Vacation of trial dates & mediation program

Bennell v Western Australia [2004] FCA 228

French J, 12 March 2004

Issues
This decision deals with applications:

- to vacate trial dates in relation to part of the area covered by a claimant application known as the Single Noongar Claim (Area 1); and
- for orders that a mediation protocol be formulated and adopted in a related claimant application known as Single Noongar Claim (Area 2).

Background
On 5 March 2004, at a directions hearing held to review the progress, through mediation, of claimant applications in the South West of Western Australia, it was noted that a mediation protocol had been agreed between the native title representative body for the region, the South West Aboriginal Land and Sea Council (SWALSC) and the State of Western Australia for progressing negotiations in relation to those applications. The object of the protocol was to achieve some form of overall agreement including a resolution of native title issues.

The court proposed standard directions to progress mediation be made in each case i.e. the applicants, SWALC and the state were to comply with the mediation protocol, which was to be varied to include the applicants as parties to it and to specify their role in it. The revised protocol was to be filed by 5 April 2004. The directions hearing was adjourned to 30 August 2004, with the Tribunal being requested to provide a mediation report on or before 23 August 2004. Orders in these terms were made on 12 March 2004. There was also a motion in two parts before the court that is dealt with in this decision.

Single Noongar Claim (Area 1)
The motion in relation to this application was for orders vacating trial dates in relation to part of the area covered by that application.

Seven applications in the Perth area, known as the Combined Metropolitan Claim, had been part-heard by His Honour Justice Beaumont. When his Honour became ill, they were set down for trial before His Honour Justice Wilcox. Only one of these applications (No 142/98) remained on foot on 9 October 2003, when Wilcox J ordered that it should be amended to combine it with an application known as the Single Noongar Claim (Area 1). Hearings for the area originally covered by No. 142/98 (known as the Perth Section) were to recommence early in October 2004.

The applicants in the Single Noongar Claim (Area 1) sought to vacate these trial dates to allow the Perth Section to be dealt with in the mediation of the Single Nyoongar Claim (Area 1). Resource limitations and the late engagement of an expert

anthropologist were cited in support of the application to vacate. The state opposed the motion.

Decision

His Honour Justice French was of the view that:

> [T]he Perth Section of the claim having already been part heard by one trial judge and now under the control of another with directions made for the resumption of the hearing, it is not appropriate that I make any order varying the orders made by Wilcox J. While there may be compromises necessary in order that the expert reports required by his Honour be filed within the time that he has prescribed, I do not consider that there is evidence that the applicants in the Perth Section claim will suffer any irremediable prejudice by being required to produce evidence relevant to their area of their section of the claim. Dr Palmer [the expert anthropologist] has been engaged relatively late in the piece and I do not consider that that fact should be given great weight as a reason for vacating the trial date and the directions made by Wilcox J...
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> This result does not mean that mediation cannot continue in respect of the Perth Section of the Single Noongar Claim (Area 1). Indeed, it might be that the ongoing litigation in respect of this section could have a bearing on producing some outcomes relevant to the larger claim—at [16] to [17].

Single Noongar Claim (Area 2)

The Single Noongar Claim (Area 2) overlapped (in whole or in part) two other claimant applications. Orders for the preparation of a mediation protocol and program to be filed by 31 March 2004 were sought by the applicant in Single Noongar Claim (Area 2). The state, which opposed the motion on the ground that the dispute with the overlapping claimants was 'fairly intractable' and that it was very difficult to seriously entertain any meaningful mediation in relation to that matter, sought orders programming the matter for trial. Counsel for the state noted that the timetable it proposed was 'fairly gentle' and not inconsistent with further negotiations taking place.

Decision

French J allowed the applicant's motion because:

- SWALSC seemed 'to be doing its best to pursue a reasonably focussed strategy for the resolution of intra-Indigenous disputes affecting the application'; and
- the Single Noongar Claim (Area 2) had neither been notified nor its party list settled—at [22].

The state was given liberty to apply for directions following notification.