Authorisation—Gubbi Gubbi application

Davidson v Fesl [2005] FCAFC 183

French, Finn and Hely JJ, 30 August 2005

Issue

This case is about an application to the Full Court of the Federal Court for leave to appeal against:

- a grant of leave to discontinue a claimant application;
- a refusal to replace the applicant in that application by exercising the discretion available under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA).

Central to both issues was the status of a claimant application in circumstances where 'the applicant' (defined in s. 61(2) as the person or persons who jointly constitute the applicant) was not authorised to do so by the native title claim group.

Background

This claimant application relevant to this decision was filed in the Federal Court in 1999 by Dr Eve Fesl. When it was considered by the court, the native title claim group was described as:

> The Gubbi Gubbi biological descendants who are matrilineally descended from [certain names of ancestors]…The surviving matrilineal descendants on whose behalf the claim is made are Evelyn Serico, Clifford Monkland, Lois Gulash, Eve Fesl, Nurdon Serico, Helena Gulash, Drew Gulash and future descendants.

The background to this case is discussed in *Fesl v Queensland* [2005] FCA 120, summarised in *Native Title Hot Spots* Issue 14. In that case, Justice Spender:

- granted Dr Fesl leave to discontinue the application; and
- refused an application made by Alexander Davidson and others to replace Dr Fesl as applicant under s. 66B.

At [12] to [14], the Full Court noted Spender J's primary reasons for granting leave to discontinue were that:

- the proceeding was likely to be held to be 'flawed from the outset' or 'foredoomed to fail' because:
  - no-one (including those making the s. 66B(1) application) contended that Dr Fesl was authorised to make the application as required by s. 61(1);
  - therefore, the application was not a 'claimant application', which s. 253 defines as one in which the 'applicant' is authorised by 'the native title claim group';
- authorisation, as a fact, is a threshold requirement for the operation s. 66B;
- therefore, that section could not operate to allow for the replacement of Dr Fesl.

The appeal

Those who made the s. 66B(1) application sought leave to appeal against Spender J's decision, submitting that Dr Fesl's admission that she did not have the authority of all members of the claim group to exercise the power of an applicant:

- meant she had no power to discontinue the claim;
- did not render the claim void from the beginning (*ab initio*); and
- supported the s. 66B(1) application for her replacement by persons authorised by members of the native title claim group—at [18].

Authorisation, standing and the threshold question

In a joint judgment, Justices French, Finn and Hely noted that:

- the definition of 'native title claim group' in ss. 61(1) and 253 is of importance because standing to bring a claimant application is confined to a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group;
- it was 'significant' that s. 61(1) appeared to require that those authorising the applicant (i.e. the native title claim group) were native title holders and not 'mere' claimants;
- it followed that, while authorisation 'can be regarded, from some points of view, as a threshold requirement for an application', it can never be resolved in favour of the applicant until the application is finally determined—at [2] to [3] and see s. 13(1).

Comment—authorisation threshold

In this context, note that authorisation appears to be a 'threshold' condition in a s. 66B(1) application, since it has been held that those making the application must satisfy four conditions:

- there is a claimant application (which is defined as noted above);
- each applicant for an order under s. 66B(2) is a member of the native title group;
- the person to be replaced is either no longer authorised by the claim group to make the application and to deal with the matters arising in relation to it or has exceeded the authority given to them by the claim group;
- the persons making the application under s. 66B(1) are authorised by the claim group to make the application and to deal with matters arising under it— French J in *Anderson v Western Australia* (2003) 204 ALR 522 at [17].

Criteria for grant of leave

In considering the application for leave to appeal, the court identified the 'primary' criteria for granting such leave:

- whether, in all the circumstances, the decision of Spender J was attended with sufficient doubt to warrant its reconsideration on appeal;
- whether substantial injustice would result if leave were given, supposing Spender J's decision to be wrong—at [21], referring to *Décor Corporation Pty Ltd v Advance Industries Inc* (1991) 33 FCR 397 at 398-9.

First criterion—finding that lack of authorisation was irreparable defect

As noted above, Spender J found that, where an application was not initially authorised, it was not a 'claimant application' and s. 66B had no application because authorisation was 'a threshold requirement' to the operation of that provision. The court noted that this view of the 'initial authorisation requirement' may be 'debatable', going on to say that:

- it was not clear whether or not Spender J intended to characterise a lack of initial authorisation as 'an irreparable defect';
- either way, it was clear that his Honour thought that such a 'defect' could not be repaired by way of an application under s. 66B for a 'change' in those named as the applicant—at [22].

This raised a question: Can a claimant application 'deficient in initial authorisation' be permitted to continue 'without any possibility' of rectification? While they didn't need to decide the point in this case, their Honours had 'serious doubts that such a result was intended by the legislation' and so, in considering the first criteria for the grant of leave, it was noted that some aspects of Spender J 's reasons 'may be attended with some doubt'—at [22].

So, it appears that a 'defect' or 'deficiency' in initial authorisation could, in an appropriate case, be rectified by the court, although it is not clear whether this would be via s. 66B or some other means.

Second criterion—grant of leave would result in substantial injustice

Those appealing against Spender J's decision also challenged:

- the factual conclusion that Dr Fesl lacked 'initial' authorisation;
- the weight attributed, or not attributed, to other matters, e.g. whether the original application was ratified by the Gubbi Gubbi people at a meeting in October 2004.

The court found that:

- the practical considerations in this case, which included the 'wide diversity of opinion as to what is the correct claimant group' and 'the serious disagreements' about identification of the proper claimant group, 'overwhelmingly' supported the proposition that no substantial injustice would be suffered by any party if leave were refused;
- the definition of the native title claim group, which is of 'great importance', was 'curiously constrained' in this case and while it was so constrained and contentious, it was difficult to see how the question of authorisation, which depended upon that definition, could 'ever satisfactorily be resolved';
- doubts had been raised about the adequacy of the notification and the participation in the 'authorisation' meeting relied upon by those making the s. 66B application and the minutes of the authorisation process for the initial application by Dr Fesl also raise doubts about participation by key elements of the defined native title claim group;
- the evidence of prejudice to those seeking leave to appeal was not very specific and, in any event, may depend upon the scope of the native title claim group as defined—at [24] to [27].

Therefore:

> [T]here is no substantial injustice arising from the discontinuance of the native title determination application. In fact there are considerable benefits to be gained in the opportunity that is now provided for a more thorough consideration of the scope of the native title claim group and the steps necessary to ensure that proper authorisation by that group is secured from named applicants—at [27].

Decision

For the reasons given above, the application for leave to appeal was dismissed—at [28].

Costs

Counsel for the various respondents sought an order for costs. Counsel for the applicants resisted, referring to s. 85A. In their Honours' opinion:

> [T]here was no demonstrable benefit to indigenous interests flowing from the bringing of the application for leave. There is plainly a practical need to focus upon sorting out differences between the various elements of the Gubbi Gubbi people that have hitherto impeded the development of a properly defined native title claim group which could advance its native title claim as one. Collateral litigation of this kind does not serve the purposes of the Act—at [29].

However, the parties were given leave to make submissions as to costs.