Strike out application — Kuyani

McKenzie v South Australia [2005] FCA 22

Finn J, 27 January 2005

Issue
Whether the Kuyani claimant application (the Kuyani claim) should be struck out under s. 84C(1) of the *Native Title Act 1993* (Cwlth) (the NTA) or otherwise dismissed under s. 84C(4) of the NTA and O. 20 r. 2 of the Federal Court Rules.

Background
The Kuyani claim was originally lodged in 1995 and has been amended on six occasions. The six amendments 'substantially altered its character'. The original claim was made by a body corporate, the Kuyani Association Incorporated, membership of which 'was open to Aboriginal people of the Kuyani tribe and (within limits) to persons who have descended from the Tribe. Membership was conferred by the decision of a membership committee and a membership fee was to be paid'. The claim area entirely overlapped a smaller area the subject of the Adnyamuthna people's claim—at [3] to [6].

An agreement between the Kuyani Association and the Adnyamuthna people had the effect of:
- excising the Adnyamuthna claim area from that of the Kuyani claim;
- including the Kuyani in the Adnyamuthna claim;
- recognising that the Adnyamuthna people had interests in the eastern part of the association's claim.

This required amendments to both applications.

The amended Kuyani application was filed in December 2000. In it:
- the name of the applicant was changed from the Kuyani Association to Mr McKenzie;
- a list of named members of the claim group excluded six of the 'principal families' included in the 1995 application, and
- the claim area was amended to exclude the area of the Adnyamuthna claim.

The application stated that a certificate of the Aboriginal representative body for the area is to be attached. This was not the case. Instead, Mr McKenzie's accompanying affidavit referred to his authorisation in accordance with traditional laws and customs which must be complied with, namely a process of consensus decision-making—at [12] and [13].

The amended application was combined with another application which had the effect of incorporating additional areas of land into the combined application. That

application was further amended three times, so as to, among other things, further change the description of the native title claim group—at [15] to [20].

Leave was given to correct typographical errors in the last of these amended applications. Justice Finn observed that 'this seems to have been interpreted liberally'. The amended claim was filed in October 2004, and the composition of the claim group was further recast. The parties agreed to his Honour regarding this latter amended application as the subject of the present strike-out application—at [21].

The strike-out application was filed by the Aboriginal Legal Rights Movement (ALRM). Among the affidavits filed by ALRM were two from persons claiming to be Kuyani but nonetheless excluded from the claim group description.

Whether the old or new Act applied

The transitional provisions to the *Native Title Amendment Act 1998* (Cwlth) relevantly include the following clause 21:

> Section 84C of the new Act applies where the main application mentioned in that section was made either before or after the commencement of that section. If the main application was made before the commencement, the reference in that section to section 61 or section 62 is a reference to section 61 or section 62 of the old Act.

His Honour noted that, while a number of cases had dealt with the operation of the transitional provision and the principles to be applied when an old Act application has been amended after 1998, the principles are not yet settled. At the heart of the controversy is whether amendment of an old Act application under the new Act means that the transitional provision ceases to apply or whether that outcome only occurs if the amended application can be characterised as being, in substance, a fresh application—at [30].

His Honour was of the view that it was 'abundantly clear' from the evidence that the amended applications made in and after 2000:

- involved claim groups different from the 1995 claim and 1998 amendment, and
- related to a significantly altered claim area.

Thus his Honour concluded that there was, in substance, a fresh application made in 2000 and therefore the s. 84C strike-out application was to be determined by reference to the provisions of the new NTA. This meant complying with s. 61 and s. 62 of the NTA—at [32] and [34].

When considering this compliance two issues arose:

- did the October 2004 amended application, with supporting evidence, properly identify the native title claim group?
- was the applicant properly authorised by the native title claim group?

Describing/naming the native title claim group

'Native title claim group' is defined in s. 61(1) as those persons who, according to their traditional law and custom, hold the common or group rights and interests

comprising the particular native title claimed. Subsection 61(4) also requires that a native title determination application must name the persons in the native title claim group or otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Finn J concluded that the applicant's own evidence indicated the individuals named in Schedule A to the October 2004 application were 'both under inclusive and over inclusive of the persons holding the group rights and interests comprising the native title claimed'. His Honour cited *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60] to [61], which says that a subset or part of what 'truly constitutes' a native title group cannot itself be a claim group under s. 61. The present case was not an instance where there may be good reason for hesitation in readily concluding that an alleged group is only a sub-group or part of a group for s. 84C purposes, as in *Colbung v Western Australia* [2003] FCA 774—at [41].

His Honour could not, from the material before him:

> [D]ivine the descriptive criteria that makes the named persons members of the native title claim group. I would have to say that the fluctuation in the numbers of listed names in the various Schedules A since December 2000 does little to reassure that the naming process is one founded on ascertainable principles or criteria—at [44].

Authorisation

Finn J cited *Strickland v Native Title Registrar* (1999) 168 ALR 242 at 259, where it was said that the concept of a person being 'authorised' by all the persons in the native title claim group is 'fundamental to the legitimacy of native title determination applications' under the new Act—at [46].

His Honour observed that 'in the course of his making his various amended applications and in seeking registration of the application Mr McKenzie ascribed his authorisation to various disparate sources'—at [49].

Because his Honour was of the opinion that the amended application of December 2000 (therefore affecting all subsequent amended applications) was 'in substance a fresh native title claim for a new native title claim group and for a new claim area,' the relevant authorisation had to be given by that 'new' claim group—at [56].

His Honour could not find any indication:

> [I]n the evidence, let alone in the prescribed affidavit...that this "group" has purportedly authorised Mr McKenzie in a way that satisfies the requirements of s. 251B of the Act—at [56].

In conclusion, his Honour was not satisfied that the requirements of ss. 61(4), 62(1)(iv) and (v) of the NTA had been met. His Honour was not prepared to allow a further opportunity to amend the application given its long history and the amendments made to it since the filing of the s. 84C application. It was unlikely that the application's flaws could be cured by further amendment—at [61].

Finn J noted in passing that:

> [W]hat purports to be Mr McKenzie's affidavit accompanying the 20 October 2004 amended application, amounts to no more than a signed version of the Form 1 "Affidavit" without the insertion of any of the information required by s 62 of the Act. Though the ALRM has sought to have the amended application struck out on this ground as well, I prefer to rely upon the other grounds ... as these relate to matters of substance not form. In saying this, though, I do not wish to be taken as condoning such non-compliance with s 62 of the Act—at [48].

Decision

Finn J ordered that the claimant application be struck out—at [62].

Postscript

In a ruling on evidence, Finn J refused an application by ALRM to tender under s. 86 the transcript of preservation evidence taken some time ago. His Honour refused the tender under s. 135 of the *Evidence Act 1995* (Cwlth) because 'it would be unfairly prejudicial to Mr McKenzie'. At the preservation hearing, which occurred after the filing of the s. 84C strike-out application, objection was taken by Mr McKenzie's counsel to a line of questioning which seemed to relate directly to the strike-out application. Counsel for the ALRM disclaimed that such was his purpose. Importantly, his Honour felt the preservation evidence:

> [W]as there taken in a contextual vacuum. There was no issue being determined, no other evidence being put to support, contradict, or qualify what was being said by Mr McKenzie. In my view it would be quite unfair to use that evidence for the purposes the ALRM now proposes—at [65].