Replacing the applicant under s. 66B - Yarrabah

Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland [2004] FCA 1703

Spender J, 16 December 2004

Issue
Should the court exercise its discretion under s. 66B(2) of the *Native Title Act* 1993 (Cwlth) (NTA) to make an order to replace the applicant in a claimant application?

Background
An application was made under s. 66B(1) to replace the applicant in this claimant application. When the s. 66B application was made, Vincent Mundraby, Les Murgha, Stewart Harris, Frederick (Ricko) Noble were jointly 'the applicant': see s. 61(2). The proposed replacement applicant was to be constituted by Mr Mundraby, Mr Murgha and Mr Harris, with Mr Noble being replaced by Charles Thomas Garling.

His Honour Justice Spender noted that this application had a 'long and unhappy history'. In December 2003, the State of Queensland informally offered to resolve the claim by a consent determination. At the time, all four members of the applicant said they had authority to accept the offer. However, in February 2004 'it became apparent that Mr Noble was not intending to follow through on his previous undertaking'—at [2] to [6].

At a directions hearing in May 2004, Spender J indicated that the application would be struck out if progress towards a determination was halted because of irreconcilable differences between the people named as the applicant. When the matter came before the court in July 2004, Mr Noble indicated that he was not prepared to sign the undertaking. At that time, Spender J said to Mr Nobel:

> [The claim] has resulted in an offer by the State...which has associated with it positive benefits to members of the Yarrabah community, which you are at the very least postponing, if not putting in complete jeopardy.

The court was also informed by Kim Elston, a senior legal officer of the NQLC that it had expended in excess of $750,000 over ten years in prosecuting the claim and that his understanding of a meeting held on 14 July 2004 to discuss the state's offer was that all four of those constituting the applicant agreed to provide an undertaking to the court in regard to processing the claim. Mr Elston went on:

> If the claim was to be struck out, the Land Council, on my instructions, would not be interested in returning to that claim in view of the amount of money that's already been spent on it.

Counsel for the state also indicated that a 'huge amount' of the state's resources had gone into this claim and that the state would find it hard to go back and start again if there was no resolution of the conflict within the claim group.

The native title claim group

His Honour noted that Mr Nobel seemed to have a 'fundamental misunderstanding' as to who constituted the claimant group. After referring to s. 61(1), Spender J pointed out that:

> The native title claim group...is not the Gunggandji People; it is not the Yidinji People; it is not the Mandingalbay People. This is a joint [combined] claim, and the persons authorised are persons who are authorised by all the persons in the native title claim group—at [14].

Section 251B 'speaks of all the persons in the native title claim group', and in this case:

> [A]ll those persons are not simply all the Gunggandji People or all the Yidinji People or all the Mandingalbay People. Mr Noble misunderstands the provision of the Act when he claims, "I was put on as an applicant by the elders of the Gunggandji People. Only the elders of the Gunggandji People can take me off"—at [16].

Section 66B

Having noted that this view of s. 251B was 'wrong', his Honour considered the requirements of s. 66B, referring to earlier decisions such as:

- *Anderson v Western Australia* (2003) 204 ALR 522; [2003] FCA 1423 per French J, summarised in *Native Title Hot Spots* Issue 8;
- *Daniel v Western Australia* (2002) 194 ALR 278; [2002] FCA 1147 per French J, summarised in *Native Title Hot Spots* Issue 2;
- *Moran v Minister for Land and Water Conservation (NSW)* [1999] FCA 1637 per Wilcox J.

His Honour observed that:

> In this particular case, a very high priority has been given to this claim and extensive resources have been directed at negotiations over the past three years in particular both by the North Queensland Land Council and by the State of Queensland—at [44]. See also [7] to [8].

Evidence of authorisation for s. 66B application

NQLC assisted with advertising in respect of a s. 66B meeting in connection with this application, which included a mail-out to all claim group members, advertisements in the *Townsville Bulletin*, the *Northern Territory News* and the *Cairns Weekend Post* and advertisements on the local indigenous radio station.

Then, 'importantly', a meeting was held on 6 October 2004 at the Yarrabah Community Hall. The court accepted the evidence of what occurred in respect of that meeting, deposed to in various affidavits.

In summary, the meeting was chaired by a lawyer from a neighbouring representative body, Bernard Beston. All those who attended the meeting were given

an information kit that made 'plain' both the history leading up to, and the purpose of, the meeting. The meeting commenced an hour later than scheduled. Some people said no decision could be made without Mr Noble (who had not yet arrived, despite the late start). Mr Beston, having formed the view that Mr Noble had had adequate time to get to the meeting, informed those present that they could proceed in his absence. It was made clear that Mr Noble would remain as a member of the claimant group even if removed from the applicant group. A discussion ensued as to the appropriate decision making process. Some said that Mr Noble could only be removed after a meeting of the descendants of one George Christian. Mr Garling then informed the meeting that 146 people from that group had met in Darwin and agreed that Mr Noble should be removed but he also pointed out that, if the group wanted to abide by law and custom, then he, as the elder, should make the decision for his group. Mr Mundraby then pointed out (among other things) that the decision rested with the whole claimant group—at [28] to [33].

The minutes of the meeting which were before the court recorded that, following this discussion, resolutions to remove Nr Noble and replace him with Mr Garling were passed unanimously—at [33].

Elements of s. 66B satisfied

His Honour was satisfied that each of the factors identified by French J in *Daniel v Western Australia* (2002) 194 ALR 278 were established by the evidence:

- the relevant claimant application is the native title determination application made by the Mandingalbay Yidinji-Gunggandji People;
- each member of the new applicant is a member of the native title claim group; and
- each applicant for the order under s 66B of the NTA is a member of the native title claim group—at [39].

Therefore, Spender J was satisfied that Mr Noble was 'no longer authorised by the claim group' and that the new applicant was authorised to bring the s. 66B motion—at [40].

Mr Noble's absence from the meeting was noted. However, the court pointed out that the absence or even dissent of various members of a native title claim group will not necessarily be fatal to a s. 66B application: e.g. *Ward v Northern Territory* (2002) 196 ALR 32, summarised in *Native Title Hot Spots* Issue 3; and *Wiradjuri Wellington v Minister for Land and Water Conservation (NSW)* [2004] FCA 1127, summarised in *Native Title Hot Spots* Issue 3—at [41].

The deciding point as to whether the resolutions were authorised by the claimant group requires consideration as to what was the appropriate decision-making process and whether it was followed:

> The question of authorisation, whether by a traditional decision-making process or by a process agreed to and adopted by the members of the claim group, has to be in respect of the members of the claim group and not a sub-group of the members of the claim group. In this case the conditions for the making of the order in my judgment have been met. It follows that the Court has a discretion as to whether or not to make the order—at [43].

His Honour considered the case to exercise the discretion was 'overwhelming':

> This will have the effect, in my opinion, of significantly raising the prospect of a successful consent determination to the benefit of all the members of the Yarrabah community. There are substantial funds, up to a $1 million, in respect of building projects which are in abeyance as a result of the lack of progress or obstructionism in relation to the evolution of a consent determination—at [45].

Decision

Spender J ordered the current applicant for the native title claim group, namely, a group of four persons acting jointly, be replaced by a new applicant pursuant to s. 66B(1) of the NTA, comprising three of the original group and one other—at [47].

Updating the Register of Native Title Claims

The court noted that ss. 66B(3) and (4) provide that:

- if the court makes an order under s. 66B(2), the Federal Court Registrar must, as soon as practicable, notify the Native Title Registrar of the name and address for service of the new applicant; and
- if the claim is on the Register of Native Title Claims, the Registrar must amend the register to reflect the order.