Replacing the applicant – must use s. 66B

Sambo v Western Australia [2008] FCA 1575

Siopis J, 22 October 2008

Issue

The main issue before the Federal Court was whether people could be removed from the group constituting 'the applicant' for a claimant application pursuant to Order 6 rule 9 of the Federal Court Rules (FCR) or whether s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) was the only option. It was found that, as a result of amendments made to the NTA in 2007, any change to the constitution of the applicant must be made in accordance with s. 66B.

Background

The claimant application relevant to this case is in the Central West Goldfields region of Western Australia. Pursuant to s. 61(2)(c), seven of the people where jointly 'the applicant' for the claim. Five of those seven people sought to have the other two, Sue Wyatt and Victor Cooper, removed either:

- because they were no longer proper or necessary 'parties' to a proceeding under O 6 r 9 of the FCR; or
- pursuant to s. 66B(1), in circumstances where no meeting of the native title claim group was held to authorise a change to the constitution of the applicant.

The evidence filed in support of the notice of motion indicated that the relationship between those who sought the orders (the movers) and the other two members of the group comprising the applicant had broken down. It was submitted that the conduct of Ms Wyatt and Mr Cooper had hindered the progress of the application and that the court should find they had ceased to be proper or necessary parties to a proceeding within the meaning of O 6 r 9(b) of the FCR.

No claim group meeting had been held to authorise the replacement of the applicant with a differently constituted group of people. The expense, time and other personal resources required in order to arrange a meeting of the 300 members of the native title group, who lived in widely dispersed places, were given as reasons for not doing so.

The movers submitted that:

- they were authorised to bring the application on the basis that they were willing and able to act reasonably in the timely management and advancement of the claim and in other ancillary matters;
- no authorisation of the persons comprising the applicant could be reasonably construed as permitting the conduct alleged in respect of Ms Wyatt and Mr Cooper;
- the conduct of the Ms Wyatt and Mr Cooper demonstrated they were no longer willing and able to act as members of the applicant.

Earlier relevant decisions

Justice Siopis set out the relevant provisions and noted that, in *Chapman v Queensland* (2007) 159 FCR 507 (2006) 154 FCR 233 (*Chapman*) and *Butchulla People v Queensland* (2006) 154 FCR 233 (*Butchulla People*), Justice Kiefel had taken the view that:

- the persons comprising the applicant were authorised to act personally and not collectively; and
- Order 6 rule 9 of the FCR could be used to change the constitution of the applicant in certain circumstances.

Justice Spender followed this reasoning in *Doolan v Native Title Registrar* (2007) 158 FCR 56 (*Doolan*).

Amendments to the NTA

On 1 September 2007 (after the decision in *Chapman*), the NTA was amended to:

- expand the circumstances in which s. 66B(1)(a) would apply to include the death or incapacity of a member of the applicant or a member consenting to being removed; and
- repeal s. 64(5), which provided for an amendment to be made to replace the applicant with a new applicant.

The court noted that, in the Explanatory Memorandum to the Native Title (Technical Amendments) Bill 2007 (EM), it was said that 'proposed section 66B would be the only mechanism through which any changes to the applicant could be made'— at [27].

Siopis J was of the view that the amendments are inconsistent with:

- Kiefel J's view in *Chapman* that 'it should not be inferred that it was intended that s. 66B(1) be the only means' of altering the constitution of the applicant;
- the premise underlying the decisions in *Butchulla People*, *Chapman* and *Doolan*, i.e. that the authorisation given by the claim group is personal to each member of the applicant, rather than being given to the particular group of persons comprising the applicant collectively—at [28] to [29].

According to his Honour:

- reading s. 66B(1)(a)(i) with s. 66B(1)(b), it was clear that, even when a person comprising the applicant has died, Parliament's intention is that 'there is to be an authorisation by the claim group of the replacement applicant, whether or not the deceased person is replaced by another person as part of the applicant';
- since the passing of the 2007 amendments, the only means whereby 'any changes can be made to the composition of the applicant' is via s. 66B;
- the decisions in *Butchulla People*, *Chapman* and *Doolan* have been superseded by the amendments—at [29] to [30].

Given those findings, the court rejected the contention that Ms Wyatt and Mr Cooper could be removed by reference to O 6 r 9 of the FCR on the basis that each was not a proper or necessary party—at [30].

Alternative – minority no longer authorised

The movers submitted in the alternative that Ms Wyatt and Mr Cooper could be removed pursuant to s. 66B(1) because their conduct was such that they no longer had the authority to act on behalf of the claim group. His Honour rejected this contention because:

> There was no evidence as to the terms on which the members of the applicant were originally appointed. However, even if it could be said that the authority of [the minority applicants] ... has ceased in accordance with the terms of their original appointment..., that would not be sufficient for the applicant movers to succeed. ... [T]he applicant movers have not been authorised by a claim group meeting to bring this motion to replace the applicant as currently constituted with an applicant as constituted by the five applicant movers. There has, therefore, been no compliance with s 66B(1)(b)—at [32].

Decision

The notice of motion to change the constitution of the applicant was dismissed.