

The Supreme Court (General Civil Procedure) Rules 2015 (Vic)

- This discussion:
- Order 22 (Summary judgment)
- Order 23 (Summary stay or dismissal of claim and striking out pleading)
- Order 26 (Offers of compromise)
- Order 29 to r 29.05 (Discovery and inspection of documents)

Order 22 – Summary judgment

- Cross-ref Part 4.4 of the Civil Procedure Act
- Part 2 of this Order relates to applications by plf for summary judgment
- Part 3 relates to applications by def for summary judgment
- References to plf and def include by counterclaim

Part 2 – Application by plf for summary judgment

- R 22.03: application under s 61 shall be made in accordance with this Order
- R 22.04: Summons and affidavit in support
- (1) An application shall be made by summons supported by an affidavit—
 - (a) verifying the facts on which the claim or the part of the claim to which the application relates is based; and
 - (b) stating that in the belief of the deponent the defence to the claim or the defence to the relevant part of the claim—
 - (i) has no real prospect of success; or
 - (ii) has no real prospect of success except as to the amount of the claim or as to the amount of the relevant part of the claim.
- (2) Where a statement in a document tends to establish a fact within paragraph (1) and at the trial of the proceeding the document would be admissible by or under the Evidence (Miscellaneous Provisions) Act 1958 , the Evidence Act 2008 or any other Act to verify the fact, the affidavit under paragraph (1) may set forth the statement.
- (3) An affidavit under paragraph (1) may contain a statement of fact based on information and belief if the grounds are set out and, having regard to all the circumstances, the Court considers that the statement ought to be permitted.
- (4) The plaintiff shall serve the summons and a copy of the affidavit or affidavits and of any exhibit referred to in the affidavit or affidavits on the defendant not less than 14 days before the day for hearing named in the summons.

R 22.05: Def to show cause

- (1) The defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court.
- (2) An affidavit under paragraph (1) may contain a statement of fact based on information and belief if the grounds are set out.
- (3) Unless the Court otherwise orders, the defendant shall serve a copy of any affidavit and of any exhibit referred to in the affidavit or affidavits on the plaintiff not less than three days before the day for hearing named in the summons.
- R 22.06: Affidavit in reply
- (1) Where the defendant serves an affidavit under Rule 22.05, the Court may by order allow the plaintiff to rely upon an affidavit in reply.
- (2) Rule 22.04(2) and (3) apply, with any necessary modification, to an affidavit in reply made under this Rule.

The procedure that follows

- R 22.07: Cross-examination on affidavit
- (1) The Court may order any party or the maker of any affidavit—
 - (a) to attend and be examined and cross-examined; or
 - (b) to produce any documents, or copies of or extracts from those documents.
- (2) Where a party is a corporation, the Court may make an order under paragraph (1) in respect of any director, manager, secretary or other similar officer of the corporation or any person purporting to act in any such capacity.

R 22.08: Hearing of application

- (1) Subject to Part 4.4 of Chapter 4 of the Civil Procedure Act 2010 , on the hearing of an application the Court may—
 - (a) dismiss the application;
 - (b) give such judgment for the plaintiff against the defendant on the claim or the part of the claim to which the application relates as is appropriate, having regard to the nature of the relief or remedy claimed;
 - (c) give the defendant leave to defend with respect to the claim or the part of the claim to which the application relates either unconditionally or on terms as to giving security, paying money into court, time, the mode of trial or otherwise; or
 - (d) with the consent of all parties, and notwithstanding Rule 77.03(1), dispose of the proceeding finally in a summary manner.
- (2) The Court may stay execution of any judgment given under paragraph (1)(b) until after the trial of any other claim or counterclaim which remains outstanding in the proceeding as between the relevant parties.
- R 22.09: Assessment of damages
- Where the Court gives summary judgment under section 63 of the Civil Procedure Act 2010 for damages or the value of goods to be assessed, the assessment shall be made in accordance with Order 51.
- See r 22.10 re judgment where debt amount unascertained

- R 22.11 permits directions where on an application under section 61 of the Civil Procedure Act 2010 for summary judgment leave is given to defend or summary judgment is given on a claim or part of a claim but execution of the judgment is stayed pending the trial of an outstanding claim or counterclaim or of the proceeding, as the case may be, the Court may give directions as to the further conduct of the proceeding
- R 22.12: Where the plaintiff obtains summary judgment under section 63 of the Civil Procedure Act 2010 on a claim or part of a claim against any defendant, the plaintiff may continue with the proceeding for any other claim or for the remainder of the claim or against any other defendant.

Part 3 – Application by def for judgment

- R 22.16: application under s 62 shall be made in accordance with this Order
- R 22.17: Application is by summons
- R 22.18: Affidavit in support
- (1) If the defendant intends to rely on an affidavit in support of the application, the affidavit shall be filed with the summons.
- (2) Where a statement in a document tends to establish a fact upon which the defendant relies and at the trial of the proceeding the document would be admissible by or under the Evidence (Miscellaneous Provisions) Act 1958 , the Evidence Act 2008 or any other Act to verify the fact, the affidavit may set forth the statement.
- (3) An affidavit relied upon by the defendant may contain a statement of fact based on information and belief if the grounds are set out and, having regard to all the circumstances, the Court considers that the statement ought to be permitted.
- (4) The defendant shall serve the summons and a copy of any affidavit in support and of any exhibit referred to in the affidavit on the plaintiff not less than 14 days before the day for hearing named in the summons.

R 22.19: Plf to show cause

- (1) The plaintiff may show cause against the application by affidavit or otherwise to the satisfaction of the Court.
- (2) An affidavit under paragraph (1) may contain a statement of fact based on information and belief if the grounds are set out.
- (3) Unless the Court otherwise orders, the plaintiff shall serve a copy of any affidavit and of any exhibit referred to in the affidavit on the defendant not less than three days before the day for hearing named in the summons.
- R 22.20: Where the plaintiff serves an affidavit under Rule 22.19, the Court may by order allow the defendant to rely upon an affidavit in reply.

The procedure that follows

- R 22.21: Cross-examination on affidavit
- (1) The Court may order any party or the maker of any affidavit—
 - (a) to attend and be examined and cross-examined; or
 - (b) to produce any documents, or copies of or extracts from those documents.
- (2) Where a party is a corporation, the Court may make an order under paragraph (1) in respect of any director, manager, secretary or other similar officer of the corporation or any person purporting to act in any such capacity.

R 22.22: hearing of application

- Subject to Part 4.4 of Chapter 4 of the Civil Procedure Act 2010 , on the hearing of an application the Court may—
 - (a) dismiss the application;
 - (b) give such judgment for the defendant against the plaintiff on the claim or the part of the claim to which the application relates as is appropriate (including the grant of any appropriate stay of the proceeding), having regard to the nature of the relief or remedy claimed; or
 - (c) with the consent of all parties, and notwithstanding Rule 77.03(1), dispose of the proceeding finally in a summary manner.
- R 22.23: Setting aside judgment
- The Court may set aside or vary any judgment given against a party who does not attend on the hearing of an application under section 62 of the Civil Procedure Act 2010 .

R 22.24: Third or subsequent party

- (1) A party who has joined a third or subsequent party to a civil proceeding may apply to the Court for summary judgment against the third or subsequent party on the ground that the defence or part of the defence of that party has no real prospect of success.
- (2) A party joined as a third or subsequent party to a civil proceeding may apply to the Court for summary judgment on the ground that the claim made against the party or part of that claim has no real prospect of success.
- (3) Part 2 of this Order applies, with any necessary modifications, to an application under paragraph (1).
- (4) Part 3 of this Order applies, with any necessary modifications, to an application under paragraph (2).
- (5) The Court may order that a claim made by or against a third or subsequent party proceed to trial if the Court is satisfied that, despite there being no real prospect of success, the claim should not be disposed of summarily because—
 - (a) it is not in the interests of justice to do so; or
 - (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

Order 23: Summary stay or dismissal of claim and striking out pleading

- **R 23.01: Stay or judgment in proceeding**
- (1) Where a proceeding generally or any claim in a proceeding—
 - (a) is scandalous, frivolous or vexatious; or
 - (b) is an abuse of the process of the Court—
- the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.
- (2) Where the defence to any claim in a proceeding is scandalous, frivolous or vexatious, the Court may give judgment in the proceeding generally or in relation to any claim.
- (3) In this Rule—
 - (a) a claim in a proceeding includes a claim by counterclaim and a claim by third party notice; and
 - (b) a defence includes a defence to a counterclaim and a defence to a claim by third party notice.
- Cross ref r 23.04(1): affidavit evidence: On an application under Rule 23.01 evidence shall be admissible for any party by affidavit or, if the Court thinks fit, orally.

R 23.02: Striking out pleading

- Where an indorsement of claim on a writ or originating motion or a pleading or any part of an indorsement of claim or pleading—
 - (a) does not disclose a cause of action or defence;
 - (b) is scandalous, frivolous or vexatious;
 - (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
 - (d) is otherwise an abuse of the process of the Court—
- the Court may order that the whole or part of the indorsement or pleading be struck out or amended.
- Cross ref r 23.04(2): On an application under Rule 23.02 no evidence shall be admissible on the question whether an indorsement of claim or pleading offends against that Rule.

O 26: Offers of compromise

- **R 26.02: Offers of compromise generally**

- (1) A party may, in respect of any claim in a proceeding, serve on another party an offer of compromise on the terms specified in the offer.
- (2) An offer of compromise in respect of a claim may be on terms that take into account any other claim made in the proceeding between the parties.
- (3) An offer of compromise must—
 - (a) be in writing and prepared in accordance with Rules 27.02 to 27.04; and
 - (b) contain a statement to the effect that it is served in accordance with this Order.
- (4) An offer of compromise must state either—
 - (a) that the offer is inclusive of costs; or
 - (b) that costs are to be paid or received, as the case may be, in addition to the offer.

R 26.03: Time for making, accepting etc. offer

- (1) An offer of compromise may be served at any time before verdict or judgment in respect of the claim to which it relates.
- (2) A party may serve more than one offer of compromise.
- (3) An offer of compromise may be expressed to be limited as to the time the offer is open to be accepted after service on the party to whom it is made, but the time expressed shall not be less than 14 days after such service.
- (4) A party on whom an offer of compromise is served may accept the offer by serving notice of acceptance in writing on the party who made the offer before—
 - (a) the expiration of the time specified in accordance with paragraph (3) or, if no time is specified, the expiration of 14 days after service of the offer; or
 - (b) verdict or judgment in respect of the claim to which the offer relates—
- whichever event is the sooner.
- (5) An offer of compromise shall not be withdrawn during the time it is open to be accepted, unless the Court otherwise orders.
- (6) An offer of compromise is open to be accepted within the period referred to in paragraph (4) notwithstanding that during that period the party on whom the offer is served makes an offer of compromise to the party who served the offer of compromise, whether or not the offer made by the party served is made in accordance with this Part.
- (7) Upon the acceptance of an offer of compromise that states that costs are to be paid or received in addition to the offer, then, unless the offer otherwise provides or the Court otherwise orders—
 - (a) such costs are to be paid or received in respect of the claim up to and including the day the offer was served;
 - (b) liability for any costs in respect of the claim in relation to any subsequent period shall be in the discretion of the Court; and
 - (c) any party to the accepted offer may apply for the taxation of the costs.

R 26.03.1: Time for payment

- An offer of compromise providing for payment of a specified sum of money to a party shall, unless it otherwise provides, be taken to be an offer providing for payment of that sum within 28 days after acceptance of the offer.
- R 26.04: Effect of offer
- An offer of compromise made in accordance with this Part shall be taken to be an offer of compromise made without prejudice, unless the offer otherwise provides.
- R 26.05: Disclosure of offer to Court
- (1) No statement of the fact that an offer of compromise has been made shall be contained in any pleading or affidavit.
- (2) Where an offer of compromise has not been accepted, then, except as provided by Rule 26.08(6), no communication with respect to the offer shall be made to the Court on the trial of the proceeding until after all questions of liability and the relief to be granted have been determined.
- (3) Paragraphs (1) and (2) do not apply where an offer of compromise provides that the offer is not made without prejudice.

R 26.07: Withdrawal of acceptance

- (1) A party who has accepted an offer for the payment to that party of a sum of money may withdraw the acceptance if—
 - (a) the sum of money is not paid—
 - (i) within the time provided by the offer; or
 - (ii) where no time is specified by the offer, within 28 days after acceptance of the offer; and
 - (b) the Court, on the application of the party who accepted the offer, gives leave.
- (2) A party seeking the leave of the Court under paragraph (1)(b) may also seek orders—
 - (a) to restore the parties as nearly as practicable to each party's position in the proceeding at the time of acceptance; and
 - (b) as to the further conduct of the proceeding.

R 26.07.1: Failure to comply with accepted offer

- If, after acceptance of an offer of compromise, a party to the accepted offer defaults in complying with that party's obligations under the offer, any non-defaulting party to the accepted offer may apply to the Court for an order—
 - (a) giving effect to the accepted offer;
 - (b) staying or dismissing the proceeding if the plaintiff is in default;
 - (c) striking out the defendant's defence if the defendant is in default; or
 - (d) that a claim, not the subject of the offer, shall proceed.

R 26.07.2: Multiple defendants

- (1) Rule 26.07.1 does not apply if—
 - (a) two or more defendants are alleged to be jointly, or jointly and severally, liable to the plaintiff for a debt or damages; and
 - (b) rights of contribution or indemnity appear to exist between the defendants.
- (2) Notwithstanding paragraph (1), Rule 26.07.1 applies if—
 - (a) in the case of an offer made by the plaintiff, the offer—
 - (i) is made to all defendants; and
 - (ii) is an offer to compromise the claim against all of them; or
 - (b) in the case of an offer made to the plaintiff—
 - (i) the offer is to compromise the claim against all defendants; and
 - (ii) if the offer is made by two or more defendants, those defendants offer to be jointly, or jointly and severally, liable to the plaintiff for the whole amount of the offer.

R 26.08: Costs consequences of failure to accept

- (1) This Rule applies to an offer of compromise which has not been accepted at the time of verdict or judgment.
- (2) Where an offer of compromise is made by a plaintiff and not accepted by the defendant, and the plaintiff obtains a judgment on the claim to which the offer relates no less favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders, the plaintiff shall be entitled—
 - (a) if the claim of the plaintiff is for damages for or arising out of death or bodily injury, to an order against the defendant for the plaintiff's costs in respect of the claim taxed on an indemnity basis;
 - (b) in the case of any other claim of the plaintiff, to an order against the defendant for the plaintiff's costs in respect of the claim before 11.00 a.m. on the second business day after the offer was served, taxed on the ordinarily applicable basis and for the plaintiff's costs thereafter taxed on an indemnity basis.
- (3) Where an offer of compromise is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment on the claim to which the offer relates not more favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders—
 - (a) the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim before 11.00 a.m. on the second business day after the offer was served, taxed on the ordinarily applicable basis; and
 - (b) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim thereafter taxed on the ordinarily applicable basis. ...

- R 26.08 (4) Where an offer of compromise is made by a defendant and the plaintiff unreasonably fails to accept the offer and the claim to which the offer relates is dismissed or judgment on the claim is entered in favour of the defendant, then unless the Court otherwise orders—
 - (a) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim until 11.00 a.m. on the second business day after the offer was made, taxed on the ordinarily applicable basis; and
 - (b) the defendant shall be entitled to an order against the plaintiff in respect of the defendant's costs after the time referred to in paragraph (a) taxed on an indemnity basis.
- (5) Where a plaintiff obtains judgment for the recovery of a debt or damages and—
 - (a) the amount for which the Court pronounces judgment includes an amount for interest or damages in the nature of interest; or
 - (b) by or under any Act the Court awards the plaintiff interest or damages in the nature of interest in respect of the judgment amount—
- for the purpose of determining the consequences as to costs referred to in paragraphs (2) and (3) the Court shall disregard so much of the amount recovered by or awarded to the plaintiff for interest or damages in the nature of interest as relates to the period after the day the offer of compromise was served.
- (6) For the purpose only of paragraph (5), the Court may be informed of the fact that the offer of compromise was served, and of the date of service, but shall not be informed of its terms.
- (7) Paragraphs (2), (3) and (4) shall not apply unless the Court is satisfied by the party serving the offer of compromise that that party was at all material times willing and able to carry out the party's part of what was proposed in the offer.
- (8) Where the plaintiff obtains judgment for the recovery of a debt or damages, and the amount of the debt or the damages was not in dispute, but only the question of liability, paragraph (2) shall not apply unless the Court is satisfied that the plaintiff's offer was of a genuine compromise.

R 26.08.1 Pre-litigation offers

- (1) If—
 - (a) a party, before a proceeding has commenced, has made an offer in writing to another party (whether or not expressed to be without prejudice) to compromise any claim made in the proceeding on the terms specified in the offer; and
 - (b) the offer was open to be accepted for a reasonable time, but was not accepted; and
 - (c) the offeror obtains an order or judgment in respect of the claim no less favourable to the offeror than the terms of the offer—
- the Court shall take those matters into account in determining what order for costs to make in respect of the costs of the proceeding.
- (2) In exercising its discretion as to costs in accordance with paragraph (1), the Court may order that the offeree pay all or part of the offeror's costs of the proceeding taxed on a basis other than the ordinarily applicable basis, from—
 - (a) the day the offer was made;
 - (b) the commencement of the proceeding; or
 - (c) any other time that the Court thinks fit.

- R 26.10 relates to the rule as it applies to contributor parties

Order 29: Discovery and inspection of documents

- R 29.01: applies to proceedings commenced by writ

R 29.01.1: Scope of discovery

- (1) Unless the Court otherwise orders, discovery of documents pursuant to this Order is limited to the documents referred to in paragraph (3).
- (2) Paragraph (1) applies despite any other rule of law to the contrary.
- (3) Without limiting Rules 29.05 and 29.07, for the purposes of this Order, the documents required to be discovered are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given—
 - (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;
 - (d) documents that support another party's case.
- (4) Notwithstanding paragraph (3)—
 - (a) if a party giving discovery reasonably believes that a document is already in the possession of the party to which discovery is given, the party giving discovery is not required to discover that document;
 - (b) a party required to give discovery who has, or has had in the party's possession more than one copy, however made, of a particular document is not required to give discovery of additional copies by reason only of the fact that the original or any other copy is discoverable.
- (5) For the purposes of paragraph (3), in making a reasonable search a party may take into account—
 - (a) the nature and complexity of the proceeding;
 - (b) the number of documents involved;
 - (c) the ease and cost of retrieving a document;
 - (d) the significance of any document to be found; and
 - (e) any other relevant matter.

R 29.02: Notice for discovery

- (1) Where the pleadings between any parties are closed, any of those parties, by notice for discovery served on any other of those parties, may require the party served to make discovery of all documents which are or have been in that party's possession and which, in accordance with Rule 29.01.1, are required to be discovered.
- (2) A notice for discovery shall be in Form 29A.
- (3) A notice for discovery served before the pleadings are closed shall be taken to have been served on the day after the pleadings close.

R 29.03: Discovery after notice

- A party upon whom a notice for discovery is served shall make discovery of documents within 42 days after the later of—
 - (a) service of the notice; or
 - (b) the day upon which the notice is taken by virtue of Rule 29.02(3) to have been served.

R 29.04: Affidavit of documents

- (1) An affidavit of documents for the purpose of making discovery of documents shall be in Form 29B and shall—
 - (a) identify the documents which are or have been in the possession of the party making the affidavit;
 - (b) enumerate the documents in convenient order and shall describe each document or, in the case of a group of documents of the same nature, shall describe the group, sufficiently to enable the document or group to be identified;
 - (c) distinguish those documents which are in the possession of the party making the affidavit from those that have been but are no longer in that party's possession, and shall as to any document which has been but is no longer in the possession of the party—
 - (i) state when the party parted with the document; and
 - (ii) the party's belief as to what has become of it;
 - (d) where the party making the affidavit claims that any document in that party's possession is privileged from production, state sufficiently the grounds of the privilege.
- (2) If a party required to give discovery in accordance with Rule 29.01.1 does not, in making a reasonable search as required by Rule 29.01.1, search for a category or class of document, the party must include in the affidavit of documents a statement of—
 - (a) the category or class of document not searched for; and
 - (b) the reason why.

Orders

- R 29.05: Order limiting discovery
- In order to prevent unnecessary discovery, the Court may, before or after any party is required to make discovery by virtue of a notice for discovery served in accordance with Rule 29.02, order that discovery by any party shall not be required or shall be limited to such documents or classes of document, or to such of the questions in the proceeding, as are specified in the order.
- R 29.05.1: Order for general discovery
- At any stage of a proceeding, the Court may order any party to give discovery in accordance with Rule 29.01.1.