

How to protect a producing party's financial interests when it's compelled to produce documents

In the matter of NewSat Limited (receivers and managers appointed) (in liquidation) ACN 003 237 303 and the entities listed in the Schedule NSD1734/2015, 21 September 2016

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Summary

In certain circumstances, a party who is under the compulsion of law – such as a subpoena or an order for production – to produce documents is entitled to be reimbursed its reasonable costs and expenses of compliance. In what circumstances may costs be recovered and what costs are recoverable?

In a decision delivered by the Federal Court of Australia on 21 September 2016 *In the matter of NewSat Limited (receivers and managers appointed) (in liquidation) ACN 003 237 303 and the entities listed in the Schedule ("NewSat")*, the Court ordered that the issuing party pay the following costs to the producing party:

- the producing party's internal costs in providing instructions to its solicitors and receiving advice;
- the producing party's external legal costs in full for reviewing the documents for relevance; and
- the producing party's external legal costs in full for advice on the order for production, attending court and communicating with the issuing party.

Background

The receivers and managers of NewSat Ltd ("Receivers") served an order for production on Morgan Stanley. The order for production did not identify specific documents but sought broad categories of documents. Following an electronic search, approximately 40,000 files were identified as being potentially caught by the order for production. The Receivers declined to agree to specific search terms which would assist in narrowing the scope of the order for production.

Morgan Stanley engaged an external law firm to assist in complying with the order for production. Clerks employed by the law firm undertook the initial review of documents for relevance. Documents potentially privileged, confidential or unsure were then reviewed by a solicitor. Documents were produced on a weekly basis in batches. Each week, Morgan Stanley's lawyers advised the Receivers lawyers on Morgan Stanley's current position as to its legal costs, the number of documents produced and the number of documents remaining to be examined.

Morgan Stanley was awarded all of its costs of compliance with the order also its costs of the Court application.

The legal principles

The statutory provision dealing with costs and expenses of compliance in producing documents is found in Rule 24.22 of the Federal Court Rules pursuant to which *"the Court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the*

subpoena. The Court in determining costs in *NewSat* followed the principles as set out in *Re Spedley Securities Ltd (in liq)* (1991) 4 ACSR 322 and *Charlick Trading Pty Ltd v ANRC* (1997) 144 ALR 647.

The Court's position

The Federal Court took the view that:

- While there is no specific statutory authority to allow for compensation for searching for documents in compliance with an order for production, it is appropriate for an allowance to be made.
- The jurisprudence concerning costs and expenses in complying with a subpoena is relevant to considering such a claim in connection with an order to produce.
- The Court's role when determining costs and expenses of compliance is to determine whether the costs and expenses claimed were incurred reasonably in complying with the order. It is not looking at it as a taxation (ie. assessment) of costs
- Considering the time constraints and the volume of the material, it was reasonable for Morgan Stanley to engage an external law firm to undertake the review of the material, including the review for relevance.
- It is not for the Court to look into the internal work capacity of a third party who has been ordered to produce documents.
- It was reasonable to undertake manual review of each document to determine relevance, privilege and confidentiality.

Implications

NSW's state equivalent of Rule 24.22 of the *Federal Court Rules* is found in Reg 33.11 of *Uniform Civil Procedure Rules*. The principles laid down in *NewSat* are also applicable to subpoenae and orders for productions issued out of NSW state courts.

From a producing party's perspective, it is important to communicate with the issuing party from the outset as to the volume of material potentially caught by a subpoena or an order for production and seek to narrow the scope if possible. If the production of a large volume of

documents is inevitable, then the producing party should keep the issuing party informed of its compliance costs and steps taken by it in complying with the process.

From an issuing party's perspective, one should ensure that the scope of the subpoena or order for production is appropriate and not unnecessarily wide. The issuing party should communicate with the producing party beforehand to see how much work is involved in attending to production and how that party will organise production. If possible, the issuing party should explore options to reduce manual effort in attending to production. The issuing party should obtain an estimate of the cost to produce.

Note: TurksLegal represented Morgan Stanley

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