Strike out, summary dismissal — claimant application

Worimi v Minister for Lands (NSW) [2006] FCA 1770

Bennett J, 19 December 2006

Issue
The main issue in this case was whether the court should strike out a claimant application made under ss.13 and 61(1) of the *Native Title Act 1993* (Cwlth) pursuant to s. 84C. The court decided to do so.

Background
This decision should be read in conjunction with the decision in *Hillig v Minister for Lands (NSW) (No 3)* [2006] FCA 1776 (*Hillig No 3*, summarised in *Native Title Hot Spots* Issue 23) and the events described in *Hillig v Minister for Lands (NSW) (No 2)* [2006] FCA 1115 (*Hillig No 2*, summarised in *Native Title Hot Spots* Issue 21).

Mr Hillig is the administrator of Worimi Local Aboriginal Land Council in New South Wales, which owned the fee simple in land at Port Stephens (the relevant land), subject to any native title rights or interests, and waned to sell it.

However, the transfer of the relevant land to the council was subject to ss. 40 and 40AA of the *Aboriginal Land Rights Act 1983 (NSW)* , which provide that the council cannot deal with the land unless it was the subject of an 'approved determination' of native title, as defined by s. 13 and s. 253 of the NTA. In separate proceedings, Mr Hillig made a non-claimant application on the council's behalf seeking an approved determination that native title does not exist over the relevant land (see *Hillig No 3*) to facilitate the sale.

In August 2006, Justice Bennett struck out a claimant application by Mr Dates (who prefers to be known as Worimi) for a determination that native title exists over the relevant land (see *Hillig No 2*). Worimi then filed a further claimant application, which is the application dealt with in this case. Her Honour observed that:

> This is not a case where Worimi claims that his immediate family hold native title rights by virtue of the membership of their family alone (cf *Colbung v Western Australia* [2003] FCA 774). He acknowledges that the Land is Worimi land. That is, according to traditional law and custom, the rights are held by Worimi people or the particular clan or group, such as the Garuahgal people. Whatever the precise identity of the people who possess such rights over the Land (see Hillig No.2 at [20]—[22]), it is a group larger than Worimi and his family. If that is the case the family, by calling itself a native title claim group, does not establish that it is a 'native title claim group' for the purposes of Worimi's entitlement to make the second application pursuant to s 61(1) of the NTA—at [43], referring to *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60].

Bennett J noted that the native title claim group must establish rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by that group. Worimi's evidence was that his claim group, made up of himself, his wife and the daughters to whom he has passed the laws and custom, was not the totality of the group which possessed the native title rights and interests under traditional laws and customs—at [46], referring to *De Rose v South Australia (No.2)* (2005) 145 FCR 290; [2005] FCFCA 110 , summarised in *Native Title Hot Spots* Issue 15.

Woromi's counsel placed considerable reliance on *Bodney v Bropho* (2004) 140 FCR 77; [2004] FCAFC 226 (*Bodney*, summarised in *Native Title Hot Spots* Issue 11), where the Full Court of the Federal Court dealt with a claim group analogous to that of the present application and allowed an appeal against an order to strike out that application pursuant to s. 84C of the Act.

Her Honour distinguished *Bodney*, noting that, unlike Mr Bodney, Woromi had changed the composition of the claim group from the first to the second application:

> Worimi's evidence is that there are other persons outside his immediate family who, as part of the Garuahgal people or the Worimi nation, would have been entitled to assert native title over the Land. His qualification is that he now understands that they do not observe traditional laws and customs and that, accordingly, the persons specified in the claim group are the whole of the group alleged by him to hold the claimed native title rights and interests—at [50].

Worimi's reliance upon the 'theoretical possibility' that individuals who are Garuahgal or Worimi by descent do not share in all of the native title rights and interests because they have ceased to acknowledge the traditional laws and observe the traditional customs of the community was not a question that her Honour felt needed to be determined on this strike-out application. Bennett J was 'prepared to accept that possibility, for the purposes of this application'—at [50].

Her Honour said that the evidence as to the claim group was inconsistent with the claim group described in the second application because:

- the claim group is not restricted to Worimi's immediate family;
- the only evidence of traditional law and custom authorises Worimi to bring the application on behalf of his immediate family;
- the claim group is not comprised of all the persons who, according to traditional law and custom, hold the common or group rights and interests comprising the native title claimed; and
- Worimi's evidence establishes that he is not authorised to bring the second application for the purposes of NTA—at [55], referring to s. 61(1).

Decision

Her Honour concluded the application should be struck out under s. 84C for failure to comply with s. 61, observing that allowing the application to proceed 'would involve useless expense'. The proceedings were also summarily dismissed pursuant to Order 20 rule 2 of the Federal Court Rules—at [56].