Roe v Western Australia [2011] FCA 421

Siopis J, 29 April 2011

Issue

The issue before the Federal Court was whether to grant leave to appeal from a decision of the court to replace the persons comprising the applicant to a native title claimant application under s. 66B of the *Native Title Act* 1993 (Cwlth)(NTA). Leave was refused.

Background

The background to this matter is provided in the summary of *Roe v Western Australia (No 2)* [2011] FCA 102, summarised in *Native Title Hot Spots* Issue 34. Mr Roe sought to demonstrate that:

- the decision of the primary judge was attended with sufficient doubt to warrant the grant of leave to appeal;
- Mr Roe would suffer a substantial injustice if leave was refused.

Sufficient doubt

Mr Roe contended that the primary judge 'failed to recognise and deal with the gravamen of his complaint', namely that there existed 'so wide a division and divergence of interest' between the Goolarabooloo and Jabirr Jabirr people that the joint Goolarabooloo and Jabirr Jabirr claim (GJJ claim) could not be pursued by the replacement applicant on behalf of the GJJ claim group as a whole because the replacement applicant had a conflict of interest—at [21].

Justice Siopis held that the primary judge:

- did not misapprehend Mr Roe's contention, nor did he fail to deal with it;
- acknowledged the intergroup divisions, found that they were 'not uncommon' in native title claim proceedings and were not 'inevitably inimical to the pursuit of a joint native title claim on behalf of a group comprising' of both Goolarabooloo and Jabirr Jabirr peoples;
- correctly held that the question of the existence of native title rights was a matter for trial;
- acknowledged the question of conflict of interest arose given that the replacement applicant was comprised of the same people as comprise the applicant for the Jabirr Jabirr application;
- considered the prospect of such a conflict of interest 'actually impinging upon the capacity and willingness' of the replacement applicant to carry out the functions of the applicant in respect of GJJ claim to the benefit of that claim as a whole;
- specifically considered the prospect of the conflict of interest materialising so as to detrimentally affect the vindication of the rights of the claim group as a whole;
- decided that the prospect of this happening was limited and insufficient to justify the exercise of the discretion to withhold making the orders under s. 66B(2) of the NTA—at [22] to [24] and [26].

Siopis J held that these findings were open to the primary judge – at [25], [26] and [33].

Substantial injustice

Mr Roe argued that he would suffer a substantial injustice as a member of the GJJ claim group because the rights of that group as a whole 'would not be properly vindicated' if the s. 66B(2) order was not set aside. This argument was rejected because Mr Roe has 'no authority to

complain on behalf of the GJJ claim group' about the replacement applicant's capacity to act as the applicant:

> [I]n circumstances where these persons were, at an authorisation meeting of the GJJ ... group, appointed to act as the applicant to replace the current applicant which comprised Mr Roe and another person—at [40].

It was noted that:

- the NTA 'contemplates that issues relating to the capacity or authority of the ... applicant ... are to be determined [by] ... the native title claim group';
- Mr Roe and Mr Shaw would have remained the current applicant, despite this being 'quite contrary to the expressed wishes of the GJJ claim group' if the primary judge had not made the s. 66B(2) order to replace them and the 'impasse arising from the dysfunctional relationship between Mr Roe and Mr Shaw would have continued'—at [41].

Decision

Siopis J dismissed the application for leave to appeal.