

Party status—PNG national

Akiba v Queensland (No 3) [2007] FCA 39

Spender J, 31 January 2007

Issue

This case deals with an application by Pende Gamogab for leave to appeal against a decision of Justice French in *Akiba v Queensland (No 2)* [2006] FCA 1173 to dismiss his application to be joined as a party to a claimant application. Mr Gamogab is from Papua New Guinea (PNG). French J's decision is summarised in *Native Title Hot Spots Issue 21*.

Background

The claimant application in question is known as the Torres Strait Regional Seas Claim. French J concluded that Mr Gamogab had an interest that might be affected by a determination in the Torres Strait Regional Seas Claim but decided against joinder in the exercise of his discretion. The exercise of that discretion was based on implications arising out of the 1978 Australia-PNG Treaty (the treaty). French J decided it was inappropriate for the native title proceedings to be used as a vehicle to advance the case of PNG villages whose members were not treated as traditional inhabitants by the executive governments of PNG and Australia for the purposes of the treaty (as was the case with Mr Gamogab's village).

Whether leave to appeal should be granted

Justice Spender noted that all of the parties in this case proceeded on the basis that leave to appeal was required because French J's decision was interlocutory. Spender J accepted leave was required without deciding that question—at [34].

Assuming leave to appeal was required, two issues were then relevant:

- whether, in all the circumstances, the decision of French J was attended by sufficient doubt to warrant it being reconsidered by the Full Court of the Federal Court; and
- whether substantial injustice would result if leave was refused, supposing the decision to be wrong—at [35], referring to *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 397 to 400.

In this case, Spender J was only concerned with the question of whether leave to appeal should be granted and not whether French J's exercise of discretion miscarried—at [38].

Decision

Mr Gamogab was granted leave to appeal on the basis that French J's exercise of discretion was 'tainted by having regard to irrelevant considerations, or by a misunderstanding of what the applicant was asserting as a basis for joinder'—at [61].

Spender J was of the view that:

- that the focus on the treaty as the basis for the exercise of the discretion was arguably 'quite misplaced'; and
- it was at least arguable that consideration of what the treaty provided, and which nationals of PNG had the benefit of it, was 'quite irrelevant on the question of joinder of Mr Gamogab, let alone determinative' — at [48] and [55].