Amendment to change claim group and replace applicant — Njamal

PC (name withheld for cultural reasons) v Western Australia [2007] FCA 1054

Bennett J, 17 August 2007

Issue

The main issue before the court was whether to grant leave to amend the claim group description and to alter the composition of 'the applicant' in a claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA). A procedural question also arose as to whether the current applicant could move the court for orders to amend the application.

Background

At a meeting on 25 October 2006 (the October meeting), the Njamal community resolved to:

- amend the description of the native title claim group in a claimant application ostensibly brought on its behalf (the first resolution);
- remove 11 of the 17 persons who comprised the 'current' applicant and then include three new persons in the 'replacement' applicant (the second resolution)—at [1].

Two notices of motion were subsequently filed, along with an application under s. 66B to replace the applicant.

Amend claim group description

The first notice of motion, which was filed by the current applicant, sought leave to amend the description of the native title claim group in the claimant application and make other amendments to address certain technical requirements of the NTA.

Leave to amend the claim group description was sought because, although the current applicant brought the proceedings 'on behalf of the Njamal people', the claim group description in the application only included the same 17 people who were named as the applicant. There was no explanation before the court why this was so.

The anthropological evidence was to the effect that 'the Njamal people' were not limited to those 17 people and that meetings of the Njamal people to consider the native title claim had never been so restricted:

> The unchallenged evidence is that the Njamal people ... have always understood that the correct [native title] claim group was to be the larger group of Njamal people. It is that larger group that has consistently attended community meetings and made decisions relevant to the application—at [5].

The proposed amendment would extend the native title claim group to 'properly and more accurately to identify' its members by way of descent from Njamal apical ancestors. The order to so amend the application was unopposed—at [6].

The court found the amendment was consistent with the scheme of the NTA: 'The proper identification of the claim group is a matter of fundamental importance to the claim'—at [9].

The other proposed amendments did not affect the substantive rights and interests claimed and were supported by the State of Western Australia. While there was no evidence that they were approved by the replacement claim group, subject to certain procedural matters, the court found that it was appropriate that the application be so amended—at [11].

Replacement of the applicant

In the second notice of motion, filed by the 'replacement' applicant, orders were sought to remove 11 of the people named as the current applicant (three of whom were deceased and seven of whom consented to being removed) and then to add three new persons to the remaining six to form the 'replacement' applicant. This involved an application under s. 66B.

There was no opposition to the removal of the deceased members or the addition of the three new members. However, one of those who was to be removed, Eddie McPhee, opposed the order seeking his removal. No-one else opposed the making of the order.

Section 66B provides for a procedure for the replacement of the applicant. Justice Bennett noted that the application made in this case met the requirements of s. 66B(1)(a)(i) because:

- there was a claimant application;
- on the making of the orders sought in the first notice of motion, all of the members of the replacement applicant would be members of the replacement claim group and all but three were also members of the current applicant;
- the persons to be replaced were no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;
- the persons making the application under s. 66B were authorised by the claim group to make the application and deal with matters arising in relation to it—at [14], referring to *Daniel v Western Australia* (2002) 194 ALR 278; [2002] FCA 1147, summarised in *Native Title Hot Spots* Issue 2.

In relation to the last two criteria, it was said that:

> [Section] ... 251B ... governs when a person ... is authorised by all of the persons in the claim group and applies in determining when a person is authorised for the purposes of s 66B ... . Authorisation may be in accordance with a process of decision-making according to traditional laws and customs (s 251B(a) of the Act). Where there is no such process, it may be in accordance with a process agreed and adopted by the claim group (s 251B(b) of the Act)—at [16].

The evidence was that there was no process under Njamal traditional law and custom that had to be followed for making decisions as to the authorisation or removal of the applicant in a native title claim so the Njamal people had agreed to and adopted a process, relying upon s. 251B(b).

According to the evidence, under the agreed process:

- decisions were made by resolution or consensus at community meetings organised by Pilbara Native Title Services (PNTS);
- all known Njamal people were included on a mailing list and invited by letter to attend;
- notices were sent to communities where Njamal people resided;
- meetings were called and held where families were represented and individuals or families with a particular interest or authority in relation to the decisions being contemplated were present;
- if it was not possible for every member of the claim group to attend a meeting, then the group regarded itself as bound by the decisions of those who were present;
- in the past, decisions had been made to form working groups to deal with day to day business and participate in surveys in Njamal country;
- if there was not a reasonably representative group of people at a meeting or insufficient attendees, then the persons present could decide it was inappropriate for a decision to be made at that meeting.

This was the process used to pass the second resolution at the October meeting. The sole agenda items were 'claim group description' and 'replacement of the applicants'.

Following discussion and, in this order, the members present unanimously resolved to:

- amend the claim group description;
- no longer to authorise the current applicant 'as a group';
- remove 11 of the 17 persons who comprised the applicant and include three new persons as part of the replacement applicant;
- authorise the replacement applicant to be the applicant and deal with matters related to the application in accordance with decisions of the Njamal native title claim group through community meetings;
- authorise the replacement applicant to bring an application under s. 66B to replace the current applicant and instruct PNTS to act for them, or to organise or appoint legal representatives to act for them, in relation to that application.

Her Honour noted that the adoption of a process of decision-making pursuant to s. 251B(b) did not require all members of the claim group to be involved in making the decision or a unanimous vote. The members of the claim group should be given every reasonable opportunity to participate in the decision-making process but:

> It cannot not, logically, be the case that all, in the sense of each and every member of the claim group[,] must be involved in and agree to the proposed decision. That would...include persons who are unable to participate by reason of age, mental capacity or unknown whereabouts and would permit an individual to prevent the progress of a

claim. To cancel a meeting merely because one member was unable to attend would also constitute a waste of limited resources—at [22].

In the court's view:

- subsection 251B reflected the communal character of native title;
- the authorisation process for the purposes of s. 251B(b) must be able to be traced to a decision of the native title claim group who adopt that process;
- a meeting that purported to authorise the replacement of the applicant should be attended by persons 'fairly representative of the native title claim [group] concerned';
- there was no suggestion that this was not the case here—at [23].

Bennett J concluded that the resolutions were made by a group of Njamal people who were sufficiently representative of the replacement claim group and who made the resolutions in accordance with an agreed process. It followed that the decision-making processes required by s. 66B had been proved. Also, each of the replacement applicants had sworn and filed an affidavit in compliance with s. 64(5)—at [24] to [25]. Note that s. 64(5) was repealed by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth).

Mr McPhee's complaint

Mr McPhee did not attend the October meeting. He was the only person who opposed the s. 66B application to replace the applicant. The main reasons given for seeking his removal were his alleged failure to attend meetings and to sign documents relevant to the claim.

Mr McPhee's counsel submitted that the October meeting was 'flawed' because the members in attendance were not properly informed of matters relevant to their decision, including:

- the reasons why he had not signed, or had delayed signing certain agreements, was not put to the meeting e.g. he had genuine concerns as to the appropriateness of those agreements and the information given to the claim group about them;
- the Njamal members could not have been in a position properly to exercise their rights and obligations as voting members in Mr McPhee's absence without being provided with complete and accurate information relevant to the agenda items;
- when PNTS accepted the responsibility for organising the meeting, it was incumbent on it to convey Mr McPhee's concerns.

PNTS submitted (among other things) that:

- members of Mr McPhee's family were present at the meeting, including the primary acknowledged family elder, his uncle Johnson Taylor, who was a member of both the current applicant and replacement applicant;
- Mr McPhee was aware of the meeting and the fact that his removal would be discussed;
- because there was a long history of Mr McPhee raising his concerns with the Njamal people, including members of both the current and the replacement claim group, there was no reason for those concerns to be recited again at the meeting.

Counsel for Mr McPhee asked the court to draw an inference that, had the meeting been properly called and those who attended informed of Mr McPhee's concerns, they might not have passed the resolution or agreed to remove him as a member of the applicant.

Bennett J declined to do so because:

- members of the replacement claim group who were present at the meeting included members of Mr McPhee's family and they had voted to remove Mr McPhee and filed affidavits in support of the proposed replacement;
- Mr McPhee had ample opportunity to notify members of the replacement claim group of his concerns and the reasons why he did not attend the meeting;
- Mr McPhee accepted that at least some members of the replacement claim group were aware of his position and the matters and concerns that he raised with PNTS;
- none of the members of the replacement claim group supported Mr McPhee's opposition to the second motion;
- Mr McPhee remained a member of the replacement claim group;
- Mr McPhee had been previously removed as a member of a Njamal working party;
- steps to remove Mr McPhee as one of those constituting 'the applicant' were first taken in 2003—at [35].

The court went on to note that the replacement applicant had established that:

- there had been a meeting of the Njamal community which had formally agreed to remove certain members of the current applicant and to add certain additional members to form the replacement applicant;
- the persons in attendance at the meeting were reasonably representative of the replacement claim group;
- some of the members of the current applicant were deceased;
- the proposed new members had each consented to become members of the replacement applicant;
- the claimants at the meeting agreed unanimously to the amendments—at [38].

Her Honour was of the view that:

> The withdrawal and conferring of authority for the purposes of a s 66B application must be shown to flow from the claim group ... . Once this is established, the actions of the claim group and the means by which it makes decisions is a matter for it. It is not for the Court to interfere with decisions reached in accordance with the Act—at [39].

Procedural matters

A procedural question arose as to whether the current applicant could move the court for orders to amend the application. The court noted that s. 62A provides that the applicant in a claimant application may deal with all matters arising under the NTA in relation to the application, including the amendment of the application—at [40].

As Bennett J saw it:

- on one view, until the making of orders to replace the current applicant, it remained the applicant in the proceedings and could deal with the application and bring the first motion;
- on the other hand, the unchallenged evidence was that the replacement claim group had withdrawn the current applicant's authority to deal with the application, which would, on its face, include a revocation of authority to file and prosecute a notice of motion to amend the application;
- the current applicant consisted of the named persons on behalf of the Njamal people;
- section 66B provided that one or more members of the claim group could apply for an order that a member, or members jointly, of the claim group replace the current applicant;
- one of the bases of such an application was that the current applicant was no longer authorised by the claim group to make the application and to deal with matters arising in relation to it, which meant that, at the time of the application for leave to amend, that lack of authorisation had already occurred—at [42] and [45].

Bennett J was satisfied that:

> The moving party in the application to replace the current applicant is the replacement applicant. Until the replacement occurs, the replacement applicant consists of a group of members of the native title claim group, some of whom are members of the current applicant. That is, one or more members of the claim group are making the application to replace the current applicant.
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> Until such time as the order for replacement is made, the current applicant remains the applicant in the proceedings. The fact that its authorisation has been withdrawn does not affect its status so far the as the proceedings are concerned, until such time as it is removed as a party to the proceedings. Indeed, the fact that authorisation of an applicant may have been withdrawn is envisaged by s 66B...It is not suggested in that section or in the Act that such withdrawal of authorisation affects the status of the applicant as a party in the proceedings prior to an order being made by the Court. It is not itself a condition of continuation as an applicant nor is it a statutory element of the right to apply to amend claims. The right to bring an application under s 66B is expressly given to the members of the claim group—at [46] and [48].

The evidence was that:

- it was the intention of the Njamal members voting at the meeting to correct the description of the claim group to reflect properly the Njamal people;
- it was not the intention of those voting at the meeting to 'de-authorise' the current applicant until the order for replacement took effect.

In the circumstances, the court was satisfied that the current applicant could move the court for orders to amend the application. It was appropriate to make the orders sought—at [49].

Service on the respondents

There are in excess of 100 respondents to these proceedings, many of whom do not attend directions hearings or otherwise take an active role in the proceedings. The

court was satisfied that requiring service of the two notices of motion and supporting documentation on all of respondents would 'involve significant and unnecessary expense' and so ordered that the applicant:

- serve a copy of the orders on the respondents within 28 days in lieu of notice;
- provide a copy of the amended application to any respondent who requested one;
- provide the respondent parties with a reference to the court's reasons—at [50] to [51].

Conclusion

The court ordered that application be amended as sought and that the current applicant be replaced—at [52].

Comment

As part of the recent suite of amendments to the NTA, s. 64(5) was repealed and s. 66B was amended so that it now provides for an application to replace the current applicant where one or more of those constituting that entity, as defined by ss. 61(2) and 253, consents to being replaced or removed or has died or become incapacitated. According to the Explanatory Memorandum to the Native Title Amendment (Technical Amendments) Bill, the intent of the amendment was that s. 66B would:

> [E]xpand the circumstances in which the Court may hear and determine an application to replace the applicant. To clarify the operation of the provisions, item 79 would repeal subsection 64(5). This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B. The Registrar would not be required to reapply the registration test to applications amended to replace the applicant.

Accordingly, proposed section 66B would be the only mechanism through which any changes to the applicant could be made—at [1.249] and [1.266].