Strike-out— abuse of process

Button v Chapman [2003] FCA 861

Kiefel J, 20 August 2003

Issue
The question in this case was whether a lack of unanimity as between those persons authorised to represent a native title claim group constitutes an abuse of the Federal Court's process.

Background
The applicant on the motion (Mr Button) sought an order striking out the Wakka Wakka Peoples' claimant application (the claimant application) as an abuse of the process of the court under O20 r2(1)(c) of the Federal Court Rules (FCR). The motion was supported by three of the sixteen people named as the applicant in the claimant application.

Mr Button submitted that the claimant application was doomed to fail because those named as the applicant could no longer act in unity as required by ss. 61(2), 62(2)(a) and 62(2)(c) of the *Native Title Act* 1993 (Cwlth). He argued that the other 13 Wakka Wakka people included in the group named as the applicant would not be able to continue effectively without the support of the members of the rest of the people in that group and that replacement of the applicant pursuant to s. 66B would be not be a successful or appropriate course.

Decision
In dismissing the motion, Justice Kiefel noted that:

- the basis for the motion was misconceived. A native title claim is not an abuse of the court's process because there is a lack of unanimity as between those said to represent the native title claim group. In particular, that there may be difficulties experienced in moving the application forward given the authorisation requirements under s. 66B does not render it an abuse of process;
- this was not a case where it could be said (and it was not contended) that the claim itself had no merit;
- the position of an applicant in cases such as this does not involve a personal right. The proceedings are largely representative in nature;
- it did not appear that the removal of those in dissident would leave the native title claim group not properly represented;
- the court had power (of its own motion) to remove 'an applicant' under O6 of the FCR if their role has become untenable and the proceedings and the interests of others delayed—at [6] to [9].

However, Kiefel J declined to exercise the power available under O6, preferring to give the 13 'co-applicants' an opportunity to consider the course they wanted to take and whether they wished to continue with the claim in its present form in the light of

the anthropological evidence that was available, which identified 15 descent groups within the larger group. Therefore, they were directed to confer as to the course they wished to take in the circumstances. The matter will be listed for directions if no application is brought within the time ordered.

Comment

In relation to her Honour's finding that the court could, of its own motion, remove 'an applicant', see the comments in the summary of *Walker v Minister for Land & Water Conservation (NSW)* [2003] FCA 947 in *Native Title Hot Spots* Issue 7. Further, the removal of a person from the group named as 'the applicant' under O6, absent an order under s. 66B, does not appear to relieve those who remain in the group that now makes up the applicant of the obligation that arises under s. 64(5) i.e. the application must be amended to reflect the order and an affidavit going to authorisation of the newly constituted applicant must be filed.