Strike out under s. 84C - Wiradjuri

Williams v Grant [2004] FCAFC 178

North, Dowsett and Lander JJ, 7 July 2004

Issue
This case deals with an appeal to the Full Court of the Federal Court against an order dismissing an application to have a claimant application struck out under s. 84C(1) of the *Native Title Act 1993* (Cwlth) (NTA). Justice Landers (with Justices Dowsett and North concurring) held that the appeal should be dismissed. North J gave separate reasons but stated that, if his analysis was wrong, the appeal should be dismissed for the reasons give by Landers J.

Background
In February 2002, Florence Grant filed a claimant application in relation to an area in central west New South Wales in which it was stated that she was authorised by the Wiradjari Council of Elders to lodge the claim on its behalf, representing Wiradjuri People, and was entitled to make the application as an authorised representative of the Council of Elders.

Neville Williams (the appellant in this case) was an applicant in an overlapping claimant application brought on behalf of the Mooka People, a sub-group of the Wiradjuri People. In August 2002, he brought an application for an order under s. 84C(1) of the NTA striking out the claimant application made by Ms Grant.

Application for strike-out
The matter determined by Wilcox J was whether, at the time of the hearing of the strike- out application, Ms Grant was authorised, within the meaning of s. 251B of the NTA, to bring the claimant application — see *Grant v Minister for Land and Water Conservation NSW* [2003] FCA 621, summarised in *Native Title Hot Spots* Issue 6. The application for strike-out was supported by a number of affidavits, some of which were sworn well before the application was made.

In the claimant application, Ms Grant was said to have been authorised to bring the application at meetings held in December 2001 and January 2002 (the earlier meetings). However, in her affidavit material, Ms Grant referred to authority given to her on 22 and 23 June 2002, some months after the claimant application was lodged in February 2002, and made no mention of the earlier meetings.

At first instance, His Honour Justice Wilcox accepted (on the basis of what was said to be unchallenged affidavit evidence) that Ms Grant was authorised to make the claim in accordance with the traditional decision-making process of the Wiradjuri People, thus satisfying the requirements of s. 61(1) and, therefore, dismissed the strike-out application.

Power under s. 84C(1) to be used sparingly and with caution

The Full Court held that:

- an application under s. 84C(1), if successful, had the very serious consequence that the native title application would be struck out, which was akin to a proceeding being summarily dismissed or, at least, dismissed before any hearing on the merits;
- no proceeding should be summarily dismissed except in a very clear case;
- an application under s. 84C(1) should be treated no differently from any other application to dismiss a claim summarily; therefore
- the court's power should be exercised sparingly and with caution;
- the person seeking strike-out must discharge a 'heavy onus', making out a clear case that the applicant has not complied with the relevant section and cannot, by amending the application, so comply—Lander J at [48] to [49] and North J at [4].

'Considering' v 'determining' a s. 84C(1) application

Under s. 84C(2), the court 'must, before any further proceedings take place in relation to the main application, consider the application under subsection (1)'.

Landers J:

- drew a distinction between 'considering' and 'determining' the strike-out application and concluded that s. 84C(2) did not require a court to determine the application before any further steps are taken;
- noted that it would be appropriate to determine the application at the same time as it was considered in circumstances where either the application to strike-out was obviously without merit or it was clearly a case that called for relief under s. 84C(1); and
- held that it may sometimes be appropriate to hear and determine a strike-out application under s. 84C at the same time as the main application e.g. where it was difficult to determine whether a person had been authorised by a native title claim group under traditional laws and customs—at [55] to [60] and see *Bodney v Western Australia* [2003] FCA 890 at [45], summarised in *Native Title Hot Spots* Issue 7.

His Honour did, however, repeat that the NTA gives priority to the strike-out application—at [60].

Merits of the appeal

Landers J held that it was necessary for Wilcox J to determine whether either Ms Grant's assertions or the contrary assertions by Mr Williams were correct—at [74].

Having considered the affidavits in support of Mr Williams' case, their Honours could not agree with Wilcox J's finding that there was no challenge to Ms Grant's affidavit evidence. On the contrary, the court found that Mr Williams' evidence did challenge Ms Grant's claim of authorisation—at [83].

However, it was held that:

- Mr Williams had the onus and responsibility of establishing that Ms Grant was not authorised by the native title group to bring the claim;
- while there was undoubtedly great confusion as to who was authorised to bring the claim and on behalf of whom, Mr Williams had not discharged the onus of establishing that the claimant application did not comply with s. 61;
- Mr Williams should have identified Ms Grant's claim of authorisation in the claimant application and then dealt with that claim by direct evidence to establish a want of authority and, if Ms Grant claimed a source of authority apart from that contained in the claimant application, he also needed to address that claim;
- because of the unsatisfactory nature of his evidence, Mr Williams' application was bound to fail—at [50] to [51] and [84] to [86].

Tender of fresh evidence

On appeal, Mr Williams sought permission pursuant to O 52 r 36 of the Federal Court Rules to tender fresh affidavit evidence. Their Honours held that Mr Williams should not be entitled to tender fresh evidence in the appeal proceedings because:

- while there were no fixed rules governing the exercise of the discretion, certain matters were usually relevant e.g. whether the applicant exercised due diligence in attempting to procure the evidence before trial but the evidence was not available at trial; and
- if the evidence had been available at trial, the opposite result would have been obtained.

In making this ruling, the court noted (among other things) that the additional evidence was always available to Mr Williams and that he had not given any explanation as to why he failed to adduce it before Wilcox J—see [37] to [39] and [45] to [47].

Decision

The court held that the appeal should be dismissed.