Summary dismissal – issue estoppel

Dale v Western Australia [2009] FCA 1201

McKerracher J, 23 October 2009

Issue

This case concerned an application for the summary dismissal pursuant to Order 20 rule 4 of the Federal Court Rules (FCR) of a claimant application made on behalf of the Wong-Goo-TT-OO. The State of Western Australia argued a conclusion reached in earlier related proceedings that the native title claim group in that application was not, and had never been, a 'society' for the purposes of s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA) raised an issue estoppel. The motion for summary dismissal was allowed and the Wong-Goo-TT-OO application was dismissed.

Appeal filed

On 12 November 2009, the Wong-Goo-TT-OO appealed from the whole of the judgment. The appeal was filed one day after the Full Court handed down judgment in an appeal on a similar issue in *Quall v Northern Territory* [2009] FCAFC 157, summarised in *Native Title Hot Spots* Issue 31. In that case at [36] to [37], aspects of Justice McKerracher's reasoning in this case are referred to with approval.

Background

A determination of native title was sought on behalf of the Wong-Goo-TT-OO in a claimant application made in 1998. It covered a broad area of the Pilbara region in Western Australia, including various town sites. When it was made, parts of areas it covered were subject to other claimant applications, including one made on behalf of the Ngarluma and Yindjibarndi peoples. Subsection 67(1) of the NTA requires the Federal Court:

> [T]o make such orders as it considers appropriate to ensure that to the extent that native title determination applications cover the same area, they are dealt with in the same proceedings.

This meant that, in considering the claim by the Ngarluma and Yindjibarndi to hold native title, the court was required to (and did) deal with (among others) the Wong-Goo-TT-OO application, but only to the extent that the area it covered overlapped with the area covered by the Ngarluma/Yindjibarndi application.

Justice Nicholson delivered the substantive decision on native title in *Daniel v Western Australia* [2003] FCA 666 (*Daniel*, summarised in *Native Title Hot Spots* Issue 6). Final orders were made in 2005, including a determination of native title recognising the Ngarluma People and the Yindjibarndi People as each separately holding native title to certain areas that had been subject to their joint claim—see *Daniel v Western Australia* [2005] FCA 536.

As a result of that determination, the Ngarluma People were recognised as holding native title in relation to the area surrounding the town sites of Wickham, Point Samson, Karratha and south of the Burrup Peninsula. However, the town sites themselves were expressly excluded from the Ngarluma/Yindjibarndi application. (The Ngarluma People have since filed a claimant application over those areas.) Those town sites were covered by the Wong-Goo-TT-OO application.

In *Daniel v Western Australia* [2005] FCA 536, orders were made to dismiss the Wong-Goo-TT-OO application to the extent that it overlapped with area covered by the Ngarluma and Yindjibarndi application. This meant that the Wong-Goo-TT-OO application was *not* dismissed over the town sites because those areas were not subject to the Ngarluma/Yindjibarndi application.

The Wong-Goo-TT-OO appealed from the decision to partially dismiss their application. The Ngarluma People (with the Yindjibarndi People) appealed against aspects of the judgment relating to extinguishment. The appeals were heard together but separate reasons for judgment were given by the Full Court. The key aspects of Nicholson J's findings in *Daniel* relevant to the Wong-Goo-TT-OO were upheld by the Full Court in *Dale v Moses* [2007] FCAFC 82 (*Dale*). The appeal by the Ngarluma People and the cross-appeals by the state and the Commonwealth were determined in *Moses v Western Australia* (2007) 160 FCR 148; [2007] FCAFC 78 (*Moses*). Both of these decisions are summarised in *Native Title Hot Spots* Issue 25.

State's application for dismissal

The state argued that the Wong-Goo-TT-OO application should be dismissed pursuant to O 20 r 4 of the FCR on the basis that no reasonable cause of action was disclosed. It contended that the claim made in that application was bound to fail because Wong-Goo-TT-OO were estopped from asserting that they form a society that has existed continuously since sovereignty because of key 'findings' made in *Daniel*. Therefore, the critical issue in this case was 'whether judicial findings were actually made' in *Daniel* to that effect—at [5] and see [55].

As a secondary argument, the state contended it was 'highly implausible' the Wong-Goo-TT-OO could establish native title over the town sites of Karratha, Wickham and Point Samson when (among other things) Nicholson J held in *Daniel* that the Ngarluma People held native title to the areas surrounding those town sites and that the Wong-Goo-TT-OO did not.

Principles governing whether no cause of action disclosed

McKerracher J noted that O 20 r 4 provides for the dismissal of a proceeding if the court is satisfied no reasonable cause of action is disclosed. It was noted that this was not an

application for summary judgment under s. 31A of the *Federal Court of Australia Act 1976* (Cwlth), a section that 'lowered the bar for summary dismissal'—at [10].

After citing the authorities relevant to whether 'no cause of action' was disclosed (including those in relation to native title), his Honour noted that:

- no proceeding should be summarily dismissed except in a very clear case;
- if there is a real question of fact or law to be determined, and the rights of the parties depend upon it, a proceeding should not be summarily dismissed;
- the fact that detailed argument may be necessary to highlight the contention should not be determinative of the issue;
- the court should have regard to the version of facts most favourable to the applicant but this does not mean that every fact pleaded has to be accepted—at [11] to [16].

Issue estoppel

Reference was made at [24] to *Blair v Currun* (1939) 62 CLR 464, where Dixon J said at 531-532 that:

> A judicial determination directly involving an issue of fact or of law **disposes once and for all of the issue**, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion. (McKerracher J's emphasis)

His Honour rephrased the doctrine as being that 'an issue estoppel is created in relation to any issue of fact or law that is legally indispensable to a prior decision involving the same parties'. It was noted that it only applies if the following requirements are met:

- the same question has been judicially decided in earlier proceedings;
- the judicial decision said to create the estoppel was final; and
- the parties to the judicial decision (or their privies) were the same persons as the parties to the proceedings in which the estoppel is raised—at [24] to [25], referring to *Carl Zeiss Stiftung v Rayner & Keller Ltd [No 2]* [1967] 1 AC 853.

Both the decision and the determination made in *Daniel* were 'quite clearly' final decisions, subject only to a right of appeal (or, which was not noted, revision or revocation of the determination pursuant to s. 13(5) of the NTA). While a decision may be final notwithstanding any right of appeal, in this case Wong-Goo-TT-OO had exhausted all avenues of appeal—at [78] to [79].

It was sufficient that the parties between whom the estoppel was raised (the Wong-Goo-TT-OO and the state) were parties in each of the matters. The fact that the Wong-Goo-TT-OO application had been consolidated with the Ngarluma and Yindjibarndi application (among others) pursuant to s. 67(1) of the NTA did not detract from the commonality as to the identity of parties—at [33] to [38].

Therefore, the only outstanding issue was whether the same question has been decided in the *Daniel* proceedings.

Was determination of Wong-Goo-TT-OO's status in *Daniel* essential to determination of the native title question?

In addressing this question, it was first noted that:

> After exhaustive analysis, Nicholson J in *Daniel* concluded that Wong-Goo-TT-OO was not and had not been a society in the relevant sense. To appreciate the significance of the conclusion (in order to determine whether Wong-Goo-TT-OO is issue estopped), it is necessary to closely consider what it was that Nicholson J necessarily had to determine in *Daniel*. In that regard, there can be no doubt that his Honour had to ascertain whether Wong-Goo-TT-OO was a society in order to ascertain whether it could hold native title. That is evident from the very nature of the concept of native title—at [39].

After noting that the statutory definition in s. 223(1) of the NTA was 'clearly the crucial question and the starting point', reference was made to the relevant case law, in particular *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (summarised in *Native Title Hot Spots* Issue 3). His Honour went on to note that the Wong-Goo-TT-OO:

> [D]id not establish that it was a [single] cognatic [kin] group and did not establish that it was a traditional group in any other sense ... . Without establishing that there had been a society which has had a continuous existence since sovereignty, it was impossible to satisfy the definition of native title in s 223(1) NTA—at [52], referring to *Dale* at [15] and [18] and *Daniel* at [384], [387], [389], [390] and [506].

Therefore, his Honour was of the view that 'there is no scope for contending that the issue determined in *Daniel* will be different in any future proceedings'. However, the 'primary thrust' of the Wong-Goo-TT-OO submissions was that no 'finding' (or indeed no 'solemn finding') was made in *Daniel*. Therefore:

> The most important issue in the present debate is whether Nicholson J relevantly made a 'finding' in terms for which the State contends. If there was no ultimate finding, there can be no issue estoppel. Although issue estoppel can operate as to fact and to law, it must be an **issue** for the doctrine to arise. Simply to discard one aspect of a claim would not raise an issue for the purposes of issue estoppel. Frequently a party may fail or succeed on one aspect of a claim while having a different result on others—at [53] to [55], emphasis in original.

Was there a finding in *Daniel* capable of operating as an issue estoppel?

His Honour considered various cases and noted (among other things) that:

- in finding whether something has been 'solemnly found against a party' or not, 'the form of the first proceeding, particularly the issues joined or admitted on the pleadings will be important';
- the essential task was to distinguish between those matters that were 'fundamental to the decision or necessarily involved in its legal justification or foundation' from matters which were not 'in point of law the essential ground work of the conclusion'—at [63] and [71].

The court rejected the Wong-Goo-TT-OO's argument that there must be a positive finding of a failure to establish, on balance of probabilities, the existence of native title in order to create an estoppel (or, in other words, that a negative conclusion, such as not being satisfied, cannot constitute an ultimate finding for the purposes of an issue estoppel)—at [72].

His Honour was of the view that:

> [C]onclusions reached about ultimate facts as distinct from evidentiary facts must necessarily be findings. That does not necessarily conflict with the observation that a failure to find a matter alleged does not establish the truth of the contrary of that which is alleged. As all the cases indicate, it is a matter of examining the real issues in dispute, the task for the Court, and the basis on which the Court arrived at its conclusion in order to assess whether a determination is, for the purposes of an issue estoppel, in the nature of an ultimate finding, however it may have been expressed—at [73].

When McKerracher J analysed the issues before Nicholson J, 'there was no doubt that positive findings of fact on the critical issue were made against Wong-Goo-TT-OO in *Daniel*' and: 'The Full Court similarly had no doubt on that issue'—at [75].

His Honour went on to note that:

> Importantly the central reasoning behind the decision in *Daniel* was that Wong-Goo-TT-OO did not hold native title over any part of the ... area [dealt with in those proceedings] because Wong-Goo-TT-OO was not a group capable of holding native title. Far from being peripheral in any sense [as had been argued], this was the first and fundamental issue that his Honour had to decide and it was decided clearly against Wong-Goo-TT-OO—at [76].

This 'fundamental finding' also disposed of the suggestion that 'different issues may arise' in relation to the town sites because, according to the court: 'There is no geographical element attached to the central determination in *Daniel*'—at [77].

Policy considerations

His Honour thought it 'doubtful' there was 'room for any discretionary factor' to operate in relation to issue estoppel. However, if there was, then the doctrine underlying issue estoppel was relevant in this case. Wong-Goo-TT-OO's assertion that they formed the requisite society had been 'exhaustively and extensively ventilated' in previous hearings. All that entailed would be 'wasted if the Wong-Goo-TT-OO were permitted to progress the present claim'. As was noted:

- there is 'a real interest in achieving finality of litigation';
- it would be 'an undesirable conflict' if a judge hearing future proceedings reached a different conclusion in relation to the 'society' issue—at [80].

The submission that the state was not acting as a model litigant because it refused to negotiate about the claim was rejected because (among other things) the state was not

obliged to continue to negotiate for resolution of a claim if it properly formed the view there was no basis to it and it would 'clearly produce an impractical outcome' to hold otherwise–at [81], referring to *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

Registration of the claim irrelevant

His Honour found that registration of the Wong-Goo-TT-OO's claim on the Register of Native Title Claims was irrelevant to the question of issue estoppel because this was an administrative act that involved 'no real assessment of the merits of the claim'—at [82] to [83], although (with respect) it should be noted that s. 190B does involve an administrative assessment of the some of the merits of the claim.

Alternative argument

As the court had concluded the matter on the basis of issue estoppel, it was not necessary for his Honour to rule on the alternative argument that it was 'highly implausible' the Wong-Goo-TT-OO could establish native title over the town sites but did note he would have been less inclined to allow it notwithstanding it had 'a logical appeal'. 'Serious' implausibility or improbability fell 'a little short of the mark' required for the purposes of O 20 r 4 of the FCR on the ground that no cause of action was disclosed—at [86] to [90].

Decision

The state's motion for summary dismissal was allowed and the Wong-Goo-TT-OO application dismissed with no order as to costs.