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Subpoenas: the costs of production and opposing production

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Subpoenas: The costs of production and opposing production

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Subpoenas are often an extremely useful way to obtain documents which are not produced through the usual disclosure process under the Rules of the Family Law Courts. For example, subpoenas can be used:

- As an alternative to enforcing disclosure; or
- To obtain documents which are not subject to the duty of disclosure because they are not within the possession or control of the other party.

Issuing a subpoena may be a cheap method of proving your client's case (or dis-proving it, which can also be useful), but there are significant costs risks for the client. Judges take different views as to the costs recoverable by the witness for the production of documents and successfully opposing production. The recent case of *X Pty Ltd and Ors & Merhi (No 2)*[1] is a stark demonstration of the costs risks associated with subpoenas.

The facts

In *X Pty Ltd and Ors & Merhi (No 2)*, McClelland J was asked to determine the costs which can be claimed by witnesses subpoenaed to produce documents. Some witnesses were successful in opposing the production of any documents, and other witnesses were required to produce documents, but more limited than required by the subpoenas.

The applicant companies fell into three categories. The first category were those in which the husband had no interest and did not hold any office or employment. The second category were those in which the husband was or he had been an office holder but held no interest. The third category were those in which the husband had an interest and was or had been an office holder.

At a previous hearing, orders were made setting aside subpoenas addressed to four companies which fell within the first category of companies. A further company, which fell within the first category, provided accountancy services to the other eleven applicant companies. That company produced documents and negotiated an arrangement with the wife regarding expenses incurred in producing those documents. Another company in the first category was alleged to own or have owned property that had been occupied by the husband and/or the wife.

[1] [2015] FamCA 862

A subpoena to that company was upheld but was varied to require production of a more limited category of documents. McClelland J narrowed, but did not dismiss, subpoenas issued to a further 6 companies.

The claims by the subpoenaed parties

McClelland J defined the costs issues raised by the applicant companies as:

1. Are the applicant companies entitled to their expenses reasonably incurred in respect to the retrieval, collation and production of documents in compliance with the subpoenas?

2. Are the applicant companies entitled to costs incurred in the proceedings arising from their objections to the subpoenas? Their objections were successful.

Costs of production

The wife argued that the first issue was a conduct money issue, and was fully dealt with by r 15.23(1) of the *Family Law Rules 2004* which provided:

> "A named person is entitled to be paid conduct money by the issuing party at the time of service of the subpoena, of an amount that is:
> (a) sufficient to meet the reasonable expenses of complying with the subpoena; and
> (b) at least equal to the minimum amount mentioned in Part 1 of Schedule 4.
>
> Part 1 of Schedule 4 of the Rules specifies that the minimum amount for conduct money to be attached to a subpoena is $10".

The applicant companies argued that, pursuant to r 15.23 and more specifically r 15.23(1)(a), it was open for the Court to require the wife to pay their reasonable expenses of complying with the subpoenas on the basis that the costs they incurred far exceeded the amounts provided by way of conduct money and the companies should be recompensed in a reasonable amount.

McClelland J relied on the summary of the law provided by Butler J in *In the Marriage of Kennedy & Evans, Trust Bank (Intervener)*[2]. Butler J considered the concept of reasonable expenses in complying with a subpoena and determined that a witness required to produce documents to the court in compliance with a subpoena, was entitled to recover the costs actually incurred but was not entitled to recover profit costs in respect to that production. The witness was entitled to include labour, together with a margin for additional statutory on costs, but was not entitled to add a component for profit in calculating those costs.

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[2] (1994) FLC 92-514

Consistently with the reasoning of Butler J, McClelland J in *X Pty Ltd* determined that each of the seven companies that were required to produce documents pursuant to the orders made at the earlier hearing (except for the accounting firm which had an agreed arrangement with the wife), could recover an amount equal to the salaries or wages paid by those companies for the time occupied by staff in searching for the documents required to be produced, together with an additional loading of 20% in respect to statutory on costs or similar payments such as superannuation, sick leave, long service leave, holiday pay and workers compensation. McClelland J considered that the calculation of that loading was necessarily imprecise but, in the circumstances, was fair and equitable.

Costs of successful objections

The second issue was the costs the companies incurred in successfully challenging the subpoenas issued by the wife and having them set aside. McClelland J said that Murphy J had usefully summarised the relevant principles in *Markoska & Markoska (Costs)*[3]:

> "The *Family Law Act* provides that, as a general rule, each party to proceedings under the Act shall bear their own costs (s 117(1)). But, the Court retains a discretion to award costs in circumstances considered appropriate to justify an award.
>
> The Court is required to have regard to a number of specified matters in the exercise of that discretion (s 117(2A)). Yet, while regard must be had to those matters, the discretion ultimately remains at large (s 117(2A)(g)).
>
> Thus, it is not necessary for a court to be satisfied that all of the factors enumerated in s 117(2A) of the Act are satisfied before an order for costs is made …
>
> So too, it is not necessary for an applicant for costs to satisfy 'any additional or special onus'; rather what is required is 'a finding of justifying circumstances as an essential preliminary to the making of an order …" (at paras 6-9).

The companies' application was based primarily on paragraphs (a), (c) and (f) of s 117(2A) of the *Family Law Act*. Section 117(2A) provides:

> "In considering what order (if any) should be made under subsection (2), the court shall have regard to:
> (a) the financial circumstances of each of the parties to the proceedings;
> (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
> (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

[3] [2011] FamCA 833

(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
(f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
(g) such other matters as the court considers relevant".

Regarding s 117(2A)(a), the applicant companies acknowledged that they were in a superior financial position to the wife, but argued that the wife had sufficient financial resources to meet a costs order.

There was no question that the wife was "wholly unsuccessful" in the proceedings in respect to the four successful companies and therefore within s 117(2A)(e) as each of the subpoenas to those companies were set aside.

McClelland J considered s 117(2A)(f) to be of lesser significance in the exercise of the court's discretion. The solicitor for the applicant companies requested a meeting with the solicitor for the wife to discuss a mutually acceptable arrangement with respect to the production of documents. The wife's solicitor declined the invitation on the basis that the companies had not identified those documents which they were prepared to produce and it was unreasonable to expect the wife to "bid against herself". The wife's request that the companies indicate the documents that they were prepared to produce was, McClelland J said, based on a false premise. He identified the false premise in his earlier judgment of *X Pty Ltd and Ors & Merhi* [4] where he said:

> "Subpoenas are not in the nature of discovery and it is for the issuing party to justify the basis upon which they require the documents to be produced; rather than imposing the obligation on the subpoenaed entity or party to indicate those documents which they are prepared to produce". (at para 29)

McClelland J considered that it was an imprudent decision on the part of the wife's solicitors to decline the invitation to meet with a view to attempting to resolve the company's concerns.

Quantification of costs where solicitors acted for multiple witnesses

The trial Judge recognised that complications can arise where parties, in whose favour a costs order is made, are represented by a firm of solicitors which also appeared on behalf of unsuccessful parties or, more relevantly in this case, not wholly successful companies. In those circumstances, it was appropriate to apply the "rule of thumb". The "rule of thumb" applies

[4] [2015] FamCA 622

where joint costs have been incurred by respondents who engage a single solicitor to represent respondents who have been both successful and unsuccessful.

In *Chen v Chan (No 2)* [5] the Court of Appeal of the Supreme Court of Victoria summarised the "rule of thumb" principle in the following terms (at para 10):

> "Where a number of parties have had the same representation, there is a 'rule of thumb' as to the apportionment of costs, namely that, where some of those parties have been successful and others have not, each successful party is only entitled to his or her proportion of the costs incurred on behalf of all, plus the costs, if any, incurred exclusively on his or her behalf. The primary issue for determination in such a case is that of fairness as between the parties, having regard to the manner in which the trial, or appeal, has been conducted".

The "rule of thumb" principle was recently considered in some detail in *James v Royal Bank of Scotland; McKeith v Royal Bank of Scotland (No.2)*[6]. After analysing relevant authorities, McDougall J held (at para 56) that the "rule of thumb may be used in some 'ordinary and straightforward cases' as a safe guide to the exercise of the costs discretion". McClelland J said:

> "The present case is sufficiently straightforward for the principle to be applied and, in the absence of assistance from the parties as to a more appropriate approach, it will be applied in the exercise of the Court's discretion to award costs". (at para 35)

Applying the "rule of thumb" principle, it was reasonable to assume that each of the four successful companies were responsible for paying 1/12 of the legal costs incurred by the 12 applicant companies collectively. Each of the successful companies was awarded 1/12 of the costs incurred collectively, together with any additional costs incurred solely on behalf of the successful companies individually.

Costs claims by the husband and the wife

The husband and wife each sought costs, but the wife's claim was dismissed on the basis that she was not "wholly successful" against the seven companies required to produce documents and the other four companies were "wholly successful" against her.

The husband's claim for costs was reserved until the final hearing, having regard to the comments of Murphy J in *Markoska & Markoska and Anor (Costs)* that it may be appropriate to consider costs incurred in interim proceedings in the context of the wider litigation between the parties.

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[5] [2009] VSCA 233

[6] [2015] NSWSC 970

The wife unsuccessfully argued that the subpoenas were issued as a result of the husband's non-compliance with his obligations of disclosure under the Act and the Rules. McClelland J considered that whether the required disclosure had occurred was potentially significant in considering the factors in s 117(2A)(c). The adequacy of the disclosure would become apparent at the final hearing.

The wife presumably felt that her application should have been dealt with in the same way as that of the husband, rather than dismissed.

Could Justice McClelland have taken a different approach?

The approach taken by McClelland J to the costs of production was different to the approach taken by Cronin J in *Moriarty & Moriarty*[7]. Cronin J discussed the loss to be compensated and emphasised that the wording of r 15.23(1) requires that the loss or expense be "substantial". He said:

> "The determination of what is substantial is very subjective. In my view, it means that the expense must be large causing loss; it must be unusual in the sense of requiring normal activity to be stopped; or it must cause an unfair inconvenience having regard to the fact that the recipient has nothing to do with the litigation.
>
> Assessment of the reasonableness of burdens involved in complying with a subpoena must take account the capacity of a party to collect and produce the documents. That means that in a large organization, the capacity to cover the expense is greater than in a small organization (see *Lucas Industries v Hewitt* (1978) 18 ALR 555 and *G and D & D* (2005) FamCA 1429).
>
> Notwithstanding the administration of justice issue, the rules are not intended to put the individual presenting the documents in a position where they lose income or capital. The rule however refers to a substantial expense and each situation must be determined on its peculiar facts.
>
> However, if the subpoena is simple and clear, requiring the production of the recipient's own documents, the inconvenience is intended and expected to be minimal.
>
> Thus, in a case where a professional fee is claimed or the bobcat driver claims significant hours of "downtime", the question still remains whether the finding, collecting, collating, marshalling and producing the documents or materials required the attention of the owner, partner or professional or whether it could be done by a clerical person albeit with some ownership or professional oversight. It is that question that the judicial officer has to ask in every case". (at paras 58-62)

Cronin J referred to the dilemma for a legal practitioner who has issued a subpoena, and the witness claims not to have been appropriately compensated for compliance. The witness has

[7] [2009] FamCA 369

no choice but to attend court to pursue their expenses. This means that the witness will incur further costs leading to further argument about expenses.

One of the subpoenas in *Moriarty* was to the husband's solicitor. The subpoena was issued by the wife due to the husband's default. The husband was billed by his solicitor for the work that was done. Cronin J found that the costs claimed by the solicitor were not reasonable on the evidence before him. He also found that as it was not the solicitor who had incurred the expense (as she had been paid for the service by her client), but the husband. The husband was the "author of his own problem". Cronin J discharged the costs order in favour of the husband's solicitor.

The second subpoena was served upon an acquaintance of the husband. The wife sought to be indemnified by the husband for the costs she was ordered to pay that witness. Cronin J ordered that he pay the costs due to the financial circumstances of the parties, the husband's failure to comply with his disclosure obligations and that otherwise the wife would be penalised for the husband's default.

The approach of McClelland J can also be contrasted with that taken in *Lovell & Lovell* [8] where Murphy J was faced with the claim of the husband's accountant, Mr Y, who asserted that he had produced 1083 pages pursuant to the subpoena. His total claim was for over $4,000 which included 6½ hours by an employee searching for the records, 3 hours for Mr Y to review them and $541.50 for printing out records. Murphy J referred to his earlier judgment in *Markoska & Markoska (Costs)* (on which McClelland J relied in *X Pty Ltd*) in which Murphy J quoted from Cronin J's judgment of *Moriarty* and rejected a claim under r 15.23 by a third party legal firm for $1,090.61 for alleged "loss or expense".

Murphy J in *Lovell* said the question was whether the expenses were “reasonable”, and this was not determined in a vacuum. There was a difference between what were reasonable amounts for an accountant to charge and what was reasonable for an issuing party to pay. He said:

> “The question is not (or, at least, not solely) whether the amounts listed are reasonable amounts for an accountant to charge; they may well be. The issue is what is reasonable for an issuing party to pay. The measure of that amount is not, in my view, what the named party might charge ordinarily for the specified tasks.
>
> In essence, what is reasonable is partial compensation for loss associated with being drawn into a process essential to the administration of justice. ...
>
> As I have said, I consider that the recompense envisaged by r 15.23 is not what the firm would charge for the work involved, but, rather, is in the nature of a broad,

[8] [2012] FamCA 34

> discretionary payment designed to balance the interests of the administration of justice, and the inconvenience that is sometimes necessarily caused to third parties with loss or expense that can seen to be other than minimal or ordinary and can be classified as 'substantial'". (at paras 252-3, 259)

Murphy J ordered that $1,000 be paid to the witness for the cost of compliance. Although McClelland J relied on *Markoska*, the costs McClelland J found to be reasonable were significantly higher than the outcome in either *Markoska* or *Lovell*.

Conclusion

In *X Pty Ltd*, the issuing party was held to be liable to meet significant costs claimed by witnesses for the cost of production and by witnesses who successfully opposed the subpoenas. The interpretation of "reasonable costs" for compliance with a subpoena can result in wildly different outcomes.

Solicitors and clients need to be wary when issuing subpoenas. Whilst subpoenas can appear to be an efficient and cost effective method of enforcing compliance with disclosure, the costs which a witness can claim are borne - at least in the first instance - by the issuing party. The client needs to be aware of and consent to the risk of a potential costs claim for compliance with a subpoena or a successful objection to the subpoena either partially or wholly.

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