Hill v Queensland [2011] FCA 472

Logan J, 3 May 2011

Issue

The issue was whether a claimant application should be dismissed for want of prosecution. The court decided not to do so but made orders that certain 'milestones' must be achieved, with the court to closely monitor compliance, and self-executing orders for dismissal if those milestones are not achieved.

Background

The applicant was ordered to show cause why an application under s. 61(1) of the *Native Title Act 1993* (Cwlth) made on behalf of the Yirendali People Core Country Claim should not be dismissed due to the applicant's failure to 'prosecute the application with due diligence'. The application was filed in December 2006. When filed, it was 'particularly well supported ... by details of prior anthropological research'. The application passed the registration test in August 2007. However, 'nothing ... which takes the evidence in the claim beyond the work apparent in' the material as filed in 2006 was filed—at [1] to [5].

When the applicant was ordered to show cause on 25 March 2011, there was also a direction made that a supporting affidavit be filed by 7 March 2011. That affidavit was not filed but, on 24 March 2011, one of the persons who comprise the applicant filed an affidavit in which he apologised for the failure to comply and stated the applicant had engaged lawyers, the matter would be progressed using funds from future act activity and public funds would also be sought and the applicant intended to retain a named historian and a named anthropologist to prepare various reports.

Due diligence required

The power to make orders under O 35A of the *Federal Court Rules* to dismiss the application for default was available but whether to do so was 'a matter for the exercise of judicial discretion'. Justice Logan noted that cases where claimant applications were dismissed for default often 'also [had] an apparent want of any prospect' of the application succeeding. In this case, material before the court gave 'cause for thinking that there may be something in this case'—at [10] to [11].

However, Logan J noted that:

> Parliament has conferred a considerable privilege on those who have not yet vindicated a claim for native title by allowing [future act] agreements to be made. The price of that privilege ... is the prosecution of a native title claim in this Court. If it is not prosecuted with due diligence, it should be struck out for the privilege Parliament has conferred is being, or at least may be, abused—at [14].

His Honour commented that, in this case:

> There is a lamentable lack of diligence evident in the litany of unobserved steps in work plans. But for the prospect that there is something in this claim ... I would regard it ... as a case which called for dismissal. I am influenced not to do that by what seems ... to be ... an understanding of the need to prosecute ... which hitherto has not been evident—at [16].

Co-operation expected

Given the material filed originally, his Honour thought this 'may well be a case ... where ... evidence can be secured in a co-operative fashion'. Logan J ordered that: '[T]he case to be managed intensively by the [Federal Court] Registrar'. Other orders as proposed by the state directed at achieving certain milestones (e.g. provision by a particular date of reports and final connection material) were also made. Any slippage must be 'highlighted ... in advance by evidence in conjunction with an application for variation of the dates concerned' and respondents given 'notice and evidence of particular difficulties' should respond 'co-operatively'. Given the history of non-compliance, Logan J made 'self-executing default dismissal orders', i.e. dismissal will occur if a particular milestone is not achieved unless 'it looks likely, for good reason, that it may not be achievable', in which case is was 'extremely important' that the applicant draw this to the attention of the other parties and the court via an application to vary—at [18] to [19] and [21].

Can dismissed claim be brought again?

While acknowledging that whether a claim dismissed for want of prosecution can be brought again was a moot point, his Honour:

> [E]xpressly reserve[d] whether, in this particular case, in the event that circumstances arise where it is appropriate to vacate the self-executing part of the order whether, nonetheless, an order of dismissal ought to be attended with a requirement for the case not to be brought again without leave of the Court—at [24].

Decision

Logan J was satisfied that, in the circumstances of this case, the application should not be dismissed 'forthwith' but rather, that orders of the kind outline above should be made—at [26].

Comment on the perceived tension in NTA

His Honour noted that, under the NTA, native title 'can only be determined by an exercise of Commonwealth judicial power', which requires the making of an application that is then 'prosecuted with due diligence' by the applicant. His Honour went onto say that:

> A condition precedent to the further prosecution of any native title claim is the successful passage of what is known as the registration test. Passage of that test, though, does give rise to an ability to negotiate indigenous land use agreements [ILUAs]. Herein, in my opinion, lies the inherent tension in the Native Title Act—at [12].

With respect, a claimant application need not pass the registration test in order to progress. In certain circumstances, failing the test may lead to an application being dismissed pursuant to s. 190F(6). However, this is not an inevitable outcome, e.g. *Champion (No 2) v Western Australia* [2011] FCA 345 and *Thomas v Western Australia* [2011] FCA 346, both summarised in *Native Title Hot Spots* Issue 34. Further (and again with respect), a registered claim is not required in order to facilitate the negotiation of an ILUA. Both an area agreement ILUA and an alternative procedure agreement ILUA can be made over areas where there is no application (registered or otherwise) before the court—see ss. 24CD(3) and 24DE. That said, his Honour's point seems to be that taking advantage of the opportunities provided by the future act regime found in Pt 2, Div 3 of the NTA can direct the applicant's attention away from the due prosecution of the related application before the court—at [13].