Summary dismissal – issue estoppel, abuse of process

Quall v Northern Territory [2009] FCA 18

Reeves J, 19 January 2009

Issue

The Federal Court was asked to summarily dismiss a claimant application on the grounds of issue estoppel, abuse of process or because it had no reasonable prospects of success. In this 'exceptional case', Justice Reeves dismissed the application, made by Tibby Quall on behalf Danggalaba and Kulumbiringin People, because:

- the decision in *Risk v Northern Territory* [2006] FCA 404 (*Risk*, summarised in *Native Title Hot Spots* Issue 19) gave rise to an issue estoppel to prevent the Quall claimants pursuing their claim in the application before the court;
- it would be an abuse of process for the Quall claimants to now pursue what was called 'the Top End society case'—at [126] to [127].

Mr Quall has appealed against this decision.

Background

In May 2001, with the consent of all the parties, orders were made to divide the proceedings in relation to the area subject of various native title applications around Darwin into Area A and Area B. Area A essentially included the lands within the urban areas of the city and Area B essentially included the areas surrounding Darwin.

Following the making of that order, those parts of the various native title applications relating to Area A were consolidated. The native title application in this case, and a number of similar applications where Mr Quall was the authorised applicant on behalf of a native title claim group (the Quall applications), became part of the consolidated proceedings, along with a number of native title applications where William Risk was the authorised applicant on behalf of a different native title claim group (the Risk applications).

In *Risk*, Justice Mansfield dismissed the consolidated proceedings, going on to make a determination under s. 225 that native title did not exist in Area A. The dismissal order affected the native title application considered in this case and 18 other native title applications, but only in so far as they related to Area A. Those parts of the native title application considered here (and one other Quall application) that related to Area B were not dismissed.

The Northern Territory was the main respondent to the 19 native title applications in *Risk* and remained so in relation to the claimant application considered in this case

(this native title application). The territory applied to strike out this native title application (the strike out application).

The territory relied on three grounds in the strike out application:

- all of the critical issues in this native title application were determined in *Risk* and, therefore, an issue estoppel arose to prevent those same issues being raised again for determination in this native title application;
- in such circumstances, it was an abuse of process to raise the same issues again for determination in this native title application;
- this native title application had no reasonable prospects of success.

The strike out application, therefore, required an identification of the critical issues determined in Risk, the critical issues raised for determination in this native title application and a comparison between the two.

After noting that the court should only summarily dismiss the application if the case for dismissal was very clear, Reeves J summarised the position in this case as follows:

> I must be satisfied to a high degree of certainty that because of an issue estoppel, an abuse of process, or no reasonable prospects of success, this native title application is plainly untenable. In the process, I must take "exceptional caution" to ensure that Mr Quall and the Quall applicants are not deprived of the right to submit a real and genuine controversy for determination, which has not yet been fully and finally determined on its merits. Furthermore, I should approach this strike out application on the version of any evidence that is favourable to Mr Quall and the Quall applicants—at [74].

Issue estoppel

Counsel for the territory submitted that the findings in *Risk* related to the ultimate facts which founded any successful native title application and that Mansfield J had made a final decision thereon in that case. Counsel for Mr Quall submitted that:

- the findings and conclusions in *Risk* did not apply to Area B;
- *Risk* had not determined the 'Top End' society case, as submitted in this matter, and so nothing decided in *Risk* could operate as an issue estoppel to prevent counsel raising this case in relation to Area B;
- this case could be put on two alternative bases:
  - the Danggalaba clan and/or Larrakia/Kulumbiringin case;
  - the Top End society case;
- therefore, no issue estoppel arose from the decision in *Risk*.

Reeves J noted that issue estoppel applies to matters of law or fact and is based upon 'public policy in the finality of litigation and private justice considerations that a person should not be "twice vexed for one and the same cause"'—at [75] referring to *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd & Ors (No 2)* (1966) 2 All ER 536 (*Carl-Zeiss-Stiftung*) at 549 to 550 and 564 to 565 and Spencer, Bower and Turner, *Res judicata* (2nd ed) at 10 to 11.

According to the court, issue estoppel applies where:

- the same question or issue has been decided;
- by a final judicial decision;
- between the parties to that judicial decision (or their privies) who are the same parties in the proceedings where the estoppel is raised—at [76], referring to *Carl-Zeiss-Stiftung* at 564, *Ramsay v Pigram* (1968) 181 CLR 271 at 276 and *Kuligowski v Metrobus* (2004) 220 CLR 363 at [21] and [40].

His Honour was of the view that there 'can be no doubt that the second prerequisite for issue estoppel had been met because the decision of Mansfield J in *Risk* was clearly a final judicial decision'. It was also found that the third prerequisite was met because the parties to the native title application in this case were 'relevantly' the same as the parties in *Risk*. In the court's view, the relevant consideration was whether the parties who were opposed on the issues putatively affected by issue estoppel were common to both sets of proceedings, not whether all the parties are identical in both sets of proceedings. In this matter, the same parties who agitated the issues in *Risk* were seeking to agitate similar issues in this native title application. Those parties were Mr Quall (as the authorised applicant bringing the claim) and the territory—at [77] to [78].

That left for consideration the first prerequisite, i.e. whether the same question or issue had been decided. Reeves J summarised the critical issues decided in *Risk* as being:

- the Larrakia peoples comprised the Aboriginal society at sovereignty that, by the traditional laws and customs of that society's normative system, possessed rights and interests in relation to the lands and waters in the Darwin area, including Area A;
- there had been a substantial interruption in the acknowledgement and observance of the traditional laws and customs of the Larrakia peoples since sovereignty such that native title did not now exist for the lands and waters in Area A; and
- there was not a separate, more confined, Aboriginal society at sovereignty that, by its traditional laws and customs, had rights and interests in relation to the lands and waters in the Darwin area, comprising the Danggalaba clan—at [80].

His Honour agreed with the submission by counsel for the territory that, in this context, the terms 'Larrakia' and 'Kulumbiringin' both refer to the Larrakia peoples and Larrakia land—at [80].

Reeves J considered that, following the decision in *Risk*, Mr Quall was estopped from pursuing the following 'critical' issues in this native title application:

- the Aboriginal society at sovereignty that, by the traditional laws and customs of its normative system, possessed rights and interests in relation to the Darwin area, inclusive of Area A, was some Aboriginal society other than the society of the Larrakia/Kulumbiringin peoples;
- there had been no substantial interruption in the acknowledgment and observance of the laws and customs of that society of Larrakia/Kulumbiringin peoples since sovereignty;

- there was a separate, more confined, traditional Aboriginal society at sovereignty comprising the Danggalaba clan that, by the traditional laws and customs of its normative system, possessed rights and interests in relation to the lands and waters in the Darwin area—at [81].

Issue estoppel — the Danggalaba clan case or Larrakia/Kulumbiringin case
The court then considered the first of the alternative cases, i.e. the Danggalaba clan case and/or the Larrakia/Kulumbiringin case.

It was found that the issues in this native title application were 'identical to those that were determined in *Risk*' because:
- the form of this native title application was identical to the form in which it was as part of the consolidated proceedings in *Risk (*and in the other eight Kulumbiringin-type title applications pursued by Mr Quall in *Risk*), no amendments having been made either when it was a part of the proceedings in *Risk* or subsequently;
- it was clear from the outset that the cases being put in the various Quall applications were based upon traditional laws and customs specific to either the Kulumbiringin (or the Larrakia society at sovereignty) or the Danggalaba clan and the description of those traditional laws and customs made no reference to any wider laws and customs or to any broader society;
- the critical question raised in *Risk* (and also raised in identical form by this native title application) was whether the Aboriginal society at sovereignty that, by the traditional laws and customs of its normative system, possessed rights and interests in relation to the lands and waters in the Darwin area was the Larrakia society described by the Risk applicants or the Danggalaba clan (and/or Larrakia/Kulumbiringin) described by the Quall applicants;
- the lands the subject to this native title application and all the other Quall applications in *Risk* were described in the same, or similar, form throughout (i.e. variously as the Larrakia or Kulumbiringin lands or country, referred to henceforth as 'Larrakia lands');
- the split was done for the parties' convenience rather than to draw any distinction between Area A or B in relation to whether those areas were Larrakia lands;
- therefore, all of the lands in both Areas A and B remained Larrakia lands in relation to which the Quall applicants asserted they held native title rights;
- Mr Quall (or his counsel) referred to these lands as Larrakia lands or country repeatedly in *Risk* and *Risk FC*—at [82] to [87], referring to *Risk v Northern Territory* [2007] FCAFC 46 (*Risk FC*, summarised in *Native Title Hots Spots* Issue 24) at [168].

Reeves J also noted that he did not consider that Mr Quall's change of position from the Larrakia/Kulumbiringin case back to the Danggalaba clan case during the final stages of the hearing in *Risk* affected this conclusion because Mansfield J ultimately found against the Quall claimants on both these cases—at [88].

It was found that:

> [A]ll the prerequisites for an issue estoppel are present in relation to the first of the alternative cases identified by Mr Quall's counsel and together they dictate that the

> decision in Risk gave rise to an issue estoppel to prevent the Quall applicants raising for determination in this native title application, the Danggalaba clan case and/or the Larrakia/Kulumbiringin case—at [89].

Issue estoppel — Top End society case

It was noted that, while the second of the alternative cases (i.e. the Top End society case) was outlined in submissions made on Mr Quall's behalf before the Full Court, it had not been mentioned 'anywhere in the various iterations of this native title application'. Mr Quall's counsel proposed allowing the Quall claimants an opportunity to properly state the case in this native title application and then consider whether it should be struck out.

Reeves J was of the view that there were some 'obvious problems' with this proposal, 'not the least being one of delay', i.e. these proceedings had been on foot for about 12 years, the Full Court hearing (where the Top End society case was first identified) took place some two years ago and the territory's strike out application had been on foot for about three months when this problem first arose. Yet: '[I]n all that time, no attempt had been made by Mr Quall, or his legal advisors, to include the Top End society case in this native title application'—[90].

The court considered that, even if Mr Quall were to be given an opportunity to properly describe the Top End society case, it would 'not be difficult to predict that it would be described in much the same [quite detailed] terms as it was ... before the Full Court'—at [91] and [92], referring to *Risk FC* at [120] to [132] and [161] to [162].

Essentially, according to Reeves J, the Top End society case was founded on the proposition that the relevant traditional Aboriginal society possessed of the rights and interests in Larrakia lands was a wider society 'of Top End Aboriginal tribes'—at [93] and see *Risk FC* at [116].

His Honour noted that the Full Court rejected this case because no such case was put in *Risk*. The case that Mr Quall ultimately put in *Risk* was based on the laws and customs of the Danggalaba Larrakia clan, it having fallen away from a case based on the laws and customs of the Larrakia/Kulumbiringin peoples. Mansfield J properly considered and (in the Full Court's opinion rightly) rejected, the case that was ultimately put to him on four bases:

- the current laws and customs of the Danggalaba clan were not 'traditional' in the sense required by s. 223(1)(a) of the NTA;
- there was uncertainty, or inconsistency, about the composition of the Danggalaba clan and the rules governing its structure;
- there was no satisfactory foundation for finding that the Quall claimants practiced and enjoyed certain rights and interests which arose under laws and customs which only they had inherited from, or had been passed on to them by, their predecessors back to sovereignty; and
- there was no satisfactory foundation for concluding that the Danggalaba laws and customs reflected, or were derived from, the normative system of the Aboriginal

society which existed at sovereignty—at [94], referring the *Risk* FC at [176] to [177].

It was obvious to Reeves J that the Full Court would not have been willing to allow Mr Quall to raise the Top End society case for the first time on appeal. Not daunted by that failure, he noted Mr Quall now wished to adopt the Top End society case in this native title application—at [95].

His Honour found that the submission by Mr Quall's counsel that the Top End society case was not determined in *Risk* 'stated the matter at too high a level of generality'. In a native title determination application made under the NTA, 'the ultimate object or goal is to obtain a determination of native title in favour of the claimant group'. Therefore, the claimant group in this case would have to persuade the court that the Top End society met the various components of the definition of native title in s. 223 of the NTA, as explained by the High Court in *Yorta Yorta Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422:

> Stated in this way, it can be seen that the object or goal the Quall applicants hope to achieve by pursuing the Top End society case in this native title application, is to answer the question ... what was the relevant Aboriginal society at sovereignty that possessed rights and interests in Larrakia lands in Area B ... with the answer: the Top End society—at [96].

In the court's view, while the Top End society case was self-evidently different in itself, and the components of that society were not considered or determined in *Risk*, the critical issue raised by that case was the same as that raised and determined in *Risk*. Accordingly, his Honour found that:

- the first prerequisite for issue estoppel was met in relation to the Top End society case;
- therefore, based in the earlier findings in relation to the other two, all of the prerequisites for an issue estoppel were present in relation to Top End society case;
- together, they dictated that the decision in *Risk* gave rise to an issue estoppel to prevent the Quall claimants pursuing the Top End society case in this native title application—at [97] and [99].

Abuse of process

In the event that the decision on issue estoppel was wrong, Reeves J considered whether it would constitute an abuse of process for the Quall applicants to now pursue the Top End society case in this native title application. Order 20 rule 4 of the Federal Court Rules empowers the court to stay or dismiss a proceeding where it is considered to be an abuse of process. His Honour noted that the underlying concerns are the same as for *res judicata* and issue estoppel, i.e. 'a person should not be troubled twice for the same cause and public policy concerns in the finality of litigation'. The court drew an analogy between the abuse of process powers and the exercise of court's powers of summary dismissal, noting the power to dismiss was to be exercised very sparingly and only in exceptional circumstances—at [100] and

[101], referring to *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699 (*Spalla*) at [64] and [67].

The court identified a non-exhaustive list of matters relevant to the determination of whether an abuse of process was occurring:

- the importance of the issue in, and to, the earlier proceedings;
- the opportunity available, and taken, to fully litigate the issue;
- the terms and finality of the finding as to the issue;
- the identity between the relevant issues in the two proceedings;
- any plea of fresh evidence and the reason why it was not part of the earlier proceedings;
- the extent of the oppression and unfairness to the other party if the issue is re-litigated;
- the impact of re-litigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
- an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process—at [102], referring to *State Bank of NSW v Stenhouse* (1997) ATR 81-423 at 64,098 and *Spalla* at [70].

His Honour was of the view that:

- the Quall claimants were seeking to raise in these native title proceedings that the Top End society was the relevant Aboriginal society at sovereignty and possessed rights and interests in Larrakia lands in Area B;
- the issue of the Top End society was being added as an alternative society to the three Aboriginal societies that were proffered in *Risk*—at [103].
- It was found that it would be an abuse of process to allow the Top End society case to be pursued in this application for, among others, the following reasons:
- the issue as to what was the relevant Aboriginal society at sovereignty possessing rights and interests in Larrakia lands was one of the ultimate issues in *Risk* and an issue of paramount importance in that case;
- the Quall claimants had an ample opportunity, of which they availed themselves, to fully litigate that issue in *Risk* and the findings on that issue in *Risk* were clear, directly apposite and final;
- the critical issue raised by the Top End society case is the same or, at least, very similar to the critical issue that was raised and determined in *Risk*;
- it would be contrary to the public policy concerns for the finality of litigation, and in maintaining public confidence in the administration of justice, to allow the Quall claimants to pursue the Top End society case;
- they have already put forward, as a real and genuine controversy, the question whether the Danggalaba clan (and/or the Larrakia/Kulumbiringin) was the relevant Aboriginal society at sovereignty, a question which was determined on the merits against them in relation to Area A;
- they now want to put forward that the Top End society was the relevant Aboriginal society at sovereignty but there was much to suggest that this did not raise a real and genuine controversy, 'not the least being the decision ... in *Risk* that the relevant Aboriginal society at sovereignty possessing rights and interests in Larrakia lands was the Larrakia peoples';

- the balance between the principle of providing free access to the courts and the principle of not vexing a person twice for the same cause tipped in favour of the territory—at [104] to [123].

Reeves J noted that: 'Thus far, Mr Quall has ... used every level of the federal courts system to pursue his case. At some point, there must be an end to litigation and I consider it has now been reached'—at [118].

His Honour also took into account the fact that:

> [T]here are many other native title applicant groups waiting ... to have their native title determination applications determined. ... [I]t is in the interest of the administration of justice ... that I ensure that the Court's resources are devoted to the resolution of real and genuine native title determination applications that have not yet been provided with a determination on their merits. Finally, ... it would not be in the interests of promoting public confidence in the administration of justice to create a situation where this Court could make conflicting determinations as to what the relevant Aboriginal society at sovereignty was for Larrakia lands, between the Larrakia peoples as found in *Risk* and the Top End society as now sought to be proffered by the Quall applicants in this native title application—at [119].

His Honour held it was not necessary to consider whether Mr Quall's native title application had any reasonable prospects of success because of his conclusion that Mr Quall's application based on a Top End society was an abuse of process—at [124].

Conclusion – application dismissed

Reeves J dismissed the native title application because he was satisfied:

- that the decision in *Risk* gave rise to an issue estoppel to prevent the Quall claimants pursuing the Danggalaba clan case, the Larrakia/Kulumbiringin case or the Top End society case in this native title application;
- it would be an abuse of process for the Quall claimants to now pursue the Top End society case in this native title application—at [126] to [127].

In making this decision, his Honour appreciated:

> [T]he extreme caution, or high degree of certainty, that ... should be applied when deciding whether to summarily dismiss an application such as this. I also take into account that at various times during the long history of these proceedings Mr Quall has not been legally represented. Notwithstanding these matters, ... this is one of those exceptional cases where this Court should intervene to summarily dismiss this native title application—at [128].