IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2020 01699

IN THE MATTER OF BRADBURY INDUSTRIAL SERVICES PTY LTD (IN LIQUIDATION) (ACN 121 279 847)

DAVID BARRY LOGISTICS PTY LTD (ACN 121 644 460) Plaintiff

v

GEOFFREY TRENT HANCOCK IN HIS CAPACITY AS LIQUIDATOR OF BRADBURY INDUSTRIAL SERVICES PTY LTD (IN LIQUIDATION) (ACN 121 279 847) & ORS
(according to the Schedule) Defendants

JUDGE:	M Osborne J
WHERE HELD:	Melbourne
DATE OF HEARING:	29 August 2022
DATE OF JUDGMENT:	30 September 2022
CASE MAY BE CITED AS:	David Barry Logistics Pty Ltd v The State of Victoria (No 3)
MEDIUM NEUTRAL CITATION:	[2022] VSC 575

PRACTICE AND PROCEDURE – Whether Court has power to grant relief amending originating process after final orders have been made – Whether Court *functus officio* – Scope and purpose of liberty to apply – *Abigroup Ltd v Abignano* (1992) 39 FCR 74 – *Patterson v Humfrey (No 2)* [2016] WASC 343 – *Eckert v Roberts* [2021] SASCA 73 – Effect of notation in 'Other Matters' – *Dautry v Wemple (No 2)* [2015] FamCAFC 248 – *Meadows v Meadows (No 5)* [2021] FamCAFC 42 – Whether s 47 of the *Civil Procedure Act 2010* (Vic) confers power on a Court to grant amendment relief after the making of final orders – *Achurch v The Queen* (2014) 253 CLR 141 – *Bailey v Marinoff* (1971) 125 CLR 529 – *PCCEF Pty Ltd v Geelong Football Club Ltd* [2018] VSC 258.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	S Maiden KC and V Bell of Counsel	Hope & Co Legal
For the Third Defendant	R Orr KC, Solicitor-General for Victoria and M Hosking of Counsel	Victorian Government Solicitor

HIS HONOUR:

1 The plaintiff, David Barry Logistics Pty Ltd ('DBL'), operates a small logistics services and warehousing business from a purpose built facility at Berends Drive, Dandenong South ('the DBL Facility'). DBL's services include the storage of 'dangerous goods', as defined in s 3(1) of the *Dangerous Goods Act 1985* (Vic).

2 On or about 28 March 2018, DBL and the second defendant, Bradbury Industrial Services Pty Ltd ('Bradbury') entered into an agreement pursuant to which DBL agreed to store certain goods at the DBL Facility for Bradbury. At the time, Bradbury operated a waste management services business, specialising in resource recovery and recycling in the industrial sector and the transportation of recycled toxic and hazardous waste.

3 Pursuant to its agreement with Bradbury, DBL received a number of industrial bulk containers ('IBCs'). Unknown to DBL, the IBCs contained prescribed industrial waste within the meaning of the *Environment Protection Act 1970* (Vic) ('PIW'), which DBL was not licensed to store.

4 On 26 November 2019, Bradbury went into liquidation following a fire which occurred at its premises. Bradbury's appointed liquidator, Geoffrey Trent Hancock, is the first defendant in this proceeding ('the Liquidator').

5 On 10 December 2019, the Liquidator served DBL with a notice issued under s 568 of the *Corporations Act 2001* (Cth) ('the *Corporations Act*'), headed '*ASIC - Form 525 - Notice of Disclaimer of Onerous Property*', attempting to disclaim Bradbury's interest in the agreement.

6 On 13 March 2020, DBL wrote to the Liquidator, requesting that he collect the IBCs. Subsequently, on 25 March 2020, the Liquidator served DBL with a further notice under s 568 of the *Corporations Act*, once again attempting to disclaim Bradbury's interest in the IBCs and their contents ('the IBC Disclaimer').

7 In the result, the IBCs were not collected and remained at the DBL Facility, occupying about 12% of its storage space. Neither Bradbury nor the Liquidator made any

payment in connection with the ongoing storage of the IBCs. The cost of disposal of the PIW was estimated to be in the order of $1 million.

8 On 8 April 2020, DBL commenced this proceeding against the Liquidator and Bradbury (as the first and second defendants) and the State of Victoria ('the State') as the third defendant. The amended originating process generally sought, among other things, the following relief:[1]

> 1. An order pursuant to s 568B(2)(a) of the *Corporations Act* that the disclaimer of onerous property made by the Liquidator be set aside.
>
> 2. An order pursuant to s 568B(2)(b) of the *Corporations Act* that Bradbury remove all the IBCs and their contents from the DBL Facility.
>
> 3. Alternatively, a declaration that the goods are *bona vacantia* and vest in the State; alternatively, an order under s 568F(1)(b) of the *Corporations Act* vesting the goods in the State.
>
> 4. If an order is made as sought in paragraph 3, an order that the State remove the goods from the DBL Facility forthwith.
>
> 5. Costs.
>
> 6. Such further or other orders as the court deems appropriate.

9 On 30 August 2021, DBL, the Liquidator, Bradbury and the State consented to orders which dismissed the claim by DBL against the Liquidator and Bradbury. The dismissal of DBL's claim that the IBC Disclaimer be set aside had the result that the IBC Disclaimer was taken to have effect as and from 26 March 2020.[2]

10 On 13 December 2021, the Court handed down reasons for judgment in the proceeding ('the Reasons'),[3] following a trial of five days duration in September 2021. The final paragraph of the Reasons concluded that '… DBL has succeeded in its *bona vacantia* claim and will be entitled to declaratory and ancillary relief. I would otherwise dismiss the s 568F(1)(b) claim'.

11 On 16 December 2021, after hearing the parties about the form of orders that should

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1 An earlier version was filed on 8 April 2020; an amended version was later filed on 14 April 2020. The relief set out above is paraphrased for ease of reading.

2 *Corporations Act* s 568C(3).

3 [2021] VSC 828.

be made, the Court made the following declaration and orders (for convenience, 'the 16 December 2021 Orders'):[4]

> THE COURT DECLARES THAT:
>
> 1. All goods formerly owned by the second defendant which are located at the plaintiff's premises at 16-24 Berends Drive, Dandenong South and were the subject of the first defendant's disclaimer of onerous property dated 24 March 2020 ('the Goods') vested *bona vacantia* in the third defendant ('the State') on the date the disclaimer took effect – which, by reason of s 568C(3) of the *Corporations Act 2001* (Cth), is taken to be 26 March 2020.
>
> THE COURT ORDERS THAT:
>
> 2. The State remove the Goods from the plaintiff's premises forthwith.
> 3. The proceeding is otherwise dismissed.
> 4. The third defendant pay 50% of the plaintiff's standard costs of the proceeding to date, including any reserved costs.
> 5. The operation of paragraph 2 of this order shall be stayed until 4:00pm on 14 February 2022 or such further period as ordered by the Court.
> 6. The proceeding is listed for directions on 11 February 2022.
> 7. Liberty to apply.

12 Over the following months, the stay on the operation of paragraph 2 of the 16 December 2021 Orders was extended by consent on a number of occasions, while DBL and the State engaged in negotiations as to the terms on which the IBCs would be stored at the DBL Facility, pending their removal. Concomitantly, the directions hearing was adjourned a number of times to accommodate the removal of the IBCs.

13 The State commenced removal of the IBCs from DBL's premises on 5 April 2022. The last of the IBCs was removed from the premises on 29 June 2022.

14 After all of the IBCs had been removed from the DBL Facility, the matter returned to Court on 13 July 2022. At this hearing, DBL indicated that it was considering applying for leave to amend its originating process, to make a claim for mesne profits or damages arising from the presence of the IBCs on DBL's premises, in respect of the

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[4] The orders set out above are paraphrased for ease of reading.

period before 16 December 2021.

15 Now, by summons dated 22 August 2022, DBL seeks leave to amend its originating process so as to insert a new paragraph 4A, which reads:

> An order under the common law or under [sch 2] s 90-15(1) of the [*Corporations Act*] that the State pay to DBL an amount equal to the value of the storage and other services provided by DBL with respect to the Goods in the period commencing on 24 March 2020 (the date that the disclaimer became effective) or 15 April 2020 (the date of service of this proceeding on the date) or such other date as the court may determine, and ending on 16 December 2021.

16 DBL submits that the Court has power to grant the leave sought, pursuant to the broad powers invested in the Court under s 47 of the *Civil Procedure Act 2010* (Vic) ('the *CPA*'). DBL proposes that granting such leave is a proper exercise of that power, as the resolution of the claim for payment under common law or under sch 2 s 90-15 of the *Corporations Act* in the current proceeding will facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute (within the meaning of s 7 of the *CPA*).

17 The State opposes the application, primarily on the basis that the Court has no power because it is *functus officio* by reason of the making of the 16 December 2021 Orders. In the alternative, the State submits that the application should be refused on discretionary grounds.

18 DBL submits that the Court has not determined the question of whether the State is liable under the common law or under sch 2 s 90-15 of the *Corporations Act* to pay DBL an amount equal to the value of the storage and other services provided by DBL with respect to the goods from the date that the disclaimer became effective (or the date of service of the proceeding) until 16 December 2021. DBL argues that such relief is supplemental to, or builds upon, the 16 December 2021 Orders, but was not determined by those orders.

19 Secondly, DBL argues that the 16 December 2021 Orders expressly left open the possibility of DBL applying for the relief it now seeks in this proceeding, emphasising the stay contained in order 5 and the reservation of liberty to apply in order 7.

Relatedly, DBL emphasises the wording of the notation in 'Other Matters', which reads:

> The stay on the operation of paragraph 2 of the orders is without prejudice to the plaintiff's ability to make such application as it may be advised for an order that the third defendant pay to the plaintiff mesne profits or some other form of payment in respect of the storage of the Goods at the plaintiff's premises as from the date of this order, or for such other period as the plaintiff may be advised.

20 DBL therefore argues that the Court is not *functus officio,* because the present application does not offend the principle of finality, which motivates the *functus officio* doctrine. It argues that the doctrine does not have the effect of precluding the determination of supplemental matters which do not involve any revisitation of matters previously decided.

21 DBL invokes s 47 of the *CPA* as a source of statutory power. Section 47 appears in pt 4.2 of the *CPA* headed 'Case Management', and reads:

> **47 Judicial powers of case management--overarching purpose and active case management**
>
> (1) Without limiting any other power of a court, for the purposes of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose, the court may give any direction or make any order it considers appropriate, including any directions given or orders made—
>
> (a) in the interests of the administration of justice; or
>
> (b) in the public interest.
>
> (2) A direction given or an order made under subsection (1) may include, but is not limited to, imposing any reasonable limits, restrictions or conditions in respect of—
>
> (a) the management and conduct of any aspect of a civil proceeding; or
>
> (b) the conduct of any party.
>
> (3) Without limiting subsection (1) or (2), a court may actively case manage civil proceedings by—
>
> (a) giving directions to ensure that the civil proceeding is conducted promptly and efficiently;
>
> …

(g) considering whether the likely benefits of taking a particular step in a civil proceeding justify the cost of taking it.

22 Section 47 makes express reference to the 'overarching purpose' set out in s 7(1) of the *CPA*, which in turn provides that the overarching purpose of the *CPA* and its rules is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.

23 Section 8 of the *CPA* requires the Court to give effect to the overarching purpose in the exercise of any of its powers or in the interpretation of those powers, whether they are part of the Court's inherent, implied or statutory jurisdictions.

24 DBL argues that s 47 should be read in conjunction with ord 36.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), which relevantly provides in paragraph 1(a):

> (1) For the purpose of—
>
> (a) determining the real question in controversy between the parties to any proceeding; or
>
> …
>
> (c) avoiding multiplicity of proceedings—
>
> the Court may, at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.

25 DBL submits that the power in s 47 of the *CPA* is broadly expressed, and being a statutory provision which invests power in the Court, should be construed liberally. It draws attention to the recent statement of approval of the appropriateness of a liberal and purposive approach to construction of such powers by the Court of Appeal of this Court in *Parker v Auswild*,[5] where the Court of Appeal referred (with approval) to the observation of Gaudron J in *Knight v FP Special Assets Ltd*,[6] which was also applied in *Mansfield v Director of Public Prosecutions for Western Australia*:[7]

> It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant.

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5 (2022) 403 ALR 111, 141 [134].

6 (1992) 174 CLR 178, 205.

7 (2006) 226 CLR 486, 492 [10] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ) (citations omitted).

> Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse.

26 Recognition of the need to exercise such powers judicially and in accordance with legal principle compels analysis of DBL's submissions to be measured against the long standing principle that a court is *functus officio* once final orders are made disposing of a proceeding.

27 In *Bailey v Marinoff,*[8] Barwick CJ stated the following:[9]

> Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any *specific and relevant statutory provision* is at an end in that court and is in its substance, in my opinion, beyond recall by that court.

28 The principle referred to by the Chief Justice was subsequently endorsed by French CJ, Crennan, Kiefel and Bell JJ in *Achurch v The Queen ('Achurch').*[10] In *Achurch,* the majority summarised the relevant principles as follows:[11]

> Absent specific statutory authority, the power of courts to reopen their proceedings and to vary their orders is constrained by the principle of finality. That principle was stated succinctly in *D'Orta-Ekenaike v Victoria Legal Aid* and re-stated by the plurality in *Burrell v The Queen*:
>
> > A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.
>
> As was said in *Burrell*, the principal qualification to the general tenet of finality is the appellate system. Relevant to the position of the Court of Criminal Appeal of New South Wales, their Honours said:
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> > But in courts other than the court of final resort, the tenet also finds reflection in the restrictions upon reopening of final orders after they have been formally recorded.

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8 (1971) 125 CLR 529.
9 Ibid, 530 (emphasis added).
10 (2014) 253 CLR 141.
11 Ibid 152-4 [14]-[15], [17] (citations omitted).

> The principle protects parties to litigation from attempts to re-agitate what has been decided and serves as 'the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time'.
>
> …
>
> Consistently with the principle of finality, courts may correct their errors before their orders are formally recorded.
>
> …
>
> Subject to express provision to the contrary, the power [to do so] subsists up to but not beyond the point at which judgment is entered. As Barwick CJ observed in *Bailey v Marinoff*:
>
> > Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance … beyond recall by that court.
>
> The rationale for the limiting requirement, that the order to be corrected has not been perfected, is that it provides 'a readily ascertainable and easily applied criterion'. It also 'marks the end of the litigation in that court, and provides conclusive certainty about what was the end result in that court'.

29 In *Achurch,* following a successful appeal by the Crown, the Court of Criminal Appeal of the Supreme Court of New South Wales resentenced Mr Achurch to 18 years imprisonment, with a non-parole period of 13 years. In its resentencing, the Court of Criminal Appeal had followed an approach later held to be incorrect by the High Court.

30 Mr Achurch then applied to the Court of Criminal Appeal (and later was granted special leave to appeal to the High Court of Australia) for the Crown appeal to be reopened, pursuant to s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the *Sentencing Act'*). Section 43 appears in a part of the *Sentencing Act* entitled 'Correction and Adjustment of Sentences'. Section 43(2) provides that the court may reopen proceedings in certain circumstances, and if necessary, amend any relevant conviction or order. The essential question before the High Court was whether the specific statutory authority given in s 43 extended to the reopening of proceedings in which a sentence open at law was reached by a process of reasoning invoking an error of law.

31 The relevance of *Achurch* for present purposes is not simply its restatement of the constraint imposed by the principle of finality on the power of courts to reopen

proceedings and vary orders absent specific statutory authority, but rather, the illustrative effect of s 43(2) of the *Sentencing Act* as an instance of the specific statutory authority which permits reopening and the variation of earlier orders. In fact, the majority in *Achurch* held that, in the particular circumstances, s 43(2) did not permit revisitation by the Court of Criminal Appeal of its earlier orders.

32 Consideration of DBL's application requires identification of that which was determined by the 16 December 2021 Orders. That enquiry starts with the relief sought by DBL in the proceeding, as set out in its amended originating process. Paragraphs 1 and 2 did not affect the State and had, in any event, been the subject of the consent dismissal of 30 August 2021.[12] They can be put to one side. The claims against the State which went to judgment were the claims for the relief set out in paragraphs 3 and 4 of the amended originating process. Those claims and the consequential claim for costs in paragraph 5 were determined by paragraphs 1 to 4 of the 16 December 2021 Orders. So too was the claim in paragraph 6 of the amended originating process for the catch all '[s]uch further or other orders as the Court deems appropriate', which was determined by the (otherwise) dismissal order in paragraph 3 of the 16 December 2021 Orders.

33 It is not in issue that the Court retained the power to extend the period of the stay on execution of the removal order contained in paragraph 2 of the 16 December 2021 Orders; so much is obvious from the reference in paragraph 5 to 'or such further period as ordered by the Court'.

34 The stay on order 2 was granted after the State had filed evidence in advance of the hearing convened on 16 December 2021 which demonstrated it would take some time for the IBCs to be safely removed from DBL's premises. As a result, at the hearing on 16 December 2021, the State submitted that the appropriate form of removal order was that the IBCs be removed as soon as practicable, and submitted that an order for removal forthwith would place the State in breach of the order, despite its best efforts to remove the IBCs. DBL pressed for an order that the IBCs be removed forthwith,

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12 See above [9].

arguing that it had sought such an order in its amended originating process and making the entirely understandable point that it should not bear the burden of that order being stayed for an indeterminate period, while the State made arrangements for the IBCs to be removed. Because of the uncertainty and potential for disputation in an order for removal 'as soon as practicable', the Court suggested an order that the IBCs be removed forthwith, but that execution of such order be stayed for a certain period, with provisions for further extension and a reservation of liberty to apply.

35 Accordingly, an order on the above terms was made. The reservation of liberty to apply was capable of invocation for the entirely uncontroversial purpose of enabling the Court's continued supervision of orders made.

36 In *Abigroup Ltd v Abignano*, the Full Court of the Federal Court of Australia explained the purpose of liberty to apply:[13]

> The reservation of liberty to all parties to apply to a court is a provision directed essentially to questions of machinery which may arise from the implementation of a court's orders. They include cases where a court may need to supervise the enforcement of orders after they have been made.

37 DBL submits that the reservation of liberty is capable of wider application, relying on *Patterson v Humfrey (No 2)*, where Le Miere J made the following observations:[14]

> Five relevant principles may be discerned from the authorities to which I have referred. First, liberty to apply is a judicial device which enables the court to supplement the main orders. Secondly, main orders may be supplemented but not to vary or change the nature or substance of the main orders. Thirdly, what amounts to a variation or impermissible change depends on the context of the individual case. What amounts to an order which supplements the main orders can only be appreciated in the context of the individual case. What appears in form to be a further order to give effect to the original order in one case may appear as a variation in a different context. Fourthly, the court may determine any unresolved rights that flow from the making of the main orders. Fifthly, the court may make consequential orders when new facts and circumstances emerge after the making of the main orders.

38 DBL submits that the claim which it now seeks to bring is a supplemental issue, arising from the Court's determination of the principal issues in dispute. It submits the new

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13 (1992) 39 FCR 74, 88.

14 [2016] WASC 343, [16]. Cited with approval in *Porter Street Investments Pty Ltd v Nellbar Pty Ltd* [2022] WASCA 33, [139].

claim involves no more than the Court determining DBL's 'unresolved rights' and does not infringe the finality principle, because it does not require the Court to re-visit or re-determine matters already determined.

39 Whilst it is true that the Court did not determine the new claim, that was because the claim had not been brought at the time of the 16 December 2021 Orders. Whilst it is also true that the entitlement to moneys by way of restitution or compensation for the storage services provided was dependent on DBL succeeding in either its *bona vacantia* claim or its s 568F(1)(b) of the *Corporations Act* claim, I do not accept that a claim which is not advanced but which is dependent on the successful prosecution of a claim that is brought, is a claim for supplementary orders in the sense that phrase was used in *Patterson v Humfrey (No 2)*.[15]

40 The final orders in that case were for the purchase of shares in a company by the defendants from the plaintiffs or, failing that, for the plaintiffs to purchase shares from the defendants. The orders further provided for the sum to be paid for the shares to be the 'Purchase Price', being 50% of the value of the total shares issued by the company, less various identified set offs ('the Set Off Purchase Price'). Orders were made appointing a date for settling, at a venue and time to be agreed, with cleared funds to be provided at settlement in exchange for executed share transfers, free of encumbrance or charge. Liberty to apply was reserved 'for further or other directions to give the effect to these orders as may be appropriate'. Costs were also reserved.

41 The plaintiffs later sought an order for their costs of the proceeding. It was accepted by the defendants in broad terms that such an order would be made. The plaintiffs then sought a supplemental order that, pending assessment of their costs, part of the purchase price payable by them at settlement for the shares be paid into the Court (or a joint interest bearing account). The Court made the order, rejecting the defendants' argument that the Court was *functus officio* and that the order was contrary to the existing orders, which set out a prescribed payment and settlement regime. The Court concluded that the existing orders did not expressly provide for payment of a specific

15 [2016] WASC 343.

amount or that the defendants were immediately entitled to receive and deal with the Set Off Purchase Price, and that the thrust of the orders was to provide that the plaintiffs were to pay for the defendants' shares. In that context, the Court concluded that the order sought was a supplementary or consequential order, to provide that at settlement the plaintiff were to pay the purchase price into an escrow account.

42 As Le Miere J's summary of the authorities noted, what amounts to a supplemental order or an impermissible change or variation depends on the context of the individual case.

43 In the context of the present case, the further order sought is not merely supplemental in the relevant sense; it is directly contrary to the dismissal order in paragraph 3 of the 16 December 2021 Orders. The reservation of liberty to apply for the purpose of facilitating the extension of the stay does not permit the implicit putting to one side of the dismissal order and facilitate the bringing of a new claim, albeit one which 'piggy backs' on the success obtained to date. The deployment of liberty to apply for that purpose alters the substance of the orders made which, relevantly, contained the declaration and the order for the removal of the IBCs but critically otherwise dismissed the proceeding.

44 As Bleby JA (with whom Kelly P and Doyle JA agreed) explained in *Eckert v Roberts*:[16]

> [L]iberty to apply cannot be deployed to obtain an order that alters the substance of a final order. Even more starkly, it cannot be used to devise what is properly characterised as a separate claim from that which engaged the jurisdiction of the court…
>
> … [T]he essence of the power … is to make any orders necessary to address any issues arising on account of the final orders determining the claim and which therefore remain within the court's jurisdiction so engaged.

45 DBL's argument also relies on the notation under the heading 'Other Matters' in the recitals to the 16 December 2021 Orders, which reads:

> The stay on the operation of paragraph 2 of the orders is without prejudice to the plaintiff's ability to make such application as it may be advised for an order that the third defendant pay to the plaintiff mesne profits or some other form

16 [2021] SASCA 73, [49]-[50] (citations omitted).

> of payment in respect of the storage of the Goods at the plaintiff's premises as from the date of this order, or for such other period as the plaintiff may be advised.

46 The notation was incorporated by the Court in the circumstances of the discussion which preceded the making of the 16 December 2021 Orders. It concerned the need to balance the entitlement of DBL (as the successful party) to the relief it sought and its commercial interest in being paid for the storage against the practical reality that, despite the best efforts of the State, the IBCs and their contents were not able to be removed for some time. After the State communicated its acceptance to a regime which provided that the IBCs would be removed forthwith but execution stayed, counsel for DBL said such an arrangement would be 'workable from the plaintiff's perspective so long as it didn't infringe on the plaintiff's entitlement to seek compensation for the ongoing loss of that space'.

47 Against that background, two things may be said about the notation and its relationship with the removal order and the stay. First, the regime was successful, in that the IBCs were removed within a time frame acceptable to DBL, and the State and DBL agreed on the storage fees to be paid during the period between 16 December 2021 and removal. Secondly, it has proven problematic, in that the inclusion of the concluding words 'or for such other period as the plaintiff may be advised' has proven infelicitous, contributing to the present impasse.

48 However that may be, it does not assist DBL. There is a distinction between notations that appear in 'Other Matters' and orders. Unlike an order, a notation is not amenable to appeal.[17] Whilst notations may be used to give context to the orders made, they do not take the place of, and nor can they be seen as, orders.[18] As such, whatever interpretation is to be given to the notation – and the State submits that it did no more than provide for the stay to be extended, or not, as the case may be – does not matter.

49 The critical question of identifying the power retained by the Court, post the making of the 16 December 2021 Orders, is determined by analysis of the orders made against

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17 *Dautry v Wemple (No 2)* [2015] FamCAFC 248, [67].

18 *Meadows v Meadows (No 5)* [2021] FamCAFC 42, [35].

the background of the relief then sought in the amended originating process, not by the notation. In that context, the 16 December 2021 Orders disposed of the proceeding, save for the limited sense preserved by the reservation of liberty to apply so as to extend the stay. The dismissal order confirmed that no component of the relief sought by DBL remained within the Court's purview.

50 DBL submits that s 47 should be construed so as to give effect to, or be consistent with, the overarching purpose of the *CPA*, which is the just, efficient, timely and cost-effective resolution of the real issues in dispute. Such a proposition may be uncontroversial; what is more controversial is whether a construction of s 47 that amounts to a conferral of a power on the Court to revisit its own orders once perfected is facultative of the just, efficient, timely and cost-effective resolution of the real issues in dispute.

51 In oral submissions, DBL argued that s 47 of the *CPA* would give the Court power to now allow the amendment relief sought, even if the 16 December 2021 Orders were limited to the declaration in paragraph 1, the order for removal of the goods in paragraph 2 and the dismissal of the proceeding in paragraph 3.[19] Thus, DBL submits that it would still be open to it to bring the application for amendment, even in circumstances where the orders were not affected by the debate arising from the reservation of liberty to apply and the notation in 'Other Matters'. Given my conclusion as to those matters, this is the position which DBL's application now confronts. DBL's application therefore rests on acceptance of the proposition that s 47 of the *CPA* operates so as to confer power on a court to revisit final orders, notwithstanding that a court would be otherwise *functus officio*.

52 In my view, s 47 does not have such broad application. First, the proper construction of s 47 must take place against the background of the principle of finality. In *Achurch*, the majority noted:[20]

> The principle of finality forms part of the common law background against which any statutory provision conferring power upon a court to reopen

19 See above [8], [11].
20 *Achurch* (n 10) 153 [16].

> concluded proceedings is to be considered. It is a principle which may inform the construction of the provision.

53 Secondly, that background recognises that, once disposed of, the proceeding is beyond the recall of a court, 'apart from any specific and relevant statutory provision'.[21] Section 43(2) of the *Sentencing Act*, considered in *Achurch*, is an example of such a provision which recognises an express capacity to revisit earlier orders. In contrast, s 47 of the *CPA* is a wide ranging, broad provision, which confers wide powers of case management on a court. Far from conferring a power otherwise lacking, its very operation is premised upon the fact that the Court has jurisdiction over a subsisting dispute, and the section confers a range of powers capable of being used in the Court's discretion. Like Croft J in *PCCEF Pty Ltd v Geelong Football Club Ltd*,[22] I do not accept that the *CPA* has the 'radical effect of conferring [a power] on this Court … after the making of final [o]rders'.[23] Although his Honour was considering s 49 of the *CPA*, not s 47, in my view, the same analysis applies here. Both sections appear in pt 4.2 of the *CPA* headed 'Case Management', and both call to be construed in the context of a settled principle that a court cannot revisit its orders once perfected, absent limited circumstances not present in the current circumstances.

54 Accordingly, the Court has no power either preserved by the 16 December 2021 Orders or arising under s 47 of the *CPA* to grant DBL the amendment relief it seeks.

55 Both parties also made detailed submissions as to the proper exercise of power, in the event that it is established that the Court has power. As part of its submissions, DBL accepted that it would not be an appropriate exercise of power to allow the amendment if a court would stay any new proceeding issued on abuse of process grounds. Its evidence condescended to the reasons why it had not advanced the new claim any earlier. Whilst DBL accepted that the new claim could have been advanced in the present proceeding, prior to the 16 December 2021 Orders and in anticipation of DBL's success, the general burden of its submission is to the effect that the mere fact that the new claim could have been brought in the current proceeding is manifestly

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21 *Bailey v Marinoff* (1971) 125 CLR 529, 530.
22 [2018] VSC 258.
23 Ibid 11 [13].

inadequate to invoke abuse of justice principles.

56 I do not propose to deal with this aspect of the argument. First, it is unnecessary given my conclusion as to the absence of power to grant the amendment relief sought. Secondly, it remains open to DBL to commence a new proceeding if so minded. In that event, the State may, if so advised, apply for a stay on abuse of process grounds.

57 Whilst the commencement of a new proceeding puts DBL to the added expense of preparing new initiating documentation and the incurrence of a filing fee, ostensibly, the elements of such claim ought to be straightforward.[24] If the State then seeks a stay of that proceeding on abuse of process grounds, the merits or otherwise of that contention is to be properly determined in that proceeding and will not be materially assisted by *obiter* surplus to the disposition of the present application.

58 The only matter that needs to be decided in this proceeding is whether the Court has power to grant DBL the leave that it now seeks. It does not. DBL's application will be dismissed accordingly.

59 Notwithstanding that the 16 December 2021 Orders provided for the dismissal of the proceeding, the State seeks a further order, for the avoidance of doubt, that the proceeding be dismissed.

60 I doubt this is necessary or appropriate. The proceeding has already been dismissed. A second order dismissing the proceeding is not required. The parties have the benefit of these reasons. The only order that needs to be made is for the dismissal of DBL's application by summons filed 22 August 2022. My tentative view is that DBL should pay the State's standard costs of and incidental to the application. If either party wishes to be heard as to any contrary orders, they should notify my chambers within 72 hours of the handing down of these reasons. Otherwise, orders will be made in the form foreshadowed.

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[24] In terms of the essential proofs necessary for the claim. The merit or otherwise is a different question.

CERTIFICATE

I certify that this and the 16 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 30 September 2022.

DATED this thirtieth day of September 2022.

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Associate

SCHEDULE OF PARTIES

S ECI 2020 01699

DAVID BARRY LOGISTICS PTY LTD (ACN 121 644 460)	PLAINTIFF
AND	
GEOFFREY TRENT HANCOCK IN HIS CAPACITY AS LIQUIDATOR OF BRADBURY INDUSTRIAL SERVICES PTY LTD (IN LIQUIDATION) (ACN 121 279 847)	FIRST DEFENDANT
AND	
BRADBURY INDUSTRIAL SERVICES PTY LTD (IN LIQUIDATION) (ACN 121 279 847)	SECOND DEFENDANT
AND	
THE STATE OF VICTORIA	THIRD DEFENDANT