Anderson v New South Wales Minister for Lands [2011] FCA 114

Jagot J, 17 February 2011

Issue

The State of New South Wales opposed an application to amend the Numbahjing Clan's claimant application, arguing the proposed amendments were not likely to lead to registration of the claim made in that application. The Federal Court found leave to amend should be granted, noting the registration test is neither 'a screening mechanism' for access to the court nor a 'condition precedent to the making of a determination of native title' by the court—at [7].

Background

The Numbahjing Clan application was filed pursuant to s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) in November 2008. It was not accepted for registration because it did not meet all of the conditions of the registration test. In particular, it did not meet all of the conditions in s. 190B (the merit conditions). The applicant sought leave to amend the application under O 13 R 2(1) of the *Federal Court Rules*. The state opposed the grant of leave.

Principles applied when considering leave to amend

At [3], Justice Jagot noted the statement in *Medich v Bentley-Smythe Pty Ltd* [2010] FCA 494 at [8] that:

> The general principle is that leave to amend should be granted unless the proposed amendment is obviously futile or would cause substantial prejudice or injustice which could not be compensated for. These considerations require the Court to take account of the nature of the proposed amendment, whether it is made in good faith, the stage in the proceedings at which leave is sought, the nature of the prejudice that may be caused and the means by which such prejudice might be redressed. The question of delay is relevant to these considerations however it is not the purpose of the Court to punish a party for delay in seeking an amendment.

It was noted these general principles must be applied within the context of the NTA, particularly the registration test provisions—at [4].

Contentions

The state contended leave should be refused because the proposed amendments did not 'cure the deficiencies in the application which caused the Registrar to refuse to register the claim in its original form'. It followed there was 'no real possibility' of the proposed amended application satisfying the conditions of the registration test.

The argument about the likelihood of the application again failing the registration test related to s. 190F(6), which empowers the court (on the application of a party or on its own motion) to dismiss a claimant application that has been refused registration if the conditions in s. 190F(6) are met and if all avenues of reconsideration or review have been exhausted. The conditions of s. 190F(6) are that:

- the court is satisfied that the application 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;
- in the opinion of the court, there is no other reason why the application in issue should not be dismissed.

Her Honour noted at [5] that the state accepted 'likely' in this context means a real possibility of registration and not that registration is 'more probable than not', as found in *George v Queensland* [2008] FCA 1518 (*George*). It followed, according to the state, that:

- 'the proposed amendments are thereby futile';
- 'it would be unjust . . . and contrary to the public interest for futile amendments to be permitted';
- the general principle set out in *Medich v Bentley-Smythe* 'dictates that leave to amend should be refused'—at [5].

Subsection 190F(6) is the 'screening mechanism', not the registration test

It was found that the statutory scheme supported the applicant's approach, i.e. 'registration is not a condition precedent to the making of a determination of native title'—at [7].

Justice Logan's comments in *George* at [50] was cited with approval:

> Strictly, even after the amendments made by the [*Native Title Amendment (Technical Amendments) Act 2007* (Cth)], it remains true that the registration test found in Pt 7 is "not a screening mechanism for *access* to the Federal Court" … [Justice Jagot's emphasis]. That is so if for no other reason than that satisfaction of the registration test is not a condition precedent to the ability to file in the Court an application for determination of a native title claim . . . It is s 190F(6) which provides the "screening mechanism".

Likelihood of registration is not the exclusive focus

The 'likelihood or otherwise of registration is a part of the factual context informing the merits of the application for leave to amend' and 'cannot be an irrelevant consideration' but this 'does not undermine the essence of the applicants' submission that the Minister's exclusive focus on the likelihood of registration is misconceived'—at [9].

The court held there was a range of material factors that must be considered, including that the proposed amendments:

- were supported by additional affidavits that were not before the Registrar when the application first underwent the registration test that, pursuant to s. 190A(3)(a), must be considered when the amended application is tested;
- 'can be inferred to represent the best attempt the applicants are likely to be able to make to advance the application';
- were 'put forward in good faith by the applicants to advance their case and to obtain registration'—at [13], [14] and [20].

Other relevant considerations included that:

- Registrar's delegate, as an administrative decision–maker, must make a decision on the amended application that appears on the material to be 'sound' and 'right' and not merely 'justifiable' or 'defensible';

- 'there would be a wide spectrum of findings potentially open to the Registrar' and so 'the earlier decision ... cannot predetermine any decision' on the amended application;
- notification and the associated 'administrative burden' imposed on the Registrar, along with the 'consequential impact on rights of others following notification … are not enlivened until the claim is registered' (see comment below on this point);
- if the amended application is not registered, the process provided by s. 190F(6) remains available—at [15], [18] to [20].

According to her Honour:

> If the proposed amendments are not obviously futile, then the unfair prejudice to the applicants which will be occasioned if the amendments are not allowed far outweighs the potential prejudice to the Minister and the public interest in the effective use of resources which might result from allowing them—at [23].

Decision

Justice Jagot granted leave to the applicant to amend the application as proposed, noting that, if the application again failed the registration test, the state or the court may require the applicant to show cause why the application should not be dismissed under s. 190F(6)—at [23] to [24].

Note on Registrar's duty to notify claimant applications, whether amended or not

Her Honour expressed the view at [18] that notification is not enlivened unless and until the claim is registered, relying on *George* at [13] to [14]. With respect, the duty to notify a claimant application under s. 66 is enlivened regardless of whether the claim is accepted for registration—see ss. 66(6)(a) and (b). Further, where notice of an amended application must be given under s. 66A (and this is only in limited circumstances), there is no duty to await the outcome of the application of the test but, as a matter of policy, the Registrar usually does.