* [2019] VSC 727, at [CPR37A.05.40].
- Where the respondent seeks a carve out to meet legal costs or other matters, a relevant factor will usually be whether the defendant has sufficient other assets to meet such costs. See *Plus Recruitment Pty Ltd v Phillips (No 2)* [2019] VSC 611, at [CPR37A.05.80].
- A possible exception to the requirement to give an undertaking as to damages is that by reason of his or her poverty the applicant is unable to give such an undertaking. See *Roe v Howard* [2020] VSC 212, at [CPR37A.05.100].
- It appears clear that the test for assessing whether the applicant’s substantive cause supports the granting of a freezing order against third parties is whether there is “a good arguable case”. See *Manda Capital Holdings Pty Ltd v Pappas* [2024] VSC 495, at [CPR37A.05.140].
- The Court will not usually allow access to the seized material prior to discovery having been completed absent consent. See *Rauland Australia Pty Ltd v Johnson (No 2)* [2019] FCA 1175, at [CPR37B.03.20].

