Applicant has standing exclusively & must act jointly

Tigan v Western Australia [2010] FCA 993

Gilmour J, 10 September 2010

Issue

The question in this case was whether three of the five people who jointly comprised the applicant in a claimant application had standing to file a notice of change of solicitor. Justice Gilmour found they did not have standing because actions taken or authorised by 'the applicant' are not lawful unless taken jointly by all of those who comprise the applicant. It is a 'statutory requirement that, although authorised individually, members of the applicant must ... act jointly'. If dissention arises, then the native title claim group must take steps to 'effect a change in the membership of the applicant'—at [27] to [30].

Background

Three of the five people authorised under s. 251B of the *Native Title Act* 1993 (Cwlth) as 'the applicant' for a claimant application made on behalf of the Mayala People filed a notice that purported to change the solicitor on the record from the principle legal officer of Kimberley Land Council Aboriginal Corporation (KLC), Robert Powrie, to Western Legal. The KLC, on behalf of the applicant, filed a notice of motion seeking an order directing the Federal Court Registrar to remove the notice of change of solicitor. It was supported by affidavits from the other two people who comprised the applicant, Valarie and David Wiggan, in which they stated that they had not consented to the change of solicitor.

The respondents to the notice of motion were the three members of the applicant who had sought the change of solicitor. One of the three respondents, Aubrey Tigan, filed an affidavit saying (among other things) that there had been a claim group meeting on 20 August 2010 at which a decision was made to change the group of people who constituted the applicant so that Valarie and David Wiggan would no longer be included in that group. Mr Tigan deposed that, as a result, an application to replace the applicant would be made to the court.

It was agreed for the purposes of these proceedings that a resolution to change solicitors was passed by a majority of the 93 claim group members present who voted (56 for, 32 against) at the claim group meeting. It was also agreed that a resolution to instruct Western Legal was passed and that the three respondents had instructed Western Legal to file the notice of change of solicitor.

Applicant has exclusive standing

The respondents' first submission was that the native title claim group as a whole, by a decision made at a claim group meeting, may deal with all matters arising under the NTA, just as the applicant may pursuant to ss. 61 and 62A. His Honour rejected

this submission, finding instead that 'it is the applicant who may deal exclusively with all matters arising under the Act in relation to the claimant application', including filing a notice of change of solicitor—at [11] to [12], repeating what was said in *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809, summarised in *Native Title Hot Spots* Issue 33.

Gilmour J referred to *Ankamuthi People v Queensland* (2002) 121 FCR 68 (*Ankamuthi* summarised in *Native Title Hot Spots* Issue 1) for support, where Drummond J found at [8] that 'only the named applicant ... has control' of the proceedings commenced by filing a claimant application. In that case, Drummond J acknowledged that the Cape York Land Council 'may well have acted on instructions of a large majority' of the native title claim group in filing a notice of discontinuance' but still found it was not thereby empowered to do so—at [16].

It should be noted (although his Honour does not) that there is one occasion when persons other the applicant have standing and that is when members of the claim group make an application to replace the applicant in circumstances where the requirements of s. 66B(1) are met.

Applicant must act jointly – majority does not rule

The respondents' second submission was that the persons who jointly comprise the applicant are not required to be unanimous in order to make a valid decision—at [11].

Gilmour J rejected this because it was 'inimical to the object' of ss. 61 and 62 'in the context of the Act as a whole'. His Honour referred with approval to Kiefel J's comments in *Butchulla People v Queensland* (2006) 154 FCR 233; [2006] FCA 1063 (*Butchulla People*) at [38] that:

> The evident purposes of s 61 are to provide for representation of the claim group, to limit the number of persons who may act as 'the applicant' in the proceedings and, when more than one person is authorised, to require them to act *in concert* with each other. It may be assumed that since the persons authorised have a common interest in the subject matter of the claim *acting jointly* should not present a difficulty. (His Honour's emphasis.)

Gilmour J also pointed out that the fact that s. 61(2)(c) states that the persons authorised are 'jointly' the applicant was 'important' and that, 'jointly' means: 'in conjunction, in combination, unitedly, not severally or separately'—at [19] referring to the Shorter Oxford English Dictionary.

After carefully considering what was said in *Doolan v Native Title Registrar* [2007] FCA 192; (2007) 158 FCR 56 (*Doolan*) and *Chapman v Queensland* [2007] FCA 597; (2007) 159 FCR 507 (*Chapman)*, his Honour concluded that these cases did not support the respondents' second submission: 'Indeed they reaffirm what was said by Kiefel J in *Butchulla People*—at [22] to [26].

According to Gilmour J, at least two propositions 'emerge from these cases', namely:

- they are to be distinguished on their facts from the present case because in this case 'the Wiggans are both alive and there is no evidence that they are not willing or able to act as members of the applicant';
- both *Doolan* and *Chapman* 're-affirm the statutory requirement that, although authorised individually, members of the applicant must, in accordance with the Act, act jointly'—at [27].

In his Honour's view, three of the five members of the applicant could not 'cause the applicant to deal with a matter arising under the Act in relation to the application by majority decision'. Rather, they 'must act in concert' and:

> If dissension arises ... between the named persons who are the applicant, then there are procedures under the Act for the native title claimant group to effect a change in the membership of the applicant. Indeed that has been foreshadowed in this case—at [28].

National Native Title Tribunal future act determinations

The respondents submitted that the National Native Title Tribunal had made determinations by consent in right to negotiate proceedings that supported their submissions. While the applicant 'provided very persuasive written submissions that this is not the case, and that the Tribunal's approach is consistent' with the court's approach, Gilmour J found it was not necessary to consider these submissions—at [29].

Decision

It was found that the respondents' action in instructing Western Legal to act and to file a notice of change of solicitors was not an action by, or authorised by, the applicant. Accordingly, the Registrar of the court was ordered to remove the notice of change of solicitors from the court file and to return it to Western Legal—at [30].

Costs

An application for costs against Western Legal was found to have no basis. The question of costs was otherwise reserved for further argument, 'in particular, whether the respondents to the motion ought be liable to pay these'—at [31].