Extension of time to comply & costs

McLennan on behalf of the Jangga People v Queensland [2009] FCA 236

Rares J, 18 March 2009

Issue

The issue in this case was whether to extend the time allowed for the Jangga People to provide particulars in relation to s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA). Orders were made to extend time but the applicant was ordered to pay the respondents' costs and the representative body was ordered to show cause why it should not be ordered to pay those costs on a party/party basis.

Background

The Jangga People's claimant application was made in 1998. In December 2002, the court was advised that it would take about three years to complete the anthropological research to support the application. In February 2004, the court was told that 'connection' material was 12 to 18 months away but a summary of a connection report was provided in June 2004. The court was later advised that an anthropologist had been commissioned but his report had not been completed. In March 2007, the court was told that Dr Paul Gorecki had been engaged to prepare a report but five months later, he told the claimants' representative, Central Queensland Land Council (CQLC) that he was no longer available. In November 2007, other anthropologists were engaged but, by early 2008, they were no longer available. According to Justice Rares, the Jangga People had 'persistently' been in default of providing anthropological or other connection material in relation to their application—at [3].

The State of Queensland sought an order to bring 'this lamentable state of affairs to a head'. At the hearing, CQLC represented the Jangga People but, because of a proposed hand-over of CQLC's representative body responsibilities to Northern Queensland Land Council (NQLC), the principal legal officer (PLO) of NQLC appeared as amicus—at [4].

On 7 March 2008, the court made orders that:

- the Jangga People provide the state (and any respondent who so requested) with historical and anthropological material on which they sought to rely to support their claim by 9 March 2009 (order 2);
- if they did not comply with order 2, the application would stand dismissed unless the court otherwise ordered (order 3);
- the Jangga People file and serve an affidavit by 30 September 2008 as to their ability to comply with order 2 and, if it was not likely they would comply, have the matter relisted.

On 29 September 2008, a solicitor for the NQLC swore an affidavit stating that the Jangga People were unlikely to comply with order 2. The matter came before the court on 17 October 2008 and an order was made that, if the Jangga People wished to vary orders 2 and 3, they should file and serve a notice of motion and any affidavits in support. Four months later, on 17 February 2009, the Jangga People filed a motion seeking a variation of orders 2 and 3 to have time for compliance extended to 26 June 2009. On 5 March 2009, when the application for an extension of time was heard, the oral evidence was that:

- a consultant anthropologist (Dr Taylor) would deliver an initial report by 23 March 2009, which would be submitted to the state by 27 March 2009;
- Dr Taylor had committed to reporting on the balance of the material required by 31 July 2009;
- all the materials necessary to satisfy the orders would be filed by 17 August 2009.

The state and the pastoralists represented by AgForce did not support the application for an extension.

According to Rares J:

> It is a tragedy that ... a claim first made in 1998 has not appeared to progress at all since it was first filed ... This native title litigation is being conducted in a manner that does not regard compliance with court orders, or the advancement of the claim in a coherent and articulated way, as being the normal course of litigation. At the moment, I have no idea whether the Jangga People have a claim or not, although since September 2006, I have been seeking to manage the proceedings to a position where they can be heard and determined, or at least all the parties can be seized of sufficient information to be able to find a means of resolving the matter for themselves. Regrettably, I have failed in that objective because, at every stage, the Jangga People have defaulted—at [16].

While the court did not infer these defaults meant there was no case to be brought:

> [T]he position is rapidly approaching where such an inference could be drawn because of the Jangga People's persistent failure to bring forward some form of coherent and satisfactory articulation of how they propose to make out their claim for native title in a way that complies with s 223—at [17].

It was noted that:

- persistent default in compliance with directions was a well recognised basis for dismissing a claim;
- the person in default will be seen to have failed to comply with the court's orders to enable the matter to be brought to hearing and determination;
- Order 35A of the Federal Court Rules provides a framework within which the court can 'bring about a summary result';
- ultimately, the role of the court is to do justice between the parties—at [18].

Decision

Rares J decided (with 'considerable reluctance') that Jangga People should have 'one last and final chance to get their litigious house in order'. However, because NQLC

presented 'an entirely unsatisfactory state of affairs for the future conduct of the litigation', the Jangga People were ordered to:

- file Dr Taylor's 'limited material' or something similar by 27 March 2009;
- on that date, identify 'definite bases on which the matter will be progressed, failing which, the matter will be dismissed'—at [19] to [20].

Costs

The Jangga People were ordered to pay the costs of the state and Mount Isa Mines Limited. NQLC was ordered to show cause why it should not be ordered to meet those costs 'on an indemnity or some other basis'. Subsequently, it was submitted for the Jangga People that s. 85A of the NTA applied and so there should be no order as to costs.

The court noted that the Jangga People sought to have time to file the particulars they were supposed to supply by 9 March 2009 extended to 26 June 2009 'in the context of the evidence that Dr Taylor had only been required to produce a report as to the position up to white sovereignty' not, as the court ordered, historical and anthropological material on which they sought to rely to support their claim. Further, even this 'limited' material would not be provided before 26 June 2009 and there was no evidence that the balance of the material due on 9 March 2009 would be provided by 26 June 2009. In his Honour's view: 'This was unsatisfactory for a party in default of the order made one year before'—at [22].

Further, at the hearing, the Jangga People initially resisted providing any time frames for compliance with the earlier order and then finally sought an extension from 26 June 2009 to 17 August 2009. According to his Honour:

> A properly prepared and presented application for an extension of time would have addressed a concrete and realistic proposed timetable made after proper enquiries of Dr Taylor to cure the default, particularly having regard to the consequence of the application failing. The respondents would then have been able to assess whether the Jangga People and the... [NQLC] had taken appropriate steps to ensure compliance, albeit late, with their obligation to identify the basis for the claim. The State and Mount Isa Mines, who resisted the application, were entitled to do so because the relief sought in the motion and the evidence in its support ... did not disclose a proper basis to vacate the orders which would have resulted in the proceedings being dismissed on 9 March 2009. And the hearing was protracted by the Jangga People's unreasonable failure for a considerable period to propose an appropriate timetable—at [25].

It was found that:

- the notice of motion was filed far later than it should have been, since NQLC knew, at least by late September 2008, that they would not comply with the order to file by 9 March 2009 and had not, at that stage, even engaged an anthropologist to begin work on that material;
- the scope of work given to Dr Taylor (i.e. the position up to white sovereignty) 'was clearly inadequate for the Jangga People to comply with the order' that the provide historical and anthropological material on which they sought to rely in support of their claim;

- there was then no prospect that the Jangga People would file the requisite material in time and, while an extension to 26 June 2009 was sought, 'even that date had been given no proper consideration';
- instructions as to when Dr Taylor could prepare a final report were only obtained after the court suggested that the solicitor for NQLC should do so, which led NQLC to seek a longer timetable than the court proposed—at [26].

In Rares J's view:

> This was not a satisfactory way to conduct this litigation, particularly given the nature of the orders made on 7 March 2008. Having regard to the circumstances above, I am of opinion that in the exercise of my discretion under s 85A(1) of the Act and s 43 of the *Federal Court of Australia Act 1976* (Cth) I should order the Jangga People to pay the costs of the State and Mount Isa Mines in respect of the notice of motion ... And, I consider that it is appropriate to require the ...[NQLC] to show cause why it should not be ordered to pay those costs on party/party basis having regard to its apparent (on the material before me) responsibility for the costs I have ordered the Jangga People to pay—at [27].

NQLC is seeking leave to appeal against the costs orders.