Leave to discontinue — application to vary

Davis-Hurst v Minister for Lands (NSW) [2009] FCA 725

Graham J, 30 June 2009

Issue

The issue before the court was whether orders giving leave to discontinue two claimant applications should be varied. The two notices of motion filed seeking the variation of those orders were heard together and dismissed.

Background

The notices of motion were filed because there were two relevant claimant applications (the main proceedings) relating to two separate parcels of land, referred in the court's reasons for decision as the Saltwater Reserve and the Khappinghat Creek land. Subject to one exception, the parties to the main proceedings were the same. On 17 December 2008, a memorandum of understanding (MOU) was entered into between the Director-General of the Department of Environment and Climate Change (NSW) and the Saltwater Tribal Council (Aboriginal Corporation) which dealt with both parcels of land. In the dictionary to the MOU, a definition of 'Saltwater People' was provided, which was significant because there was also a reference to other indigenous groups in the MOU, namely the Pirripaayi people and the Birpai people.

The fifth respondent in each proceeding, Keith Kemp, sought to vary orders made on 2 June 2009 (which were not to take effect until 28 days after that date) to discontinue both proceedings. Unless varied, the grant of leave to discontinue would take effect at the end of the day the matter was again brought before court. It was noted that:

> It is an unusual circumstance where a respondent wants to keep an application ... alive. That is what Mr Kemp effectively wants to do. As I understand it, he claims to be a member of the Pirripaayi people. It is common ground that the Pirripaayi people are also known as the Birpai people, referred to in the Memorandum of Understanding—at [9].

In an affidavit sworn 29 June 2009, Mr Kemp deposed that:

> The effect of the discontinuance of the proceedings will be that for all intents and purposes those people described in the MOU as the Saltwater people will be regarded as the traditional owners of the claim area, to the exclusion Pirripaayi people generally and me in particular. ...
>
> [I]n the event that the present application is discontinued it would be necessary for me to file a fresh native title application, wait for the registration test to be applied, and then wait further for the notification period to expire, before the matter could proceed to determination.

His Honour noted that the MOU:

- stated it was not intended 'in any way to affect or impact upon any native title rights and interests';
- acknowledged it 'does not constitute recognition of native title rights and interests nor does it constitute an authorisation of any act' under the NTA or the *Native Title Act 1994* (NSW); and
- provided that the Saltwater Tribunal Council would withdraw the main proceedings 'within a reasonably practicable time upon the commencement of this MOU'—at [10].

It was also noted that the solicitor appearing for the applicant in the main proceedings informed the court that the definition of 'Saltwater People' in the MOU was formulated to ensure Mr Kemp was included—at [11].

Decision

Justice Graham J saw 'no reason' why the orders of 2 June 2009 should be varied and so dismissed both notices of motion.