Strike-out under s. 84C — Southern Arunda Yunkunjatjara Ngura ritja claim

Kite v South Australia [2007] FCA 1662

Finn J, 2 November 2007

Issues

The main issues in this case were:

- whether the Federal Court should strike out a claimant application pursuant to s. 84C of the *Native Title Act 1993* (Cwlth) (NTA);
- whether the claim group as described in the application included all the people who hold the native title claimed;
- whether all of the members of that group satisfied the criteria said to give status as native title holders.

The application was struck out.

Background

The State of South Australia sought to have a claimant application filed by John Kite struck out pursuant to s. 84C or summarily dismissed pursuant to s. 31A *Federal Court of Australia 1976* (Cwlth) (FCA). The two main grounds the state relied upon were that:

- the native title claim group did not include all of the persons who hold the native title claimed; and
- the claim group as described was incapable of authorising the making of the application.

As the court noted:

- section s. 84C empowers the court to strike out an application that does not comply with ss. 61, 61A or 62 of the NTA; and
- section 31A of the FCA permits the court to summarily dismiss the whole of a proceeding if it is satisfied that the applicant has no reasonable prospect of successfully prosecuting the application—at [2].

The court relied upon s. 84C in this matter.

The application, brought by Mr Kite on behalf of the Southern Arunda Yunkunjatjara Ngura ritja (SAYN) claim group in August 2007, overlapped seven other claimant applications, including the Kokatha application and the Antakirinja Matu-Yankunytjatjara application. The claim group was made up of five named individuals. The court noted that:

- the SAYN application appeared to be 'another instalment in the disintegration of agreements struck at Spear Creek' in May 2004, which sought to resolve overlapping native title claims in parts of South Australia;

- in one of the Spear Creek agreements, Mr Kite was described as a member of the former Kokatha Munta claim group, with his membership (later withdrawn) being founded, apparently, on the Kokatha ancestry of his mother, Mrs Gladys Kite;
- Mr Kite and his family had been involved in the Kokatha application but did not fall within the current claim group description in that application;
- the application for the Antakirinja Matu-Yankunytjatjara claim included Gladys Kite and all her descendants, something Mr Kite was apparently unaware of and sought to have rectified;
- in the second of the affidavits Mr Kite filed in these proceedings (the second affidavit), he acknowledged that all five members of his claim group were members of the extended family of his mother, indicated that the former Kokatha Munta claim was made on the basis of Kokatha ancestry and stated that his mother was of Kokatha ancestry.

In the second affidavit, Mr Kite went on to say (among other things) that:
- the SAYN claim was not based upon Kokatha ancestry but upon 'my father's and his father's ancestry and upon the paternal ancestry of the other members' of the SAYN claim;
- under 'my traditional law and culture, my father's father and his ancestors are the basis of my capacity to be one of the claimants' in the SAYN claim;
- four of the five claim group members had capacity to make that claim (i.e. apart from Adam Tunkin) through 'our paternal grandfather Bill Kite and his ancestors, more so than through my father or the other claimants' fathers';
- the fifth member of the claim group, Mr Tunkin, was a member on the basis that his father was a relative of Mr Kite's mother, he was adopted by Mrs Kite's father and he was recognised as *'nguraritja'* for a big part of the claim area because, among other things, of his father's status as *nguraritja* (which the court noted was said by the state to be a Western Desert Bloc term for 'land owner').

Further, Mr Kite said in the second affidavit that the members of the claim group believed they 'are the people who are qualified to make this claim for native title rights and interests in the country to which the claim applies' as *nguraritjas* (i.e. as 'traditional custodians of the claimed land') because:
- they were 'the descendants of grandfather Bill Kite', who had 'extensive knowledge of traditional laws and customs and about where his country was and his relationship with that country';
- Bill Kite and his ancestors 'were traditional custodians of the claimed country from a time prior to white settlement of South Australia in 1825';
- they all knew and lived by 'our traditional laws and customs', which 'deal with people's connections with country';
- those traditional laws and customs made it 'clear who can speak for country, what rights those people have in respect of the country and also what responsibilities they have';
- the people who could speak for the country were 'those who have been taught our traditional laws and customs and then, having learned them, have been willing to

remember them and acknowledge that those traditional laws and customs are binding upon them';
- the five members of the SAYN claim were 'the only descendants of grandfather Bill Kite and his ancestors who fit this description, today';
- the members of the claim group's extended family 'who have not learned and who do not now live by the traditional laws and customs of grandfather Bill Kite and his ancestors', were 'not qualified' to claim traditional country and were 'content' that Mr Kite and the four other members of the claim group 'hold the traditional knowledge and ... perform the traditional role of exercising the traditional claims upon, and responsibilities toward our grandfather's country'.

The court noted that:
- to the extent that there was any assertion that Mr Tunkin was a descendant of Bill Kite, it was inconsistent with what Mr Kite had said earlier about Mr Tunkin;
- a handwritten genealogy in evidence indicated that, while Bill Kite was Mr Kite's grandfather, he was the great-grandfather of three other members of the claim group—at [11] and [14].

Statutory framework

Justice Finn referred to the applicable principles as set out in *Reid v South Australia* [2007] FCA 1479 (summarised in *Native Title Hot Spots* Issue 26) at [22] to [30], noting in passing that:

> [T]he indispensable nexus between traditional laws and customs and claimed native title rights and interests is made plain in s 223(1) ... which recognises "communal, group or individual rights and interests of Aboriginal peoples" in relation to land where "the rights and interests are *possessed* under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples"—at [18], emphasis in original.

It was also noted that:
- the proper identification of the native title claim group, as required by s. 64(1), is the central or focal issue of a native title determination application because it is that group which provides the authorisation under s. 251B and a determination recognising native title is made in that group's favour;
- therefore, a subset of what 'truly' constitutes a native title group cannot itself be a claimant group under s 61(1), although if a sub-group of a community sharing traditional laws and customs alone possessed rights and interests in a particular area, that sub-group may itself constitute a native title claim group;
- the court's power to strike-out under s. 84C should be exercised only where the claim as expressed is untenable upon the version of the evidence favourable to the respondent to the strike out—at [21] to [22] and [24].

Consideration

Finn J was of the view that the application was 'fatally flawed' in a number of respects. It was noted firstly that, on its face, the application form contained 'apparent contradictions, ambiguities and infelicities that would have required systematic address' if the claim was not struck out, for example:

- the assertion that the rights and interests claimed were 'individual rights and interests';
- the general rights described did not 'accommodate the differing bases of the connection to the claim area of the four Kite descendant claimants and of Adam Tunkin';
- while the application suggested that the claim group members' status as native title holders was derived by means of ancestry in some manner, the evidence was that Mr Kite's instructions to counsel were 'adamantly and repeatedly: you claim through your grandfather';
- the grandfather relied upon for the purposes of the application was Bill Kite but only one of the five claim group members was the grandchild of Bill Kite;
- the description of native title rights and interests in the application suggested that Aboriginal peoples other than the claim group acknowledged the same traditional laws and observe the same customs in relation to the claim area;
- Mr Kite submitted that the five claimants were 'not inevitably asserting that they have failed to include all possible members of their claimant group in their claim' but, rather, were acknowledging there may be others who hold native title in the parts of the same country 'on the basis of different groups' laws, customs and traditions'.
- this was not what was said in the application and there was no evidence suggesting that there may be other native title holders observing different laws and customs in relation to the claim area or parts of it—at [25] to [26].

The matters of substance identified by the court were:
- whether the designated claim group constituted the entirety of the possible native title group suggested by the application and evidence, given the 'inherently contradictory character' of the application itself (called the sub-group claim) and Mr Kite's conception of who is possessed of native title rights and interests (called the trust-like claim);
- the actual composition of the claim group itself and to the basis of its membership, in the light of the members' relationship to Bill Kite and Adam Tunkin's membership of the group—at [24] and [35].

The state submitted that:
- the native title rights and interests listed in the application form presupposed a wider claim group that included, at least, female membership;
- no such membership was disclosed;
- the application form recognised ancestry 'as the author of the status as native title holder' yet there were descendants of Bill Kite who were not included in the claim group;
- the court should infer that the claim group is 'simply a sub-group of the wider community of Bill Kite's descendants'.

Sub-group claim

It was found that the application was defective on its face because it revealed that there were other people who could claim native title under the same traditional laws and customs as the claim group. While this was something that could be cured by an

appropriate amendment, Finn J was of the view that other deficiencies in the application meant that this would not save the application—at [28].

Trust-like claim

In relation to the 'trust-like' claim, it was noted that this gave rise to 'a more controversial question'. The genealogical evidence indicated there were 'considerably more living descendants of Bill Kite' than the claim group members, but Mr Kite asserted that the claimed native title rights were held by the five members of the claim group alone—at [29].

Mr Kite's submissions were that:

- the 'wider community' (i.e. other descendants of Bill Kite, excluding the five named claimants) had the benefit of those rights but were not the holders of those rights;
- the rights were held 'in the custody of' the five named male claimants 'for the benefit of' the 'wider community of Bill Kite descendants';
- Mr Kite's affidavit did not assert that there were only five men *entitled to enjoy* the traditional rights described but asserted that those rights *were held* by the five men named.

While not suggesting that common law trust had any place in native title claims, 'for ease in exposition' Finn J described this as a 'trust-like' claim in that:

- the basis of the claim is that the five claim group members, as *Ngurarityas*, are the traditional custodians of the claimed land and alone were entitled to speak for it;
- the wider community of Bill Kite descendants was, on the evidence, excluded because members of the 'extended family' had not learned, and did not now live by, the traditional laws and customs 'of grandfather Bill Kite and his ancestors', and were 'not qualified to claim traditional country';
- the wider community was said to be 'content' that the five claim group members held the traditional knowledge and performed the traditional role of exercising the traditional claims upon, and responsibilities toward, 'our grandfather's country'—at [30]

It was noted that, in written submissions, there was a 'variant' on who were the possessors of 'knowledge', namely that:

- Mr Kite was not saying that the five claimants were the only ones with the requisite knowledge;
- 'quite differently', he was saying that the five claimants were the individuals 'holding and having authority to commence' the claim 'in respect of the rights, for the benefit of themselves and the wider community of descendants of Bill Kite and that man's ancestors'—at [31].

His Honour considered that the trust-like claim 'gives some reason for pause' because:

> The application and the accompanying evidence when considered most favourably to Mr Kite ... does suggest (subject to what is later said) that there is a basis for asserting the claim group members were, in accordance with traditional law and custom, authorised to

> make the claim (i.e. as *Nguraritjas*); that they were entitled to speak for the country; and that they had particular responsibilities in relation to the land claim. But the doubt it engenders is that these matters have had some part to play in contriving the claim group itself. That doubt is exaggerated by the not altogether satisfactory explanation given of the "rights" of the wider community of descendants of Bill Kite to enjoy or to have the benefits of the native title rights and interests claimed. Nonetheless, it is said on Mr Kite's behalf that the division between holding the claimed rights and interests on the one hand, and having the benefit or enjoyment of them on the other is a factual proposition that is not to be tested on the present motion—at [33].

His Honour decided he was 'obliged to give Mr Kite the benefit of the doubts I have' but observed that, while the court was not prepared to assume that the particular traditional laws and customs of an Aboriginal group could not 'produce the type of internal relationship within a community such as is advanced in this claim', nonetheless:

> I have some concern that in this matter the claim may well owe more to concepts drawn from common law conceptions of property than from traditional laws and customs. I refer in particular to the apparent equation here of the idea of being a "holder" of native title rights and interests with that of being the "owner" of those rights and interests—at [34].

Actual composition of the claim group

As to the actual composition of the claim group, and the basis of its membership, Finn J considered it members' relationship to Bill Kite. It was noted that:

- the application, when considered in light of Mr Kite's evidence and submissions, hung on descent from Bill Kite and the contention of Mr Kite that 'you claim through your grandfather';
- Mr Kite alone of the claim group was Bill Kite's grandchild;
- the application and the evidence did not address the status of the three other Kite-descended claim group members (i.e. excluding Mr Tunkin) by reference to their respective grandfathers;
- Mr Kite's affidavit proceeded on the incorrect assumption that all of the claim group members were Bill Kite's grandchildren;
- this error was coupled with the 'opaque ancestral basis' upon which was stated in the application that the members of the claim group had 'acquired their status as native title holders'—at [36] to [37].

As a result, the court was satisfied that:

- the application itself did not 'reveal an intelligible basis upon which the claimants themselves each derive their claimant status by descent';
- the application and the evidence taken together were embarrassing—at [37].

Adam Tunkin's membership of the claim group

It was conceded that the fifth claim group member, Adam Tunkin, was not a descendant of Bill Kite, although the affidavit evidence purported to 'qualify' Mr Tunkin on the basis of descent, which could not be so—at [38].

There was evidence that Mr Tunkin appeared to have a Kokatha connection, that there were other possible native title claimants observing different laws and customs with rights and interests in the land claims and that the claim overlapped the Kokatha application.

His Honour was of the view that the 'best that can be said' on the evidence was that, while Mr Tunkin may be able to speak for the country, 'no satisfactory explanation for his membership of the claim group has been advanced':

> His presence simply reflects the confusion and disorder that attends so much of this application ... . Recognising the difficulties posed by the evidence concerning Mr Tunkin, Mr Kite's counsel acknowledged, though he did not concede, that Mr Tunkin might not "make the grade" in establishing claim group membership. It was suggested, nonetheless, that he could be excised from the claim group and that it proceed with the remaining four members—at [41].

It was found that:

- there was no acceptable explanation for Mr Tunkin's inclusion in the claim group;
- leave to amend the application to excise his name from the claim group would not be given because the basis upon which the remaining group members (apart from Mr Kite) are asserted to be within the group in virtue of their relationship with *their* respective grandfathers (who are not Bill Kite) had not been adverted to at all in this matter—at [42].

Authorisation

It was found that:

> The vices in the membership of the claim group carry over into the alleged authorisation of Mr Kite to bring the claim itself. I need say no more about this, other than to observe that this particular claim group is itself probably best described as self-identifying and self-authorising and is objectionable for those reasons ... . The process of authorisation described in the affidavit accompanying the Form 1 suggests as much—at [43].

Decision

The court made an order that Mr Kite's application be struck out pursuant to s. 84C of the NTA.