Reinstatement — claim dismissed for default

Nucoorilma Clan of the Gamilaaroy Aboriginal People v NSW Minister for Land & Water Conservation [2009] FCA 1043

Buchanan J, 17 September 2009

Issue

The court was asked to extend time to comply with orders to file certain documents. However, the claimant application concerned stood dismissed because conditional orders for its dismissal had become effective. As it was found that it was not in the interests of justice to extend time or interfere with those orders, the notice of motion for an extension of time was dismissed.

Background

The claimant application concerned covered land surrounding Inverell in NSW. It was made in 1998 by Matthew Munro and Suzanne Blacklock under the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the 'Ncoorilma Tribe' (also described as the 'Ncoorilma Munros'). The native title claim group as described in the application (as amended in 1999) was:

> The Nucoorilma clan of the Gamilaaroy/Gomilroi/Gumilaroi Aboriginal People who are the direct Descendants of John Munro and Sarah Harrison who were married in the 1850s and were traditional owners of the claim area.

Justice Buchanan noted that:

> It might be thought that identification of the claiming group in this way, namely the descendants of a single couple united in a European ceremony of marriage at a time when the area in question was significantly affected by European settlement, might raise unusual features for claims of this kind. At the very least, close attention would be needed to identification and establishment of the elements of a claim for native title by these particular claimants in this particular area—at [3].

The matter moved 'at a leisurely pace' until April 2002 when the court directed the applicant to provide an outline of lay evidence by 1 July 2002. That was later extended to 30 September 2002. On 1 October 2002, the applicant filed a statement that did not comply with those orders but eight witnesses were identified as capable of addressing the relevant matters e.g. the claim group's connection to the claim area under traditional law and custom and the sites and spiritual places within the claim area, including the significance of the sites and any associated stories. It was 'important' to bear in mind the representation as to the availability of this evidence when 'consideration is given to the course of events thereafter'—at [4] to [5].

In March 2003, a listing for a preservation of evidence hearing in June 2003 was vacated. A year later, the applicant was directed to provide the respondents with a list of lay witnesses, a short statement of the substance of the evidence they would give and an 'outline genealogy' on or before 19 November 2004. The applicant did

not comply with those orders. On 7 March 2005, seven brief outlines of evidence that dealt with matters in 'only the most summary way', and not with the matters foreshadowed earlier, were filed. On 27 November 2007, a statement of facts and contentions was eventually filed. After reviewing its, his Honour commented that:

> [T]he assertions .... made, more than eight years after the proceeding ... commenced, had no apparent specific connection with the group identified in the ... application, namely the descendants of John Munro and Sarah Harrison, any explanation why they should ... be regarded as the traditional owners of the claim area or any statements ... specifically concerning their descendants which might have supported a claim for a determination of native title ... . The statement of facts and contentions bore no apparent relationship either to the matters which, it had been said in 2002, would be the subject of evidence—at [9].

At 'on country' hearings conducted by Buchanan J over three days in December 2006:

> [E]vidence was called only from ... two of the grandchildren of John Munro and Sarah Harrison. ... . Self-evidently, it was only the beginning of an evidentiary process which, if the claim was to be seriously maintained, would require much greater attention and development—at [10].

Subsequently, Buchanan J was unable to make the matter progress any more rapidly and so a court registrar held case management conferences to prepare for a hearing before the end of 2008. The applicant was directed to file documents addressing (among other things) a detailed schedule of matters. In September 2008, the applicant filed points of claim that 'articulated ... in a general way, the factual foundation' of the application. Time for compliance with some of the earlier orders was extended and orders were made for the filing of the substance of the lay witnesses' evidence by 27 February 2009. The applicant did not comply with any of these orders within time. On 13 March 2009, time was extended to 31 March 2009 and hearing dates in November 2009 and February 2010 fixed. His Honour also 'included a further buffer of one month ... before the proceedings would stand dismissed'. As was noted: 'It must have been apparent that the time had come for the applicants to put their case forward, if they had a case which was capable of being advanced'—at [11] to [13] and [16].

The applicant filed further documents that were 'nominally outlines of evidence' but 'even then, not all the orders ... were complied with'. As a result, the matter stood dismissed and the hearing dates were vacated on 30 April 2009. On 9 July 2009, the applicant sought reinstatement of the proceedings and an extension of time in which to file outstanding documents. There was no doubt the court had power to extend time (notwithstanding that the order for dismissal had taken effect) and that it should be used to relieve against injustice. The question was whether to exercise the discretion to do so. The State of New South Wales and NTSCORP Ltd opposed the grant of an extension of time—at [17] to [19] and [21] to [24].

Strike-out for default — Order 35 rule 3

As was noted, the discretion conferred by O 35 r 3 of the Federal Court Rules is unconfined. This case fell within two of the situations identified in the authorities as 'obvious candidates for the exercise of the power', namely cases where:

- there was a history of non-compliance by an applicant that indicated an inability or unwillingness to co-operate in having the matter ready for trial within an acceptable period; and
- whatever the applicant's state of mind or resources, the non-compliance was continuing and causing unnecessary delay, expense or other prejudice to the respondents—at [29].

A conclusion that the applicant is either subjectively unwilling to co-operate or unable to do so is not readily reached but, if it is, fairness to the respondent normally requires summary dismissal. Ultimately, the court was required to 'exercise a judicial discretion having regard to the interests of justice'—at [30] to [31].

In this case:

> The proceedings have ... been on foot for a little over 11 years. It seems quite apparent that the applicants are unable to organise themselves in a way which will permit reasonable and timely compliance with the Court's orders. ... . [T]he latest default is the last in a series of similar defaults—at [30].

The remaining issue was where prejudice might lie if the matter was reinstated. According to the court:

> [T]here would be real prejudice to the respondents actively opposing the notice of motion if the proceedings were reinstated. On the other hand it is difficult to identify any prejudice to the applicants of any permanent or ongoing kind ... . No costs are sought from the applicants. It is not suggested that any form of estoppel would arise. A further claim might be made if necessary and appropriate—at [30].

Decision

The notice of motion seeking an extension of time to file outstanding documents was dismissed because Buchanan J was not satisfied that the interests of justice required either the making of such an order or any interference with the conditional orders dismissing the application—at [31].