Strike-out under s. 84C

Beattie v Queensland [2007] FCA 596

Kiefel J, 27 April 2007

Issue

The issue in this case was whether a claimant application should be struck out pursuant to s. 84C of the *Native Title Act 1993* (Cwlth) (NTA). The court decided to do so.

Background

A strike-out application under s. 84C(1) was brought by Thomas Newman, a respondent to the Western Wakka Wakka People's claimant application. Section 84C provides for strike-out of an application made under s. 61 of the NTA that does not comply with ss. 61, 61A or s. 62.

Mr Newman also sought, in the alternative, an order under O 35A r 2 of the Federal Court Rules (FCR) to stay or dismiss the application on the basis of non-compliance with the court's orders and directions. The State of Queensland, local government respondents and, to some extent, those making seven overlapping claimant applications groups supported Mr Newman's application.

Claimant application

When the Western Wakka Wakka People's claimant application was filed in 1999, it was made on behalf of the descendants of certain named persons and stated that:

- 'these families recognise that they are direct descendants of the Western Wakka Wakka People'; and
- there were no relatives claiming in the Western Wakka Wakka claim area 'other than those named in this claim'.

The native title claimed was said to be subject to, and in accordance with, 'traditional Western Wakka Wakka laws and customs' but the application contained statements that the authority to lodge the claim was 'through practised family customs and practices' and, at another point, 'according to Western Wakka Wakka laws and recent practices of Aboriginal decision-making on behalf of the ... descendants group'.

The claimant application expressly stated that the claim group did not assert it comprised the only traditional owners of the area. Justice Kiefel noted statements to the effect that:

> [I]n the event that the [Western Wakka Wakka People's] claim is not successful, the claim group would automatically be a party to the Barunggam native title claim [one of seven overlapping claims]. If that latter claim was unsuccessful, those claimants could join this claim—at [8].

An affidavit filed by a member of the claim group deposed that it was comprised of seven family groups or 'lines' from a named ancestor, Jane Darlow. However, a comparison of the list of people deposed to as constituting the claim group with the persons identified in the application showed discrepancies—at [9].

Kiefel J noted that the claimant application spoke of 'Western Wakka Wakka People and their laws and customs', on the one hand, but identified the claimants as 'the descendants of only one member of a family' and referred to customs and practices of 'a family'.

Strike-out application

In support of the strike-out application, Mr Newman submitted that the application did not meet the requirements of ss. 61(1) and 62, including requirements relating to the authorisation. The claimants submitted it should not be assumed that there were other members of the Western Wakka Wakka People because the descendants named in the application may be 'all that remains of them'.

Justice Keifel thought this submission was problematic because:

> In *Members of the Yorta Yorta Aboriginal Community v State of Victoria* ... (2002) 214 CLR 422 at ... [49]-[50] it was pointed out that laws and customs necessary to support native title do not exist in a vacuum; they arise out of and define a particular society—at [11].

In this case, there was nothing to suggest the continued existence of a wider group i.e. a society of Western Wakka Wakka persons who observe that society's laws: 'If such a group did once exist, all that remains are the descendants of one person and they are said to follow family customs and practices'—at [12].

It was found that s. 61(1) was not met because (among other things):

- the families in the claimant application may be part of a larger group i.e. the application stated that the Barunggam people had the same native title rights as the claim group in this case, which was demonstrated by the statement in the application that the Barunggam people 'could elect to join in the claim';
- the assertion that the claim group in this case might also join in the Barunggam people's claim was also 'one of a shared right';
- it could be inferred that this claim group identified with the Barunggam claim group but chose to make 'a discrete claim on behalf of the families over a specific area' and it may be that the families in this case were 'but a sub-group of a larger group';
- the only inference that could be drawn from the reference to the Barunggam people in the application was that those persons were accepted as having the same native title interests as the Western Wakka Wakka i.e. no other explanation was possible;
- therefore, the Barunggam people were 'necessary to the authorisation process' for the Western Wakka Wakka application;
- further, the evidence of the claim group showed that the persons who had been treated as the claim group with respect to the application were not the same in

every respect as those identified as descendants in the application itself—at [14] to [16].

Her Honour was also of the view that the requirements of s. 62 were not met both because of deficiencies in the mapping and description of the claim area and the deficiency or absence of the required affidavits—at [18].

It was found that amendment would not be sufficient to overcome the extent of the non-compliance with ss. 61 and 62 and, in particular:

> The problem of authorisation cannot...be resolved by amendment of the claim and the question of the proper constitution of the claim group must be addressed—at [20].

Decision

The application was struck out—at [24].

Kiefel J noted that, had s. 84C not been relied upon, the court would have been inclined to use the powers given by O 35A of the FCR to dismiss the application because:

> There has been a complete lack of response to the Court's orders, nothing to show that the claimants are motivated to progress these proceedings and nothing to suggest that there is any purpose to be served by their continuation—at [23].