Removal of one of those named as the applicant, amendment to claim group

Central West Goldfields People v Western Australia [2003] FCA 467

Carr J, 14 May 2003

Issues

This case concerned an application by Dorothy Dimer, one of the group of people named as the applicant in the Central West Goldfields claimant application, to have her name removed from that group. Orders were also sought to have Ms Dimer and descendants 'excluded' as 'registered claimants' and to 'exclude' one of her ancestors from the application.

Background

Ms Dimer's reasons for bringing the application to remove her from the group of people named as the applicant were primarily that:

- the representative body had not provided adequate information or advice to her family prior to the combination of their application with three other overlapping claimant applications; and
- genealogical information about her family had been made available in an inappropriate way.

Submissions

The Goldfields Land and Sea Council (GLSC) submitted that the court could exercise the discretion available under O 6 r 9(b) of the Federal Court Rules, which provides relevantly that the court may, either of its own motion or by application of a party, order that a person cease to be a party where the person has ceased to be a proper or necessary party. The State of Western Australia submitted that Ms Dimer was one of the people who, jointly, constituted 'the applicant' rather than a party in her own right—see s. 61(2) of the *Native Title Act 1993* (Cwlth).

Removal from group named as the applicant

Justice Carr was of the view that:

> Although there are provisions in the Act for amending an application 'so as to replace the applicant with a new applicant' [s. 64(5)] and to replace an applicant in particular circumstances relating to authorisation [s. 66B], there does not appear to be any provision for the present circumstances where one of a group of applicants seeks to have herself removed from the proceedings—at [8].

While agreeing with the state's submission, Carr J was of the view that Ms Dimer was also a party to the proceedings because she was 'named as one of the eight joint applicants who seek the relief (albeit in a representative capacity) described in the principal application'. The reasons why Ms Dimer wished to be excluded did not

need to be considered. The fact that she no longer wanted to be one of the 'named applicants' was enough. Carr J found that it was 'no longer necessary for her to be a party and ... it would not be proper to force her to be one'—at [10] to [11].

Removal as 'registered claimants'

The second order sought was the exclusion of Ms Dimer and her descendants as 'registered claimants'. It was possible that this was a reference to 'registered native title claimant', which is defined in s. 253 as a person or persons 'whose names appear...on the Register of Native Title Claims as the applicant'. Given that orders were made to remove Ms Dimer from the group named as the applicant, there was (in his Honour's opinion) 'no point' in seeking this order. Therefore, Carr J interpreted the second order sought as being one that excluded Ms Dimer and her descendants from the native title claim group.

The third order sought related to removing one of Ms Dimer's ancestors from the description of the native title claim group. While the court would 'ordinarily' make such orders simply because it was sought, Carr J refused to do so in this case because:

- it was not sufficiently clear that this was what Ms Dimer wanted;
- to do so might affect the interests of other people in the claim group; and
- there was no evidence that all of the persons who might be affected had consented to these orders being sought or that those jointly named as the applicant were 'duly' authorised by those who might be removed as members of the claim group if the orders were made–at [12].

Comment

The removal of Ms Dimer's name from the group named as the applicant pursuant to the Federal Court Rules, rather than under the NTA, is (with respect) somewhat problematic and has some implications that do not appear to have been noted by the court.

Subsection 61(2) provides that where more than one person is authorised to make a claimant application, they are jointly 'the applicant', i.e. a single legal entity. Altering the constitution of the group named as the applicant is a replacement of the applicant in that, for example, the 'old' applicant in this case included Ms Dimer and the 'new' applicant does not. Under the NTA, this would be an amendment to the application and s. 64(5) would apply. This requires that the new applicant (constituted by those who remained after Ms Dimer was removed) must file an affidavit stating that they are authorised by the claim group to be the applicant and stating the basis for that authorisation.

Given the repeated statements by the court that proper authorisation of the applicant is of central importance to the conduct of claimant applications and to the importance of maintaining the 'ultimate' and 'continuing' authority of the native title claim group by ensuring 'the applicant' is properly authorised (e.g. *Daniel v Western Australia* [2002] FCA 1147 at [11], [16] and [17], Justice French), it is not surprising that there is a requirement under the NTA that the newly constituted applicant must

be shown to retain authority of the claimant group. Were this not so, the change in the applicant brought about by removing one of its members could be done without the claim group's authority.

It is not difficult to envision circumstances where the claim group authorised a group as 'the applicant' only so long as it was constituted in a particular way (e.g. to include a particular person or to include one representative from each the subgroups or families that make up the claim group). The removal of a particular person (even because they are deceased) could mean that those remaining are no longer authorised. The Explanatory Memorandum to the Native Title Amendment Bill 1997 [No. 2] supports this view:

> When a claimant application...is amended to replace the applicant with a new applicant, that new applicant must provide an affidavit showing authority ... [referring to what became s 64(5)]. *A new applicant may be required*, for example, if ... *one of the group of persons* that *together make up the applicant*, becomes *incapacitated or dies*—at [25.42], emphasis added.

When the amended application is referred to the Native Title Registrar by the court under s. 64(4), it is put through the registration test and, if accepted, the amendment (in this case, the change to the applicant) is entered onto the register. In this way, the Registered Native Title Claimant (those whose names appear on the register as the applicant) reflects the court's orders: see s. 190(3) and s. 190A. Absent the referral of an amended application and the application of the test, the Registrar does not appear to be empowered to amend the Register to reflect the court's order unless it is an order made under s. 66B(2)—see s. 66B(4).