Strike-out under s. 84C — Kokatha

Thomas v South Australia [2004] FCA 951

Mansfield J, 22 July 2004

Issue

The issue in these proceedings was whether or not a claimant application should be struck out because the applicant was not authorised pursuant to s. 251B(a) to make the application as required under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

A claimant application, brought under the old Act by Roger Thomas and Daniel Clifton on behalf of the Kokatha People, was amended on 30 March 1999, after the new Act commenced. Subsection 61(1) of the new Act (if it applied) required Mr Thomas and Mr Clifton to be authorised by the native title claim group to bring the application. Such authorisation was said to have been given via resolutions passed at a meeting convened by the Aboriginal Legal Rights Movement Inc (ALRM), the representative body for the area, on 30 and 31 January 1999 (the Stirling North meeting).

ALRM certified the application under the provisions operative at the time pursuant to which a representative body must not certify unless it was of the opinion that the applicant had the requisite authority. The certificate stated that ALRM was of the opinion that authorisation had been given in accordance with s. 251B(a), i.e. according to a process of decision-making that, under the traditional laws and customs of the claim group, must be complied with in relation to authorising things of that kind. The certificate described the Stirling North meeting and a series of public notices given prior to that meeting. It stated that the approximately 150 persons present at the meeting were representative of the key family groups that made up the claim group. That opinion was based upon a report by Ms Hodgson, an anthropologist engaged by ALRM.

In November 2003, Ningal Richard Reid made an application under s. 84C(1) to strike-out the claimant application on the basis that Mr Thomas and Mr Clifton were not authorised under s. 251B(a). Evidence before the court indicated that Mr Reid was recognised as a senior traditional elder of the native title claim group.

In bringing the strike-out application, Mr Reid contended that:

- at no time did Ms Hodgson consult him and, without consulting him, she could not have formed a reliable anthropological opinion about the traditional decision-making process of the native title claim group; and
- the Stirling North meeting was a democratic process that involved a vote by show of hands and not one made pursuant to the traditional laws and customs of the native title claim group, as required under s. 251B(a).

Evidence adduced by ALRM in opposition to the strike-out application included an affidavit of Parry Agius, the Executive Director of ALRM, asserting that the native title claim group authorised Mr Thomas and Mr Clifton to bring the claimant application. The affidavit exhibited a confidential draft report by Ms Hodgson which stated that the 'constitution and carriage of the community meeting held in January 1999 where applicants were authorised to proceed reflects traditional decision making practices'. As the report was heavily edited, Justice Mansfield concluded it could not be given too much weight without knowing what the deletions were.

Other evidence adduced in opposition included an affidavit in which Mr Thomas deposed to having been present at the Stirling North meeting and stated that:

- the resolution authorising him and Mr Clifton to bring the claimant application was passed without dissent; and
- because Kokatha law men, as well as law men from remote communities with responsibility for Kokatha laws and customs (including Mr Reid) were present, the authorisation was provided by a process of traditional decision-making.

The onus is on the applicant

Mansfield J noted that:

- the onus on a party seeking to strike-out a native title determination application under s. 84C(1) is the same as under O 20 r 2 of the Federal Court Rules, i.e. the court's power should be exercised sparingly, with caution and only when the court is satisfied that the person seeking strike-out has made out a very clear case that the applicant has not complied with the relevant section and cannot, by amending the application, comply;
- unless it appeared from the face of the application and supporting affidavits filed in accordance with s. 62, there would rarely be a circumstance in which the onus could be discharged at [2], [12] and [17] to [18], applying the decision in *Williams v Grant* [2004] FCAFC 178 at [48] to [49] (summarised in this issue of *Native Title Hot Spots*).

His Honour found that it was not a function of the court upon an application under s. 84C(1) to determine the reliability of competing evidence and where the truth lies in relation to some disputed question of fact. Therefore, this decision did not reflect a decision whether in fact the claimant application was authorised in accordance with s. 251B(a) of the NTA—at [12], [16] and [24].

Decision

It was held that, while the evidence did show that there was a real and serious issue about authorisation, it did not demonstrate clearly that:

- the respondent was not authorised in accordance with s. 251B(a) to bring the native title application; or
- the evidence relied on by the claimants and ALRM to show authorisation was erroneous—at [16].

Therefore, Mansfield J was not persuaded to the necessary degree that the claimant application was not authorised as required by s. 61(1) and so dismissed the strike-out application.