Applicant's power to seek leave to discontinue

Close on behalf of the Githabul People #2 v Queensland [2010] FCA 828

Collier J, 6 August 2010

Issue

This case concerns whether the applicant in a claimant application was authorised to seek leave to discontinue the application and, if leave was granted, whether it should be conditional. Justice Collier decided the applicant was authorised and exercised the discretion available under O 22 r 2(2) of the Federal Court Rules (FCR) to grant leave to discontinue, subject to a condition preventing a further application over the area without leave of the court. Such leave will only be granted if (among other things) an anthropological report dealing with all Indigenous issues is first prepared and distributed to the respondents to the existing claim and the Indigenous respondents to that claim are given appropriate assistance by Queensland South Native Title Services Ltd (QSNTS).

Background

Late in 2007, a determination recognising native title was made in relation to part of the area covered by a claimant application brought on behalf of the Githabul People, i.e. the part of application area within the State of New South Wales. The State of Queensland was not, at that time, prepared to recognised the Githabul People as native title holders over the part the application area within Queensland's borders (see *Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847, summarised in *Native Title Hot Spots* Issue 27). The application in question in this case (Githabul # 2) was filed by Trevor Close shortly afterwards in April 2008. It covers 245 hectares on the Queensland side of the Queensland/New South Wales border, referred to as the Mt Lindesay area. Mediation was conducted for about six months until July 2009 when Justice Dowsett ordered it to cease.

The application was later listed for trial at the request of a lawyer employed by QSNTS acting on behalf of the applicant. Trial was to commence on 11 October 2010. However, at a claim group meeting in May 2010 (the May meeting), a split in the claim group became apparent. QSNTS was told certain claim group members would not participate any further and so sought to vacate the trial. However, in June 2010, Justice Greenwood refused to vacate the trial dates and joined Kenneth Markwell, Myfanwy Lock and Ruth James (all of whom claimed native title interests) as respondents. Orders were also made that:

- Mr Close file an affidavit explaining how he was authorised to make the application and the events of the May meeting concerning whether he continued to be authorised to prosecute the application;
- QSNTS's Chief Executive Officer file an affidavit explaining the recent decision to withdraw funding when the matter had been set down for trial at the request of QSNTS's lawyers and indicating whether QSNTS consulted with those affected

by the decision and was satisfied the claim group members understood the general course of action being taken, referring to ss. 203BB(1) and 203BC(1).

QSNTS's evidence indicated funding was withdrawn because of counsel's advice that the split in the claim group meant there was no long a reasonable prospect the application would succeed. The Principal Legal Officer for QSNTS, Shahzad Rind, deposed to the fact that:

- Mr Close gave him written instructions to seek discontinuance of the application on 23 July 2010;
- the native title steering committee of the Githabul people, consisting of seven people the claim group had given the role of directing and assisting Mr Close, unanimously resolved at a meeting on 2 August 2010 (which Mr Rind attended) that Mr Close should be authorised and directed to seek leave to discontinue.

The notice of motion seeking leave was filed on 27 July 2010.

Applicant was, in fact, authorised to seek discontinuance

It was accepted that the steering committee's authorisation on 2 August 2010 was effectively given 'by the claim group itself'. However, the notice of motion seeking discontinuance was filed before that date (i.e. on 27 July 2010). 'Notwithstanding this irregularity', Justice Collier found on the evidence that 'specific authority has been conferred' on Mr Close by claim group members to seek leave to discontinue on the basis that the resolution of the steering committee was effective *nunc pro tunc* (now for then) to authorise the earlier filing of notice of motion—at [18].

Authorised in any case via ss. 62A and 251B

Collier J found that Mr Close was 'in any event' authorised to seek leave to discontinue the proceedings 'by reason of the combined effect' of ss. 251B and 62A of the NTA —at [21] and see also [33].

Section 251B 'describes the process whereby all the persons in a native title claim group ... authorise a person or persons to make a native title determination application ... and to deal with matters arising in relation to it'. Relevantly, s. 62A provides that, in the case of a claimant application 'the applicant may deal with all matters arising under this Act in relation to the application'—at [22] to [23].

While the court was not aware of any authority directly on point, decisions that considered s. 62A 'more broadly' were noted, including *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809 (summarised in *Native Title Hot Spots* Issue 33), where Gilmour J found that s. 62A conferred standing 'exclusively upon the applicant in respect of dealing with all matters arising under' the NTA 'in relation to the application' and that the effect of s. 62A is that 'no-one else is so empowered, whether or not they are a member of the relevant claim group'—at [24] to [29].

In the light of these authorities, Collier J concluded that only the applicant (Mr Close in this case) has authority to seek leave to discontinue a claimant application.

Further, the applicant is 'not obliged to seek the approval of the claim group to do so' because:

> The phrase "all matters arising under this Act in relation to the application" in s 62A is ... unambiguous, and should not read narrowly. "All matters" means ... all matters, including discontinuance, and the words "in relation to" have been held to be extremely wide although their meaning will be determined by the context—at [32].

Grant of leave

Leave of the court was required because a claimant application is a representative proceeding—at [2], referring to O 22 r 2(2) of the FCR, *Ankamuthi People v Queensland* (2002) 121 FCR 68 (*Ankamuthi*) and *McKenzie v South Australia* [2006] FCA 891 (*McKenzie*), summarised in *Native Title Hot Spots* Issue 1 and Issue 21 respectively.

While all of the parties agreed leave to discontinue should be given, the grant of leave pursuant to O 22 r 2(2) of the FCR was 'at the unfettered discretion of the judge'. The 'traditional approach' was that the court would usually allow discontinuance provided this caused no injustice to the other parties—at [34] to [35], referring to *Covell Matthews & Partners* [1977] 1 WLR 876 at 879.

In this case:

- the applicant's legal advice was that the claim 'no longer has reasonable prospects of success;
- the late joinder of several Indigenous respondents indicated 'the existence of other possible native title interests';
- the state 'is not prepared to be a party to a consent determination in the current environment';
- the applicant wanted to 'continue mediation ... and commission further expert anthropological research specifically dealing with the issue of indigenous interests in the area'—at [36].

Among other things, it was also noted that, 'notwithstanding any order of discontinuance, it is very possible' that another claimant application 'will be filed in future in respect' of the Mt Lindesay area by the same claim group. Collier J thought this 'an unsatisfactory state of affairs', sympathising with the state's desire for 'finality', but was of the view that discontinuance was unlikely 'to produce such finality'—at [37] to [38].

While there was an 'obvious question' as to why it should not 'simply be dismissed' rather than discontinued given the applicant conceded the application had 'no prospects of success', Collier J was prepared to grant leave subject to certain conditions, given that:

- there was no opposition to discontinuance;
- the applicant proposed to 'continue mediation' and 'commission further anthropological research'; and
- 'the general principle' was that a party 'ought not be obliged to conduct litigation against its will'—at [40].

Decision
Leave to discontinue was granted. It was subject to conditions agreed to by the state and the applicant that any further claimant application could only be filed with the leave of the court and, in respect of any such application, the court must be satisfied that, among other things:

- 'expert anthropological evidence' has been obtained 'specifically dealing with all indigenous interests in the relevant area'; and
- QSNTS had offered 'appropriate assistance to the second and third respondents'—at [40].

It was noted the court has power to impose conditions pursuant to O 22 r 7 of the FCR, i.e. 'a discontinuance under O 22 shall not, *subject to the terms of any leave to discontinue*, be a defence to a proceeding for the same, or substantially the same, cause of action'—at [40], emphasis in original.

The orders also contain a condition that no application for leave to file a further claimant application can be brought until one month after the anthropological report has been provided to the state and the other respondents. Order 4 provides that a failure to comply with the conditions will mean that Order 4 and the discontinuance itself will be a defence to any further claimant application brought by or on behalf of the Githabul People in relation to any part of the Mt Lindesay area.