[2003] QSC 198

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 5772 of 2003

TRI-STAR PETROLEUM (ARBN 050 415 739) Applicant

and

TIPPERARY OIL & GAS (AUSTRALIA) PTY LIMITED First Respondent

and

TIPPERARY CORPORATION Second Respondent

BRISBANE

..DATE 03/07/2003

~~[2002~~] QSC 198

ORDER

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HIS HONOUR: I have before me an application by Tri-Star Petroleum Company against Tipperary Oil and Gas Australia Pty Limited and Tipperary Corporation and against Messrs Hogan, Coulter, Brain and Heim.

Tri-Star and the two Tipperary companies are litigants against each other in the 238th District Court, Midland County in Texas in proceedings involving a number of other parties. Tri-Star asserts that the individuals named above are persons able to give or provide evidence in those proceedings.

It procured from Judge John G Hyde of the Midland County Court a request for assistance to obtain evidence for civil proceedings dated 19 June 2003, which request was exhibited to an affidavit filed in this Court on the 30th of June.

Mr Hogan is the Chief Executive of the Department of Natural Resources for Queensland, Messrs Coulter and Brain are employees of the State working in that department, and Ms Heim is a former State employee from that department.

Paragraph 13 of the letter of request was as follows:

> "Should there be an objection to the depositions lodged by the Department of Natural Resources and Mines the request in Court will reconsider the granting of this request for assistance and rule on that objection."

That paragraph was evidently inserted by the Judge in recognition of the general approach taken in such matters in respect of foreign executive governments.

When the matter was first brought before the Queensland Government it was referred to the Crown Law Office and a solicitor from that office contacted the solicitors for Tri-Star. She advised that Messrs Coulter and Brain would insist upon preservation of their rights to claim privilege against self-incrimination and/or to claim public interest immunity or any other valid claim of privilege.

Ms Jackson wrote, "My client's initial view is that the evidence they can give in this matter is extremely limited. They therefore seek clarification from you as to the evidence which you believe they can give."

Whatever happened subsequently does not appear but something happened which caused the Crown Solicitor to take a different tack. A second letter was sent by facsimile to the solicitors for Tri-Star on the 1st of July. That, it will be noted, is the day after the application was filed. By then Ms Jackson was also acting for Mr Hogan. She then confirmed that she held instructions to write to Judge Hyde pursuant to paragraph 13 of the request which I have already read out and to object to orders being obtained to compel Messrs Coulter and Brain to provide oral testimony. She did not indicate any objection in respect of Ms Heim but that does not now appear to matter.

Her specific objections were, first, that the section under which the application was being brought, section 36 of the Evidence Act 1977, could not permit an order to be made binding upon the Crown or any person in that person's capacity

as an officer or servant of the Crown, by reason of section 35A of the Act.

Second, she took the point that the Foreign Tribunals Evidence Act 1856, an Imperial Act, did not bind the Crown in any right and did not permit the making of an order. In the alternative she asserted as it was expressed that section 35A of the Evidence Act was "not repugnant to and was supplementary to" the Foreign Tribunals Evidence Act. Whether that was meant to mean "was repugnant to and not supplementary to" might be queried.

In any event, that development was sufficient to cause the parties to request the matter to be adjourned to enable a further hearing before Judge Hyde when it first came before me on the 2nd of July. That took place this morning, early this morning Eastern Australian time. The outcome of that hearing was that Judge Hyde indicated his intention to withdraw the letter of request.

The parties have today come before me on the basis that that will in fact be done and that consequently it is not appropriate for the relief sought in the application to be pursued.

That leaves outstanding only the question of the costs of the application. On behalf of the applicant Mr Griffin QC submits that there should be no order as to costs. He submits that the law appeared to allow the application to be made, that the

only reason for the failure of the application is the late change in the request by Judge Hyde and that the costs are not costs which ought to be paid by either party in those circumstances.

For the named respondents there has been no appearance today and I was informed by Mr Griffin that the solicitor had indicated that the Crown Solicitor was not intending to appear today and that there would be no application in respect of the costs of the named respondents, that is to say the individually named respondents.

As far as the two corporate respondents are concerned, Mr O'Donnell QC who appeared both yesterday and today has sought an order that Tri-Star pay their costs.

Mr O'Donnell's submission is first that the application was misconceived right from the start because there was never any power to make an order having regard to the fact that the persons sought to be examined were all employees or former employees of the Crown. Alternatively he submits that the request from Judge Hyde always embodied within itself the risk that the request would be withdrawn if an objection were taken so that by commencing its proceedings without first ensuring that there would be no objection, Tri-Star took the risk that what in fact eventuated would occur.

Had the proceedings not occurred in such a telescoped time frame there might be some force in the second submission.

However, the proceedings were hastened because of the need to try to have the evidence taken while the applicant's American attorneys were in Australia. That, it seems to me, was a reasonable course for the applicant to adopt.

The cost of people travelling across the Pacific is substantial and I have no doubt the professional fees involved are also very substantial, at least if Australian professional fees are any guide. I therefore would not use this as a ground for ordering costs against the applicant.

The question of power is somewhat more complicated. The primary section under which the application was initially brought appeared to be section 36 of the Evidence Act. When the matter came on today Mr Griffin indicated that no reliance was placed on that section by reason of section 35A of the Act.

That concession was, I think, well made. It seems clear from that section that there is no power under Division 3 of the Evidence Act 1977 for such an order to be made. However, Mr Griffin submitted that there was an alternative source of power to be found in the Foreign Tribunals Evidence Act 1856, an Imperial Act passed for use in the then colonies to enable evidence of this sort to be taken for foreign courts.

That Act was repealed in the United Kingdom in 1975 but remained in force in respect of the colonies, see Ukley v. Ukley [1997] VR 121.

Mr Griffin submitted that this case fell squarely within that Act and that there was no equivalent provision to section 35A exempting the Crown from its operation.

Mr O'Donnell's response was that the application of that Act was impliedly terminated in Queensland by the enactment of the Evidence Act 1977. He submitted that not only is it plain that the Evidence Act covers every point in the Imperial Act but it also introduces the important limitation embodied in what is now section 35A.

It was therefore, he submitted, repugnant to the Imperial Act and consequently repealed it, or at least rendered it inoperative in Queensland from the time of its passage. He relied in that context on the analogous decision of the High Court in Hazelwood v. Webber (1934) 52 CLR 268 particularly at page 275, distinguishing at the same time the decision of the Judicial Committee in Abel Lemon & Company Pty Ltd v. Baylin Pty Ltd (1985) 63 ALR 161.

In support of the argument that there was an intention to end the application of the Imperial Act, Mr O'Donnell referred to the Second Reading Speech of the then Attorney-General on introducing the 1977 Act:

> "This Division will replace provisions contained in two 19th century Imperial Acts, namely the Foreign Tribunals Evidence Act 1856 and [another Act]."

In response to that argument, Mr Griffin relied on two decisions in this Court: first, the decision of Master Lee, as he then was, in Fullmer v. Cape York Cattle Company [1987]

1 QdR 6; and the decision of Justice White in Re Cochrane Consulting Incorporated v. Uwatec (USA) Incorporated [1998] 2 QdR 137. In both those cases, the Imperial Act was relied upon for the making of an order.

When one considers those cases a little more closely, it is evident that they do not really support the proposition for which Mr Griffin cites them. The decision of Master Lee certainly had regard to the question of whether there was an implied repeal and considered the question of whether there was repugnancy between the State and the Imperial legislation. However, it does not appear that the Master considered the impact of Section 35A (or Section 35(2) as it then was) in this context, although he referred to it subsequently. Also his judgment was one given on an ex parte application. The question of repugnancy was not addressed before Justice White.

I do not regard either of those decisions as addressing the point raised by Mr O'Donnell and on which he submits the conclusion should be that the Imperial Act ceased to apply. To my mind, the combination of the text of the Queensland Act, its comprehensiveness, its inconsistency in the form of Section 35A with the terms of the Imperial Act and the remarks of the Attorney on the Second Reading Speech all indicate that there was an intention that the Imperial Act should cease to apply in Queensland upon the coming into force of the Evidence Act 1977.

That gives rise to the question whether in 1977 it was open to the State Parliament to terminate the application of Imperial legislation.

Counsel were not prepared to argue on this costs application the effect of the Colonial Laws Validity Act 1865 and in particular whether that Act would render any Queensland legislation purporting to terminate the Imperial legislation void for repugnancy. Nor were they prepared to argue whether in the event that there was any such repugnancy the enactment of the Australia Acts 1986 would have overcome the difficulty.

My tentative conclusion is that the Evidence Act would be held to be valid but I expressly refrain from reaching any conclusion on that point in the absence of argument. Counsel wisely, in my view, chose not to turn what is simply an argument as to costs into a major debate on constitutional law.

That question of costs really comes down to two questions or perhaps three. The first is was it unreasonable to bring the application. In my view, it cannot be said that the applicant acted unreasonably in filing the application and proceeding as far as it did. There were two decisions of this Court applying the Imperial Act, matters were required to be done quickly, there was no reason to think that a finding of non-applicability of the English legislation was inevitable.

Second, the application is but one interlocutory step, in effect, in on-going United States litigation. That becomes relevant because I do not think it would be appropriate that there should be no order as to costs.

It is common ground between the parties that, in Texas, the costs regime is somewhat similar to that which applies in Australia. That is, costs are ordered between parties and by and large follow the event.

That being so, it seems to me that the preferable course is to order that the costs of this application be costs in the cause in the United States litigation.

The third reason why I think that I ought not to adopt Mr O'Donnell's course and order costs in favour of the respondents is that it has not been demonstrated conclusively that the tentative view which I have taken about the effect of the Queensland legislation is correct. I think that and the other matters to which I have referred mean that the costs are really costs which were part of the American litigation and which should follow the event in that litigation.

Mr O'Donnell submitted that such an order would be impractical. It does not seem to me that that is so, notwithstanding that the American litigation may be complex and that there may be an outcome which is not clear cut. There is no certainty that will occur. By and large, litigation is either settled or carried to a conclusion where

one party or the other wins. I see no reason why the possibility of complexities should be allowed to stand in the way of an order.

The order as to costs should be that the costs be costs in the cause in the US action and that the costs be recoverable upon either party filing an affidavit by its solicitor deposing as to the outcome of that action (cause number CV-42265 in the 238th Judicial District Court of Midland County, Texas, Tipperary Corporation and Tipperary Oil and Gas Australia Pty Ltd -v- Tri-Star Petroleum Company) and exhibiting a sealed copy of a final order in that action. To take account of the potential complexities referred to by Mr O'Donnell, there should be liberty to apply in respect of the order for costs.

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HIS HONOUR: The application should be dismissed.

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