

Injunction sought to restrain representative body

Charlie v Cape York Land Council (No 2) [2006] FCA 1683

Greenwood J, 5 December 2006

Issue

The main issue in this case was whether the Federal Court should make an interim order restraining a representative Aboriginal/Torres Strait Islander body (representative body) from holding a meeting to authorise amendments to a claimant application.

Background

This case deals with the second application by Gordon Charlie for an interim order restraining a representative body, the Cape York Land Council (CYLC), from holding an authorisation meeting in relation to a claimant application brought on behalf of the Dingaal People. Mr Charlie's first such application, which alleged CYLC had failed to discharge its duty under s. 203BB(1) of the *Native Title Act 1993* (Cwlth) (NTA) by not accepting a particular family (the Brims) as part of the native title claim group, was dismissed: see *Charlie v Cape York Land Council* [2006] FCA 1418, summarised *Native Title Hot Spots Issue 22*.

Mr Charlie's additional evidence

The additional evidence provided by Mr Charlie to support this application included:

- his letter to the CYLC dated 1 November 1994 describing his claims regarding the ancestry of the Brim family and a similar letter he sent to the National Native Title Tribunal;
- his letter to the CYLC dated 27 February 2003 in which he asserted that he is the traditional custodian for the Dingaawalwarra People, purportedly to put the CYLC on notice that all Brim family members ought to be added to any claim of native title brought on behalf of the Dingaal claim group, and requested that the Brim family be invited to relevant meetings of the claim group;
- two 'mandate' documents in which a range of signatories assert that Brim family members are part of the Dingaal and Charlie family groups and are to be considered part of the Dingaal claim group;
- the purported minutes of the 'Dingaale Native Title Meeting' of 3 July 2005.

CYLC's evidence

The CYLC filed extensive affidavit material in reply which addressed three issues, namely the extent to which:

- an examination of the anthropological evidence demonstrated any relationship between the Brim and Charlie families and any connection to the lands the subject of the Dingaal native title claim;

- doubts might be held about the accuracy of the minutes of the meeting said to have taken place on 3 July 2005; and
- the balance of convenience weighed in favour of the CYLC, having regard to the logistical steps associated with convening a two-day meeting of existing claim group members and the dislocation which would arise if the injunction was granted.

Interim injunctions - organising principles

Justice Greenwood set out the 'organising principles' governing this matter, including that:

- in all applications for an interlocutory injunction, a court will ask whether there is a serious question to be tried as to the applicant's (in this case, Mr Charlie's) entitlement to relief, whether the applicant is likely to suffer injury for which damages will not be an adequate remedy and whether the applicant has shown that the balance of convenience favours the granting of an injunction;
- in assessing whether the applicant has made out a prima facie case, it is enough that the applicant show a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial;
- the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought;
- the reference to practical consequences is illustrated by the particular considerations which arise where the grant or refusal of an interlocutory injunction in effect would dispose of the action finally in favour of whichever party succeeded;
- these principles must be applied having regard to the nature and circumstances of the case—at [14] to [16], referring to the High Court's decision in *Australian Broadcasting Corporation v O'Neil* [2006] HCA 46 at [19] and [65] to [72].

His Honour went on to consider the evidence in the light of these principles.

Anthropological evidence

The evidence going to whether or not there was a serious question to be tried included an affidavit of Dr Fiona Powell, an anthropologist retained by the CYLC to prepare a connection report in relation to the Dingaal application who had worked in the area since the early 1970s. Her evidence was that at no time had she obtained information of a connection between the Charlie family and the Brim family or a connection on the part of the Brim family to the area of the current Dingaal claim.

The court noted that:

- it was 'clear' Dr Powell had a long-term deeply rooted knowledge of the ancestral and anthropological evidence in relation to the claimant groups who had a 'demonstrated connection' with the relevant area;
- Dr Powell had compiled genealogical information, including that relating to the Charlie family, from as early as the 1970s (including interviews with Gordon Charlie) and her evidence was that at no time did she obtain information of a

connection between the Charlie family and the Brim family or a connection on the part of the Brim family to the area of the current Dingaal claim—at [18] to [19].

Greenwood J was satisfied that, 'plainly', Dr Powell's evidence was persuasive for the purposes of interlocutory proceedings—at [28].

Evidence as to the 'mandate'

The CYLC provided affidavits from people who denied that they signed the mandate documents provided by the applicant which purported to assert the inter-relationship of the Brim family. Greenwood J held that this raised serious doubts as to the accuracy of the 'mandate documents'—at [26].

Minutes of meeting 3 July 2005

The CYLC provided affidavits from a number of persons that raised doubts about the accuracy of the minutes of the meeting of 3 July 2005, including affidavits of people listed in the minutes as having attended who deposed that they did not. Greenwood J considered that this raised 'more profoundly serious doubt about the accuracy and integrity of the document described as the minutes'. It was held that 'no weight at all' should be attributed to that document for 'interlocutory purposes'—at [26].

Balance of convenience - loss of Brim family claims

His Honour considered the steps taken to prepare for the two-day meeting against the proposition by Mr Charlie that the claims of the Brim family members would be 'irreparably' lost if the meeting went ahead. It was found that:

- these claims would not be lost if the meeting went ahead;
- any reliable information that demonstrated an interrelationship between the Brim and Charlie families, and a connection with the lands the subject of the Dingaal claim, could be put before the CYLC and the current Dingaal native title claim group—at [29].

Greenwood J held that:

- Mr Charlie had not demonstrated a serious question to be tried or a prima facie case in the sense that, if the evidence remains as it is, there was a probability that he would be found, at the trial of the action, to be held entitled to relief;
- the material relied upon by Mr Charlie in connection with the minutes of meeting of 3 July 2005 and subsequent decision was, at least for interlocutory purposes, 'entirely unreliable';
- no irreparable injury would arise if the meeting went ahead;
- having regard to the extensive steps taken to convene the meeting, and the dislocation caused by enjoining it, the balance of convenience weighed in favour of making no interlocutory order—at [30].

Decision

His Honour:

- dismissed Mr Charlie's application for an interlocutory injunction; and

- ordered him to pay CYLC's costs because the material he relied upon 'so fails to demonstrate any of the necessary elements in support of an interlocutory order of the kind sought' that he 'ought' to pay those costs—at [31] to [32].