Party status

QGC Pty Limited v Bygrave [2010] FCA 659

Reeves J, 23 June 2010

Issue

The issue in this case was whether Queensland South Native Title Services (QSNTS) should be joined as a party to an application for judicial review of a decision by a delegate of the Native Title Registrar not to accept an application for the registration of an Indigenous Land Use Agreement (ILUA). The application for review was brought under s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act) and s. 39B of the *Judiciary Act 1903* (Cwlth).

Background

QGC Pty Limited, the applicant in the review proceedings, negotiated an agreement with the Iman People in relation to the whole of the area subject to a claimant application made on their behalf (the Iman People # 2 application). An application under s. 24CG of the *Native Title Act* 1993 (Cwlth) (NTA) to have the agreement registered on the Register of Indigenous Land Use Agreements was made to the Native Title Registrar in March 2010. The agreement was signed by eight of the persons comprising the registered native title claimant for the Iman People # 2 application. A ninth person refused to sign.

A delegate of the Registrar found the agreement did not comply with the requirements of s. 24CD(1) of the NTA, one of the requirements an agreement must meet in order to be an ILUA pursuant to s. 24CA. Subsection 24CD(1) provides that: 'All persons in the native title group ... must be parties to the agreement'. QGC challenged the correctness of the delegate's decision. QSNTS applied to be a party to these proceedings.

Did QSNTS have a sufficient interest?

Justice Reeves held (among other things) that:

- cases dealing with the nature of a relevant interest to become a party under s. 84(5) of the NTA do not assist in determining what is a sufficient interest for the purposes of s. 12 of the AD(JR) Act;
- taking into account the breadth of the term 'interest' as used in s. 5 of the AD(JR) Act, QSNTS, in its capacity as the 'recognised representative body' (see comment below) under the NTA with responsibilities for the agreement area had a 'sufficient interest in the decision to which these proceedings relate';
- these matters gave QSNTS a 'demonstrable and direct interest' that went beyond 'a mere emotional or intellectual concern in the decision the subject of these proceedings' and set QSNTS apart 'from an ordinary member of the public' or a mere busybody;

- the fact that this interest may not be peculiar to QSNTS, in that all other representative bodies may have a similar interest, did not detract from this conclusion—at [20], [23] and [26].

His Honour supported this decision by noting that the question of whether a majority of the native title group, as distinct from an unanimity of it, meets the requirements of s. 24CD(1) of the NTA 'is likely to affect the number and diversity of the native title holders, or groups of native title holders' QSNTS is 'required to represent'. Reeves J concluded that this, in turn, would have implications for how QSNTS discharged its functions under the NTA—at [24] to [25].

Comment – QSNTS is not a recognised representative body

Among other things, Reeves J noted that a failure by QSNTS to perform its functions is a ground under s. 203AH(2)(a) for Ministerial withdrawal of recognition as a representative body. However, since QSNTS is not a representative body but a body funded to perform the functions of a representative body, regard should be had to ss. 203FE and 203FEA instead. Nothing appears to turn on the distinction in this case.

Who was the solicitor on the record?

As QSNTS had a sufficient interest, the next question was whether Reeves J should exercise his discretion to make it a party to the proceedings and, in particular, whether joining QSNTS would give rise to a conflict of interest. However, before determining that issue, his Honour had to identify the solicitor on the record in the Iman People #2 application. It appeared to be the person who held the position of Principal Legal Officer (PLO) at QSNTS rather than a particular solicitor described by name. His Honour noted that this did not amount the compliance with the *Federal Court Rules*:

> The Rules clearly require that the nominated solicitor's name, address, telephone number, facsimile number and email address must be provided: see O 4 r 4(1)(c) and (d) and O 9 r 4(1)(b). ... [E]xcept where there is some statutory provision to the contrary ... , I do not consider that a party will comply with these Rules by providing the solicitor's job title. The difficulties that arose in this case amply demonstrate the pitfalls in that approach—at [51].

After a factually complicated inquiry that 'demonstrated ... a disturbing lack of compliance' with the FCR, it was found that, in fact, the solicitor on the record for the Iman People # 2 application at all material times was Colin Hardie, a private legal practitioner retained to act in the role of PLO of QSNTS. Mr Hardie had not acted, and did not intend to act, for QSNTS in these proceedings. The solicitor on the record for QSNTS was Deanne Cartledge, who was also a private practitioner—at [43] to [44].

No actual or perceived conflict of interest existed

In considering whether the court should exercise its discretion to join QSNTS, Reeves J addressed whether this would give rise to a conflict of interest in relation to Mr Hardie's fiduciary duties to the applicant for the Iman People #2 application that told against doing so—at [58].

It was found (among other things) that:

- while Mr Hardie had concurrent 'fiduciary' engagements as a solicitor to the Iman People and as an agent to QSNTS as his principal, no situation was identified where the duties of loyalty owed were in conflict;
- Mr Hardie was not involved as a solicitor or otherwise in assisting QSNTS to pursue its interests in relation to the construction of s. 24CD(1) of the NTA;
- while this may involve QSNTS taking a position adverse to the interests of the applicant for the Iman People #2 application, there was nothing to suggest this would have any adverse effect on their claim or, more importantly, on Mr Hardie acting for them in that claim;
- the Iman People #2 application and these review proceedings were not sufficiently related to attract the extended application of the proscription against a solicitor acting both for and against a client in the same proceedings because the only common factor between the two proceedings was that the Iman People's native title rights and interests were involved in both—at [75] to [78] and [82].

Therefore, Reeves J did not consider that the 'circumstances of the adverse interests ... called for any intervention to ensure the due administration of justice'. According to his :

> There is no suggestion that the credit or character of any of the second respondents [the applicant in the Iman People #2 application] will be attacked or questioned in these proceedings. Indeed, it seems to be common ground that there will be no dispute on the facts in these proceedings and they will be limited to a question of law. And, of course, there is no suggestion that Mr Hardie proposes to act for any other party in the Iman #2 claim and he has not acted for ... [QSNTS] in these proceedings, nor does he intend to do so. It follows that both the perception and reality is that Mr Hardie will not be "changing sides" if ... [QSNTS] becomes a party to the proceedings—at [79].

The fact that there was no 'fully fledged contradictor' was also a relevant consideration. This was the result of the Registrar's delegate being limited by the principles set out in *R v Australian Broadcasting Tribunal, Ex parte Hardiman* (1981) 144 CLR 13 and the fact that the person who refused to sign the agreement was self-represented—at [83].

Decision

QSNTS was made a party because it had a sufficient interest in the decision the subject of these proceedings and no good reason had been advanced as to why the discretion to do so should not be exercised—at [82] and [85].