



Express law fast track information for clients

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TAKING GENUINE STEPS STATEMENTS SERIOUSLY

Almost a year after the *Civil Dispute Resolution Act 2011* received Royal Assent, the Federal Court decision of Reeves J in *Superior IP International Pty Limited v Ahearn Fox Patent and Trade Marks Attorneys* [2012] FCA 282 (23 March 2012) serves as a timely reminder about the importance of parties' lawyers advising their clients about the requirement to file a genuine steps statement and assisting them to comply with that requirement. In the case before the Court, both of the parties' lawyers failed to comply with the requirement and, along with his Honour's scathing comments, now face potentially severe personal and professional consequences as a result.

The background facts

Superior IT International Pty Limited (the plaintiff) applied under the *Corporations Act 2001* (Cth) to set aside a statutory demand served on it by a trustee of a trust trading as Ahearn Fox Patent and Trade Mark Attorneys (the defendant). The total statutory demand was \$10,706.33 and centred on a professional fee dispute relating to the plaintiff engaging the defendant to prosecute an application for a patent for an invention in Australia and overseas. Reeves J upheld the plaintiff's application and set aside the defendant's statutory demand.

Consequences of failing to file a genuine steps statement

Justice Reeves noted that the plaintiff would ordinarily be entitled to an order for costs based on the usual principle that costs follow the event. However, in this case, Reeves J refused to make such an order and instead stood the costs issue over for further argument. Reeves J put the parties' lawyers on notice that he intended to have regard to the following:

- s 9 of the *Civil Dispute Resolution Act 2011* (the Act), which requires that a lawyer acting for a person who is required to file a genuine steps statement has a duty to advise that person of that requirement and to assist that person to comply with it
- Pt VB and s 43 of the *Federal Court of Australia Act 1976* (the FCA Act), which provides that parties to a civil proceeding must conduct the proceeding (including settlement negotiations) according to law and as quickly, inexpensively and efficiently as possible
- s 37N(5) of the FCA Act, which provides that, if the Court or a judge orders a lawyer to bear costs personally, the lawyer must not recover the costs from his or her client.

Having identified the matters relevant to the adjourned costs argument, Reeves J allowed the parties' lawyers the opportunity to make submissions about how costs should be awarded in the proceeding.

However, since an obvious conflict was likely to arise between the interests of the clients and their respective lawyers, Reeves J also made the following orders:

- the two lawyers concerned were to be joined as parties to the proceeding for the limited purpose of determining the question of costs
- each of the two lawyers concerned is to provide a copy of the reasons for judgment to his client and advise the client to seek independent legal advice on the question of costs
- the Registrar is to provide a copy of the reasons for judgment to the Queensland Law Society, the Bar Association of Queensland and the Legal Services Commission so that those bodies may take such action as they consider appropriate in relation to the two lawyers concerned.

Why did the Court impose such severe orders?

Justice Reeves was clearly exasperated by the conduct of the parties and their lawyers during the one-day hearing. It appears that they had at least 3 opportunities on the day to resolve the dispute in a timely, inexpensive and efficient manner (taking into account the nature of the dispute) but failed to do so:

- At the start of the hearing, having noted that neither party had filed a genuine steps statement, Reeves J asked the two lawyers whether they had made any attempt to try to resolve the matter. On being told that there had been no such attempt, Reeves J briefly adjourned the matter to allow this to occur, but it was to no avail.
- Justice Reeves then directed the parties' lawyers to notify their respective clients about how much each lawyer intended to charge in legal fees. The Court was informed that the plaintiff's lawyer intended to charge about \$12,205 including filing fees and the defendant's lawyer intended to charge \$8,000. Despite the total legal costs being double the amount in dispute, parties were unable to resolve the matter.
- In his final attempt to force the parties and their lawyers to see some common sense, Reeves J reminded the parties' lawyers of their duty to conduct litigation as quickly, inexpensively and efficiently as possible. Again, this was to no avail.

The hearing of the application then proceeded, with Reeves J noting:

[The application] lasted a full day, a large part of which was taken up with objections to the voluminous affidavit material described above. In keeping with their bellicose approach thus far, when I began to hear the objections, I discovered that there had been no discussion between the two lawyers to attempt to resolve any of them and thereby avoid their clients' and the court's resources being wasted on that exercise. To compound this situation even further, during the hearing of those objections it emerged, incredible as it may sound, that neither lawyer appeared to have a copy of the *Federal Court Rules 2011* or the *Evidence Act 1995* (Cth) with him in court. Thus, neither of them could tell me which section or rule he was relying upon to make particular objections.

Justice Reeves described this situation as the 'absolute antithesis' of the overarching purpose of civil practice and procedure set out in s 37M of the FCA Act, which is to conduct the resolution of disputes accordingly to law and as quickly, inexpensively and efficiently as possible. Reeves J said:

[T]his is the sort of conduct that brings the legal profession into disrepute, that significantly undermines the efficient disposal of civil litigation and that has the potential to erode public confidence in the administration of justice in this country.

Implications for the Commonwealth

When it is appropriate to do so, Commonwealth litigants already consider and undertake genuine steps to resolve disputes before litigation is commenced. The Act does not change this but requires greater emphasis on alternative dispute resolution and early, out-of-court resolution.

For Commonwealth agencies, the genuine steps requirement also needs to be considered alongside the existing requirement in paras 5.1 and 5.2 of Appendix B to the *Legal Services Directions 2005* (Cth) that the Commonwealth or an agency only start proceedings if it has considered other methods of dispute resolution and, when participating in alternative dispute resolution, that it participate fully and effectively.

As this decision demonstrates, the Federal Court will take the failure to file a genuine steps statement into account when awarding costs and when also exercising the other powers available to it to ensure that lawyers conduct litigation in a timely, inexpensive and efficient manner.

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