Authorisation of the applicant

Fesl v Queensland [2005] FCA 120

Spender J, 22 February 2005

Issue
Can an application under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) be used to 'regularise' a claimant application that was not properly authorised at the time it was made?

Background
Two notices of motion were before the court:

- one filed by the applicant, Dr Fesl, seeking leave to discontinue the claim; and
- a s. 66B application seeking to replace the applicant on the claim—at [1].

The application had been registered since 1999.

Justice Spender was of the view that he ought to consider the question of discontinuance first as the question of whether the applicant's replacement was authorised pursuant to s. 66B was the 'subject of fierce controversy'—at [21].

Leave to discontinue the claim
Order 22 r. 2(2), of the Federal Court Rules requires that: 'a party who represents any other person in the proceeding shall not discontinue his claim for relief under sub-rule (1) without the leave of the Court.'

The State of Queensland, one Indigenous claimant, and a large number of Indigenous respondents supported the application for discontinuance but it was opposed by persons associated with the s. 66B application. It was common ground that the original application had never been properly authorised as required by s. 61(1) of the Act.

Consequently, his Honour was of the view that:

- the proceeding was likely to be held to be 'flawed from the outset' or 'foredoomed to fail';
- that the application was not even a 'claimant application', as defined in s. 253 of the NTA—at [2] to [3].

That section defines a claimant application to mean:

> A native title determination application that a native title claim group has authorised to be made, and unless the contrary intention appears includes such an application that has been amended. If the application was not authorised it could not be a native title determination application as the essence of the latter is one which requires that there has been an authorisation by the native title claim group—at [4].

His Honour at [6] noted the comments in *Covell Matthews and Partners v French Wools Ltd* (1977) 1 WLR 876 at 879 where Justice Graham said, among other things, that:

> [T]he court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved.

His Honour was very conscious of the fact that discontinuance would deprive the present claimants of the 'benefits of registration' but was of the view that discontinuance would not:

> [D]eprive them of benefits already obtained, and it will not prevent a new claim being registered, assuming it satisfied the requirements of NTA. The native title holders, including any who were not claimants under the present claim, retained protections afforded by the future act provisions of the NTA—at [7].

Section 66B application

Spender J was not persuaded by the argument that, because the applicant lacked authorisation to initiate the claim, she was powerless to seek to discontinue it—at [19].

His Honour noted that all parties were agreed that the applicant was not authorised by the claimant group, although there was a wide diversity of opinion as to what was the correct claimant group. In his Honour's opinion, if the application was not a 'claimant application', then s. 66B of NTA was incapable of application because:

- authorisation is a threshold requirement for the operation of s. 66B of NTA;
- the section is based on the condition that the applicant in a native title claim had authority to act which was conferred at the time when the claim was made—at [22] and [24].

His Honour was satisfied that:

- the original application was not authorised as required by s. 61 of the NTA and did not constitute a 'claimant application' as defined by s. 253;
- it was appropriate in all the circumstances (including disagreement as to the identification of the proper claim group) to permit leave to discontinue the proceedings—at [27].

Decision

The applicant was given leave to discontinue the proceedings pursuant to O. 22 r. 2(2) of the Rules of the Federal Court. Given the outcome, the court considered that it would be otiose to consider the motion seeking replacement of the applicant pursuant to s. 66B and thus the relief sought by that motion was refused—at [28] to [30].