Costs – s. 85A and procedural steps

Akiba on behalf of the Torres Strait Regional Sea Claim Group v Queensland [2010] FCA 321

Greenwood J, 1 April 2010

Issue

The issue before the Federal Court was whether the Torres Strait Regional Authority (TSRA) was entitled to costs associated with complying with a subpoena and in respect of a notice of motion (NOM) it made in response to the subpoena. This, in turn, raised a question as to whether s. 85A of the *Native Title Act 1993* (Cwlth) (NTA) applied, which provides that, unless the court orders otherwise, each party to a proceeding must bear its own costs. It was found that s. 85A is 'very likely' to apply to a procedural step that is 'necessarily interconnected with the ventilation of a party's interest' in a s. 61 application, e.g. a claimant application—at [59].

Background

A claimant application made on behalf of the Torres Strait Regional Sea Claim Group (the Torres Strait Regional Seas Claim) was filed in 2001. The TSRA is a respondent and the solicitor on the record for the applicant. A joinder motion was brought by Pende Gamogab on behalf of the Dangaloub-Gizra Group at Kurpere village (also known as Kupiru) in Papua New Guinea. Mr Gamogab was eventually joined as a respondent in November 2007.

In May 2008, the applicant filed a draft statement by anthropologist Dr Kevin Murphy in support of the claims which made reference to a report by Dr Murphy about:

> [V]arious claims and counterclaims that were being put forward by Papua New Guineans of a number of Western Province villages for inclusion in the category of "traditional inhabitants" for the purpose of the administration of the Torres Strait Treaty.

A subpoena for that report was issued at Mr Gamogab's request in October 2008. TSRA objected to the subpoena and later filed the NOM to set it aside on grounds of relevance. In November 2008, the Commonwealth (a respondent to the Torres Strait Regional Seas Claim) advised the court of a potential claim of public interest immunity in relation to the report. TSRA's NOM was set down for hearing on 15 January 2009 before Justice Greenwood. On 9 January 2009, Mr Gamogab obtained a copy of the report from the PNG government with no restrictions on its use. The day before the hearing, Mr Gamogab informed the parties he would no longer 'pursue' the subpoena. At the hearing, the court was informed of these events. The parties agreed there was no point in proceeding, save as to costs. The TSRA and Mr Gamogab agreed this could be determined on the papers. The other respondents withdrew.

Section 85A NTA applied

The threshold question was whether s. 85A applied to these proceedings, i.e. the subpoena and the NOM. The Torres Strait Regional Seas Claim is an application for a determination of native title made pursuant to s. 13 under s. 61(1), which is found in Part 3 of the NTA. Part 4 of the NTA, which contains s. 85A, deals with 'processing ... applications, and making of determinations, relating to native title', as noted in the overview of Part 4 given in s. 79A. According to s. 80, the provisions of Part 4 apply 'in proceedings in relation to applications filed in the Federal Court that relate to native title'. Section 81, also found in Part 4, confers 'exclusive jurisdiction' on the court to hear and determine applications that 'relate to native title'.

His Honour observed that, while it was plain that s. 85A applied to a claimant application and any appeal (because such an application is within the exclusive jurisdiction conferred by s. 81), such an application is 'framed' by litigation. Events such as an order for the production of documents by way of subpoena 'represent procedural *steps*, between the parties ... , *along the way* to a judicial determination of the justiciable controversy' which was, in this case, the application under s. 61(1) for a determination of native title—at [43], emphasis in original.

Part 3 also contains Div 1A, which provides for the making of other kinds of application to the court. Under s. 69(2), 'any other application ... in relation to a matter arising under' the NTA may be made to the court. The language of s. 69(2) reflects s. 213(2), which provides that (subject to the NTA) the court 'has jurisdiction in relation to matters arising under' the NTA. This is the conferral of 'subject matter jurisdiction' which 'is not conferred exclusively'. As his Honour noted, an application under s. 69(2) is not a native title determination application made under s. 61(1)—at [40].

In *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 (*Lardil)*, it was found that s. 85A did not apply. Greenwood J distinguished that case on the basis that:

- it concerned a 'matter arising' under the future act provisions of the NTA and so fell within the subject matter jurisdiction conferred by s. 213(2); and
- in this case, both the subpoena and the NOM were 'matters arising' under the *Federal Court of Australia Act* 1976 (Cwlth) and the Federal Court Rules (FCR) and, therefore, s. 213(2) was not relevant—at [46], [48] to [53].

On the face of it, what Mr Gamogab sought was access to a document to have determined (within the limits imposed on him by the court) the interest he seeks to 'ventilate as a respondent in the s. 61 application exclusively vested' in the court. Greenwood J found that:

> If the application [concerned] involves a procedural step necessarily interconnected with the ventilation of a party's interest in a s 61 proceeding where the addressee is a participant in the proceeding, ... s 85A is very likely to apply and, in the case of the subpoena Mr Gamogab caused to be issued and the challenge to it, s 85A does apply—at [59].

Operation of s. 85A

Among other things, it was noted that:

- section 85A removes any ground of expectation that unless cause is shown, costs will usually follow the event;
- the discretion available under s 85A to award costs is not confined but is to be exercised judicially;
- the starting point in s. 85A(1) is that each party 'must bear his or her own costs' unless the court determines it is appropriate in all the circumstances to make an order for costs;
- one express basis upon which a party may be ordered to bear costs is that the party has engaged in unreasonable conduct as mentioned in s. 85A(2)—at [61], referring to *Ward v Western Australia (No 2)* (1999) 93 FCR 305 and *Davidson v Fesl (No 2)* [2005] FCAFC 274.

Conclusions on the facts

Justice Greenwood's conclusion on the material and submissions filed by the parties included that:

- a conclusion was open that Mr Gamogab sought to obtain Dr Murphy's report to aid the articulation of his interest in the claimant application;
- Mr Gamogab knew the report was prepared for both the governments of Australia and Papua New Guinea and the reason for its preparation;
- he also knew it was likely to address sensitive questions of treaty inclusion and that, in all probability, it was confidential and would raise questions of public interest immunity;
- the TSRA, as (among other things) a representative body under the NTA, is a 'mezzanine' party rather than a non-party, i.e. it assumes a position between a party agitating its own interest and that of a non-party;
- Dr Murphy's report, commissioned by the TSRA for the governments of Australia and PNG, was directed to treaty questions, not to facts or issues in controversy in the claimant application, notwithstanding that research discussed in the report may have been relevant to that application—at [70] to [82].

Costs where no hearing on the merits

The TSRA submitted that Mr Gamogab acted unreasonably and so caused the TSRA to incur costs within s. 85A(2) in relation to the NOM. Greenwood J considered at length the principles that apply in relation to costs when there is no hearing on the merits—at [83] to [96].

His Honour when on to find that the correct approach was:

- if the parties acted reasonably throughout, there would usually be no order allocating costs because the absence of findings on the merits deprived the court of the 'primary factor informing where the cost burden should lie';
- in rare cases, a judge may feel so confident that one party was almost certain to have succeeded if the matter had been fully heard that a cost order would be justified, even where both parties acted reasonably;
- however, these principles had to be considered within the framework of s. 85A;

- where the statute selects as a starting point such as s. 85A(1), even one subject to an unconfined judicial discretion, findings of fact on the merits after a hearing are 'critical in the exercise of a discretion in moving the parties from the statutory starting point to some other position, taking account of all the circumstances of the case;
- in such circumstances, the exercise of the discretion to displace the statutory starting point is made even more difficult—at [97] to [100].

It was found that, in the absence of a hearing on the merits, for the purposes of s. 85A the court 'must be satisfied that the conduct of a party was so unreasonable that the other party should obtain the costs of the action'. As was noted:

> [I]n the absence of a hearing, the material may show that a judge can be confident that one party was almost certain to have succeeded ... . However, in the context of s 85A ... , if one party is shown, on the material, to be so likely to succeed even without a hearing as to the merits, the conduct of the other party in contesting the proceeding is very likely to bear the description of conduct so unreasonable that the other party should obtain the costs of the action—at [101].

This led the court to conclude there was no basis for making an order as to costs in relation to the TSRA's NOM to set aside the subpoena—at [102].

Compliance costs

This final issue was whether the TSRA was entitled to an order that Mr Gamogab pay costs incurred by the TSRA in complying with the subpoena. Order 27, subrule 11(1) of the FCR provides that the court may 'order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena'. Among other things, the TSRA argued that it should be considered a non-party in the circumstances in order to 'invoke the principle that a non-party is entitled to its solicitor and client expenses reasonably incurred in relation to the subpoena'. However, his Honour had already determined that, because it performs 'an engaged statutory role as a skilled addressee of the issues inherent in the determination of the s. 61, the TSRA is a 'mezzanine' party rather than a non-party—at [80] to [81], [106] and [111].

Greenwood J concluded that:

> [T]he TSRA acted reasonably in taking steps to determine its compliance position and its obligations in relation to the report especially having regard to the circumstances in which it was commissioned [by the TSRA] and the purpose for which it was obtained. The question of public interest immunity became a matter of particular focus having regard to those circumstances—at [113].

These expenses incurred in taking those steps were found, in fact, to be 'legal costs ... necessarily incurred' and, therefore 'costs of and incidental to the subpoena'. On the face of it, they fell within s. 85A and, therefore, it might be thought no order as to costs should be made. However, in this case Greenwood J thought it appropriate to 'order otherwise', as contemplated by s. 85A(1), because:

- the TSRA was 'necessarily required' to examine its obligations in relation to Dr Murphy's report, which raised quite separate issues of sovereign immunity and thus public interest immunity;
- the TSRA 'ought not to be put to expense (including legal expenses) in addressing that matter at the hands of the issuing party'—at [115] to [116].

If any of the expenses his Honour identified 'do not fall within the characterisation of costs' for the purposes of s. 85A(1), then it was found that they would fall within O 27, r 11(1) of the FCR—at [117].

Decision

The court decided to make orders that:

- the TSRA be excused from further compliance with the subpoena;
- Mr Gamogab pay the reasonable expenses incurred by the TSRA in taking steps to comply with the subpoena; and
- the TSRA's NOM be dismissed with no order as to costs.