

Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd (No 2) [2014] NTSC 57

PARTIES:

GROOTE EYLANDT ABORIGINAL
TRUST INCORPORATED
(STATUTORY MANAGER
APPOINTED)

v

SKYCITY DARWIN PTY LTD

TITLE OF COURT:

SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO:

25 OF 2014 (21412662)

DELIVERED:

5 DECEMBER 2014

HEARING DATES:

BY WRITTEN SUBMISSIONS

JUDGMENT OF:

MASTER LUPPINO

CATCHWORDS:

Costs – Application for pre-action discovery – Principles applicable to costs orders in pre-action discovery applications – Application of Practice Direction No 6 of 2009.

Supreme Court Rules rr 29.02, 32.11, 63.03

Practice Direction No 6 of 2009 paras 1, 3, 4, 6, 7, 8, 9, 10, 11, 13

Trepang Services Pty Ltd v Sodexo Remote Sites Australia Pty Ltd [2014] NTSC 23;

Schmidt v Won [1998] 3 VR 435;

Proctor v Kalivis (No 3) [2010] FCA 1194;

J & A Vaughan Super Pty Ltd v Becton Property Group Ltd [2003] FCA 340;
Kallitsis v Emerson Finance Pty Ltd [2008] VSC 180;

REPRESENTATION:

Counsel:

Plaintiff:	S Brownhill
Defendant:	T Anderson

Solicitors:

Plaintiff:	Roussos Legal Advisory
Defendant:	Ward Keller Lawyers

Judgment category classification:	B
Judgment ID Number:	LUP1405
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd (No 2) [2014] NTSC 57
No. 25 of 2014 (21412662)

BETWEEN:

Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed)
Plaintiff

AND:

Skycity Darwin Pty Ltd
Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 5 December 2014)

- [1] In these proceedings the Plaintiff sought an order for preliminary discovery against the Defendant. On 17 July 2014 I ruled in favour of the Plaintiff on that application and subsequently orders for preliminary discovery were made on 14 August 2014. At the same time orders were made for filing of affidavits and submissions in respect of the costs of the application.
- [2] The parties have agreed that the Plaintiff will pay the Defendant's costs of making preliminary discovery, commonly referred to as the

compliance costs. An order to that effect was included in the orders made on 14 August 2014.

- [3] After considering the affidavits and submissions I relisted the matter for further submissions and then made orders for filing of submissions limited to questions of the application of *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms* (“PD6”).
- [4] Relevant provisions of PD6 are now set out namely:-

- 1. Unless otherwise ordered by a Judge, this Practice Direction applies to all civil proceedings commenced by writ (other than a writ of habeas corpus) or by Originating Motion where the Court has ordered that the proceeding continue as if by writ or has ordered pleadings in accordance with O.4.07 pending in the Supreme Court on 1 January 2010 (the commencement date) or commenced thereafter.
- 3. The objectives of this part are:
 - 3.1 to encourage the exchange of early and full information about a prospective legal claim;
 - 3.2 to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;
 - 3.3 to support the efficient management of proceedings where litigation cannot be avoided.
- 4. Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include:
 - 4.1 the plaintiff writing to give details of the claim;
 - 4.2 the defendant acknowledging the claim letter promptly;

4.3 the defendant giving within a reasonable time a detailed written response; and

4.4 the parties conducting in good faith genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.

6. The plaintiff's letter should:

6.1 give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;

6.2 enclose copies of the essential documents on which the plaintiff relies and any documents (except privileged documents) which might significantly impair the plaintiff's case;

6.3 ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period;

(For many claims, a normal reasonable period for a full response may be one month.)

6.4 state whether court proceedings will be issued if the full response is not received within the stated period;

6.5 identify and ask for copies of any essential documents, not in the plaintiff's possession, which the plaintiff wishes to see;

6.6 state (if this is so) that the plaintiff wishes to enter into mediation or another alternative method of dispute resolution; and

6.7 draw attention to the Court's powers to impose sanctions for failure to comply with this Practice Direction and, if the recipient is likely to be unrepresented, enclose a copy of this Practice Direction.

7. The defendant should acknowledge the plaintiff's letter in writing within 14 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the plaintiff, the defendant should give reasons why a longer period is needed.

8. The defendant's full written response should as appropriate:

- 8.1 accept the claim in whole or in part and make proposals for settlement; or
 - 8.2 state that the claim is not accepted.
 9. If the claim is accepted in part only, the response should make clear which part is accepted and which part is not accepted.
 10. If the defendant does not accept the claim or part of it, the response should:
 - 10.1 give detailed reasons why the claim is not accepted, identifying which of the plaintiff's contentions are accepted and which are in dispute;
 - 10.2 enclose copies of the essential documents on which the defendant relies, and any documents (except privileged documents) which significantly impair the defendant's case;
 - 10.3 enclose copies of documents asked for by the plaintiff, or explain why they are not enclosed;
 - 10.4 identify and ask for copies of any further essential documents, not in the defendant's possession, which the defendant wishes to see; and
- (The plaintiff should provide these within a reasonably short time or explain in writing why he is not doing so.)
- 10.5 state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.
 11. The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the plaintiff and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the Court may have regard to such conduct when determining costs.
 13. If, in the opinion of the Court, non-compliance with this Part has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to delay

or costs being incurred in the proceedings that might otherwise not have been incurred, the orders the Court may make include:

- 13.1 an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
 - 13.2 an order that the party at fault pay those costs on an indemnity basis;
 - 13.3 if the party at fault is a plaintiff in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;
 - 13.4 if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate than the rate at which interest would otherwise have been awarded.
- [5] *PD6* specifies pre-action protocols that are required to be complied with prior to the commencement of proceedings.¹ In part those protocols oblige the parties to make disclosure of documents.² The Practice Direction contemplates that orders dispensing with discovery pursuant to Rule 29.02 of the *Supreme Court Rules* (“*SCR*”) will be made if proper disclosure has occurred or some limited orders for discovery will be made where full compliance has

¹ *Practice Direction 6 of 2009*, paras 3-13.

² *Practice Direction 6 of 2009*, paras 6.2, 6.5, 10.2, 10.3 and 10.4.

not occurred.³ Clearly, restricting the discovery process is an integral part of *PD6*.⁴

- [6] *PD6* does not apply to the Plaintiff's application for pre-action discovery as that application was properly commenced by Originating Motion.⁵ *PD6* will however apply to any proceedings which the Plaintiff may commence against the Defendant following the pre-action discovery assuming that any such proceedings are commenced by Writ. For that reason, it may be simplistic to look at the Originating Motion in isolation. In the course of argument, Ms Brownhill for the Plaintiff suggested that an alternative method by which the Plaintiff could have secured production of the required documents would have been to commence the substantive proceedings and to then seek orders for discovery. Ignoring the requirement to comply with *PD6* in that event for the present, such an approach may have been successful as, depending on the pleadings, the documents sought have been discoverable.

- [7] The Plaintiff might also have been able to obtain the documents through the *PD6* process. Pursuant to paragraph 6.1 of *PD6*, the Plaintiff could have written to the Defendant giving the required details of the substantive claim and enclosing whatever "essential" documents it held. Thereby the Plaintiff would have complied with

³ *Practice Direction 6 of 2009*, para 22.

⁴ This is acknowledged in the Explanatory Document For Practice Direction No 6 of 2009, para 5.4.

⁵ *Practice Direction 6 of 2009*, para 1.

paragraph 6.2 of *PD6*. It could then have requested copies of other “*essential*” documents in accordance with paragraph 6.5 of *PD6*. The “*essential*” documents could have been the same documents that the Plaintiff sought in the application for pre-action discovery. The ability to request “*essential*” documents from the Defendant could be said to operate as a *de facto* order for pre-action discovery and without having to satisfy preconditions to the same extent as applies to an application for pre-action discovery under the *SCR*.

[8] Mr Anderson for the Defendant submitted that the Plaintiff was in default of its obligations under *PD6*. As I understand his submission, he does not argue that *PD6* applies to the proceedings commenced by the Plaintiff’s Originating Motion, which would be clearly wrong, but that it applies to the underlying “*potential dispute*”.⁶

[9] I am not convinced that the Defendant is able to rely on *PD6* in that way. Although I accept that *PD6* applies to the substantive dispute between the parties, the problem with Mr Anderson’s submission is that, other than requiring the pre-action conduct to occur before proceedings are commenced, *PD6* does not set a timeline for compliance with the various steps it provides. The Plaintiff could comply at any time before commencing the substantive proceedings. The Plaintiff could also apply for an exemption.⁷ Therefore until

⁶ *Practice Direction 6 of 2009*, para 4 and para 5.1 of the Explanatory Document.

⁷ *Practice Direction 6 of 2009*, para 1.

proceedings are commenced, the Plaintiff cannot be found to be in default. Even then, as is now often the case where proceedings have been commenced and allegations of incomplete compliance with *PD6* arise, time can be granted to allow compliance to occur. Therefore the Plaintiff may not necessarily have been exposed to the sanctions in paragraph 13 of *PD6*.

- [10] In any case, those sanctions depend on whether non-compliance has led either to the commencement of proceedings “*...which might otherwise not have needed to be commenced*” or whether it has “*...led to delay or costs being incurred...that might otherwise not have been incurred*”. The first limb cannot apply. Although there is clear scope for the application of the second limb, that cannot currently be determined. I have no evidence on which I could rule on that. In most cases those determinations could not be made until the completion of the proceedings.
- [11] In *Trepang Services Pty Ltd v Sodexo Remote Sites Australia Pty Ltd*,⁸ I discussed the principles in respect of costs orders in pre-action discovery applications. I also discussed the principles in the context of the disclosure obligations and cost sanctions set by *PD6* and I concluded that compliance with *PD6* was a relevant factor in the exercise of the Court’s discretion. However, in that case in respect of the application of *PD6*, there was a material difference on

⁸

[2014] NTSC 23.

the facts namely the existence of a contractual entitlement to production of the documents sought. Additionally, the documents had also been requested in a formal *PD6* pre-action letter.

[12] As I said in *Trepang*, the authorities reflect a divergent approach in the various jurisdictions in respect of costs orders in pre-action discovery applications, at least with respect to the costs of the application as opposed to the compliance costs. In summary, the principles insofar as they have application to the current matter, are as follows:-

1. In the Northern Territory the general rule in respect of costs in proceedings in this Court is that costs are in the discretion of the Court.⁹ Therefore no one order can be ruled out depending, as it does, on the particular circumstances of each case.
2. The *SCR* contain a costs provision specifically in respect of pre-action discovery applications.¹⁰ That sets out specific orders the Court may make but does not limit the general discretion.
3. The particular circumstances of the case are taken into account including the nature of the case and the way the parties conducted the preliminary discovery litigation.

⁹ Rule 63.03(1) of the *Supreme Court Rules*.

¹⁰ Rule 32.11 of the *Supreme Court Rules*.

4. The conduct of the parties as well as the extent of an adversarial approach taken by a respondent in the lead up to proceedings is a relevant consideration.
5. Ordinarily a respondent will be awarded the costs of compliance.

[13] Mr Anderson argued that *Schmidt v Won*,¹¹ as a decision of the Victorian Court of Appeal based on rules which are identical to those in the *SCR* for current purposes, should be followed. If followed that would lead to an order favourable to the Defendant. Although I agree that the decision in *Schmidt v Won* is highly persuasive, in my view in the Northern Territory¹², the operation of *PD6* as a factor relevant to the exercise of the Court's discretion is sufficient to distinguish the interstate authorities including the decision in *Schmidt v Won*.

[14] In my view the application of *PD6* reinforces the suitability of orders such as that made in *Proctor v Kalivis*¹³ where the question of costs was deferred to the substantive proceedings if they were commenced within a set time frame. In this way the extent to which the parties complied with *PD6* and how that relates to issues as to preliminary discovery costs, including the application of the second limb of

¹¹ [1998] 3 VR 435.

¹² In Victoria, pre-action protocols were set by amending Rules of Court subsequent to the decision in *Schmidt v Won*. I was not referred to, nor am I aware of, any authorities which consider the principle in *Schmidt v Won* in light of that.

¹³ [2010] FCA 1194.

paragraph 13 of *PD6*, can be properly assessed with the benefit of hindsight.

[15] Even if I were to disregard considerations relative to *PD6*, in any case, I would make the same order. Relative to the factor of the conduct of the parties, in my view the Defendant took an overly adversarial approach to the Plaintiff's application. The Defendant's conduct was such as to justify a departure from any "usual" order in the exercise of the Court's discretion and following the relevant authorities.¹⁴

[16] Some additional facts need to be set out to put this into perspective. The Defendant complains that the Plaintiff should have complied with *PD6* before bringing its application. Mr Anderson submitted that, had the Plaintiff complied with *PD6*, the Defendant may have treated the matter differently and that the "*.... matter may have taken a very different course.*"¹⁵ Such a submission seems to accept that the Defendant's conduct was less than ideal but nonetheless seems to attempt to justify it and by blaming the Plaintiff. Mr Anderson's submission however is unsupported by any facts or available inferences. It actually runs counter to the available evidence. And it is contradicted by the Defendant's actions in the lead up to the filing of the application. The evidence establishes that before the

¹⁴ *Proctor v Kalivis* [2010] FCA 1194; *J & A Vaughan Super Pty Ltd v Becton Property Group Ltd* [2013] FCA 340.

¹⁵ Defendant's submissions 18 August 2014, para 17. See also Defendant's submissions 1 September 2014 para 9 and 13 October 2014 para 6.

application was filed a letter requesting production of documents was sent on behalf of the Plaintiff to the Defendant. That was met with a terse refusal and a comment that documents would not be provided “*...absent a legally enforceable requirement to do so*”,¹⁶ presumably meaning a Court order. The Defendant then nominated its solicitors for future correspondence.

[17] That set the early framework. Despite this apparently unambiguous refusal to negotiate which necessitated the commencement of the proceedings, Mr Anderson also submitted that it was “*...the Plaintiff which led the parties down the adversarial path by commencing the proceedings without warning or notice to the Defendant, and without giving the parties an opportunity to reflect on their respective positions through a structured process of negotiation or mediation*”.¹⁷ That misstates where the fault lies. I think that in view of the clear refusal by the Defendant to provide documents absent a Court order and the unwillingness to negotiate, it was reasonable for the Plaintiff to commence the proceedings.

[18] Mr Anderson however persisted and also submitted that had the Plaintiff complied with PD6 “*...at the very least the Defendant would have wanted to explore a settlement to the fullest extent possible*”.¹⁸ Again that was not evident from the Defendant’s responses before the

¹⁶ Letter dated 13 September 2013.

¹⁷ Defendant’s submissions 1 September 2014 para 9.

¹⁸ Defendant’s submissions 13 October 2014 para 6.

proceedings were commenced and it runs counter to the attitude of the Defendant to the application overall.

[19] The Defendant maintained its pre-commencement attitude after the Plaintiff filed its application. The Plaintiff has submitted, and the Defendant has not challenged, that after the Defendant served its affidavit evidence the Defendant wrote to the Plaintiff describing the application as futile and inviting the Plaintiff to discontinue.¹⁹

[20] The Defendant's adversarial approach was clearly demonstrated in the conduct of the hearing. Mr Anderson conceded little and took nearly every available point. He took issue with every category of document which the Plaintiff sought, albeit with a valid arguable basis in one case. He rejected the availability of factual inferences which I considered were properly available. The Defendant's approach overall was based on an unshakeable view that the substantive proceedings proposed by the Plaintiff were based only on suspicion and speculation. Indicative of the Defendant's attitude, Mr Anderson referred to the Plaintiff's arguments in terms such as "*a hopeless exercise*", and "*wild speculation*", with "*...enormous gaping holes in the evidence*", "*without a shred of evidence*" and "*flimsy foundation*". As is evident from my reasons, I did not share that

¹⁹ Plaintiff's submissions 25 August 2014 para 27 and Annexure GMR-14 to the affidavit of George Roussos made 25 August 2014.

view. In my view the approach taken by the Defendant extended the duration of the hearing in a substantial yet avoidable way.

[21] All things considered, in my view the most appropriate order is one consistent with *Proctor v Kalivis*²⁰ namely to defer the Plaintiff's costs of the application to the substantive proceedings and allowing sufficient time for those proceedings to commence. This factors in issues of the pre-action conduct of both parties and takes into account the operation of *PD6*, how the *PD6* disclosure obligations inter-relate with questions of preliminary discovery, and that the Plaintiff may have been able to seek the required documents through the *PD6* process.

[22] I do not consider that the position should be different because the Plaintiff opted to utilise the pre-action discovery procedure in lieu of the pre-action protocols of *PD6*. That the Plaintiff was entirely successful on its application, despite opposition, reinforces that. It also serves to reinforce that the documents were discoverable had the *PD6* route been taken. In my view, in the exercise of the Court's discretion this is sufficient to justify deferring costs to the substantive proceedings with suitable safeguards to re-visit the position if those proceedings are not commenced.

²⁰

[2010] FCA 1194.

[23] I am not prepared to go as far as to require the Defendant to pay the Plaintiff's costs. This is reinforced by reason that the Defendant has raised a number of matters in submissions which concern me. This relates to matters apparently ascertained by the Defendant after my reasons for granting preliminary discovery were published. It concerns an alleged failure by the Plaintiff to put relevant facts known to the Plaintiff before the Court on the hearing of the application.

[24] I am unable to determine this on the material before me. Although the Plaintiff has denied the allegation in answering submissions, I have no evidence before me concerning the allegation. That is understandable given the stage in the proceedings where the submission was made. The Plaintiff has not put on evidence either of its denial. If the Defendant's allegations have substance then it may be that had the Plaintiff taken the *PD6* route, that material would likely have needed to be disclosed as part of the Plaintiff's compliance with *PD6*. This may give a basis for activating the second limb of paragraph 13 of *PD6* but I cannot determine that now. All of these uncertainties can be best assessed at the conclusion of the matter and when the extent of each party's compliance with *PD6* can be properly assessed. That reinforces the desirability of an order deferring costs to the substantive proceedings.

- [25] Generally speaking a respondent will be awarded compliance costs. The rationale for that is that an order for pre-action discovery is an indulgence which invades the respondent's private affairs and then only to determine if a subsequent action should be brought. A respondent should not be out of pocket by the requirement to comply.²¹ Notwithstanding that, the application of *PD6* and the effect of that on my reasons for deferring the costs of the application would apply equally to the compliance costs. But for the agreement reached by the parties and the consent order made in that respect I would also have deferred compliance costs.
- [26] The order I propose to make is to defer the question of costs of the Plaintiff's application to the subsequent proceedings. It is not known at this time whether those proceedings will be commenced. The preliminary discovery will not occur for some time as the Defendant has sought leave to appeal my decision and the parties have, quite appropriately, agreed to a stay of the orders pending the outcome. Depending on how that resolves, time will be required for the Defendant to comply with the orders and then for the Plaintiff to consider the documents and decide if proceedings will be commenced. Given the indeterminate timeframe it is inappropriate to set a time by which the Plaintiff should be required to pay the Defendant's costs absent commencement of substantive proceedings.

²¹ *J & A Vaughan Super Pty Ltd v Becton Property Group Ltd* [2010] FCA 340; *Schmidt v Won* [1998] 3 VR 435; *Kallitsas v Emerson Finance Pty Ltd* [2008] VSC 18.

I propose to give liberty to the parties to apply for that purpose so that an appropriate default time can be determined later.
