Dismissal of claimant application

Tucker on behalf of the Narnoobinya Family Group v Western Australia [2009] FCA 1459

Marshall J, 4 December 2009

Issue

The issue was whether the Federal Court should dismiss a claimant application for failure to prosecute. In the event, the applicant was ordered to produce details and a time frame for the progressing of the application, failing which the application would stand dismissed. The applicants subsequently took sufficient action to avoid dismissal under a self-executing order but the application for dismissal remains on foot, adjourned to a date to be fixed.

Background

Two claimant applications made under the *Native Title Act 1993* (Cwlth) (the NTA), referred to as the Narnoobinya claim and the Ngadju claim, substantially overlap as to the area claimed. The latter was well advanced and part-heard. The former had not been prosecuted with any diligence since it was filed 13 years ago. The Goldfields Land and Sea Council (GLSC), on behalf of the Ngadju applicants, sought dismissal of the Narnoobinya claim because of a failure to progress the application. The Narnoobinya applicant had been a respondent to the Ngadju application but had ceased to be a party because of a failure to comply with a court order to file an address for service. In November 2006, Narnoobinya applicant sought restoration of party status in the Ngadju claim. This was the catalyst for the GLSC's dismissal motion. Justice Marshall noted that the only formal step the Narnoobinya applicants had taken in their own proceeding was to contest the dismissal application in the course of seeking rejoinder to the Ngadju application—at [4] to [6] and [8].

GLSC had standing

The Narnoobinya applicant argued GLSC lacked standing. The court found that the GLSC was entitled to seek dismissal at 'the very least' because it was a respondent to the Narnoobinya application and represented the Ngadju people in their claim. In any case, 'technicalities should [not] be a barrier to the doing of justice' and, if necessary, the court had 'ample power to act on its own motion to grant the relief sought'—at [7].

Decision

Marshall J noted that the power of the court to strike out a claim should be exercised cautiously. Therefore, his Honour considered it 'fair and just' to make a self-executing order that the Narnoobinya application would stand dismissed pursuant to O 20 r 4(2) of the Federal Court Rules unless, by 11 December 2009, the applicant filed and served a document setting out 'precisely what steps they intend to take in their proceeding and a reasonable timeframe for carrying out such steps'. This took

into account the 'drastic step involved in terminating a proceeding' and gave the Narnoobinya applicant a chance to 'give serious consideration to the tasks which confront them'—at [9] to [11].

Motion to restore party status adjourned

The Narnoobinya applicant's motion to rejoin the Ngadju application was adjourned pending the outcome of the dismissal motion because the Narnoobinya applicant showed 'little interest in pursuing their own application with appropriate diligence' and, in any case, if the Narnoobinya claim is not dismissed, s. 67 of the NTA will 'require, prima facie, joinder of both applications', a step that 'should not be taken lightly' in the circumstances—at [12] to [13].

Comment – s. 67

If sufficient steps are taken to avoid dismissal, it will be necessary for the court to grapple with the question of what might be appropriate orders to ensure that, to the extent of the overlap, the applications are heard in the same proceeding in circumstances where one of the applications is well advanced (including being part heard) but the other lags well behind, procedurally at least. On this issue, see *Rose on behalf of the Kurnai Clans v Victoria* [2010] FCA 460, summarised in *Native Title Hot Spots* Issue 32.