

Judicial disqualification—native title proceedings

Margarula v Northern Territory [2009] FCA 290

Reeves J, 5 March 2009

Issue

The issue before the Federal Court was whether Justice Reeves should disqualify himself from further hearing or determining a claimant application made under ss. 13 and 61(1) of the *Native Title Act 1993* (Cwlth).

Background

Approximately ten years ago, when he was a barrister in Darwin, Reeves J provided an advice to the Aboriginal and Torres Strait Islander Commercial Development Corporation (the ACD Corporation) as to whether native title had been extinguished over the land on which the Crocodile Hotel stands. That area is claimed by the applicant, Yvonne Margarula, made on behalf of the Mirrar People in a claimant application that was before the court. On becoming aware of the advice he had previously given, Reeves J informed the parties. A notice of motion seeking to have his Honour disqualify himself was then brought by the applicant.

Test for disqualification on the basis of apprehended bias

Reeves J outlined the test in relation to the apprehension of bias principle as stated by the High Court in *Ebner v Official Trustee* (2000) 205 CLR 337. That test provides that a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. This involves a two-step process:

- the identification of what it is said might lead the judge or juror to decide a case other than on its legal and factual merits; and
- the logical connection between that matter and the feared deviation from the course of deciding the case on its merits—at [39].

The advice to ACD Corporation was the matter which the applicant said might lead Reeves J to decide the Mirrar application other than on its legal and factual merits—at [40].

His Honour considered a number of factors that strongly suggested that no logical connection existed, namely:

- that no issue of fact or credibility was likely to arise in the determination of the application and all underlying facts were matters of public record and almost certain to be agreed by the parties;
- the issues in the application were likely to be exclusively legal, involving the construction of the NTA and its application to the underlying facts; and

- since the provision of the advice, there had been a number of significant decisions of the High Court bearing on the issue of extinguishment, all of which would be binding on any determination in this matter—at [52].

Reeves J also considered a number of facts that strongly suggested that there was a logical connection:

- the legal issues in the advice were the same as one of the critical legal issues to be raised at the determination and concerned an area of land which was part of the claim area;
- the correctness of the advice would therefore be a live issue, albeit a legal one; and
- the client for the advice was not a party to the proceedings but was indirectly connected to one of the main respondents because it is a statutory authority of the Commonwealth—at [53].

While his Honour was not convinced that it had been firmly established that he should disqualify himself, he considered it prudent to do so on the basis that:

- the objection had been raised at an early state in the proceeding;
- it would be a relatively simple matter to arrange for another judge of the court to hear the application; and
- if the Full Court were later to rule that his Honour should have disqualified himself, a great deal of public resources would have been wasted and a significant amount of time would be lost—at [55] and [56].

Procedural issues

Reeves J considered a number of questions related to the appropriate procedure when applying to have a judge disqualify themselves from hearing a matter, such as whether a formal notice of motion was always necessary or appropriate. It was concluded that a formal notice of motion was appropriate course in this matter. Consideration was also given to whether it was sound for a judge to make an order disqualifying himself or herself. After considering a number of authorities, his Honour considered it appropriate that he make the order disqualifying himself but characterised it as declaratory and self-operative—at [32] and [38].

Decision

Reeves J made an order disqualifying himself from further hearing or determining the proceeding. The costs of the motion will be costs in the proceeding.