Summary applications in the Federal Court

Spencer v Commonwealth (2010) 269 ALR 233; [2010] HCA 28

Peter Spencer outside the High Court of Australia. Photo: Ray Strange / Newspix

In the recent decision of *Spencer v Commonwealth* (2010) 269 ALR 233; [2010] HCA 28 ('*Spencer*') the High Court examined section 31A of the *Federal Court of Australia Act 1976* (the 'FCA'). Following *Spencer*, former authorities which had set out the basis for determining a summary dismissal application, such as *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 ('*Dey*') and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 ('*General Steel Industries*'), will no longer apply directly to such an application brought in the Federal Court pursuant to section 31A of the FCA.

Facts and Decision

Mr Spencer owned a farm at Shannons Flat in New South Wales. He was restricted from clearing vegetation on his farm by reason of two New South Wales Acts, namely, the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW). Mr Spencer alleged that the restrictions effected an acquisition of property from him other than on just terms. The property acquired was said to include certain carbon sequestration rights.

Mr Spencer claimed that the acquisition arose through the implementation of agreements between New South Wales and the Commonwealth. He alleged that the Commonwealth Acts which authorised the agreements were invalid to the extent that the Acts effected or authorised the acquisition of property from him other than on just terms, within the meaning of section 51(xxxi) of the Constitution. The Commonwealth Acts in question were the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth).

Upon application by the Commonwealth, Emmett J dismissed the proceedings pursuant to section 31A of the FCA on the basis that Mr Spencer had no reasonable prospects of success of obtaining the relief he sought. This was (in part) due to his Honour's conclusion that the Commonwealth Acts were not laws with respect to the acquisition of property pursuant to section 51(xxxi) of the Constitution. Mr Spencer's appeal to the full Federal Court was dismissed.

After the full court dismissed Mr Spencer's appeal, the High Court delivered its reasoning in *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 ('*ICM*'). All of the justices in *Spencer* were of the view that had the courts below been aware of that decision, the proceedings would not have been dismissed. As Heydon J summarised the position (at [61], footnotes

excluded in this and all following extracts):

> … on 9 December 2009, *ICM Agriculture Pty Ltd v Commonwealth* was decided. A majority of this court concluded that, notwithstanding *Pye v Renshaw*, the legislative power of the Commonwealth conferred by sections 96 and 51(xxxvi) of the Constitution does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms. Further, three members of the court placed a question mark over the validity of legislation relating to an 'informal arrangement' providing for Commonwealth funding to a State if it acquires property on unjust terms. The applicant has pleaded facts which might attract a conclusion favourable to him if that question is answered against validity. Discovery of documents might assist him to establish those pleaded facts.

All members of the High Court were of the opinion that the appeal should be allowed, the order of Emmett J be set aside and the Commonwealth's application seeking summary dismissal be dismissed.

Section 31A of the FCA

Of more relevance for current purposes is the court's analysis of section 31A of the FCA. That section was introduced into the FCA in 2005. So far as is relevant, section 31A provides as follows:

> (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
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> (a) the first party is defending the proceeding or that part of the proceeding; and
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> (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
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> (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
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> (a) hopeless; or
>
> (b) bound to fail;
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> for it to have no reasonable prospect of success.

Three judgments were delivered.

(i) Hayne, Crennan, Kiefel and Bell JJ

The majority comprised Hayne, Crennan, Kiefel and Bell JJ. Their honours emphasised two aspects of the legislation. First, importance was given to the word 'reasonable' in the phrase 'no reasonable prospect'. Second, effect needed to be given to what their honours described (at [52]) as the 'negative admonition' in sub-section 31A(3), that a proceeding or a defence may have no reasonable prospect even if it is not 'hopeless' or 'bound to fail'. In their honours' view (at [52]):

> …the combined effect of subs-sections (2) and (3) is that the enquiry required in this case is whether there is a 'reasonable' prospect of prosecuting the proceeding, not an enquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail.

Accordingly, different considerations apply to sub-sections 31A(2) and (3) from those which had applied before section 31A was enacted. Indeed, their Honours' expression was that section 31A 'departs radically' (at [53]) from earlier forms of provisions concerning summary applications. In particular, the majority were of the view that the former basis for summary determinations stemming from the oft-cited decisions of *Dey* and *General Steel Industries* did not apply to section 31A. This is because that basis required the formation of 'a certain and concluded determination that a proceeding would necessarily fail' (at [53]).

Thus, their honours said:

> The test identified by Dixon J in *Dey* can thus be seen to be a test requiring certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success. (At [54].)

And:

> As Barwick CJ also pointed out in *General Steel Industries*, the test to be applied was expressed in many different ways, but in the end amounted to different ways of saying 'that the case of the plaintiff is so *clearly* untenable that it cannot *possibly* succeed' (emphasis added). As that formulation shows, the test to be applied was one of demonstrated certainty of outcome.' (At [55]; emphasis in *Spencer*.)

Accordingly, the majority were of the view that it was 'dangerous' (at [56] and [57]) to seek to understand the statutory expression 'no reasonable prospect of successfully prosecuting the proceeding' by reference to these cases or by reference to the interpretations given to other statutory tests, such as the test in rule

24.2 of the Civil Procedure Rules of England and Wales, in which the relevant test was 'no real prospect'.

Their honours considered that full weight needed to be given to the expression as a whole. However, 'judicial creation of a lexicon of words and phrases' to interpret the phrase was to be avoided (at [58]). Their honours' final comment was (at [60]):

> At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes.

Thus, the majority did not seek to formulate a judicial test for how to approach a summary application pursuant to section 31A of the FCA. Indeed, the only certainty about such an application may be the comment by their Honours (at [60]) that:

> Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly.

(ii) French CJ and Gummow J

In their joint judgment, French CJ and Gummow J did not adopt the same approach to section 31A as the majority did. The emphasis of their honours' reasoning was the 'caution' with which the power to summarily terminate proceedings must be exercised (at [24]), a matter which the majority touched on only briefly, as referred to above. In this regard, their honours referred to a number of decisions including the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* (2000) 201 CLR 552 at [57] where their honours had referred to the 'high degree of certainty about the outcome of the proceeding if it were allowed to go to trial' that was needed when considering a summary application. The decisions of *Dey* and *General Steel Industries* were referenced in the footnotes in explaining this requirement of certainty.

French CJ and Gummow J then stated (at [24]):

> There would seem to be little distinction between those approaches and the requirement of a 'real' as distinct from 'fanciful' prospect of success contemplated by section 31A. That proposition, however, is not inconsistent with the proposition that the criterion in section 31A may be satisfied upon grounds wider than those contained in pre-existing Rules of Court authorising summary dispositions.

(iii) Heydon J

Heydon J delivered a separate, short judgement in which no opinion was expressed as to section 31A. His Honour was of the view that it was not necessary to consider the correct approach to section 31A in order to determine the result of the appeal. His Honour commented that apart from some limited remarks, no submissions had been advanced by the parties concerning section 31A.

Conclusion

It is clear from the reasoning of Hayne, Crennan, Kiefel and Bell JJ that different considerations affect the application of section 31A of the FCA from the principles derived from decisions such as *Dey* and *General Steel Industries*. *Spencer* applies to summary applications in the Federal Court. Insofar as New South Wales is concerned, Part 13 of the *Uniform Civil Procedure Rules* 2005 is worded differently from section 31A of the FCA and, in particular, does not contain a rule equivalent to sub-section 31A(3). Presumably, decisions such as *Dey* and *General Steel Industries* will continue to apply to summary dismissal applications brought pursuant to Part 13 of the UCPR.

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