Replacing the applicant under s. 66B — Douglas North claim

Que Noy v Northern Territory [2007] FCA 1888

Mansfield J, 29 November 2007

Issue
The main issue before the Federal Court in this case was whether to make an order to replace the applicant on a claimant application pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where the decision to seek those orders was made by three different sub-groups of the native title claim group at three separate meetings. The court decided that this 'aggregated' decision-making process was permissible and made the order sought.

Background
A proposed pipeline to transport gas, if approved, would cross land in the Northern Territory which included the area covered by the Fish River and Douglas North claimant applications. The Douglas North application was made in March 2001 by representatives of three subgroups:

- the Kamu people, represented by Arthur Que Noy and Marjorie Foster;
- the Warai people, represented by Gabriel Hazelbane; and
- the Wagiman people, represented by Paddy Huddleston.

Mr Hazelbane and Mr Huddleston had agreed to the proposed terms of access for the pipeline but Ms Foster refused to join in that agreement. This gave rise to the application under s. 66B(2) to replace the current applicant dealt with in this decision. In relation to the Fish River application, see *Parry v Northern Territory* [2007] FCA 1889 summarised in *Native Title Hot Spots* Issue 27.

The s. 66B application
The notice of motion was filed by Arthur Que Noy, Gabriel Hazelbane, Paddy Huddleston, Margaret Foster and 10 other members of the Douglas North native title claim group. It sought, effectively, orders to remove Marjorie Foster as one of the people jointly constituting the applicant (see s. 61(2)(d) of the NTA) and to instate her daughter (Margaret Foster) instead, along with Arthur Que Noy, Gabriel Hazelbane and Paddy Huddleston, as the 'new' applicant.

Technical matters
Justice Mansfield noted that s. 66B refers to replacing 'the applicant', a term which is defined in s. 253 by reference to s. 61(2) to include, jointly, all of the persons authorised to make the application. Thus, the motion under s. 66B should be to replace all of the named persons who jointly comprise the applicant, despite the fact it proposed that some of them were to retain their status. In the court's view, that was 'a practical, but not a substantive, issue'. The terms of the motion intended, and would practically operate, to remove only Ms Foster as a named applicant and to replace her with another Kamu person—at [8].

The second preliminary matter was whether the appropriate persons had brought the motion under s. 66B(1). His Honour noted the NTA contemplated an application under s. 66B being brought by the members of the claim group who proposed to replace the current applicant. That was made clear by the words of s. 66B (see the chapeau to s. 66B(1) and s. 66B(1)(b) and the consistent use of the phrase 'the member or the members')—at [9].

In this case, the s. 66B application was brought not only by those persons proposed to be the 'new' applicant but also by 10 other members of the native title claim group. In Mansfield J's view:

- the application should not have been brought by the extra 10 people unless they were to be part of the proposed new applicant;
- however, as the intent of the application was clear, the motion should be treated as not including the extra 10 names—at [9].

Section 66B

His Honour noted that the cumulative grounds upon which a s. 66B motion may be brought, i.e. one of the two alternatives in ss. 66B(1)(a)(i) or (ii) and the ground in s. 66B(1)(b), refer to the application for the determination of native title under ss. 13 and 61 of the NTA. The cumulative grounds were said to:

> [F]ocus upon the status of the current applicant to make the application or that applicant's conduct in relation to that application, and upon the putative applicant's authorisation to make and deal with matter arising in relation to that primary application. The status of the proposed new applicant to pursue the motion under s. 66B require those cumulative conditions to be satisfied, but not necessarily an explicit separate authorisation by the claim group to seek an order under s. 66B. That status already exists if there is an authorisation of the claim group under s. 251B to make the claimant application itself and to deal with the matters arising in relation to it—at [11].

It was common ground that there was a relevant claimant application. The motion was only contested by Marjorie Foster. The applicants submitted that Ms Foster either:

- had exceeded the authority given to her and should be replaced pursuant to s. 66B(1)(a)(ii); or
- was no longer authorised and should be replaced pursuant to s. 66B(1)(a)(i).

It was, his Honour noted, 'of course necessary' for them to also show that they were authorised by the native title claim group to make the application for determination of native title and to deal with matters in relation to it—at [12] to [14].

To satisfy the condition in s. 66B(1)(a)(ii), the applicants had to show the extent of the authority originally given to Ms Foster by the claim group and the conduct that showed she had exceeded that authority. However, there was no requirement for a decision to be made revoking such authority—at [15].

Affidavit evidence was provided in support of the motion including affidavits of anthropologists Lesley Mearns and Kim Barber.

The dispute chiefly involved the Kamu people. The decisions of the Wagiman and Warai people to remove Ms Foster's authority and to authorise her replacement as part of the applicant were said to be made at separate, subsequent meetings.

The Kamu people

In relation to the Kamu People, Marjorie Foster asserted from September 2006 that she was the only rightful elder of the Kamu people and the sole traditional owner of Kamu country. She claimed to hold power to arbitrarily exclude persons from the Kamu group, to consult exclusively on behalf of the Kamu people and to appoint alternative legal representation without consultation with the other persons comprising the applicant or other Kamu people—at [19].

Ms Mearns gave evidence, not put in issue by evidence from or on behalf of Marjorie Foster, that:

- such status and power were not vested in Ms Foster either through a traditional or any agreed process;
- disputes among the Kamu people were resolved by 'a process of comprehensive consultations with emphasis on senior persons, being Marjorie Foster, those of her children who have been actively involved in Kamu matters, and Arthur Que Noy'—at [19] to [20].

While the evidence did not precisely delineated the authority vested in Ms Foster by the native title claim group, Mansfield J did not consider that it was fatal to a conclusion that Ms Foster had exceeded the authority given to 'the applicant', including herself, to deal with matters relating to the application. His Honour noted that:

- regard must be had to the whole of the evidence; and
- the facts in this case were sufficient to demonstrate that the current applicant (the four persons named as the applicant), by reason of Marjorie Foster's conduct, had exceeded the authority given by the claim group—at [21] to [22].

His Honour expressed his conclusion in this way because he was of the view that 'the applicant' under the NTA was all the persons authorised by a claim group to make and deal with a claimant application. The court's conclusion, in reality, concerned the conduct of Marjorie Foster ostensibly on behalf of 'the applicant' and Mansfield J held that she did not have the authority of the claim group to:

- unilaterally decide that the solicitors acting for the claim group should not be permitted to have access to the claim area for the purpose of addressing issues arising out of the proposed pipeline;
- take steps to negotiate regarding the terms of access to the claim area to the exclusion of others—at [22].

The fact that the other persons comprising the 'applicant', Arthur Que Noy, Gabriel Hazelbane and Paddy Huddleston, supported the making of the order under s. 66B(2) confirmed that to be the case—at [22].

It was not necessary for the court to decide whether Ms Foster had exceeded the authority given to her by the Kamu subset of the claim group because that was not a question that arose under s. 66B(1)(a)(ii). However, on the evidence, if it were necessary, his Honour would have concluded that Ms Foster had exceeded the authority given to her by the Kamu people—at [24] to [25].

It was also not necessary for the court to consider whether the alternative provided for in s. 66B(1)(a)(i) had been established. However, Mansfield J was of the view that the evidence was

sufficient to show that Ms Foster (and 'the applicant' of which she was one member) was no longer authorised by the claim group to deal with matters in relation to the application—at [26].

It was noted that, from the perspective of the Kamu People, the meeting held on 9 February 2007 was the occasion where they resolved to remove Ms Foster and replace her with Margaret Foster and Arthur Que Noy. While there was a scarcity of information concerning the meeting and its arrangements, his Honour concluded (based on the evidence of Ms Mearns) that the Kamu people traditionally make a decision by a process of comprehensive consultations with emphasis on senior persons, being the upper two generations, who have been actively involved in Kamu matters. The evidence of the two anthropologists was that the Kamu people followed that process at their meeting.

While not without some hesitation, his Honour decided that the Kamu people:
- withdrew Marjorie Foster's authority to make decisions in relation to the application;
- replaced her with her daughter, Margaret Foster, as a member of the 'applicant'—at [31].

His Honour then considered whether those decisions, along with those of the Wagiman and Warai peoples, showed that the 'applicant' was no longer authorised by the claim group—at [31].

The Wagiman People
The Wagiman People's meeting was held on 21 June 2007 and was attended by Paddy Huddleston (one of the named applicants), George Huddleston, Joe Huddleston and Lenny Liddy, who were said to constitute the 'core' of the upper generation of Wagiman men. In the court's view, while the evidence was 'somewhat scanty', on balance, the 'Wagiman people did decide in accordance with their traditional decision-making process to support the decisions made by the Kamu people on 9 February 2007'—at [32].

The Warai People
His Honour was also concerned about the adequacy of the evidence in relation to the Warai people's meeting held on 27 June 2007. The only people who attended were Gabriel Hazelbane (a named applicant) and George Yates. Mr Barber described them as 'the most senior of the Warai people' and gave evidence that the decision taken at the meeting was made in accordance with the Warai people's decision-making process. There was no other evidence that they could make binding decisions on behalf of the Warai people. Nor was there any evidence that other Warai people had been consulted or notified that such a decision was being considered. Marjorie Foster submitted that there was insufficient evidence to conclude that the Warai people had supported the decision of the Kamu people. However, after considering the available evidence, Mansfield J concluded it was sufficient to allow the court to conclude that the Warai people supported the decision of the Kamu people—at [35].

'Accumulated' decision making
The applicants asserted that the decision of the claim group could be made by accumulating the separate decisions of the Kamu, Wagiman and Warai peoples within it. His Honour noted the evidence of Mr Barber that:
- the three sub-groups have a part of the society which covers the Douglas North claim area and have dreamings and kinship which interconnect them;

- in relation to those areas which belong to areas within that application area, the claimants are of the view that they are able to discuss those particular parts of their country in separation from the others but in understanding of the decision made by the other groups about their common interest over the whole;
- this is, in part, because they want to make very clear their decision-making process and the basis on which they also cooperate;
- based on his experience in multi-group situations, it was preferable for consultations to take place by going from group to group, whilst being mindful of the common nature of the project;
- he was not aware of any occasions where the groups concerned with the pipeline had come together
- there was no requirement under Aboriginal tradition that the Kamu, Warai and Wagiman groups could only make a decision such as the one considered in this case by actually meeting in person 'collectively and together'—at [37].

Decision

His Honour found that:

- the traditional decision-making process of the Kamu, Wagiman and Warai people collectively involves each group undergoing its own traditional decision-making process, in light of decisions of the other groups, and a consensus being drawn from those group decisions;
- therefore, an aggregated decision making process could be used;
- the decision of each group supported the s. 66B application and resolved to remove the authority of Marjorie Foster and replace her as part of the 'applicant' with Margaret Foster;
- accordingly, the elements of ss. 66B(1)(a)(i) and (ii) and 66B(1)(b) were satisfied—at [38].

Orders were made to:

- remove the current applicant and replace it with Arthur Que Noy, Gabriel Hazelbane, Paddy Huddleston and Margaret Foster;
- extend time for any application for leave to appeal until the parties received the reasons for those orders—at [43].

Appeal proceedings

Marjorie Foster's appeal from Mansfield J's judgment was dismissed—see *Foster v Que Noy* [2008] FCAFC 56, summarised in *Native Title Hot Spots* Issue 27.