Party status for PNG national – appeal to Full Court

Gamogab v Akiba [2007] FCAFC 74

Kiefel, Sundberg and Gyles JJ

Issue

This case deals with an appeal to the Full Court of the Federal Court against a decision to dismiss an application to be joined as a party to a claimant application known as the Torres Strait Regional Seas Claim—see *Akiba v Queensland (No 2)* [2006] FCA 1173 (*Akiba No 2* , summarised in *Native Title Hot Spots* Issue 21).

Background

Pende Gamogab, a citizen of Papua New Guinea (PNG), applied pursuant to s. 84(5) to be joined as a party to the Torres Strait Regional Seas Claim. Section 84(5) provides that:

> The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

In *Akiba No 2* , French J (the primary judge) concluded that Mr Gamogab had an interest that might be affected by a determination in the Torres Strait Regional Seas Claim. The finding that the Mr Gamogab had such an interest was uncontentious on appeal.

The primary judge then considered whether or not to exercise the discretion available under s. 84(5) to join Mr Gamogab in the light of:

- 1978 Australia-PNG Treaty concerning sovereignty and maritime boundaries in the area between the two countries (the treaty), the *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (Cwlth), the *Torres Strait Fisheries Act 1984* (Cwlth) and an article on the history contents of the treaty;
- the effect of a determination of native title made pursuant to s. 225 of the NTA and the 'defensive' use of a claim to hold native title in the absence of an application under s. 61(1);
- the concept of 'interests' for the purposes of joinder under the NTA— *Akiba No 2* at [18] to [28] and [37] to [49], referring to *Kokatha Native Title Claim v South Australia* (2005) 143 FCR 544; [2005] FCA 836 (summarised in *Native Title Hot Spots* Issue 15) at [24] and *Byron Environment Centre Inc v The Arakwal People* (1997) 78 FCR 1 (*Byron*).

The primary judge decided, in the exercise of discretion, that joinder should be refused, largely because of implications arising out of the treaty.

The village of Kupere, where Mr Gamogab lived, was not one of the 14 'treaty villages' whose inhabitants are accepted, under an exchange of notes between Australia and Papua New Guinea (PNG), as beneficiaries of the treaty. This meant that he was not recognised as a 'traditional inhabitant' with traditional customary rights under the treaty. French J said:

> There is a risk ... that the joinder of Mr Gamogab will bring to bear on these proceedings debates between village communities in PNG about their respective interests in the Torres Region Seas Claim area. These are matters best left to the courts of PNG or to its executive government to resolve by agreement with the Australian government under the Treaty. As a matter of discretion I consider that the joinder of Mr Gamogab, notwithstanding his claimed interest, is undesirable. I consider that attention should also be given to the position of other PNG nationals who have been joined as parties—*Akiba No 2* at [48].

Assuming that the primary judge's decision was interlocutory, in which case leave to appeal to the Full Court was required, it was granted—see *Akiba v Queensland (No 3)* [2007] FCA 39 (*Akiba No. 3* , summarised in *Native Title Hot Spots* Issue 24).

Majority decision on appeal

Justice Gyles (with Justice Spender agreeing) was of the view that the exercise of the discretion miscarried because the primary judge:

- misdirected himself as to the nature of the discretion being exercised;
- failed to give any, or any proper, consideration or weight to the statutory intention that all parties whose interests may be affected should be before the court at the one time to be dealt with by the one determination of native title;
- did not give any consideration to imposing terms which could 'cure' the possible risk attaching to joinder—at [50] and [64].

Gyles J was of the view that the primary judge:

- 'appeared to consider that the discretion to join or not to join a party was, in effect, at large', which was wrong;
- failed to consider whether any risk arising from joinder of Mr Gamogab could be dealt with by imposing conditions upon joinder that prevented Mr Gamogab from relying upon inappropriate matters—at [56].

After setting out the relevant provisions found in ss. 66 and 84, Gyles J noted that Mr Gamogab could have been joined to the proceedings as of right 'if he had applied in time' i.e. within the period prescribed by s. 66(10). This, it was said:

> [I]ndicate[s] that the principal issue which arises under s 84(5), assuming the threshold as to affectation of interests is reached, is to assess the prejudice occasioned to the other parties and the Court by the delay in applying to be joined. It would be odd in this day and age if delay in applying, in itself, were to radically prejudice a potential party. That view is consistent with the "in rem" nature of the proceeding (see s 225)—at [59].

Gyles J noted that:

- joinder of parties is a necessary aspect of the management of all litigation and there are always rules of court governing that topic;

- it is fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party;
- once the nature of the statutory discretion is understood, the risk referred to by the primary judge could hardly outweigh the evident statutory purpose of having all parties, whose interests may be affected, before the court at the one time so that they could be covered by the same determination of native title;
- no finding was made that there was any prejudice to any party by reason of a late application for joinder—at [60] to [61], referring to Order 6 of the Federal Court and *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

Conditions could be imposed

His Honour noted (among other things) that:

- the docket judge could control the proceeding to prevent truly irrelevant or inappropriate arguments or material being advanced by a party and the Commonwealth (as a party to the proceedings) should be in a good position to judge that situation;
- an appropriate term could have been constructed imposing conditions upon a grant of leave to be joined;
- the management of a large native title claim is difficult, with the number of parties entitled to be joined being one contributing factor;
- that said, there was good reason for joinder because the interests of the parties may be affected by a determination in the proceedings;
- while the width of the construction of 'interests' under s. 84 had a 'significant' impact, the remedy to any case management difficulties it gave rise to did not lie in excluding persons whose interests may be affected 'in the exercise of an unconstrained discretion by individual judges';
- the very width of the interests that may be affected by a determination indicated that every party was not to be treated in the same way in the management of the case and the docket judge had considerable discretion as to the extent to which a party was permitted to participate in the process;
- Mr Gamogab accepted that there would be limitations on what he could rely upon if joined—at [63] and [65], referring to *E I Du Pont De Nemours & Co v Commissioner of Patents (No 5)* (1989) 87 ALR 491 and *Byron*—at [63] and [65].

Conclusion

Gyles J noted that, while there were well known limits upon an appeal court intervening in relation to the exercise of judicial discretion on a matter of practice and procedure, a decision to exclude a party is a particular kind of decision on a matter of practice and procedure. In this case, the appeal should be allowed because the exercise of discretion by the primary judge miscarried—at [64].

The discretion having miscarried, it was found that 'it is clear that joinder should have been permitted'. While it was open to the Full Court to make an appropriate order, it was preferable that the docket judge 'consider whether terms should be imposed upon the joinder and, if so, what those terms ought to be'—at [66].

Decision
The majority decision was to allow the appeal, set aside the orders dismissing Mr Gomogab's application for joinder and remit the matter to French J. As to costs, it was noted that s. 85A of NTA, which did not apply 'in terms' to an appeal, did refer to 'proceedings' in the Federal Court and so it appeared there was no scope for a costs certificate to be granted under the *Federal Proceedings (Costs) Act 1981* (Cwlth)—at [49] to [50] and [66] to [67].

Dissent
Justice Kiefel dissented, finding that that appeal should be dismissed with no order as to costs. Her Honour's reasons are not summarised here—see [1] to [48].