Strike-out of *Bodney* applications - appeal

Bodney v Bropho [2004] FCAFC 226

Spender, Branson and Stone JJ, 24 August 2004

Issue

This decision relates to whether the judge at first instance properly exercised the discretion available under s. 84C of the *Native Title Act 1993* (Cwlth) (NTA) to strike-out certain claimant applications on the basis of a failure to comply with the requirements of s. 61. The Full Court considered whether:

- the trial judge erred in exercising his discretion under s. 84C by not allowing opportunity to amend the applications to meet the requirements of s. 61(3) of the old Act;
- an application made under the old Act and amended under the new Act is required to satisfy s. 61 of the new Act on an application under s. 84C.

Background

This was an appeal from the decision of Justice Wilcox striking out five claimant applications made by the appellant, Mr Bodney (the Bodney applications): see *Bodney v Western Australia* [2003] FCA 890, summarised in *Native Title Hot Spots* Issue 7. Note that there was an overlap between these applications and others that were part-heard.

Three of the Bodney applications were made under the old Act and had not been amended since the new Act commenced (the unamended applications). The other two applications, known as the Hartfield application and the Main application, were made under the old Act and amended after the new Act commenced (the amended applications).

In summarising his conclusion to strike-out the applications, Wilcox J stated he had 'reached a clear conclusion that each of the Bodney applications fails to comply with the requirements of the relevant form of s. 61. The situation cannot be cured by further evidence; the deficiencies are contained in the applications themselves'.

Lead judgment

Justices Spender and Branson agreed with the reasons for judgment of Justice Stone, except that Branson and Spender JJ considered it unnecessary for the appellate court to decide whether the primary judge was right to conclude that the amended applications were required to comply with s. 61 of the new Act-see below.

Strike-out applications generally

Referring to relevant extracts from the Senate debate relating to the proposed insertion of s. 84C, Stone J found that strike-out applications under s. 84C(1) should be approached in the same way as applications under O 20 r 2 of the Federal Court Rules. Her Honour held that:

- an application under s. 84C should be approached with caution and allowed only where a clear case for summary dismissal has been made; and
- the court has power to defer determining a strike-out application in an appropriate case—at [46] to [54], referring to *Williams v Grant* [2004] FCAFC 178, summarised in *Native Title Hot Spots* Issue 11.

Primary grounds of appeal

The principle grounds of appeal related to:

- the way in which Wilcox J dealt with the evidence concerning the alleged inadequacies of the Bodney applications and their failure to comply with the relevant form of s. 61 of the NTA; and
- Wilcox J's failure to give Mr Bodney the opportunity to amend the applications on the basis of an unwarranted assumption that he would not be able to amend the applications to comply with the NTA or obtain legal assistance to do so.

Mr Bodney submitted that:

- in describing the amended applications as being made on behalf of a sub-group, Wilcox J misunderstood his evidence;
- he and his siblings and their descendants were now the only living descendants of a wider native title group—at [70] to [72].

Nature of the appeal

Her Honour noted that an appellate court is not entitled to substitute its discretion for that of the primary judge unless the primary judge has made an error as described in *House v The King* (1936) 55 CLR 499 at [505]:

> If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of discretion is reviewed on the ground that a substantial wrong has in fact occurred—at [73].

Citing relevant authorities, her Honour also noted that, where the decision relates to a matter of practice and procedure (as in this case), an appellate court should exercise particular caution and grant relief sparingly—at [74].

Findings on the unamended applications

Stone J, with Spender and Branson JJ agreeing, held the primary judge was correct in finding that the claim group description in the unamended applications was not sufficient to comply with s. 61(3) of the old Act. However, the question was whether the Mr Bodney could have amended the applications so that they complied with s. 61(3) and, if so, whether the appellant should have been permitted to amend—at [75].

Her Honour:

- accepted Mr Bodney's contention that the various descriptions of the persons whom he claimed held native title referred to the same body of people, such that it was possible for Mr Bodney to amend the applications to comply with s. 61(3) of the old Act;
- found, by inference from the principles in *House v The King* set out above, that the primary judge had failed to properly exercise his discretion—at [76].

In so finding, Stone J noted that:

- the primary judge had dismissed the applications without any overt consideration of whether leave to amend should be given;
- Mr Bodney was an unrepresented litigant in part-heard proceedings where considerable evidence concerning the substantive applications had already been taken, and that evidence would not be before the court in any fresh claimant application Mr Bodney might file following dismissal of the subject applications; and
- the evidence on which Wilcox J relied was seriously disputed and the witnesses whose evidence was contrary to Mr Bodney's position were not cross-examined—at [76] to [77].

Findings on amended applications

Item 21 of Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions found in Table A of the notes to the NTA) states that:

- section 84C applies irrespective of whether the main application was made before or after the section commenced;
- if the main application was made before s. 84C commenced, the reference in s. 84C to s. 61 or s. 62 'is a reference to s. 61 or s. 62 of the old Act'.

Her Honour noted Justice O'Loughlin's view in *Quall v Risk* [2001] FCA 378 (Quall) that for the purposes of s. 84C the new Act will apply to an old Act application amended after the new Act commenced if the amendments changed 'the composition of the claimants' or 'the particularity of the claimants'.

However, it was also noted that it was not entirely clear what was meant by 'changing the composition of the claimants', a difficulty that was 'enhanced' by the expression, 'changing the particularity of the claimants'. In any event, Stone J found that:

- the provisions of the new Act and the transitional provisions do not require 'a reading of item 21 that departs from its clear and unambiguous terms';
- there may be some justification for treating an application purporting to be made on behalf of a native title claim group different in substance from the group named pursuant to s. 61(2) of the old Act as a fresh application;
- if there was an amendment to that effect, the application as amended might fairly be characterised as a fresh application, i.e. the change would need to be such that the claim group was 'different in substance' from the group originally named;

- however, an amendment that provided further particulars of the claim group, as opposed to one that changed the composition of the claim group, would not justify departing from the clear words of item 21 of Schedule 5—at [79] to [86], agreeing with Justice Emmett in *Wharton v Queensland* [2003] FCA 1398.

Her Honour acknowledged that, in this case as in others, it may be difficult to tell whether the amendments resulted in a change in the composition of the claim group or merely refined the description of that group and provided additional detail. However, given the principle cited above, she was not prepared to interfere with Wilcox J's findings i.e. that, on the evidence, Mr Bodney's amendments changed the composition of the claim group and did not merely particularise that group. Therefore, because no error of the kind described in *House v The King* was apparent, Branson J agreed with his Honour's conclusion that the amended applications were required to comply with s. 61 of the new Act—at [87] to [88].

While both Spender and Branson JJ found it was unnecessary in this case to decide whether the amended applications had to comply with s. 61 of the old or new Act, both went on to state their opinion on the matter. Spender J was of the view that:

> [T]he strike-out application in each of the five applications fell to be determined by the requirements of s. 61 under the old Act. This conclusion gives efficacy to Item 21 in Schedule 5 of the amending Act. In my opinion, this case is indistinguishable from Wharton—at [13].

Branson J expressly disagreed with Wilcox J's finding that, where an applicant chooses to amend a native title determination application made under the old Act by changing the composition of the claimants, the amended application must comply with s. 61 of the new Act:

> At least so far as any application under s 84C...is concerned, the position is governed by item 21 of Schedule 5 ... [which] ... indicates that the question turns on when the main application was made—at [21].

Amended applications—authorisation issue

Stone J found no reason why the problem with the description of the claim group could not have been cured by amendments that may have resolved the authorisation issue. It was noted that:

- for the purpose of a strike-out application, resolving the authorisation problem would not necessarily involve Mr Bodney proving that such authorisation had been granted but would involve a coherent claim having been authorised; and
- the 'intrinsic unlikelihood' of Mr Bodney's submission that the only living members of the wider claim group were his family was not relevant to the issue of whether the appellant should have been given leave to amend the applications—at [90] to [91].

Spender J found that:

- there would be no difficulty in amending to address any deficiency in the claim group description in the circumstances; and

- Wilcox J's finding of fact that the applications were made by a subgroup, in particular on disputed evidence untested by cross examination, was not a basis upon which an application asserting such a claim group should be struck out—at [6] to [12].

Branson J found that:

- the issue of whether the small group on whose behalf Mr Bodney made the applications was also the whole native title group need not be determined on the appeal;
- any defect or error capable of being corrected by amendment should ordinarily be allowed to be corrected, particularly as the substantive proceedings were part heard and also to avoid multiplicity of proceedings;.
- Wilcox J allowed his views as to the merits of the respective applications made by Mr Bodney to influence his judgment on the strike-out motions;
- on remittal, the primary judge may need to decide whether it is necessary to determine whether either the old or the new Act permits the making of a claimant application by a subgroup—at [27] to [35].

Unrepresented litigant

A further ground of appeal was that Wilcox J did not take into account that Mr Bodney was semi-literate, had little education or knowledge of the law and was not represented. Stone J found this ground could not be sustained, stating that:

> While this position may impose on the Court an obligation to take particular care that the unrepresented litigant understands the proceedings ... there is no obligation on the Court, indeed it would be injudicious, to attempt to compensate fully for the disadvantage resulting from the lack of representation; there would be a grave risk of the Court being apparently or actually partisan. In any event, no evidence was brought to support this allegation. Indeed the nature of the proceedings ... was such that the lack of representation was comparatively unimportant. The claim that the applications did not meet the requirements of s. 61 ... is something that his Honour could determine by his own examination of the applications as distinct from, for instance, a case that calls for forensic experience or skilled cross-examination—at [68].

Decision

The appeal was allowed, the orders of the primary judge set aside and the motions remitted to the primary judge for further consideration.