FEDERAL COURT OF AUSTRALIA

Clancy on behalf of the Wulli Wulli People #2 v State of Queensland [2019] FCA 351

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| File number: | QUD 31 of 2019 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 4 March 2019 |
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| Catchwords: | **NATIVE TITLE** – application to remove party from proceedings – where applicant is a member of the claim group – where respondent identifies as a member of another group – whether applicant adequately represents respondent’s interests – respondent removed from proceedings |
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| Legislation: | *Native Title Act 1993* (Cth) ss 84(8) and 84(9) |
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| Cases cited: | *Butterworth on behalf of the Wiri Core Country Claim v Queensland* (2010) 184 FCR 397  *Kulkalgal People v State of Queensland* [2003] FCA 163  *Lander v State of South Australia* [2016] FCA 307 |
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| Date of hearing: | 4 March 2019 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Native Title |
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| Category: | Catchwords |
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| Number of paragraphs: | 14 |
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| Counsel for the Applicant: | Mr Dan O’Gorman |
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| Solicitor for the Applicant: | Mr Ted Besley |
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| Counsel for the First Respondent: | Ms E Longbottom |
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| Solicitor for the First Respondent: | Crown Law |
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| Counsel for the Sixth Respondent: | The Sixth Respondent appeared via telephone |
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| Counsel for the Second to Fifth and Seventh to Fiftieth Respondents: | The Second to Fifth and Seventh to Fiftieth Respondents did not appear |

ORDERS

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|  | | QUD 31 of 2019 |
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| BETWEEN: | ROBERT CLANCY, ELIZABETH BLUCHER, CHRISTINE BOSWORTH, BRIAN CLANCY, JULIEANNE EISEMANN, ERICA GYEMORE, ELIZABETH LAW, ASHLEY SALTNER AND JENNIFER WRAGGE ON BEHALF OF THE WULLI WULLI PEOPLE #2  Applicant | |
| AND: | STATE OF QUEENSLAND  First Respondent  BANANA SHIRE COUNCIL  Second Respondent  NORTH BURNETT REGIONAL COUNCIL (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 4 MARCH 2019 |

THE COURT ORDERS THAT:

1. Edwina Chapman be removed as a respondent to this proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(DELIVERED EX TEMPORE AND REVISED)

RANGIAH J:

1. This is an application for an order under s 84(8) of the *Native Title Act 1993* (Cth) (**the Act**), that Edwina Chapman be removed as a party to the proceedings. Section 84 of the Act provides, relevantly:

*Dismissing parties*

(8) The Federal Court may at any time order that a person, other than the applicant, cease to be a party to the proceedings.

*Court to consider dismissing parties*

(9) The Federal Court is to consider making an order under subsection (8) in respect of a person who is a party to the proceedings if the Court is satisfied that:

(a) the following apply:

(i) the person’s interests may be affected by a determination in the proceedings merely because the person has a public right of access over, or use of, any of the area covered by the application; and

(ii) the person’s interests are properly represented in the proceedings by another party; or

(b) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

1. All parties other than Ms Chapman and two self-represented pastoralists have agreed to move towards a consent determination. Ms Chapman has stated that she is not prepared to enter into negotiations towards a consent determination, and that the matter should proceed to a contested hearing on the question of connection. The applicant seeks an order that Ms Chapman cease to be a party on the basis that her interests are properly represented by the applicant.
2. From an early stage, there has been an issue as to the proper composition of the claim group. The particular issue is whether the descendants of two persons, MiMi and Maggie Hart, should have been included as members of the claim group.
3. Ms Chapman applied for an order joining her as a party, and that order was made. The basis of the joinder was that she was a descendant of MiMi and Maggie Hart and had an interest in their addition as apical ancestors of the claim group.
4. At a conference of the expert anthropologist engaged by the parties in the proceedings, it was agreed that MiMi and Maggie Hart should be included as apical ancestors. The applicant’s solicitors wrote to Ms Chapman on 10 September 2018, saying that the applicant would recommend to a claim group meeting that MiMi and Maggie Hart be included as apical ancestors, and that the claim be renamed to a neutral title that would not include “Wulli Wulli”. The letter also said that the descendants of MiMi and Maggie Hart would be invited to a claim group meeting at which the amendments would be considered.
5. Ms Chapman continues to oppose the claim. In written submissions and at the hearing of the application, she expressed her concern to be that the area claimed is the country of the Wakka Wakka people and not the Wulli Wulli people. She identifies as Wakka Wakka and not Wulli Wulli. Ms Chapman claims, as I understand it, that she takes her Wakka Wakka identity through MiMi and Maggie Hart. Ms Chapman accepts that she is descended not only from MiMi and Maggie Hart, but also from other apical ancestors named in the Wulli Wulli application. Therefore, irrespective of whether she identifies as Wulli Wulli, she is a member of the claim group.
6. Ms Chapman also acknowledges that an agreement was made between elders of the Wakka Wakka and Wulli Wulli as to the boundaries of their country. She has not suggested that the boundary of the Wulli Wulli claim does not reflect that agreement. However, she now says that the Wulli Wulli claim is over what is truly Wakka Wakka country.
7. The Act confers a broad discretion upon the Court under s 84(8) to order that a respondent cease to be a party to the proceedings. The discretion must be exercised having regard to the circumstances of each case and must take into account the objects and purposes of the Act more generally: *Lander v State of South Australia* [2016] FCA 307 at [25]. The exercise of the power in s 84(8) is not constrained by the particular circumstances that may give rise to a dismissal under s 84(9), and the Court may exercise its discretion to dismiss a respondent party even if the circumstances set out in s 84(9) do not exist: *Butterworth on behalf of the Wiri Core Country Claim v Queensland* (2010) 184 FCR 397 at [39]. Generally, the Court has been reluctant to allow dissentient members of a claim group to become or remain respondents: *Kulkalgal People v State of Queensland* [2003] FCA 163 at [7]–[8]; *Butterworth* at [33]; *Lander* at [27]–[30].
8. There are two reasons why I consider that Ms Chapman should not be allowed to remain as a respondent. The first is that Ms Chapman’s interests will be adequately represented in the claim. The applicant will recommend to the claim group that MiMi and Maggie Hart be included as apical ancestors, a goal that Ms Chapman has sought to achieve by her joinder.
9. The application for Ms Chapman’s removal may be criticised as premature, given that the claim group meeting has not yet been held, and the claim group may yet reject the applicant’s recommendation. However, the Court was informed that the application has been made at this stage to avoid the high costs of a second claim group meeting. The applicant wishes to hold a single meeting where the claim group will authorise the amendments to the claim, as well as the terms of a consent determination. It seems highly likely that the claim group will authorise the inclusion of MiMi and Maggie Hart, since the State of Queensland has indicated that it will not consent unless they are included. Further, if the claim group ultimately does not include them, it will be open to Ms Chapman to apply again for joinder as a party.
10. The second reason is that Ms Chapman has not adduced sufficient evidence to suggest a tenable case that the country claimed by the Wulli Wulli is in fact Wakka Wakka country. The agreement reached suggests the contrary.
11. Further, the inclusion of MiMi and Maggie Hart and the renaming of the claim should assist in the resolution of Ms Chapman’s concerns. The issues she raises seem to be more issues of naming of the claim group than substantive issues of who holds native title rights and interests in the claim area. I am not satisfied that Ms Chapman has a tenable defensive claim to protect as a respondent.
12. For these reasons, I will order that Ms Chapman be removed as a party. As I have indicated, this does not prevent her from making another claim for joinder if dissatisfied with the outcome of the foreshadowed claim group meeting.
13. The order of the Court will be that Edwina Chapman be removed as a respondent to this proceeding.

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| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 20 March 2019

SCHEDULE OF PARTIES

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|  | QUD 31 of 2019 |
| Respondents |  |
| Fourth Respondent: | SOUTH BURNETT REGIONAL COUNCIL |
| Fifth Respondent: | WESTERN DOWNS REGIONAL COUNCIL |
| Sixth Respondent: | EDWINA ROBYN CHAPMAN |
| Seventh Respondent: | KEVIN COWBURN |
| Eighth Respondent: | QUEENSLAND SOUTH NATIVE TITLE SERVICES |
| Ninth Respondent: | ERGON ENERGY CORPORATION LIMITED |
| Tenth Respondent: | TELSTRA CORPORATION LIMITED (ACN 33 051 775 556) |
| Eleventh Respondent: | MICHAEL VINCENT BAKER |
| Twelfth Respondent: | THOMAS JAMES BANCROFT |
| Thirteenth Respondent: | DUNCAN WILLIAM BROWN |
| Fourteenth Respondent: | GLENYS PAULINE BROWN |
| Fifteenth Respondent: | MARK RICHMOND BROWN |
| Sixteenth Respondent: | PHILLIP RICHMOND BROWN |
| Seventeenth Respondent: | HUGH NORMAN MACKLEY CAMPBELL |
| Eighteenth Respondent: | ANSGAR GREIN |
| Nineteenth Respondent: | ANTOINETTE GREIN |
| Twentieth Respondent: | LINDSAY GORDON GRONO |
| Twenty-First Respondent: | GEOFFREY THOMAS HARTWIG |
| Twenty-Second Respondent: | MARGARET OLIVE HARZER |
| Twenty-Third Respondent: | BRUCE RAYMOND HUTCHINSON |
| Twenty-Fourth Respondent: | VIVIEN CLARE HUTCHINSON |
| Twenty-Fifth Respondent: | DARCY FREDERICK KNUDSEN |
| Twenty-Sixth Respondent: | JOHN DAVID LINDENMAYER |
| Twenty-Seventh Respondent: | LORRAINE FAHEY LINDENMAYER |
| Twenty-Eighth Respondent: | ALEXANDRA WINTER O’NEILL |
| Twenty-Ninth Respondent: | JAMES ANTHONY O’NEILL |
| Thirtieth Respondent: | RICK ERNEST PAYNE |
| Thirty-First Respondent: | JUDITH ELIZABETH ANN PLANT |
| Thirty-Second Respondent: | ROBERT JOHN PLANT |
| Thirty-Third Respondent: | ROBERT LESLIE RICHARD PLANT |
| Thirty-Fourth Respondent: | RAYMOND SPENCER POULSEN |
| Thirty-Fifth Respondent: | LYLE GEORGE PURNELL |
| Thirty-Sixth Respondent: | COLIN ANDREW SEILER |
| Thirty-Seventh Respondent: | JOAN MAY SEILER |
| Thirty-Eighth Respondent: | LYNNELLE EVELYN SEILER |
| Thirty-Ninth Respondent: | PETER ALFRED SEILER |
| Fortieth Respondent: | PETER NOEL THOMPSON |
| Forty-First Respondent: | SHARON MAREE THOMPSON |
| Forty-Second Respondent: | GLENVILLE ROLAND TUCKER |
| Forty-Third Respondent: | JAMES BARRY TUCKER |
| Forty-Fourth Respondent: | LEONARD EDWIN TUCKER |
| Forty-Fifth Respondent: | PETER LEONARD TUCKER |
| Forty-Sixth Respondent: | NOELEEN KAY VANDERHAVE |
| Forty-Seventh Respondent: | ROSS JOHN VANDERHAVE |
| Forty-Eighth Respondent: | LINDSAY KEITH WALTERS |
| Forty-Ninth Respondent: | JEANETTE ANNE YOUNG |
| Fiftieth Respondent: | WILLIAM HENRY YOUNG |