Reinstatement of a dismissed application

Kullilli People # 2 and Kullilli People # 3 v Queensland [2007] FCA 512

Tamberlin J, 13 April 2007

Issue

The issues in this case were:

- who had authority to bring a motion seeking to reinstate two dismissed claimant applications and then to set aside orders requiring the people who made those applications to file a new application;
- did the Federal Court have jurisdiction to reinstate the dismissed applications and make those orders;
- if jurisdiction was established, what factors were relevant to the exercise of any discretion in relation to the exercise of that jurisdiction?

Background

As part of a program directed at progressing claims in southern Queensland by (among other things) resolving overlaps, Justice Tamberlin made the following orders:

- by 1 November 2006 , the Kullilli People file and serve a new claimant application that incorporated the terms of certain agreements between them and other claim groups in the area concerned;
- the Kullilli People # 2 and Kullilli People # 3 claimant applications stand dismissed as at 2 November 2006.

When the orders were made, Queensland South Native Title Service (QSNTS), the representative body for the area, was the legal representative for both claims but it subsequently ceased to act. No further order was sought prior to 2 November 2006 and 'as a consequence of this inaction the order came into force'—at [9].

On 13 December 2006, a firm of solicitors applied to have the applications reinstated and to set aside the order that a new claimant application be filed on behalf of the Kullilli People. Both the State of Queensland and QSNTS opposed that application.

Authority to make the reinstatement application

Tamberlin J decided that the Kullilli People were legally represented by QSNTS until both Kullilli People claimant applications were dismissed on 2 November 2006 as a result of his conditional orders.

The firm of solicitors making the application in this case filed an affidavit attaching a copy of an 'authority' (dated 4 November 2006) that 'confirmed' that the firm was appointed to represent the Kullilli 'applicant'. This authority to act was challenged by the state and QSNTS on the basis that it was signed by only nine of the 12 people

who jointly constituted Kullilli People's 'applicant' in the two dismissed applications: see s. 61(2)(c) of the *Native Title Act 1993* (Cwlth) (NTA).

His Honour considered that ss. 61(1) and (2)(c) required a claimant application to be made by a person, or persons, authorised by a 'native title claim group'. Therefore, Tamberlin J was of the view that the person, or those persons jointly, comprised the applicant i.e. if more than one person was authorised, as in this case, then they were, jointly, the 'applicant group'

The request for reinstatement of the applications relied on a resolution passed at a meeting of the native title group in March 2002 which said that decisions of 'the Applicants':

> [A]re generally expected to be made by consensus but, where that is not **practicable** or **possible** in respect of a matter, then, unless there is a need to make the decision immediately..., time will be permitted for each Applicant to consult with his or her families... **Then** a decision about the matter can be made with agreement of 7 or more of the Applicants. (Tamberlin J's emphasis.)

His Honour found that:

- the power to 'enter into an arrangement' with less than all members of the 'applicant group' was contingent on consultation;
- therefore, there was 'at least a real doubt as to the effectiveness of the authorisation relied on by' the firm of solicitors—at [14].

The state submitted that the case law recognised that the role of 'the applicant' was a representative one and that it was not 'competent' for only some of the persons who comprised 'the applicant' to obtain separate legal representation and act other than by unanimous agreement. His Honour was of the view that:

> In these circumstances...there is a significant doubt whether ... [the firm of solicitors] has been duly authorised to act. I think the better view is that there is no such authority on the face of the present documents and the evidence before me—at [15].

Jurisdiction

The application to set aside the dismissal order was brought under O 35 rule 7(2)(c) of the Federal Court Rules, which gives the court power to set aside a judgment after it has been entered where the order is interlocutory. In this case, the order of dismissal had been entered. Tamberlin J found that:

> [T]he orders for dismissal effective as from 2 November, is final because it has the effect of dismissing the applications. However, having regard to the conclusion I have reached as to the exercise of my discretion it is not necessary to resolve this question—at [16].

Discretion

Assuming that the court had power (i.e. discretion) to set aside the orders made, his Honour was of the view that it should not be exercised in this case because:

> It is well settled that, although broad, the discretion conferred by O 35 r 7(2)(c) should be exercised in a judicial manner and only in exceptional circumstances...This guideline is based on the principle of finality of litigation which counsels courts to exercise caution

when considering whether orders previously made and final on their face and entered should be reopened for consideration and set aside—at [17].

It was noted (among other things) that:

- no satisfactory attempt was made to either comply with the orders and file a new application or have the orders vacated;
- the directions to file a new application were part of a strategy to resolve overlaps and reinstating these applications would create an overlap with another application and result in all the overlapping applications being programmed for trial;
- the Kullilli People could make a new application that was both properly authorised and also removed 'the doubts inherent in the present circumstances'—at [17] to [23].

Decision

The application for reinstatement of the applications was dismissed and the application to set aside the order that a new application be filed was refused—at [24].