Strike out under s. 84C – Kabi Kabi #3

Van Hemmen v Queensland [2007] FCA 1185

Collier J, 9 August 2007

Issues

The main issues before the court in this case were:

- whether a claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA) should be either struck out or summarily dismissed; and
- what (if any) costs orders should be made in favour of a non-party.

Background

Queensland South Native Title Service (QSNTS) was joined as a party to a claimant application, known as Kabi Kabi #3, and then sought to have that application either struck out pursuant to s. 84C of the NTA or dismissed pursuant to O 20 r 2 of the Federal Court Rules (FCR).

The motion for dismissal was supported by Gurang Land Council (GLC), the State of Queensland and the applicant for an overlapping claimant application known as Kabi Kabi #2. Counsel for Kabi Kabi #2 also indicated to the court that they were prepared to discontinue their application if the Kabi Kabi # 3 proceedings were dismissed.

Kabi Kabi #3 was one of a number of native title determination applications instituted by members of the Kabi Kabi community in relation to essentially the same area north of Brisbane. There was a substantial overlap between the area covered by the Kabi Kabi #3 and Kabi Kabi #2 applications.

'The applicant' (as defined in ss. 61(2) and 253 of the NTA) for Kabi Kabi #3 consisted of 12 people who, it was said, were authorised to make the Kabi Kabi #3 application in accordance with a traditional decision-making process for making decisions of that kind i.e. they relied upon s. 251B(a). The native title claim group was described in the application as being comprised of the descendants of 12 named apical ancestors. Kabi Kabi #3 was not accepted for registration because the Native Title Registrar's delegate was not satisfied that the applicant was authorised as required by s. 190C(4).

'The applicant' for Kabi Kabi #2 consisted of three people. The native title claim group was described so as to include 11 of the 12 apical ancestors named in Kabi Kabi #3.

Application of s. 84C and O 20 r 2

Justice Collier noted that:

- section 84C of the NTA was limited to an application made under s. 61(1) of the NTA and applied where the application failed to comply with ss. 61, 61A or 62;

- Order 20 rule 2 of the FCR was only enlivened if no reasonable cause of action was disclosed or the proceeding was frivolous, vexatious or an abuse of process;
- the courts have tended to equate the consequences of strike-out under s. 84C with those of summary dismissal under O 20 r 2 and so have acted cautiously on the basis that no court proceeding should be summarily dismissed except in a very clear case—at [6] to [8].

Collier J first considered the submissions in relation to s. 84C.

Submissions in support of strike-out

QSNTS submitted that the Kabi Kabi #3 applicant was not authorised as required under the NTA because (among other things):

- in the Kabi Kabi #3 application, it was said that the applicant was authorised in accordance with a traditional decision-making process whereby a number of unidentified 'elders' conducted meetings in 2005 but there was little evidence or detail of that process;
- there was clear affidavit evidence there had been no consultation with, or authorisation by, a number of other elders and family members who were descendants of the named apical ancestors;
- although the Kabi Kabi #2 and Kabi Kabi #3 applications covered a similar area and had 11 common apical ancestors, each application was said to be authorised by all the persons in the native title claim group;
- both could not be so authorised and either one or both of the applications must not be authorised in accordance with s. 61(1)—at [16].

Some of the examples of the lack of detail about the decision-making process QSNTS pointed to were that there was no indication of:

- which elders attended the meetings, whether they were present at each meeting and how they made decisions;
- which family each of the elders represented, what representation or consultation was accorded to families who did not have elders attending, who the 'other persons' who gave authorisation were or who authorised them to represent and speak for the descendants;
- the basis upon which the elders were identified and why elders who were not present were not required to be consulted.

In the affidavits filed in relation to the authorisation of the Kabi Kabi #3 application, it was said that:

> The Elders drive the traditional decision-making process of the native title claim group for decisions of this kind. The persons who comprise the Applicant are 10 Elders of the native title claim group and 2 persons authorised by the Elder of their families to represent their respective families... As required by our traditional laws and customs, *the Elders have consulted with the members of their respective families and one another about the need for and content of this Application* (emphasis added).

QSNTS submitted that no such consultation had occurred. Kabi Kabi #2 submitted (among other things) that the decision-making process relied upon by Kabi Kabi #3 was 'seriously defective to the point of being incurable'—at [17].

The state submitted that:

- there could not be 'valid' authorisation of both the Kabi Kabi #2 and the Kabi Kabi #3 applications;
- material filed by Kabi Kabi #3 did not sufficiently address the authorisation issue;
- the current situation with competing claims would continue to waste more time and money in fruitless interlocutory applications—at [18].

Kabi Kabi #3 submissions

In opposing the motion for dismissal, the legal representative for Kabi Kabi #3 submitted (among other things) that:

- the application had failed the registration test because of a failure of authorisation but changes to the NTA meant the application had to be tested again;
- it would be premature for the court to 'close the administrative window of opportunity' opened by the changed to the NTA by dismissing the application;
- an adjournment until later in 2007 should be granted to allow Kabi Kabi #3 to 'take advantage of' the change in the law—at [19].

Affidavit evidence

The court had before it the affidavit of a consultant anthropologist contracted by QSNTS in which that anthropologist said (among other things) that he was not satisfied that all 'appropriate living Kabi Kabi descendants of the ancestors named on the Form 1 in each of Kabi Kabi #2 and Kabi Kabi #3' had been adequately consulted. There were also several affidavits from people who identified as Kabi Kabi deposing to the fact that they had not been consulted about the Kabi Kabi #3 application.

For Kabi Kabi #3, there was an affidavit:

- from one of the people named as the applicant that purportedly set out a process decided upon by the elders whereby authorisation should be via a meeting, advertised in the paper and attended by 'everyone', at which a vote could be taken to reach a 'majority decision'; and
- from a consultant anthropologist saying (among other things) that a 'majority decision' of a meeting held in accordance with Australian meeting conventions conformed to the 'traditional values associated with' Kabi Kabi decision-making if prior consultation was evident that included the opportunity for input by 'relevant parties', opportunity for 'relevant people' to speak to issues (before or during the meeting), adequate notice of the meeting through 'acceptable channels' and adequate opportunities to express both support for, and dissent from, possible courses of action.

Findings

While noting the caution with which courts approach strike-out applications, her Honour found it was appropriate to make an order pursuant to s. 84C because (among other things):

- both the lack of identification of 'elders' in the Kabi Kabi #3 application and the evidence of apparently well-respected members of the Kabi Kabi community that they neither authorised the application nor were consulted in relation to it indicated there was a serious issue of non-compliance with s. 61 in relation to authorisation;
- for the purposes of s. 251B(a), the evidence of the decision-making process did not have 'the level of collective interaction and discussion' to be expected in a traditional context and did not show that a majority vote was a method of decision-making in accordance with traditional Aboriginal law and custom of the Kabi Kabi people;
- if the authorisation process was not in conformity with traditional laws and customs for the purposes of s. 251B(a), then it was not clear that the native title claim group had agreed to, and adopted, any particular decision-making process in relation to authorising the application as required by s. 251B(b);
- the legal representative for Kabi Kabi #3 did not submit that the application was authorised in accordance with s. 61 but, rather, referred only to the opportunity to be re-tested for registration;
- no additional evidence was produced by Kabi Kabi #3 in these proceedings to demonstrate compliance with the authorisation requirement;
- there was nothing to show why the extra time sought by Kabi Kabi #3 would result in the key issue of the alleged authorisation of two applications by the Kabi Kabi people over a very similar area being addressed—at [22] to [29].

It was unnecessary in these circumstances for the court to deal with O 20 r 2 of FCR.

Costs in favour of non-parties

The Kabi Kabi #2, although not formally a party, sought costs in respect of the preparation of affidavits relating to a notice of motion filed in June 2006 by Kabi Kabi #3 (the June 2006 NOM) but discontinued May 2007. Prior to the discontinuance, Kabi Kabi #2 had indicated it would seek leave to be joined formally to the proceedings but did not do so.

Collier J reviewed s. 43 of the *Federal Court Act 1976* (Cwlth) in the light of s. 85A of the NTA and the relevant case law, going on the note that:

- there is no absence of jurisdiction to order costs against non-parties and the jurisdiction to do so could be exercised *against* persons who were considered to be the 'real parties' to the litigation;
- however, the order sought by Kabi Kabi #2 was by a non-party against a party and, while such an order was available, it would (if ever appropriate) be extraordinary and exceptional;
- no order for costs had been sought by the parties to the proceedings in relation to its discontinuance of the June 2006 NOM—at [39] to [40] and [47].

Her Honour considered the following points as relevant:

- the policy articulated in s. 85A was that parties usually bear their own costs and this policy was equally applicable to non-parties;
- the Kabi Kabi #2 applicant was analogous to an intervener and, as a general rule, conventional rules as to recovery of costs tended not to be applied to interveners;
- the Kabi Kabi #2 applicant was not obliged to file documents or do anything else in the proceedings;
- while having an interest in the proceedings for 'obvious reasons', there was 'no requirement of reason or justice' that entitled the Kabi Kabi #2 applicant to recover its costs;
- in these circumstances, and taking into account the principle that an order for costs in favour of a non-party would be exceptional, it was not appropriate to make any such order—at [48].

Decision

The court ordered that:

- the Kabi Kabi People #3 native title determination application be struck out pursuant to s. 84C;
- there be no order as to costs in favour of the Kabi Kabi #2 applicant in relation to the June 2006 NOM—at [31] and [49].