Starkey v South Australia [2011] FCA 456

Mansfield J, 9 May 2011

Issue

The issue before the Federal Court was whether Ningil Richard Reid, a member of the Kokatha Uwankara native title claim group, should cease to be a respondent to the Kokatha Uwankara Native Title claimant application (KU application) pursuant to s. 84(8) of the *Native Title Act 1993* (Cwlth) (NTA). Orders were made that Mr Reid cease to be a respondent to the claim. It was found that the circumstances where a member of the claim group should be made or remain a respondent will be 'rare'—at [61].

Background

Mr Reid gave notice within the period fixed by the s. 66(10) of the NTA that he sought to become a party to the application. He apparently fell within ss. 84(3)(a)(ii) or (iii), i.e. as a person who claimed to hold native title in relation to the application area or as a person whose interests may be affected by a determination in the proceeding. Therefore, s. 84(3) apparently made him a party to the application as of right—at [36] and [65].

However, pursuant to s. 84(8), the court 'may at any time order that a person, other than the applicant, cease to be a party to the proceedings'. The material before the court showed that:

- Mr Reid did not say he had interests as a member of a different, competing claim group;
- rather, his concern was 'intra-mural', i.e. that the proper decision-making process for the purposes of authorising a person or persons to make the KU application pursuant to s. 251B of the NTA was not followed;
- Mr Reid said (at least for the Kokatha as part of the KU claim group) that only he could authorise the making of the claim under the traditional laws and customs and that he had not done so—at [46] to [47].

Respondent status for claim group member should be permitted rarely

Justice Mansfield conducted an extensive survey of the case law touching upon the issue before the court. Among others, Justice Ryan's comments in *Bidjara People #2 v Queensland* [2003] FCA 324 (*Bidjara #2*) 'concerned facts closely parallel to the present issue'. In that case, a claim group member sought to become a respondent relying upon the discretion available under s. 84(5). The person was dissatisfied with how the applicant was conducting the claim but had not made application for joinder within the notice period and so could not rely on s. 84(3). Ryan J joined her as a party, stating that:

> [I]t would ... lead to injustice if ... dissentient members were ... denied a voice in the determination of the claim. They clearly remain persons whose interests may be affected by a determination in the proceedings within the meaning of s 84(3)(ii) or (iii). It would unnecessarily multiply proceedings to require those persons to institute their own claims. Accordingly, I consider ... that such persons can be made parties pursuant to s 84(5).

Mansfield J was (respectfully) of the view that injustice would not necessarily follow if dissentient claim group members were 'denied a voice in the determination of the claim' and, in

fact, could imagine circumstances when 'the opposite might be the case'. His Honour went on to note that:

> Section 62A ... contemplates the authorised applicant having control of the proceeding, and not the individual members, or any particular individual member, of the claim group. That is ... to ensure the coherent and effective prosecution of the claim. If the approach espoused in *Bidjara #2* were *routinely adopted*, any one or more dissentient members of the claim group would be able to become respondent parties to an application, even if the claim group as a whole according to its relevant decision-making process under s 251B had appointed the applicant and did not wish to remove and replace the applicant. ... . It would subvert the clear intention of s 62A ... to provide to respondent parties one person (or a group of persons) responsible for dealing with the claim on behalf of the claim group—at [55] (emphasis added).

After considering a number of other cases, Mansfield J found that, on balance, the authorities indicated that:

- there was 'no necessary legal impediment' to a claim group member being joined, or remaining, as a respondent;
- the discretion under s. 84(5) to join a claim group member as a respondent exists but 'its favourable exercise ... will be rare';
- the circumstances where a member of the claim group who became a respondent as a result of s. 84(3) would be permitted to remain a respondent 'will be rare'—at [61] and [68].

His Honour also thought it 'appropriate' to note (among other things) that neither the definition of native title in s. 223 nor the requirements of a determination of native title in s. 225 'require the consideration of, or the resolution of, any intramural or internal issues about the respective status of, or relative responsibilities of, individual members of the claim group'. As a result:

> There is ... no reason routinely to recognise and give a voice to those within the claim group who take a different view about any such matters from that taken by the claim group through the authorised applicant—at [63].

Mr Reid's case

The 'particular feature' of Mr Reid's case was 'his assertion that the claim itself has not been duly authorised because he is the only person who can do so'. It was found that the evidence was not 'presently sufficient' to allow Mr Reid to remain as a respondent party on this basis. His Honour noted that:

> It is hard to distil from the unsatisfactory material and cogent supporting evidence. He has not sought to explain fully why he should be allowed to go behind the agreements to accept the earlier decisions of the claim group or of the Kokatha People, to which he was a party. There may be more cogent evidence available to him, but it has not been identified. Significant time, money and resources have been invested in this claim. I am informed that these efforts are close to bearing fruit as a consent determination is within sight. Mr Reid, as a group member, will benefit from such a consent determination—at [69].

Decision

In the light of the findings on both the law and the evidence, Mansfield J decided it was 'not in the interests of justice' to allow Mr Reid to remain a respondent to the proceeding. Accordingly, pursuant to s 84(8), his Honour ordered Mr Reid cease to be a party—at [70] and [72].

Alternative procedural avenue – s. 84D

The court gave one further 'important' reason for the order:

> There is an alternative procedural avenue available to Mr Reid to explore the strength of his contention that only he could have authorised the claim: s 84D(2)(c) ... . It provides for a member of the native title claim group to apply for an order under s 84D(1) requiring the applicant to produce evidence to the Court of the authorisation. That provision provides a vehicle for Mr Reid to raise his concern, without him remaining a respondent party to the application—at [71].