Summary dismissal – issue estoppel

Holborow v Western Australia [2009] FCA 1200

McKerracher J, 23 October 2009

Issue

The State of Western Australia sought to have the Yaburara/Mardudhunera claimant application dismissed to the extent it related to two town sites pursuant to Order 20 Rule 4 of the Federal Court Rules (FCR) on the basis that no reasonable cause of action was disclosed. It was argued that findings in an earlier related decision gave rise to an issue estoppel. The motion for summary dismissal was allowed on that basis. Given the court's conclusions on the issue estoppel argument, it was not necessary to rule on the alternative arguments the state raised and so they are not summarised here.

Background

The area surrounding the relevant part of the Yaburara/Mardudhunera application had already been subject to a determination recognising the Ngarluma People as the native title holders. There was an overlap between the Yaburara/Mardudhunera application area and that covered by (among others) an application made on behalf of the Ngarluma/Yindjibarndi. Orders were made pursuant to s. 67(1) of the *Native Title Act 1993* (Cwlth) (NTA) to deal with those applications in the same proceeding but only to the extent that the area covered by the former overlapped the area covered by the latter. Justice Nicholson delivered the substantive decision on native title *Daniel v Western Australia* [2003] FCA 666 (*Daniel*, summarised in *Native Title Hot Spots* Issue 6).

Final orders, including a determination recognising the Ngarluma People and the Yindjibarndi People as each separately holding native title to certain areas, were made in *Daniel v Western Australia* [2005] FCA 536. The Yaburara/Mardudhunera application was dismissed to the extent that the area it covered overlapped the area covered by the Ngarluma/Yindjibarndi application. However, there was no overlap between those applications in relation to certain town sites. Therefore, the Yaburara/Mardudhunera claim remained on foot in this respect.

Concession in relation to Dampier

The state sought to have the application dismissed over the town sites of Dampier and Karratha. However, during the hearing of the state's summary dismissal application, the Yaburara/Mardudhunera conceded that the Dampier town site could not be claimed because of prior extinguishment. Despite this 'binding concession', Justice McKerracher thought it was 'desirable' to put the question 'beyond doubt' and so made an order dismissing the claim for native title in that respect. While the reasons summarised below are 'primarily' directed to the claim over Karratha, the court would have reached the

same conclusion in respect of Dampier in the absence of the concession—at [19] and [119].

Principles governing summary dismissal

His Honour noted the state's application was made pursuant to O 20 r 4 of the FCR, which applies to proceedings commenced before 1 December 2005 and (relevantly) allows the court to dismiss a proceeding if it is satisfied that 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 [22].

Principles governing whether no cause of action disclosed

After citing the relevant authorities, the court 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 [23] to [29].

Issue estoppel

Reference was made at [30] 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 [30] to [31], referring to *Carl Zeiss Stiftung v Rayner & Keller Ltd [No 2]* [1967] 1 AC 853.

Same parties or their privies

This condition was met. The Yaburara/Mardudhunera and the state were parties to the previous proceedings (i.e. those dealt with in the *Daniel* litigation) and were parties to proceedings before McKerracher J. The Ngarluma People were a party to the previous proceedings because they were part of the claim group in the Ngarluma/Yindjibarndi

application and 'received their own determination'. Alternatively, they were 'clearly privies' in the requisite sense because they had 'a key interest in that decision and a benefit from it'. In these proceedings, the Ngarluma People were entitled to party status but his Honour made no order to that effect, given the finding on issue estoppel. It was noted that neither the existence (or addition) of different respondents nor the fact that there were parties to the earlier proceedings who are not parties to the current proceedings made any difference to the question of issue estoppel—at [3] to [10] and [98].

Was a finding made in *Daniel* capable of operating as an issue estoppel?
In order to determine the issue estoppel argument, it was necessary to consider what it was that Nicholson J had to determine in *Daniel*. In this respect, McKerracher J noted the importance of the definition of native title in subsection 223(1) of the NTA—at [39] to [47].

In addition to advancing some additional arguments, the Yaburara/Mardudhunera adopted the submissions made on behalf of the Wong-Goo-TT-OO in *Dale v Western Australia* [2009] FCA 1201 (summarised in *Native Title Hot Spots* Issue 31). An 'important aspect' of that argument was the contention that there was no relevant 'finding'. 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 [49].

It was central to the issue estoppel argument to determine whether or not Nicholson J made findings on the topic of whether the Yaburara/Mardudhunera had the ability to hold native title. After considering various cases, it was noted (among other things) that 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 [61] and [65].

The court rejected the argument that there must be a positive finding that the Yaburara/Mardudhunera failed to establish, on the balance of probabilities, the existence of native title in order to create an estoppel. Negative findings can 'still constitute an estoppel'—at [66] and [90].

It was noted that Nicholson J was of the view that:

- the Yaburara/Mardudhunera who claimed to be Yaburara had not established this was the case;

- the evidence supported the view that the Yaburara/Mardudhunera claimed as Mardudhunera;
- although the Mardudhunera group had held the requisite continuity since sovereignty, the evidence did not establish that the Mardudhunera had exercised the remaining two rights found to be presently observable continuously back to sovereignty;
- on that basis, no requisite connection was established and, even if the Mardudhunera group had connection at the time of sovereignty, it had not survived the passage of time—*Daniel* at [352], [375] and [501].

McKerracher J also referred to *Moses* at [305] and [313], where the Full Court was satisfied that Nicholson J:

- 'made findings' that the evidence established that Ngarluma country 'included the Karratha area' and 'supported an inference that the Ngarluma people have retained a continuous connection with the Karratha area';
- treated the Ngarluma area as a whole because he formed the view on the evidence that it was all part of Ngarluma lands—at [86] to [87].

It was noted that:

> The ... claim ... in *Daniel* was brought on the basis that the areas claimed were the areas where the Yaburara and the Mardudhunera People held native title. ... . Nicholson J rejected and dismissed the claims insofar as they overlapped the Ngarluma/Yindjibarndi claim and found that the areas were areas over which only the Ngarluma or Yindjibarndi People held native title. Accordingly, his Honour's finding was, in effect, that the areas surrounding the townsites were not Yaburara or Mardudhunera country and the Yaburara/Mardudhunera People did not hold any native title rights within it—at [91].

Further, at [93], his Honour cited the extensive passages in *Daniel* from which it was 'apparent' that:

> Evidence given by the Yaburara/Mardudhunera witnesses in *Daniel* as to boundaries of the Yaburara/Mardudhunera country or Yaburara country or Mardudhunera country ... did not draw a distinction between areas surrounding the townsites and the townsites themselves which had been excluded from the hearing—at [92].

Did policy considerations militate against issue estoppel?

The court took the view that the concept of issue estoppel was 'a substantive rule of law' and that, if an issue estoppel is found, there 'does not appear to be any discretionary basis to ignore it'. However, even if there was 'room' for discretion, the doctrine underlying issue estoppel was relevant. In this case:

- the claim by the Yaburara/Mardudhunera People to be the relevant society 'has been exhaustively and extensively ventilated in previous hearings';
- all that entailed would be 'wasted' if they were allowed to progress their claim to the Karratha town site;
- there is a real interest in achieving finality of litigation;

- it would be 'undesirable' if a judge in future proceedings reached a different conclusion than that reached by Nicholson J on the same point—at [102] to [109].

The submission that the state was not acting as a model litigant in refusing to negotiate in this case was rejected because (among other things):

> There is ... no reason to believe that in circumstances where there is a proper foundation for a view that a claim has no basis, the State should continue to negotiate for resolution of it. That would clearly produce an impractical outcome—at [110], referring to *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

Was registration of the claim relevant?

McKerracher J found that registration of the 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 [111] to [112].

Conclusion on issue estoppel

McKerracher J was satisfied the findings in *Daniel* (supported by *Moses*) were necessarily negative to the native title claim made by the Yaburara/Mardudhunera. To the extent that those findings were based on the failure to be satisfied by their evidence, the Yaburara/Mardudhunera are estopped by the findings that:

- they do not hold native title in the area; and
- any use and enjoyment of resources and protection of important places they engaged in did not have the required continuity back to sovereignty and was thus not traditional—at [90] and [93] to [95].

It would be 'wholly artificial ... to suggest ... that a different conclusion might be reached' as to Yaburara/Mardudhunera's status within the town site of Karratha 'as distinct from the entirety of the surrounding claim area' when no such distinction was made in the evidence. Indeed, such a conclusion would be 'inconceivable'. Therefore, his Honour concluded that the Yaburara/Mardudhunera are estopped from advancing a claim for native title in respect of the town site of Karratha—at [99] to [101] and [118].

Decision

While exceptional caution was required before the power to dismiss on a summary basis was exercised, in this case McKerracher J had 'no doubt that the Yaburara/Mardudhunera are estopped in the manner asserted' by the state and so allowed the motion for dismissal. Pursuant to s. 85A, there was no order as to costs—at [120].