Interlocutory injunction – Rubibi

Sebastian v Western Australia [2008] FCA 926

Gilmore J, 19 June 2008

Issue

The issue before the Federal Court was whether to make orders to restrain the making of future act agreements over areas where native title had been found to exist. The 'core submission' made by those applying for injunctive relief (the Walman Yawuru) was that the registered native title claimant (the Rubibi applicant) had no authority to negotiate with the State of Western Australia in relation to those future acts. The application was dismissed pursuant to. 31A of the *Federal Court of Australia Act 1976* (Cwlth) (FCA) because there were no 'arguable serious issues to be tried' and so no reasonable prospect of success. There was no order as to costs.

Background

Injunctive relief was sought on behalf of the Walman Yawuru, a group that had unsuccessfully opposed the making of a determination recognising the communal native title of the Yawuru community over areas in and around Broome. The substantive proceeding to which this application relates is a claimant application made pursuant to s. 13(1) of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the Yawuru community by the Rubibi applicant.

The determination recognising the Yawuru community's native title is not yet effective because no prescribed body corporate (PBC) has been determined. As a result, the details of the Yawuru community's claimant application are still on the Register of Native Title Claims.

The Rubibi applicant (acting as the 'registered native title claimant') has, since the finding that the Yawuru community holds native title, been negotiating with the state to reach a 'global agreement' to settle native title and heritage issues in relation to specific future developments in Broome. The Walman Yawuru, who were recognised as part of the native title holding community, but not as holding native title to their clan area on that basis, decided not to participate in the negotiations pending resolution of their appeal against that finding (among other things). They were unsuccessful on appeal—for further background, see *Western Australia v Sebastian* [2008] FCAFC 65, summarised in *Native Title Hot Spots* Issue 27.

Despite the dismissal of the appeal, and an invitation to participate in the negotiations, the Walman Yawuru maintained that the Rubibi applicant did not represent them and that they wished to be independently represented.

In support of the application for injunctive relief, it was submitted (among other things) that:

- the actions taken by the state and the Kimberley Land Council (the KLC, representing the Rubibi applicant in the negotiations) effectively denied the Walman Yawuru the option of taking any action to protect specific sites of significance to them;
- the state and the KLC had entered into a formal agreement under which the KLC is recognised as the sole authority to enter into negotiations on behalf of the traditional owners of Broome over potential processing sites to service the Brown Basin gas field—at [17] to [20].

Was the court *functus officio*?

The Rubibi applicant, in seeking to have the Walman Yawuru's application dismissed, submitted (among other things) that:

- the court was *functus officio* because final orders had been made in the substantive proceedings (i.e. the claimant application made on behalf of the Yawuru community had been heard and determined), apart from the exercise of liberty to apply in respect of the PBC determination and the inclusion of maps of the determination area;
- liberty to apply did not extend so far as to allow the making of the application for injunctive relief.

In the event, it was not necessary to decide this question because the Walman Yawuru's representative conceded that, if the two main issues discussed below were resolved against them (which they were), their application should be dismissed. Therefore, his Honour Justice Gilmour assumed (without deciding) that the court had jurisdiction to entertain the Walman Yawuru's application—at [28].

However, his Honour was not persuaded that it was 'necessarily the case' that the court was *functus officio* because (among other things):

- the court had ancillary powers flowing from ss. 22 and 23 of the FCA to resolve the whole of the controversy between the parties and so had power to make supplemental orders;
- while the exercise of this jurisdiction required caution, it was not limited to making of orders in aid of the enforcement and 'working out' of original orders—at [23] to [28].

First issue – native title party

The first issue was whether the Rubibi applicant had ceased to be a 'native title party' for the purposes of s. 30(2) of the NTA, which provides that: 'A person ceases to be a native title party if the person ceases to be a registered native title claimant'. The question before the court was not one of statutory construction but whether, on the facts, the provision applied.

It was accepted that procedural rights in relation to future acts accrue to a 'registered native title claimant', as defined in s. 253 of the NTA i.e.

> [P]ersons whose…names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land and waters.

A 'registered native title claimant' is (among other things) a 'native title party' in right to negotiate proceedings – see ss. 29(2) and 30(1) of the NTA. The names of all of the people comprising the Rubibi applicant still appear on the Register of Native Title Claims in relation to the whole of the relevant area. However, the Walman Yawuru submitted that the Rubibi applicant had ceased to be a native title party because of the note to s. 30(2), which provides that:

> If a native title claim is successful, the registered native title claimant will be succeeded as a native title party by the registered native title body corporate.

His Honour observed that the NTA clearly contemplated the removal of the registered native title claimant from the Register of Native Title Claims once an 'effective determination' was made. However, in this case:

> [T]o the extent that it was determined that native title existed, the determination was to take effect immediately upon the making of a determination [of a PBC] under s 56(1) or s 57(2) of the Act…No determination has been made under either of those provisions of the Act. Accordingly the determination of native title has not yet taken effect—at [38].

The court accepted that the order was made in these terms to address:

> [A] perceived hiatus in the Act whereby, once a native title determination had been made and taken effect over an area of land, …the Native Title Register would…be amended to remove the entry pursuant to s 190(4)(d)…if the application was finalised. Early determinations became effective immediately with respect to areas where native title had been extinguished, as well as areas where native title existed, but allowed a period of time for nomination of a prescribed body corporate…In such a case, there was an hiatus period between removal of the entry from the Register of Native Title Claims and thereby removal of the details of the registered native title claimant and the entry onto the National Native Title Register of the PBC…Arguably, in this period there was no native title party…to notify or to negotiate with for the purposes of Part 2 Division 3 of the Act—at [40].

The court noted that s. 190 was amended by s. 100 of the *Native Title Amendment (Technical Amendments) Act 2007* so that s. 190(4)(d) now addresses this issue and that:

> [I]n the period between the making of a native title determination and the making of a PBC determination or nomination, the Register of Native Title Claims will make the situation clear to ensure that procedural rights are only accorded to the registered native title claimants over areas where native title has been found to exist—at [43].

After noting these amendments, it was found that the Rubibi applicant was:

- the 'registered native title claimant' as a matter of fact (because the determination of native title in this case was yet to take effect);
- the 'native title party' for the purpose of exercising the right to negotiate under the NTA—at [44].

Therefore, the submission that the Rubibi applicant had ceased to be a native title party failed—at [45].

Second issue – authorisation

The Walman Yawuru submitted that, even if the Rubibi applicant was empowered to exercise procedural rights in relation to future acts, the Walman Yawuru people had not authorised the Rubibi applicant to make the substantive application as required by s. 61(1). The court noted (among other things) that:

- no application to replace the Rubibi applicant had been made pursuant to s. 66B at any time during the proceedings;
- both the native title claim group description and the description of the native title holders in the determination of native title included a list of apical ancestors;
- the first two apical ancestors on both of those lists were identified in oral submissions made on behalf of the Walman Yawuru as their apical ancestors;
- therefore, the native title claim group included the Walman Yawuru people;
- no challenge concerning authorisation had been made earlier in the proceeding, the claim was now finalised (but for the nomination of the PBC) and final orders had been made—at [50].

In these circumstances, his Honour found that the submission on lack of authorisation failed:

> [T]he Walman Yawuru cannot now raise the question of the lack of authorisation of the Rubibi applicant…In its negotiations with the State the Rubibi applicant represents the Yawuru Community which includes the Walman Yawuru people—at [50].

Costs

After noting the discretion to order costs pursuant to s. 43 of the FCA, and the effect of s. 85A of the NTA on its exercise, Gilmore J found (among other things) that:

- the application for injunctive relief was brought within the substantive proceedings and so, pursuant to s. 85A(1), *prima facie* there would be no order as to costs;
- the issues in this case were complex, on one level, and those seeking the injunction were not represented by a solicitor or counsel;
- in these circumstances, while the application had no reasonable prospects of success, the Walman Yawuru's pursuit of it should not be characterised as 'unreasonable conduct' for the purposes of s. 85A(2). (On unreasonable conduct, see *Birri-Gubba (Cape Upstart) People v Queensland* [2008] FCA 659, summarised in this issue of *Native Title Hot Spots*);
- there was no other basis for departing from the *prima facie* rule under s. 85A and so no order for costs should be made—at [53] to [57].

Decision

Gilmore J dismissed the Walman Yawuru's application for injunctive relief pursuant to s. 31A of the FCA because there were no 'arguable serious issues to be tried' and so no reasonable prospect of success, with no order as to costs—at [52] and [57].

Postscript – appeal finalised, special leave application filed

On 18 July 2008, the Full Court made orders by consent to finalise the appeal proceedings. Pursuant to those orders (among other things), the state's appeal and the Walman Yawuru cross-appeal were dismissed, the Rubibi cross-appeal was

allowed in part and the determination of native title made on 28 April 2006 varied to reflect the court's findings on the appeal.

On 15 August 2008, the state filed an application for special leave to appeal against findings made in *Western Australia v Sebastian* [2008] FCAFC 65 that Reserve 631 was not validly create and that Reserve 1647 was not vested in trustees under the *Cemeteries Act 1897* (WA).