

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

No. QG6196/98

BETWEEN:

Connie Isaacs – on behalf of the Turrbal people

Applicant

AND:

State of Queensland

First Respondent

Brisbane City Council

Second Respondent

Richard Kirk Architect Pty Ltd

Third Respondent

**Submissions on behalf of the Third Respondent and the Musgrave Park Cultural
Centre Inc.**

Preliminary

1. These submissions are made on behalf of the third respondent, Richard Kirk Architect Pty Ltd (“Kirk”) and Musgrave Park Cultural Centre Inc. (“MPCC”).
2. For the reasons set out below, it is submitted that:
 - 2.1. MPCC should be joined as a party;¹
 - 2.2. Kirk should be removed as a party;
 - 2.3. The relief sought in the Applicant’s Notice of Motion should be dismissed with costs.

The third respondent’s/MPCC material

3. Affidavit of Richard Lionel Kirk sworn 29 August 2002.
4. Affidavit of Selwyn Bowman Johnson sworn 30 August 2002.

¹ Order 6 rule 8, *Federal Court Rules*

Brief observations on the applicant's material

5. The chronology section of the applicant's written submissions refer to numerous documents and events, which are unsupported by any evidence. It is impossible for either Kirk or MPCC to usefully respond to that recital.
6. The relevant chronology is:
 - 6.1. On or about 13 May 1998, the Turrbal peoples lodged a claim seeking native title over land including the site on which the subject development is proposed. MPCC is a respondent in those proceedings.
 - 6.2. On 29 July 1999, a Deed of Grant in Trust was sealed in respect of land described as Lot 3 SP110538, County of Stanley, Parish of South Brisbane ("the DOGIT"). It is within the area claimed by the Turrbal peoples.
 - 6.3. On 5 November 1999, the Native Title Registrar accepted the Turrbal people's claim for registration under section 190A of the *Native Title Act*.
 - 6.4. On 24 October 2000, notice was given to the Applicant under section 24JA of the *Native Title Services Act 1993* in respect of the construction of an indigenous cultural centre.² The proposed site includes the DOGIT land and is adjacent to the Musgrave Park Swimming School Pool and has a small frontage onto Cordelia Street, West End adjacent to the Glenelg intersection as well as what is commonly known as Musgrave Park.³ It is all within the area claimed by the Turrbal peoples.
 - 6.5. On 28 March 2002, MPCC entered into an agreement to sub-lease land the subject of the DOGIT.⁴ The lease is to commence upon the completion of the construction of the centre.
 - 6.6. On 7 June 2002, an application for Development Approval in respect of the indigenous cultural centre was lodged with the Brisbane City Council.

Facts relied upon by the third respondent/MPCC

7. Kirk operates an architectural practice that is designing and managing the construction of the indigenous cultural centre and lodged the Development Approval application on behalf of MPCC and the other land owners/holders, the first and

² Affidavit of Kenneth Albert Brandes, 29 August 2002, paragraph 13; exhibit KAB9.

³ Affidavit of Richard Leslie Kirk, 29 August 2002, paragraph 5; exhibit RK-3 - MPCC Assessment Report, page 3.

⁴ Affidavit of Kenneth Albert Brandes, 29 August 2002, exhibit KAB-9; paragraph 13 and dot point "26 October 2000" in Applicant's chronology.

second respondents.⁵

8. MPCC is incorporated under the *Associations Incorporation Act 1981*.⁶ Its stated objects are:

“To identify, document, preserve and promote the post-invasion history and cultural heritage of the Aboriginal inhabitants of south-east Queensland (“region”), with proper respect being accorded to traditional owners.

To establish and maintain a keeping place for the Aboriginal community with procedures for the proper acceptance and care of materials, relating to the history of the Aboriginal communities in the region.

To establish and provide an information and referral service specifically for matters concerning the history of the Aboriginal peoples and communities in the region.

To establish and operate a cultural centre promoting the history and culture of Aboriginal people generally and with specific reference to the people historically associated with the region.

To collect and maintain items and intellectual property that are relating to the history and development of the people historically associated with the region, and to use them for research and the enjoyment, education and cultural enrichment of the general community.

To provide a facility for the social interaction of the Indigenous (Aboriginal and Torres Strait Islander) people within the area.

To employ staff and utilise the staff to meet the needs of the Association.

To purchase such things as are necessary for the education, recreation, social and welfare needs of the Aboriginal community.

To support and advocate for the rights and interests of the Aboriginal people of the region who are dealing with the wider community, government departments and statutory corporations or other such bodies.

To do anything that may contribute to the general well-being of the Aboriginal people in the region.

To promote the interest and understanding of the general population in the cultural heritage of Aboriginal people generally and with specific reference to the people historically associated with the region.”

Submissions

Removal of Kirk as a party/Joinder of MPCC as a party

9. Kirk should not have been joined as a party to these proceedings.

9.1. It is merely a professional adviser to the project.

9.2. A holder of an interest in land must obtain development approval from the local authority before any construction can lawfully take place.⁷

⁵ Affidavit of Richard Leslie Kirk, 29 August 2002, paragraphs 1-5.

⁶ Affidavit of Selwyn Johnson, 30 August 2002. paragraph 2, exhibit SJ-1

- 9.3. Kirk does not hold any interest in any land the subject of the current proceedings.
- 9.4. Regardless of the merits of the Applicant's Notice of Motion, there is no cause of action available against him. An order against Kirk will lack any legitimate utility. It will only cause financial detriment.
10. MPCC should be a party to these proceedings.
- 10.1. It has a significant interest in the proposed development and thus the outcome of the present application.
- 10.2. It has a proprietary interest in respect of one parcel of land the subject of the development application.
- 10.3. Its members are primarily indigenous people with a historical connection to the site and who have had many years of personal involvement in the empowerment of the local indigenous community including investment of human and financial resources into the development and construction of the cultural centre.⁸
- 10.4. The interests of its members are seriously affected by the outcome of these proceedings.

The Applicant's Notice of Motion

11. The test for the grant of an injunction is well settled; the applicant must show that there is a "serious question to be tried" and then that the "balance of convenience" requires that an injunction should be made: *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland* (1982) 46 ALR 398, *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148.
12. However, before turning to those issues a preliminary question arises as to the how this matter should be dealt with by this Court. This is a Notice of Motion seeking injunctive relief in a native title proceeding. The procedure is "questionable".⁹
13. The Applicant does not assert in her affidavit material the basis upon which she and/or any member of the Turrbal peoples has an interest in the land upon which the proposed development is to occur. However, in the Applicant's written submissions, it is asserted at the first dot point on page 2 under the heading "*Chronological Order of Events*",

"5 November 1999 – The Turrbal people's native title application passed the

⁷ *Integrated Planning Act 1997.*

⁸ Affidavit of Selwyn Johnson, 30 August 2002. paragraph , exhibit SJ-

⁹ A similar observation was made in *Lardil, Kaiadilt, Yangkaal & Gangalidda People v. The State of Queensland* [2001] FCA 414 by French J, paragraph 3, where the applicants had brought a Motion for a final injunction in native title proceedings seeking to stop the establishment of a buoy mooring.

Registration Test.”

14. Whilst there is no evidence before the Court in these proceedings in respect of this assertion, it is not disputed that the Turrbal peoples claim was accepted for registration by the Native Title Registrar on or about that date.¹⁰ However, registration does not put the question of title beyond debate on an application by a registered native title claimant for an injunction: *Fejo v. Northern Territory of Australia* (1998) 195 CLR 96 at 125-126; *Lardil, Kaiadilt, Yangkaal & Gangalidda People v. The State of Queensland* [2001] FCA 414.
15. The Court in *Fejo* was dealing with an interlocutory injunction. In *Lardil et al*, Dowsett J stated that: “*it follows that on an application for a final injunction, an applicant must demonstrate that he or she has native title.*” French and Merkel JJ essentially agreed with that proposition.¹¹
16. The applicant’s Notice of Motion seeks an injunction without stating whether it is interlocutory or final. The relief sought does not express any contingency or future event. Judicial notice can be taken that a native title claim which overlaps other claims, over an urban area such as South East Queensland, will probably take several more years for determination either by mediation or litigation. For all relevant purposes, it is submitted, the relief sought should be viewed in these proceedings as a claim for a final injunction. Accordingly the Notice of Motion should be dismissed.
17. There is a further deficiency in the Applicant’s application. In *Lardil et al*(supra), the primary judge correctly observed that the procedural rights given by Division 3 Part 2 only arose where an act or proposed act is or would constitute a ‘future act’ as defined in section 233 of the *Native Title Act*. The Applicant asserts, at 2.0(i) of her submissions, act of sealing the DOGIT was racially discriminatory. To succeed in that argument the DOGIT must be shown to be a “future act” within the definition of section 233: *Native Title Act*. The applicant has not done so.¹²
18. No assessment could properly be made upon the material before the Court as to whether the applicant’s claim for native title is arguable or not. However it is clear that such an assertion has some prima facie deficiencies in respect of the site upon which the indigenous cultural centre is to be constructed.
19. The Applicant has not established that there is any serious question to be tried.

¹⁰ Pursuant to section 190A of the *Native Title Act*.

¹¹ Dowsett J at para 107 at page 26, Merkel J at para 71, page 20, French J at para. 60, page 18.

¹² The DOGIT is excluded from the definition of “future act” in section 233 by subsection (3). It was granted under the *Land Act 1994*. “Community purposes” in section 30 of that Act includes “Aboriginal purposes”. It is also arguably a Category A past Act. The rest of the site is also arguably a Category B past Act.

20. As to the balance of convenience, Kirk and MPCC respectfully adopt the submissions filed on behalf of the first respondent, namely and perhaps additionally, in sum:

- 20.1. The DOGIT was granted on 3 August 1999. The applicant received notice pursuant to section 24JA of the *Native Title Services Act 1993* on or about 24 October 2000.¹³ The Applicant provides no explanation for the substantial delay in seeking an injunction.
- 20.2. MPCC has, on several occasions, invited the Turrbal peoples to become members of MPCC. These have been declined.¹⁴ The expressed desire by the Applicant to be consulted or to provide permission seems less than genuine, if not merely obstructionist.
- 20.3. Members of MPCC have contributed significant human and other resources, over more than a decade, towards the proposed development.
- 20.4. MPCC will suffer material financial damage if the injunction is granted. Indeed, there is a risk that the development will not be able to proceed under the ambit of the current financial grant from government if the development is delayed for any substantial period.¹⁵
- 20.5. The applicant, if successful in obtaining native title over the subject land, can seek compensation for any loss.

21. Accordingly the Notice of Motion must be dismissed. Kirk and MPCC are entitled to their respective costs.

A Boe
Boe Callaghan
Lawyers for the Third Respondent and Musgrave Park Cultural Centre Inc.
30 August 2002

¹³ Affidavit of Kenneth Albert Brandes, 29 August 2002, exhibit KAB-9; paragraph 13 and dot point "26 October 2000" in Applicant's chronology.

¹⁴ Affidavit of Selwyn Johnson, 30 August 2002, paragraph 7.

¹⁵ Affidavit of Richard Lionel Kirk, 29 September 1999, paragraphs 10 & 11.