Dismissal under s. 190F(6)

Sambo v Western Australia (No 2) [2010] FCA 927

McKerracher J, 26 August 2010

Issue

The issue in this case was whether a claimant application made on behalf of the Central West Goldfields People should be dismissed pursuant to s. 190F(6) of the *Native Title Act 1993* (Cwlth) (NTA). In circumstances where it was found the application was unlikely to achieve its purpose (i.e. a determination on native title) and all of the conditions for dismissal were met, the fact that doing so might stop payments under a future act agreement did not provide any 'other reason' not to dismiss—at [47].

Background

The Native Title Registrar had considered the claim made in this application three times. Initially, in October 1999, it was accepted for registration. However, it was not accepted when re-tested in September 2006 and again failed to meet the requirements for registration in September 2008. No steps were taken to seek review or reconsideration of the Registrar's decision, primarily because of a deadlock between Sue Wyatt and Victor Cooper and the rest of the members of the claim group. The dispute centred on how future act matters had been handled and on the connection of the immediate families of the Cooper claim group members to the Central West claim group. Justice McKerracher had already considered dismissing the proceedings pursuant to s. 190F(6) in *Sambo v Western Australia* [2009] FCA 940 (summarised in *Native Title Hot Spots* Issue 31) where:

- it was submitted that considerable resources had been put into preparing the claim and the expert reports filed gave 'weight to the notion that the claim is serious, proper and deserving of further attention';
- the applicant's solicitors indicated a claim group meeting was needed to reactive the claim and it was likely the composition of the claim group would change if such a meeting were held;
- the indications were that, if issues as to claim group membership could be resolved, the claim would be re-registered—at [14] to [16].

Therefore, the court allowed the applicant time to hold a claim group meeting given there might be 'a reasonable and relatively imminent possibility of that' it would be held. However, it was not and so the court advised the parties it would again consider dismissing the application pursuant to s. 190F(6) of its own motion—at [17] to [18].

Statutory framework

Subsection 190F(6) provides that the court may, of its own motion or on the application of a party, dismiss a claimant application if:

- the court is satisfied that the application in issue has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
- in the opinion of the court, there is no other reason why the application should not be dismissed.

Subsection 190F(5) provides that s. 190F(6) applies if:
- in the Native Title Registrar's opinion, the claim made in the application does not satisfy all of the merit conditions found in s. 190B or it is not possible to determine whether all of those conditions are met because of a failure to meet all of the procedural and other conditions found in s. 190C; and
- the court is satisfied that all avenues for judicial review or reconsideration by the National Native Title Tribunal have been exhausted without the claim being registered.

In the Explanatory Memorandum to the Native Title Act Amendment Bill 2006 (EM), it was said that the proposed power to dismiss was intended to:

> [P]rovide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system—EM at [4.331].

However, as his Honour noted, the EM also indicated that an application should not be dismissed if there was a good reason for it remaining in the system despite being unregistered, e.g. because it was close to resolution—at [9].

Not likely to be amended to lead to a different outcome
At the outset, his Honour noted that: 'The history of this matter does not inspire confidence as to the likelihood of an amended claim being filed and accepted for registration'—at [34].

While there had been progress recently (e.g. the applicant now had funding to hold a claim group meeting) and 'considerable resources have been utilised to conduct the necessary anthropology and to progress the claim to its current point', this did not 'go to the question' the court had to consider, i.e. whether it was likely the claim would be amended so as 'to overcome its previous defects'. The applicant's evidence was that, in addition to properly authorising the applicant, amendments were needed to:
- include all of the descendants of named apical ancestors that had previously been excluded from the claim group description (this exclusion was one of the reasons the claim was not accepted for registration);
- remove apical ancestors and their descendants 'where there is insufficient material to establish a connection; and
- remove an overlap with another native title claim—at [36].

There was no 'clear evidence' that holding a claim group meeting would result in an amended application being filed, 'let alone one that would lead to a different

outcome once considered by the Registrar'. Rather, the evidence highlighted 'the difficulty, if not impossibility, of the formation of a cohesive claim group to authorise the amendments that would lead to the acceptance of the application'—at [37].

Alternatives, such as contingent orders, were not seen to be useful given 'the persistent deadlock between the members of the claim group'. It was clear that:

> The claim does not have the support of all the persons holding Native Title rights and interests and that all of the people holding Native Title rights and interests will not participate in the authorisation process—at [39].

It was found it was not likely the application would be amended in a way that would lead to a different outcome once considered by the Registrar—at [40].

Affect on payments under future act agreements not 'other reason'

The applicant claimed that dismissal could result in payments under a future act agreement between Cliffs Asia Pacific Iron Ore (Cliffs) and both the Ballardong and Central West claim groups ceasing and that this provided the court with a reason not to dismiss, as contemplated by s. 190F(6)(b). The applicant for each claim filed an affidavit addressing this issue. According to the court:

> The meaning of 'dismissed', and the means of disposal of monies in the event of dismissal, are now topics of dispute between the Central West Goldfields people and the Ballardong people—at [44].

However, the fact that dismissal pursuant to s. 190F(6) may affect certain provisions in a trust deed entered into following Supreme Court proceedings in relation to future act matters was not 'a reason to decline to dismiss a native title determination application' pursuant to s. 190F(6)(b) because:

> The purpose of a native title determination application is to seek determination on native title. If an application reaches a condition where it is unlikely to ever achieve that purpose, as this one has, then it should be dismissed and not used for purposes pertaining to the independent financial affairs of various persons or groups—at [47].

Decision

The application was dismissed because his Honour was satisfied that, for the purposes of s. 190F(6):

- it has not been amended since it was considered by the Registrar;
- it is not likely to be amended in a way that would lead to any different conclusion by the Registrar;
- there is no other reason why it should not be dismissed—at [50].

It was noted that evidence gathered to date 'will not be destroyed by ... dismissal'. It could be used 'to take such action as ... may be advised in relation to the bringing of a fresh application'—at [51].