

# Trust money released to defend s.66B application.

## *Adnyamathanha People v South Australia* [2003] FCA 211

Mansfield J, 18 March 2003

### Issues

The main questions dealt with in this case are:

- whether the court should permit the trustees of a charitable trust administering future act agreement monies to make decisions about the use of that money to defend an application made under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) when two of the trustees were the people sought to be removed from the group of people named as the applicants; and
- whether two of the three trustees should be removed.

### Background

The principle claimant application dealt with in this case is an amalgamation of previous applications brought on behalf of the Adnyamathanha People over an area surrounding the Flinders Ranges in South Australia. These applications were brought prior to the 1998 amendments to the NTA and, therefore, prior to the introduction of both the requirement in s. 251B that persons bringing a claimant application must be authorised by the claim group and the registration test.

In April 1998, one of people named as the registered native title claimant made an agreement with a mining company. The agreement made provision for royalty payments that were to be applied to a specified charitable trust (the trust). The trustees were Flinders Trustees Ltd (an independent corporate trustee), the claimant who entered the agreement and her son (the mother and son).

Despite the nine people currently named as the applicant in the principle proceedings having been authorised to maintain the principal application, there was some obvious discord among them. It was alleged that, at a meeting of the Adnyamathanha People held in March 2001, a decision was taken to bring an application under s. 66B to remove the names of the mother and son from the group named as the applicant. In August 2001, an application in these terms was made to the court, together with (among other things) an application for an injunction to prevent the mother and son from dealing with the trust funds and orders removing the son and Flinders Trustee Ltd as trustees.

However, the trustees had passed a resolution to allow the mother and son to access trust funds to pay for their defence of the s. 66B application.

### Application of trust funds

Justice Mansfield commented that the question was whether or not, in the circumstances of this case, the court should permit the trustees to make decisions about the use of the money held in trust. Without taking any view with respect to the rights and wrongs of the evidence to date, his Honour declined to exercise his discretion to interfere with the trustees fulfilling their obligations pursuant to the trust, apparently in accordance with their bona fide intentions of doing so. In this context, it was notable that one of the trustees was an independent corporate trustee—at [24] to [25].

His Honour noted that there was significant evidence provided:

- on the one hand, by those bringing the s. 66B application such that, although it was not necessary to do so at this stage, it could be concluded that there was a serious question to be tried as to whether the mother and son should maintain their status as claimants and, in the case of the mother, as one of the people named as the applicant;
- on the other, to show that the resolutions relied upon to support the s. 66B application were both flawed and did not amount to authorisation by the Adnymathanha People in accordance with s. 251B, as required by s. 66B(1)(b)—at [26].

Further, there was evidence to suggest that it was not irresponsible of the mother and son to oppose the s. 66B application and that there was a reasonable basis for resisting it. Therefore, Mansfield J was of the view that this was not a case where it would be clearly inappropriate to allow the trust funds to be applied to defending the s. 66B application—at [26].

Notwithstanding the existence of serious questions to be tried, his Honour was not persuaded that the court should exercise its discretion so as to prevent the trustees from continuing to act for the time being:

Their duties as trustees are clear. If they abuse them, they may be called to account ... . [Those seeking to restrain the trust] should not...gain the benefit of effectively freezing out the trustees from their role ... [in circumstances] where it is not clear that the trustees have acted, or are likely to act, in breach of the Trust and where it is not clear that the assets of the Trust might be placed beyond reach or improperly dissipated without the beneficiaries having any meaningful recourse to the trustees. I am also not sufficiently persuaded that the proposed expenditure of the funds to resist a disputed application to alter the native title claimants is so outside the scope of the Trust as to be unauthorised—at [28] to [29].

## **Decision**

Among other things, orders were made to permit the funds of the trust to be released in order to meet the proper costs of the mother and son in defending any application to remove them as applicants and any incidental expenses in that defence—at [30].