FEDERAL COURT OF AUSTRALIA

Alvoen on behalf of the Wakaman People #5 v State of Queensland (No 2) [2020] FCA 960

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| File numbers: | QUD 178 of 2018  QUD 728 of 2017  QUD 746 of 2015  QUD 143 of 2015  QUD 350 of 2017  QUD 351 of 2017 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 9 July 2020 |
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| Catchwords: | **NATIVE TITLE** – where order sought by applicant for presence of legal practitioner in room while applicant’s witness gives evidence by Microsoft Teams – impending preservation of evidence hearing – where witness elderly and of ill-health – where location for giving evidence remote – where necessary for evidence to be given remotely in context of COVID-19 public health environment – where presence of legal practitioner to assist witness with technology – unreasonable objection to presence of legal practitioners by some respondent parties – ethical obligations of legal practitioners to the Court – s 85A *Native Title Act 1993* (Cth) – costs awarded |
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| Legislation: | *Australian Solicitors Conduct Rules 2012* rr 24, 26  *Federal Court of Australia Act 1976* (Cth) s 37N, 43  *Native Title Act 1993* (Cth) s 85A |
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| Cases cited: | *Davidson v Fesl (No 2)* [2005] FCAFC 274  *De Rose v South Australia* [2005] FCAFC 137  *Oil Basins Ltd v Watson* [2014] FCAFC 154  *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11  *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; [2001] FCA 1865  *Tullock v State of Western Australia* [2010] FCA 351  *Ward v State of Western Australia* (1999) 93 FCR 305; [1999] FCA 580 |
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| Date of hearing: | 8 July 2020 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Native Title |
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| Category: | Catchwords |
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| Number of paragraphs: | 25 |
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| **The mention of the interlocutory application** |  |
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| Counsel for the Applicant: | Mr D O’Gorman SC |
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| Solicitor for the Applicant: | North Queensland Land Council |
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| Counsel for the First Respondent: | Ms M Barnes |
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| Solicitor for the First Respondent: | Crown Law |
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| Counsel for various respondents (2R, 3R, 11R, 12R, 17R, 18R, 20R, 21R, 22R, 23R, 24R and 25R) and interested persons: | Mr D Kempton |
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| Solicitor for various respondents (2R, 3R, 11R, 12R, 17R, 18R, 20R, 21R, 22R, 23R, 24R and 25R) and interested persons: | Preston Law |
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| Solicitor for various respondents (9R, 10R, 13R, 14R and 19R): | The various Respondents did not appear |
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ORDERS

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|  | | QUD 178 of 2018  QUD 728 of 2017  QUD 746 of 2015  QUD 143 of 2015  QUD 350 of 2017  QUD 351 of 2017 |
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| BETWEEN: | JOHN ALVOEN & ORS ON BEHALF OF THE WAKAMAN PEOPLE #5  Applicant | |
| AND: | STATE OF QUEENSLAND  Respondent | |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 8 JULY 2020 |

THE COURT ORDERS THAT:

1. Order 20 made on 13 May 2020 be amended to read:

“William Thomas will give his evidence using video-conference facilities provided to him in Kowanyama by North Queensland Land Council and may have a North Queensland Land Council solicitor and other staff member in attendance whilst he gives his evidence.”

1. Pursuant to section 85A(2) of the *Native Title Act 1993* (Cth), GAG Crystalbrook Station Pty Ltd, Mareeba Shire Council, Tablelands Regional Council, Robert O'Shea, Mark Porter, Michael Porter, Philip Porter, Uwoykand Tribal Aboriginal Corporation, White River Resources Pty Ltd, Penny McClymont, Rex McClymont, John Foote, Janelle Foote, James O’Shea, Janelle O’Shea, Lance O’Shea, Bradley O’Shea and Emma O’Shea pay the applicant’s costs of and incidental to the case management hearing of 8 July 2020, such costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1. Yesterday morning the applicant, the State, and the parties represented by Mr David Kempton appeared at a case management hearing listed urgently by me in these proceedings. The case management hearing was listed in circumstances where, on 7 July 2020, the applicant had filed an interlocutory application seeking the following order:

1. Order 20 made on 13 May 2020 be amended to:

“*William Thomas will give his evidence using video-conference facilities provided to him in Kowanyama by North Queensland Land Council and may have a North Queensland Land Council solicitor and other staff member in attendance whilst he gives his evidence*.”

1. After hearing the parties at the case management hearing, I made an order in the terms sought by the applicant in its interlocutory application. Following application by Mr O’Gorman SC for the applicant, I also ordered costs referable to the case management hearing in favour of the applicant against the clients on whose behalf Mr Kempton acted, pursuant to s 85A(2) of the *Native Title Act 1993* (Cth) (**Native Title Act**).
2. It is appropriate to publish reasons for those orders.
3. The urgency in listing the case management hearing was, in summary, for the following reasons.
4. The proceedings are currently listed on Monday, 13 July 2020 and Wednesday, 15 July 2020 via Microsoft Teams for the preservation of the evidence of Mr William Thomas, a member of the claim group.
5. On 13 May 2020, I made orders including the following:

19. The Preservation Evidence Hearing is to be a virtual hearing using Microsoft Teams remote access technology and will otherwise comply with the Court’s “National Practitioners/Litigants Guide to Virtual Hearings and Microsoft Teams” procedure.

20. William Thomas will give his evidence using video-conference facilities at the Kowanyama Aboriginal Shire Council and may have up to two (2) support persons in attendance whilst he gives evidence.

1. In his first unsworn affidavit filed on 7 July 2020, Mr Christopher Harriss (a legal officer employed by the North Queensland Land Council Native Title Representative Body (**NQLC**) with the day to day carriage of these proceedings for the applicant), deposed that he was informed that, whilst Kowanyama Aboriginal Shire Council (**Council**) could arrange a Telstra videoconference for up to 20 people, such an arrangement would not comply with Order 19 of the Orders of 13 May 2020. Further, Mr Harriss deposed (in summary) that:

* To his knowledge, the Council did not have a spare computer or laptop for use by Mr Thomas to give evidence on 13 and 15 July 2020 in compliance with the Orders of the Court;
* He proposed driving from Cairns to Kowanyama with an NQLC laptop installed with Microsoft Teams in order for Mr Thomas to give evidence by Microsoft Teams on 13 and 15 July 2020;
* For reasons of occupational health and safety, he proposed travelling with another NQLC staff member;
* He was concerned that the provision of evidence by Mr Thomas via an NQLC laptop would not comply with Order 20 as it would not be using the videoconference facilities at the Kowanyama Aboriginal Shire Council;
* Mr Thomas may not be familiar with Microsoft Teams software; and
* He was concerned that he and another NQLC staff member would not be “support persons” within the meaning of Order 20 if they were present whilst Mr Thomas gave evidence.

1. In his second unsworn affidavit also filed on 7 July 2020, Mr Harriss deposed (in summary) that:

* At 4.49 pm on 2 July 2020, he emailed a proposed minute of consent (in the same terms as that sought in the interlocutory application of the applicant) and his first unsworn affidavit to the active respondents in the proceeding and invited them to consent to the proposed orders or reply otherwise;
* At 10.15 am on 3 July 2020, the solicitors acting for the State of Queensland emailed an executed copy of the minute of consent;
* At 9.41 am on 6 July 2020, he emailed the consent orders executed by the applicant and the State with the first unsworn affidavit to all active respondents, noting that no other active respondents had indicated either their consent or why they were not prepared to consent, and sought responses in light of the interlocutory application the applicant sought to file after 3.00 pm that day to amend Order 20;
* At 11.28 am on 6 July 2020, Mr Kempton responded relevantly as follows:

Your original application and supporting affidavit sought to have the preservation of evidence hearing of Mr Thomas in Cairns because the Kowanyama Aboriginal Council did not have a spare laptop.

You are now making an application to have the preservation of evidence hearing in Kowanyama because the Kowanyama Council does not have a spare laptop.

There is no evidence as to why Mr Thomas is unable to travel to Cairns for the purpose of the preservation of evidence hearing as previously ordered.

Never the less, we are instructed to consent to the giving of evidence by Mr Thomas in Kowanyama.

We understood the support persons contemplated by the order related to Mr Thomas’ medical condition and/or his computer skills.

There is nothing in the material that explains the need for North Queensland Land Council solicitor and other staff member in

attendance whilst Mr Thomas gives his evidence.

We do not consent to an order in these terms.

(Errors in original.)

* Mr Harriss responded at 11.52 am on 6 July 2020, relevantly as follows:

Mr Thomas is unable to travel to Cairns for the purpose of the preservation of evidence hearing because the current orders provide it is to occur in Kowanyama. See order 20 attached.

Will you consent to an NQLC staff member who is not a solicitor taking a laptop to Kowanyama so the hearing may proceed?

* Mr Kempton responded at 11.59 am on 6 July 2020, relevantly as follows:

I write on behalf of Crystalbrook Pty Ltd and Mr Kerr’s clients.

We consent to Mr Thomas giving his evidence in Kowanyama.

We have no objection to anyone taking a laptop to Kowanyama for this purpose.

We object to any member of the NQLC being present whilst the evidence is being given.

1. At [7] of his second unsworn affidavit Mr Harriss deposes:

I have today been informed by NQLC Principal Legal Officer Mr Graham O’Dell that he will, of course, abide by his professional rules concerning interacting with witnesses whilst under oath.

1. I understand from this evidence that either or both Mr Harriss and Mr O’Dell will travel to Kowanyama, that there will be at least one lawyer from NQLC in the room present whilst Mr Thomas gives evidence, and that both Mr Harriss and Mr O’Dell are NQLC staff members (such that if they both go, there will be two NQLC lawyers potentially present with Mr Thomas whilst he gives evidence).
2. Yesterday morning when the parties appeared before me, Mr Kempton submitted that his clients continued to object to the course of action proposed by the applicant, and opposed the interlocutory application filed on 7 July 2020. I asked Mr Kempton why his clients objected to the course of action proposed by the applicant and why I should not make an order in the terms sought by the applicant. In summary, Mr Kempton submitted as follows:

* The orders made on 13 May 2020 were made on the basis that Mr Thomas may require some medical assistance or some technical support whilst giving evidence;
* There was no evidence before the Court that Mr Thomas required medical or technical support;
* If technical support were required, a technician could be outside the room wherein Mr Thomas sat;
* His clients did not object to the first part of the order proposed by the applicant;
* His clients objected to the presence of a lawyer in the same room as Mr Thomas whilst Mr Thomas gave evidence because:
  1. Even the presence of a lawyer could have some influence upon the evidence that will be given; and
  2. All types of nuances – “sideways glances”, “raising of the eyebrows”, “nodding heads” – potentially prejudiced Mr Kempton’s clients;
* It was difficult to understand why Mr O’Dell would need to be there;
* Mr Harriss had not addressed the concerns of Mr Kempton or his clients;
* No explanation was given as to why a lawyer should be present in the room to the exclusion of all others;
* Mr Thomas was giving evidence in a closed room, not a Court environment;
* The State had suggested that undertakings could be given, however, the applicant had not responded; and
* No affidavit evidence to justify the order being changed had been given.

1. In respect of the order sought, and the submissions of the parties, I make the following findings.
2. First, the preservation of evidence is currently listed for hearing on 13 and 15 July 2020, less than three business days away. There are clear time pressures currently on the parties and the Court to ensure that Mr Thomas, who will be at Kowanyama on the western coast of Cape York Peninsula next week, and who is an important witness for the applicant, is able to give evidence. It is not in dispute that Mr Thomas is giving evidence in a preservation of evidence hearing because he is elderly, suffers from ill-health, and it is essential that his evidence not be lost by the passage of time. It is undesirable that the giving of his evidence be unnecessarily delayed.
3. Second, it is also clear from the material before the Court that Mr Harriss and/or Mr O’Dell propose to drive from Cairns to Kowanyama – a distance of some 600 kilometres – to deliver a laptop in order for Mr Thomas to give evidence in accordance with the Orders of this Court of 13 May 2020. This course of action appears reasonable, facilitative, and consistent with the obligations of the parties under s 37N of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**).
4. Third, I reject the submission of Mr Kempton that no affidavit evidence has been adduced by the applicant explaining the reason for its proposed course of action. Mr Harriss has deposed that the facilities in Kowanyama do not support the action required by the Orders of 13 May 2020; that Mr Thomas may have difficulty with the Microsoft Teams technology; and, further, that Mr Thomas will be giving evidence via a NQLC laptop. The presence of NQLC staff (be they lawyers or others) to provide Mr Thomas a computer, and to assist him to operate that computer and associated technology seems unremarkable in this context.
5. Fourth, and contrary to submissions by Mr Kempton, it was apparent from submissions from the Bar Table, in particular submissions of Ms Barnes for the State, that there have been communications between the legal representatives for the parties over the past week to endeavour to resolve the present impasse between them concerning the giving of evidence by Mr Thomas. I understand that the interlocutory application filed by the applicant was against a background of those discussions.
6. Fifth, it is not in dispute that both Mr Harriss and Mr O’Dell are legal practitioners in the State of Queensland. In particular, rr 24 and 26 of the *Australian Solicitors Conduct Rules 2012* (**ASCR**) provide, *inter alia*, that a solicitor must not advise or suggest to a witness that false or misleading evidence should be given, nor coach a witness by advising what answers the witness should give to questions which might be asked, nor confer with a witness on any matter related to the proceeding whilst that witness remains under oath and cross-examination. There is no suggestion that either Mr Harriss or Mr O’Dell are unaware of their obligations to the Court imposed by the ASCR, or would act inconsistently with those obligations whilst Mr Thomas is giving evidence. Although I understand there was a suggestion by the State that undertakings be given by Mr Harriss and/or Mr O’Dell to alleviate the concerns of Mr Kempton’s clients, in my view such undertakings would be unnecessary because they would simply supplement already existing obligations of Mr Harriss and Mr O’Dell to the Court as legal practitioners.
7. Sixth, as Ms Barnes for the State clearly – and with respect, sensibly – submitted, any concerns of the Court or any parties concerning the conduct of a NQLC lawyer or lawyers in the room with Mr Thomas whilst he gave evidence could be allayed by requiring all individuals in the room with Mr Thomas to remain visible to the Court during the delivery of oral evidence by Mr Thomas. Mr Kempton’s asserted concerns are curious in circumstances where lawyers for a party are routinely in the same court room whilst evidence is given by that party.
8. Seventh, although the interlocutory application filed on 7 July 2020 by the applicant was listed yesterday for mention rather than hearing, I nonetheless considered it necessary to make the order sought by the applicant in circumstances where:

* The order sought was simple and reasonable;
* The reasons for the order sought were explained by the applicant and had been communicated to all parties;
* The State had no objection to the proposed course of action by the applicant;
* All parties present were given an opportunity to address the Court in respect of the interlocutory order sought;
* No parties who were not present in Court sought any orders referable to the interlocutory application, by electronic communication to Chambers, the Registry, or otherwise;
* There were good reasons to make the order sought, including ensuring compliance with the earlier Orders of this Court; and
* As I have already observed, significant time pressures and the requirements of efficient case management required prompt resolution of the issue by the Court.

1. Finally, s 85A of the Native Title Act provides:

Costs

(1) Unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs.

*Unreasonable conduct*

(2) Without limiting the Court's power to make orders under subsection (1), if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the Court may order the first-mentioned party to pay some or all of those costs.

1. As the Full Court has observed in such cases as *Davidson v Fesl (No 2)* [2005] FCAFC 274 and *Oil Basins Ltd v Watson* [2014] FCAFC 154, s 43 of the Federal Court Act grants an unfettered discretion to the Court to award costs. Ordinarily costs follow the event: *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; [2001] FCA 1865 at [11] and *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11.
2. The language of s 85A of the Native Title Act lies against the application of that ordinary rule, with the starting point – as contemplated by s 85A(1) in respect of applications under the Native Title Act – being that each party bears its own costs. Section 85A(2) permits the Court to order costs in circumstances where a party to a proceeding has, by an unreasonable act or omission, caused another party to incur costs. However, that provision does not limit the Court’s power to make orders under s 85A(1): *Davidson* at [9] and *Oil Basins* at [115], see also *De Rose v South Australia* [2005] FCAFC 137 at [8]-[10]; *Ward v State of Western Australia* (1999) 93 FCR 305; [1999] FCA 580 at [35] and *Tullock v State of Western Australia* [2010] FCA 351 at [23].
3. In this case, I consider that the objection by Mr Kempton on behalf of his clients was without merit, and seemed to serve little, if any, practical purpose other than to impede the progress of this litigation. Mr Kempton, on behalf of his clients, objected to the presence of any NQLC lawyer in the room whilst Mr Thomas gave evidence. However as Mr Kempton and his clients would clearly have been aware from correspondence between the parties (and indeed, generally), that presence was:

* Only to provide technical support to an elderly and ill witness who was likely unfamiliar with the Microsoft Teams technology;
* In a remote location in Australia;
* In the middle of the public health pandemic caused by COVID-19 where it is necessary for witnesses to appear by such remote access technology; and
* In the context of facilitating compliance with Orders of this Court.

1. The objection by Mr Kempton on behalf of his clients was on the basis that the applicant had not “explained the need” for that presence, however that “need” was evident as matter of practical necessity (particularly in light of the acknowledgment by Mr Kempton that his clients understood that the Orders of 13 May 2020 contemplated support persons to assist, at least partly, with Mr Thomas’ computer skills). The objection was obstructive and unreasonable within the meaning of s 85A of the Native Title Act.
2. It is appropriate that the clients on whose behalf Mr Kempton acts bear the applicant’s costs of and incidental to yesterday’s case management hearing, to be taxed if not otherwise agreed.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 9 July 2020