Atkinson v Minister for Lands NSW [2010] FCA 1073

Jagot J, 1 October 2010

Issue

The main issue was whether to dismiss two claimant applications pursuant to s. 94C given that, in more than five years, the applicants had filed no evidence despite being ordered to do so by the Federal Court. The applicants had been 'permitted to exhaust every opportunity to obtain funding' but failed to secure it. It was found to be contrary to the interests of justice 'to permit the proceedings to consume yet more time and resources with no real end in sight'—at [25].

Background

These applications were brought on behalf of the Mooka and Kalara United Families, the first in February 2002 over the area subject to a future act notice given under s. 29 of the *Native Title Act 1993*(*Cwlth*) (NTA) concerning a proposed mining lease and the second in June 2002 over an area subject to a notice given under s. 29 in relation to a proposed exploration licence. Neither claim was accepted for registration. Both have a lengthy history before the court.

On 23 March 2005, the applicants were ordered to file certain materials by 23 September 2005 but did not comply. On 18 July 2006, the court ordered that all of the applicants' material be filed by 20 November 2006, extended to 20 November 2007 and then 1 July 2008 at the applicants' request. The applicants did not comply. On 25 July 2008, the court ordered them to file an amended application (as foreshadowed) and all relevant materials by 14 November 2008. Again, there was no compliance. On 26 February 2010, the Minister for Lands (NSW) sought orders that the applicants take steps to progress their claims by 1 October 2010 failing which the proceedings would stand dismissed. Justice Jagot agreed with the Minister's submissions that (among other things):

- recent amendments to the NTA were intended to ensure native title claimants had the same responsibility as all other applicants to 'advance and resolve' their claims;
- continuing non-compliance with orders, 'irrespective of the cause being an inability rather than an unwillingness to do so', involved 'unreasonable delay' that prejudiced both the respondents and 'the due administration of justice';
- dismissal for a failure to prosecute would not prevent subsequent properly constituted and diligently prosecuted applications being made—at [26].

Funding issue

From May 2009, the applicants pursued funding for their claims, including review of two decisions not to fund them. The court adjourned these proceedings several times to allow the applicants to do so. The applicants argued they were now being 'punished for diligently pursuing their funding application'. However, Jagot J said this argument was 'misconceived'. These proceedings were not about funding and, in any case, the applicants had been 'permitted to exhaust every opportunity to obtain funding' and had not secured it. It was contrary to the interests of justice 'to permit the proceedings to consume yet more time and resources with no real end in sight'—at [25].

Further, a lack of funding was not a 'compelling reason' not to dismiss the applications within the meaning of s. 94C(3), which provides that the court must dismiss claims made in response to future act notices in some circumstances. According to Jagot J:

> On the applicants' own submissions, the unresolved issues about their claim will remain unresolved without funding. As the prospect of obtaining funding is now purely speculative, the unresolved issues cannot be a reason, let alone a compelling reason, not to dismiss the applications—at [27].

Decision

In the circumstances, Jagot J was satisfied it was in the interests of justice to make self-executing orders whereby the applications would stand dismissed if the applicants did not file and serve their amended applications and other material by 29 October 2010.

Postscript

In *Atkinson v Minister for Lands for NSW (No 2)* [2010] FCA 1477, the applicants sought to vary Jagot J's orders but did not succeed. The applications now stand dismissed.