Party status, consolidation of proceedings

Wilson v Department of Land & Water Conservation [2003] FCA 307

Hely J, 9 April 2003

Issues
The questions before the court were whether two claimant applications by the same applicant over adjoining areas should be consolidated and whether those with interests on the adjoining application be joined as respondents to the first.

Background
Two claimant applications had been made in north-eastern New South Wales on behalf of the Bandjalang People (referred to as Bandjalang No 1 and Bandjalang No 2). Bandjalang No 2 adjoins the area covered by Bandjalang No 1 but covers a much larger area. As a result of legal advice, and due to funding considerations, separate applications were filed at different times and were at different stages in the process. However, the evidence given to date in Bandjalang No. 1 suggested that there was only one traditional Bandjalang area, made up of the area covered by the two applications. Much of the evidence filed in Bandjalang No 1 regarding traditional law and custom may, therefore, have also been relevant to Bandjalang No. 2. However, it was anticipated that further expert evidence would be filed if Bandjalang No 2 proceeded to trial.

Members of the NSW Farmers Association (the farmers), who were respondents in Bandjalang No 2 but who had no interest in the area covered by Bandjalang No 1, filed a notice of motion pursuant to s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA) in Bandjalang No 1 seeking joinder. They also sought an order consolidating the proceedings pursuant to Federal Court Rules (FCR) O29 r 5. In support of the motion, they submitted that:

- evidence given and decisions made in Bandjalang No 1 (to which they were not parties) could be received into evidence in Bandjalang No 2; and
- the findings of the court in the first matter be adopted by the court in the second: see s. 86 and s. 82(1) of the NTA.

The farmers' application was opposed by the native title applicants on the basis that:

- the farmers did not have an interest in the area subject to Bandjalang No 1;
- the NTA does not permit the consolidation of the kind sought; and
- it was a matter of speculation that the court would exercise the discretion available under s. 86 when hearing and determining Bandjalang No 2.

Did the farmers have the requisite interest?

Justice Hely noted that, according to s. 225 of the NTA, the court's task in Bandjalang No 1 is to determine the nature and extent of both the native title and non-native title rights that exist in relation to the application area—at [19] to [20].

In accordance with s. 84(5) of the NTA, the court has the power to give leave to a person to join the proceedings if it is satisfied that the person's 'interests' may be affected by a determination in the proceedings. In this context, the term 'interests' is not confined to those referred to in s. 253 of the NTA. Hely J referred to the findings on the meaning of 'interest' in this context made in *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 and noted that, although that decision was made under the old NTA, it continues to apply to the amended NTA.

The test enunciated in that case was, essentially, that the interest:

- need not be legal or equitable but must be genuinely, demonstrably and not indirectly affected by a determination in the proceedings;
- must be capable of being defined with reasonable certainty; and
- must not be so remote or insubstantial that it would be mere speculation as to whether and how it might be affected.

His Honour applied this test and found that while there was no reason for giving a narrow or confined operation to s. 84(5):

- it was difficult to see how a person who does not assert any interest in or connection with the area covered by the application has an interest that may be affected by a determination in the proceedings;
- whether or not the farmers had an interest because of the potential 'precedent' value of the outcome of Bandjalang No 1 was a matter of speculation, there was no way to know whether or not the court would exercise the discretion available under s. 86, even if asked to do so and, even if this was proposed, the farmers would have an opportunity to make submissions on the point;
- therefore, even if the farmers had such an interest, it could not be clearly defined at this stage and was indirect or remote and so did not meet the test enunciated in *Byron*;
- any party to the proceedings is entitled to participate in mediation and to veto any consent determination that might be proposed;
- according the farmers this status in Bandjalang No 1, when their interests are in relation to lands within Bandjalang No 2, would be 'inconsistent with the scope and purpose of the NTA'—see [22] to [35] and [51].

Intervention

The farmers, as an alternative, sought to intervene in Bandjalang No. 1 under O 6 r 17 of the FCR for the limited purpose of cross examination of any witness whose evidence touched on Bandjalang No 2. Hely J found that what was sought was outside of the realms of O 6 r 17. His Honour also considered s. 23 of the *Federal Court Act 1976* (Cwlth) (a point not raised by the farmers), but was of the view that even if there was power under that section to permit intervention, it would not be appropriate to exercise it for a purpose unrelated to the disposition of the proceedings. An intervener is a party to the proceedings and has all the privileges of

a party. Therefore, a person who does not have a sufficient interest to meet the requirements of s. 84(5) should not be permitted to intervene—at [36] to [38].

Consolidation

His Honour was of the view that if an order consolidating the proceedings was made under O 29 r 5 of the FCR, the two applications 'would be merged into one', with the:

> [N]ecessary consequence ... that the land the subject of the consolidated proceedings would be the two areas the subject of the existing applications. In order to achieve that result, amendment of the applications ... would be required—at [40].

Hely J then referred to ss. 64(1) and 64(2) of the NTA, which provide that a claimant application can only be amended to include land or waters that were not covered by the original application if the amendment combines the application with another claimant application. The question posed by his Honour was whether the court could force an applicant to combine the two applications and whether any such power should be exercised. It was noted that:

- section 67, which requires that the court make such orders as it considers appropriate to ensure that, to the extent of any overlap between the areas covered by one or more applications for a determination of native title, the applications are dealt with in the same proceeding, did not apply because the applications abut rather than overlap;
- it was not contended that the prosecution of two separate claims was an abuse of process; and
- the bringing of two applications was not 'obviously' oppressive given the differences in the persons (other than the claimants) with interests in the area covered by each application—at [42] and [45].

After noting that the power to consolidate is a discretionary power, Hely J expressed the view that the structure of the NTA is such that he had 'real doubts' as to whether the court has the power to 'force a combination' of claimant applications: 'except in the circumstances referred to in s. 67'. (Presumably his Honour meant to confine this to circumstances where applications that overlap are brought by the same applicant on behalf of the same claim group. For example, it would seem unlikely that compliance with s. 67 in other cases would allow for combination would be 'forced' upon overlapping claimant applications brought by different groups). If this is the case, then the court 'cannot effectively order consolidation of proceedings which relate to separate claims'. Even if there is such a power, this was not a case in which the court should exercise it—at [46].

Query whether his Honour had regard to *Strickland v Western Australia* (1999) 89 FCR 117; [1999] FCA 221 at [3] to [4] (to which no reference was made). In that case, the orders made indicate that Justice RD Nicholson accepted that there is a legal distinction to be drawn between the combination and consolidation. An order to combine applications results in two or more claimant applications becoming a single application. It is a 'species of amendment' in which one claimant application is amended to combine it with others: *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [6], Beaumont, Wilcox and Lee, citing with approval French J in

Bropho v Western Australia (2000) 96 FCR 453; [2000] FCA 1 at [25]. On the other hand, an order to consolidate results only in two or more matters being treated as one proceeding, rather than being an amendment of any of the substantive applications. The orders made by RD Nicholson J indicate that, when claimant applications are combined, it is not appropriate for the court to also exercise the power to consolidate.

Concurrent trials

His Honour considered making an order under O 29 r 5 of the FCR, pursuant to which different proceedings are tried at the same time, but concluded that this was not an appropriate course to take in the circumstances because:

- Bandjalang No 1 was relatively close to trial, whereas Bandjalang No 2 was still in mediation;
- it could not be assumed that the same judge would determine both cases because the farmers had already indicated that they would apply to disqualify Hely J from hearing Bandjalang No 2 if he made findings in Bandjalang No 1 that were adverse to their interests;
- it was difficult to determining which witnesses were common to both applications; and
- the other respondents to Bandjalang No 2 were not parties to the motion and may not be in a position to cross examine Bandjalang No 1 witnesses before they have prepared their own cross examination in the proceedings to which they were parties—at [48] to [49].

Decision

The notice of motion filed by the farmers was dismissed with no order as to costs.