Strike-out of claimant application

Hillig v Minister for Lands (NSW) (No 2) [2006] FCA 1115

Bennett J, 22 August 2006

Issue

The issues before the Federal Court were:

- whether the applicant in a claimant application should be joined as a party to a non-claimant application over the same area;
- whether the claimant application should be summarily dismissed under s. 84C of the *Native Title Act 1993* (Cwlth) (NTA) or Order 20 rule 2 of the Federal Court Rules.

Background

A non-claimant application was brought by Peter Hillig, the administrator of the Worimi Local Aboriginal Land Council (the council). It covered land in the Port Stephens area that had been transferred to the council under the *Aboriginal Land Rights Act 1983* (NSW) (Land Rights Act). At the time of the hearing of this case, a contract for sale of the land in question had been executed and awaited completion. However, the transfer of the land to the council was subject to ss. 40 and 40AA of the Land Rights Act, which provided that the council could not deal with the land unless it was the subject of an 'approved determination' of native title, as defined by s. 13 and s. 253 of the NTA. Mr Hillig sought a determination that native title did not exist in relation to the land to facilitate the completion of the contract for sale.

In February 2006, the Worimi claimant application (the Worimi application) was filed. The native title claim group described in that application, which was prepared by Mr Gary Dates (also known as Worimi) without legal advice, was:

> The female members of the Garuahgal people who are descended from Mary Mahr born in 1847... being those aboriginal people whose traditional lands and waters are situated in the Port Stephens area of New South Wales.

Worimi (Mr Dates) asserted that authority to make the claimant application was given to him as the custodian and protector of the Garuahgal women. He made application to be joined to the non-claimant application brought by Mr Hillig. In May 2006, the council filed motions to be joined in, and to strike out, the Worimi application. The hearing of those motions commenced on 13 June 2006 but was adjourned when the court was notified that Worimi was unwell and could not attend. When it recommenced, Worimi was legally represented.

Counsel for Worimi accepted that the original application was deficient, failed to comply with the NTA and was liable to be struck out but opposed such an order on the basis that her client should have the opportunity to file a further application. A proposed application was prepared and tendered during the hearing in support of an application for an adjournment to file a further application. The proposed

application was to be made by Worimi (Mr Dates). It specified a different native title claim group, made up of Worimi, his wife and their four daughters.

Application by Worimi for joinder in the non-claimant application

Justice Bennett held that if Worimi (Mr Dates) had a claim to native title over the Port Stephens land on behalf of a native title claim group, subject to compliance with the NTA, he would have sufficient interest to be joined to the non-claimant application—at [18].

In terms of the original Worimi application, Bennett J held that there were a number of difficulties with the identification of the claim group, including that:

- it was described in various ways in the original application and in the affidavits filed in support of the application;
- Worimi was named as an individual who belonged to the claim group when the application was clearly made on behalf of the female members of the relevant group—at [21] and [29].

Her Honour held that:

- it was apparent that the native title claim group had not been clearly identified, contrary to s. 61(4);
- Worimi (Mr Dates) was not a member of the claim group as required by s. 61(1);
- the evidence on authorisation was insufficient and established that some of the women of the Worimi nation and the Maaiangal clan, including Worimi's mother, did not authorise the application—at [29], [30], [37] and [80].

In terms of the proposed application, Bennett J identified significant problems:

- authorisation of the original application may not extend to an abandonment of the native title claim group's claim as a result of Worimi substituting himself, his wife and their daughters for the current claim group;
- the proposed application formulated a claim that was contradicted by the evidence of the applicant as to the identity of the correct claim group and the nature of the original claim;
- the proposed application asserted individual or group native title rights and interests on behalf of Worimi, his wife and their children (the proposed claim group);
- this was not a case of identifying the earlier claim group with more certainty – rather, the intention was to change the persons on whose behalf the application was brought;
- the claim group did not include all the persons who hold the common or group rights and interests as required by s. 61(1) – it had not been shown that the proposed claim group alone possessed rights and interests in the Port Stephens land;
- the requirements of ss. 61 and 251B relating to authorisation had not been met because the identity of the native title claim group was uncertain;
- therefore, it could not be said that all the persons who hold the common rights and interests had authorised the bringing of the proposed application—at [51] to [52], [56], [66] and [70]. See also s. 61(1).

Claimant application struck out

Bennett J was of the view that, if the description of the claim group in the proposed application, as a matter of construction, could not comply with the NTA and could not be cured by amendment or further evidence, then there was no good reason to grant an adjournment. Therefore, the original claimant application should be struck out—at [46] and [72].

Application for adjournment

Her Honour held that it was not appropriate to permit Worimi (Mr Dates) to file the proposed application as an amended application because of the inconsistencies in the claim groups of the original and proposed application and issues in relation to authorisation of the proposed claim group. Nonetheless, he was given a further opportunity to present his case—at [81] to [82].

Abuse of process

Mr Hillig's argument that the claimant application was an abuse of process brought only to prevent the sale of the land and ventilate complaints about the conduct of the land council was rejected:

> [T]here is ... evidence from Mr Dates [Worimi] of his independent concern for the Port Stephens land and his claim to native title and for the women whom he has asserted have an interest in the land. In the context of a non-claimant application for a declaration that no native title exists ... , Mr Dates' [claimant] application ... and his application to be joined to the [non-claimant] application does not, of itself, constitute an abuse of process, whether or not his concern is to prevent the sale of the land—at [85].

Decision

Her Honour struck out the Worimi application, relying on s. 84C of the NTA, and dismissed it under O 20 r 2 of the Federal Court Rules. Worimi (Mr Dates) was ordered to file and serve any further claimant application and any further evidence in support of his application to be joined to Mr Hillig's non-claimant application.