Dismissal of respondent parties

Butterworth on behalf of the Wiri Core Country Claim v Queensland [2010] FCA 325

Logan J, 26 March 2010

Issue

The issue before the Federal Court was whether to remove as respondents to a claimant application people who were acknowledged as included in the native title claim group for the Wiri Core Country Claim and who were also parties as of right to that application. Orders were made to remove them. The consideration of the relationship between 'the applicant' and the claim group is of particular interest.

Background

An amended claimant application was filed on behalf of the Wiri Core County Claim in April 2009. Notice of the amended application was given as required by the *Native Title Act 1993* (Cwlth) (NTA). On 8 February 2010, within the three month notification period specified in the NTA, the court received a letter from Norman Johnson enclosing Form 5 applications for Mr Johnson and others who sought to be joined as respondents. Mr Johnson was asked by the Deputy Registrar of the Federal Court to show cause why he and those other persons should become respondents.

Relationship between applicant and claim group

It was expressly acknowledged in open court by the applicant for the Wiri Core County Claim that Mr Johnson had standing as a Wiri man. It was also acknowledged that 'the applicant' for a claimant application, brought as it is on behalf of a native title claim group, has 'responsibilities ... from time to time to consult with' that group—at [30].

According to Justice Logan,

> To consult with a native title claim group means to extend an opportunity to that group to be heard on appropriate occasions. It does not mean that a single member or group of members in a native title claim group can presume to dictate the decisions which a native title claim group might have from time to time to make as a way of giving guidance to an applicant in respect of the carriage of a native title application—at [31].

Later, his Honour commented that:

> Consult does not equate with "be dictated to by a member of". A member of a native title claim group, where a need for consultation arises, is entitled to be given an opportunity to be heard, nothing more and nothing less than that. There may be circumstances whereby, having regard to the taking advantage of that opportunity to be heard or, perhaps, a failure to give it, ... , those dissentient members ought properly to be joined as parties so that they can be heard directly in the proceedings—at [39].

While there were circumstances that may arise where it would be appropriate to join 'what have been termed in earlier cases dissentients', it seemed to the court that, 'in the ordinary course of events' the scheme of the NTA was that the claim group authorise particular persons to act on that group's behalf in the management of an application:

> That, to me, is an indication of a parliamentary intent that there be a reasonable and practical way of giving instructions in respect of the conduct of an application, for the benefit not only of the members of the native title claim group but also for the benefit of those respondents who necessarily have to deal with the native title application—at [31].

Comment – consultation with claimants

His Honour's view that the consultation required by the applicant does not equate with being 'dictated to' by a member of native title claim group needs to be read to take account of the fact that certain members of the claim group (such as the elders) may have the right to 'dictate' to the applicant under their traditional law and custom.

Parties to the proceeding

Logan J found that Mr Johnson and each of the other persons concerned fell within s. 84(3)(a) of the NTA and, further, were persons who had given notice in writing in Form 5 within the period set out in s. 84(3)(b). Consequently, his Honour held that each was a party to the proceedings as of right by force of s. 84(3)—at [3] to [9].

Power to dismiss

Pursuant to s. 84(8), the court may order at any time that a person (other than the applicant) cease to be a party to the proceedings. Subsection 84(9) provides that the court 'is to consider making an order' under s. 84(8) 'in respect of a person who is a party to the proceedings' if it is satisfied that:

- the person's interests may be affected by a determination in the proceedings merely because the person has a public right of access over, or use of, any of the area covered by the application; **and**
- the person's interests are properly represented in the proceedings by another party; **or**
- the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

It was held that the power to dismiss a party in s. 84(8) of NTA was not constrained by the circumstances referred to in s. 84(9) and that provision did not provide an exhaustive list of the circumstances where the dismissal power could be exercised—at [39].

Should they remain as parties?

His Honour held that:

- while Mr Johnson and the other people concerned were joined as of right, s. 84(8) indicated it did not follow that they must necessarily remain respondents; and

- to take a contrary view would, in effect, be 'subversive to the very reason for the existence of an applicant'—at [33].

The court was not persuaded that there was a need for a Mr Johnson and the other persons to have party status. In this case, Logan J saw no need 'at all' for them to have 'direct input as opposed to an indirect input via consultation ... between the applicant and the members of the native title claim group'—at [37] and [39].

Decision

For the reasons given and 'of my own motion' Mr Johnson and the other persons concerned were dismissed as parties with no order as to costs. Indeed:

> [T]he fact that Mr Johnson has been moved to seek to take advantage of s 84(3) ... and what I have heard from him today would persuade me that under no circumstances would a costs order, ... , be appropriate. It was very important that he be heard ... and that the applicant ... acknowledge its role in terms of representing all members of a native title claim group—at [40].

Mr Johnson and the others concerned were given liberty to apply in respect of joinder—at [41].