Reinstatement of dismissed application refused

Smith on behalf of the Southern Barada & Kabalbara People v Queensland [2009] FCA 285

Dowsett J, 20 February 2009

Issue
The question in this case was whether a claimant application that had been dismissed for failure to comply with court orders should be reinstated. It was decided that it would be inappropriate to do so in this case.

Background
The applicant for the Southern Barada & Kabalbara People's application was ordered amend the application and file an affidavit stating that the applicant intended to prosecute any amended application to determination on or before 30 September 2008 (later extended to 13 February 2009). If there was no compliance, the applicant was to show cause as to why the application should not be dismissed. The applicant was also ordered to file and serve a certificate by a legal practitioner stating that the practitioner was of opinion that the amended application was in proper form. There was no compliance with these orders and the application was dismissed. The applicant then applied for an order extending time until 15 May 2009 (supporting the application with an affidavit of the principal legal officer of Queensland South Native Title Services) saying (among other things) that there was to be a meeting of the claim group to authorise the proposed amendment before the end of April so that an amended application could be filed by 15 May 2009.

Justice Dowsett noted that the applicant accepted at least as far back as April 2007 that the claim group description in the application was inadequate and that the court had made various orders since then designed to resolve that problem. According to his Honour:

> It has become part of folklore in this area of the law that there is a chronic lack of funds available ... . Nonetheless, the litigation must proceed. ... There is a tendency ... to pretend that all problems can be sorted out by mediation and similar extra-curial procedures. The experience of the law is that those procedures work best when the claims and responses to them are clearly identified—at [4].

Power to reinstate discretionary
Dowsett J was of the view that the deficiency in the application was 'of a fundamental kind' in that it went to 'the very identification of those who are entitled to claim'—at [5].

The application to set aside the dismissal order was brought under O 35 r 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. Although it was not clear, Dowsett J thought the reference to 'interlocutory orders' should not be read to include an order that proceedings be dismissed because to 'treat such an order in that way would completely undermine its effect'. It was noted that the authorities suggested that the discretion conferred by O 35 r 7 to vary an order 'should be exercised sparingly'—at [6], referring *Kullilli People # 2 and Kullilli People #3 v Queensland* [2007] FCA 512 (summarised in *Native Title Hot Spots* Issue 24) at [16].

The explanation given in this case was 'hardly adequate' because the court had been told things that did not appear in the material before it. Therefore, it was 'inappropriate' to act on those things. In this Honour's opinion:

> Even if there be jurisdiction to set aside an order of this kind other than on appeal, I would not do so because I do not think, given the history of the matter, that an appropriate basis has been demonstrated for a favourable exercise of the discretion—at [6].

Dowsett J was aware that dismissal meant the loss of procedural rights, such as the right to negotiate, that arose because claim was registered but said that:

> This seems to me to be an appropriate result. Once it is established that a claim group is incorrectly constituted, there can be little justification for allowing it to enjoy the benefits of registration. I do not understand the purpose of the legislation to be to guarantee to people, who have no valid claim, the right to negotiate—at [7].

Decision

The notice of motion seeking reinstatement of the application was dismissed. In so doing, Dowsett J was careful to point out that:

> I do not criticize the applicant's present legal advisers ... . However the history of the management of this matter is not good. This is an extreme case, and should not be taken as an indication that, in all cases where delay has been caused by absence of funding, or by neglect of the legal advisers, an application will necessarily be struck out. Each case must be decided on its merits—at [8].