Party status and costs –claim group members and corporation refused joinder

Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland [2004] FCA 1097

Spender J, 25 August 2004

Issue
The issues in this case were:

- whether a dissentient claimant and an Aboriginal corporation may be joined as respondent parties to a claimant application under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA);
- the distinction between the doctrines of res judicata and issue estoppels;
- cost orders under s. 85A(2) on the basis of unreasonable conduct.

This summary covers only the matters of general application or interest in the judgment. It does not address the particular findings made in relation to all of the orders sought.

Background
Michael Morgan filed a notice of motion in September 2003 (the current motion) seeking 31 orders in relation to the Combined Dulabed and Malanbarra/Yidinji claimant application (the combined application). A similar notice of motion filed by Mr Morgan in which orders in substantially the same terms were sought (the earlier motion) was dismissed by his Honour Justice Drummond: see *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2002] FCA 1370. Prior to the filing of the earlier motion, the court had ordered that mediation cease because the parties indicated they were close to a consent determination of native title.

Mr Morgan's submissions
Put broadly, Mr Morgan made his application because he rejected:

- the asserted connection of those making the combined application to the claim area; and
- the authority of those making the combined application—at [13] to [26].

He also alleged improper conduct by the North Queensland Land Council (NQLC) in relation to its handling of complaint procedures, representation and funding issues—at [27].

Res judicata and issue estoppel
In dealing with submissions that the doctrines of res judicata and issue estoppel prevented Mr Morgan from succeeding on the current motion Justice Spender, citing relevant authorities, noted that:

- the doctrine of res judicata has effect where 'the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence'; and
- in order to rely on res judicata, it was necessary to show that the earlier judgment was a final judgment between the parties and that there existed identity of parties and of subject matter—at [30].

It was found that the doctrine of res judicata did not prevent the current motion from being considered as there was no final decision, in the sense that a cause of action had merged into judgment. However, as Spender J noted, an issue estoppel may defeat a litigant without res judicata doing so. Issue estoppel arises where 'for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order'—at [31] to [33].

Joinder of dissentient claimant as respondent party to claimant application
Mr Morgan sought orders that he and another member of the claim group be joined as parties to the combined application under s. 84(5) of the NTA. It was uncontested that they were members of the claim group. As noted above, Mr Morgan had sought joinder as a party in the earlier motion.

Spender J considered the differing views of Justice Drummond in *Kulkalgal People v Queensland* [2003] FCA 163 and Justice Ryan in *Bidjara People #2 v Queensland* [2003] FCA 324 (both summarised in *Native Title Hot Spots* Issue 5) in relation to joining dissentient claimants as respondents.

In *Kulkalgal*, Drummond J held that the only avenue for a dissentient claimant was an application under s. 66B to replace the applicant on the basis that the applicant was no longer authorised or had exceeded their authority. The statutory scheme left no room for the principle that a person represented in an action by a representative applicant under O 6 r 13 of the Federal Court Rules can, if dissatisfied with the way the representative applicant is conducting the action, be joined as a respondent in the proceedings—at [41].

In *Bidjara*, Ryan J considered that s. 66B did not accommodate the situation of a dissentient claimant. Noting that it would unnecessarily multiply proceedings to require such persons to institute their own claims, his Honour held that dissentient claimants could be made parties pursuant to s. 84(5) as they are persons whose interests may be affected by a determination in the proceedings within the meaning of s. 84(3)(ii) or s. 84(3)(iii)—at [43].

Spender J preferred the view of Ryan J, noting that whether the discretion conferred by s. 84(5) was to be exercised in the circumstances of a particular case must depend on the circumstances of that case, including its history. In this case, his Honour declined to exercise the discretion to join the dissentient claimants as parties on the basis of issue estoppel:

> Mr Morgan is seeking the same relief as he sought in the earlier notice of motion, and for the same reasons...I acknowledge that the basis of Drummond J's earlier decision was his Honour's view as to power, but I nonetheless think that Mr Morgan is estopped by the decision on the first notice of motion seeking to be joined as a party from re-agitating the correctness of that decision. Even if I be wrong in that conclusion I would not, for discretionary reasons...accede to the request ... . In my opinion the discretion ... should not be exercised ... . The position is now no better than it was when Drummond J declined to join Mr Morgan ... in November 2002—at [49].

Application to join Aboriginal corporation as a party

Spender J found no basis under s. 84(5) for joining the Tjapanbara Yidinji Aboriginal Corporation as a party because an Aboriginal corporation's interest only existed to the extent to which it represented native title claimants. There was no evidence that the corporation's 'interests may be affected by a determination in the proceedings' beyond the interests of its individual members—at [50] and [51], citing *Adnyamathanha People No 1 v South Australia* [2003] FCA 1377, summarised in *Native Title Hot Spots* Issue 8.

Order seeking referral to Tribunal for mediation

An application to have the proceedings referred back to the Tribunal for mediation was refused because:

> [M]ediation would not have been an appropriate order [even] if Mr Morgan was [made] a party to the proceedings, as s. 86B(5) empowers the Court to direct mediation if the Court considers that the parties 'will be able to reach agreement'. Mr Morgan has made it abundantly clear that he is unable to accept even the validity of the combined claim and thus any order for mediation involving Mr Morgan would have the effect of creating an ... indefinite adjournment of the prosecution of the claim—at [53].

Orders sought against land council

Spender J declined to make orders against NQLC, the representative body for the area, on the basis that NQLC was not a party to the proceeding. His Honour also held it was not competent for the court to make orders dictating procedure and allocation of resources by a representative body—at [62] and [69].

Costs orders against Mr Morgan

Subsection 85A(1) provides that each party is to bear their own costs unless the court otherwise orders but this is subject to s. 85A(2), which provides that a party that has 'by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding' may be ordered to pay costs.

Spender J, while noting that Mr Morgan was not legally represented, considered he should pay the combined applicants' costs 'forthwith', according to O 62 r 3(3) of the Federal Court Rules, stating that:

> Mr Morgan is ... not entitled to seek to re-litigate issues decided adversely to him in earlier court proceedings, at least without exposure to costs ... . [H]e has unreasonably caused the respondents ... to incur the costs of his second notice of motion. He has frustrated and delayed the possibility of a consent determination of a claim that has a

> very protracted history, a result that would ... benefit Mr Morgan as an acknowledged member of the claim group—at [74].

His Honour found the policy that it is ordinarily inappropriate that an unsuccessful party in interlocutory proceedings pay costs 'forthwith' had no application in the circumstances:

> Mr Morgan unsuccessfully sought to be made a party to these proceedings. His plain objective ... was to torpedo ... aspirations ... for a determination of the native title claim. The making of an order that the costs of this second notice of motion be paid forthwith might tend to dissuade Mr Morgan from any further such attempts—at [77].

Decision

The current motion was dismissed, with orders as to costs outlined above.