Summary dismissal – issue estoppel

Quall v Northern Territory [2009] FCAFC 157

Moore, Lindgren & Stone JJ, 11 November 2009

Issue

Tibby Quall, on behalf Dangalaba and Kulumbiringin People, appealed against the summary dismissal of their claimant application pursuant to O 20 r 4 of the Federal Court Rules (FCR). The appeal was dismissed because it was held that the judge at first instance was correct to dismiss the proceedings because an issue estoppel arose that was fatal to the application.

Background

In May 2001, orders were made to divide proceedings in relation to lands the subject of various native title applications in and around Darwin into Area A and Area B. The proceedings relating to Area A dealt with part of the area subject to Mr Quall's application. A number of other claimant applications made by William Risk on behalf of the Larrakia People were also dealt with (in whole or in part).

Justice Mansfield dismissed the proceedings in relation to Area A and later made a determination under s. 225 of the Native Title Act 1993 (Cwlth) that native title did not exist in Area A. The dismissal (and the determination) only affected Mr Quall's application in so far as it related to Area A, i.e. the part of that related to Area B was not dismissed. It was the application making a claim to Area B that was the subject these appeal proceedings. The Northern Territory applied to strike out the application pursuant to O 20 r 4. At first instance, Reeves J dismissed the application because:

- Mansfield J's decision in relation to Area A in *Risk v Northern Territory* [2006] FCA 404 (*Risk*, summarised in *Native Title Hot Spots* Issue 19*)* gave rise to an issue estoppel that prevented Mr Quall from pursuing the claim in relation to Area B;
- it would be an abuse of process for the Quall claimants to pursue what was called 'the Top End society case'—see *Quall v Northern Territory* [2009] FCA 18 (*Quall*, summarised in *Native Title Hot Spots* Issue 30*)*.

Mr Quall's appeal from the judgment in *Risk* was dismissed by the Full Court. His application for special leave to appeal to the High Court from that judgment was also dismissed—see *Risk v Northern Territory* [2007] FCAFC 46 (summarised in *Native Title Hot Spots* Issue 24) and *Quall v Northern Territory* [2008] HCATrans 127.

Mr Quall appealed to the Full Court from Reeves J's judgment in *Quall*. The only issue in the appeal was whether Reeves J was correct to conclude that certain findings in *Risk* give rise to an issue estoppel that precluded Mr Quall and those on whose behalf he

claimed (referred to collectively as 'the Quall applicants') from proceeding with their application for a determination of native title over Area B.

Preliminary issues on appeal

Justices Moore, Lindgren and Stone were of the view that leave to appeal was not required because the judgment below was final. However, as the Northern Territory did not contend otherwise, it was not necessary to consider the question further. Mr Quall's application to adjourn the appeal and vacate the hearing date was dismissed but he was granted leave to extend time to file the notice of appeal by one day because it was in the interests of justice to do so. Leave to make an amendment that was essentially a collateral attack on Mansfield J's judgment in *Risk* was refused. Other proposed amendments were found to be unnecessary because they were covered by the existing grounds of appeal. The court declined to allow the reading of an affidavit said to contain evidence that was unavailable at the time of the hearing before Reeves J because the 'reasonable inference to be drawn ... was that the material had been available ... but ... the appellants had not accessed it' until after the hearing—at [21] to [26].

Summary dismissal on grounds of issue estoppel

Order 20 r 4 would apply in this case if the court was satisfied that, 'for the proceeding generally or for a claim for relief in the proceeding ... no reasonable cause of action is disclosed' because an issue estoppel arose from *Risk*. The court noted with approval the applicable principles as set out by Reeves J, which (in summary and relevantly) are:

- the court should only dismiss the application if the case for doing so was very clear;
- therefore, in this case the court must be satisfied to a high degree of certainty that the application is plainly untenable because of an issue estoppel upon the version of the evidence favourable to the applicant;
- generally, no weighing of conflicting evidence or of inferences that might be drawn from it should be undertaken;
- the court must be exceptionally cautious to ensure that the claimants were not deprived of the right to submit for determination a real and genuine controversy that had not yet been fully and finally determined on its merits—at [11].

Further, for the doctrine of issue estoppel to apply, the territory had to prove that the same question or issue has been decided by a judicial decision in earlier proceedings (i.e. in *Risk*) that was final and that the parties to that decision (or their privies) were the same parties (or their privies) in the proceedings where the estoppel is raised (i.e. in *Quall*). It was noted that these well-established principles apply to an application under O 20 r 4 for summary dismissal of a native title determination application made under the NTA—at [11] to [12].

Common parties

In this case, the Quall applicants and the territory were both parties in the proceeding in *Risk*. The court agreed with Reeves J that it was not necessary that the parties in *Risk* and

Quall be identical. All that was necessary is that 'the parties are common to both sets of proceedings'. The court noted that, while issue estoppel may only be raised against a party who is a party to both of the relevant proceedings (in this case, *Risk* and *Quall*), it did not follow that a plea of issue estoppel would be defeated merely because a new party was added to, or a previous party was removed from, the second proceeding—at [36], referring with approval to (among other cases) *Dale v Western Australia* [2009] FCA 1201 (summarised in *Native Title Hot Spots* Issue 31).

Identical issues

The fact that the proceedings in *Risk* related to a different area of land (Part A) did not mean 'that there cannot be the requisite identity of issue'. The 'precise issue decided in the first place' (in *Risk*) must be identified 'in order to ascertain whether it is identical with what is sought to be litigated in the second place' (i.e. in *Quall*)—at [38] to [39].

After outlining elements of the submissions made on appeal and the reasons given in *Quall* and *Risk*, the court noted that:

> In relation to both Parts A and B the claim to native title depended on the uninterrupted observance of laws and customs from sovereignty. Those laws and customs were asserted to be those of a particular group of Aboriginal people which includes the appellants—at [43].

Their Honours accepted that certain points made in the territory's submissions provided an 'accurate summary' as to the identity of that Aboriginal group. They included that:

- Mr Quall has always asserted in this application that the land claimed was Larrakia land, although he adopted the term 'Kulumbiringin land' rather than 'Larrakia land' in the current version;
- notwithstanding this change in 'nomenclature', there was no change in 'the underlying identity or character of the land in question';
- the claim group is said to comprise certain named descendants of Kulumbiringin ancestors;
- in Attachment S, which sets out the factual basis for the claim, it is asserted that the native title claim group acknowledge and observe traditional laws and customs because of a connection to land 'in the Darwin region, and subject areas, what we call Kulumbiringin land';
- in the same attachment, it is accepted that 'Larrakia', rather than 'Kulumbiringin', has generally been used in ethnographic and historical material to describe the Aboriginal people of the Darwin region and it is asserted that that the traditional area of Kulumbiringin country is best depicted on the attached map by Norman Tindale called 'Aboriginal Tribes of Australia';
- that map shows the boundaries of lands and waters identified as 'Larakia', which 'coincide generally with the description in Attachment S of Kulumbiringin country';
- the application makes no distinction within the lands identified as Kulumbiringin lands or country about matters of connection or traditional laws and customs;

- therefore, it is 'clear' that the application is founded on an assertion that Area B was held, at sovereignty, by a group of Aboriginal people pursuant to the traditional laws and customs of the same society of Aboriginal people as the land the subject of findings in *Risk*.

Decision

The appeal was dismissed because an issue estoppel 'inevitably' followed from certain findings made in *Risk*, a proceeding to which both the Quall claimants and the territory were parties. The findings were:

- the land in Part B, as in Part A, is Larrakia land;
- the Larrakia peoples are the relevant Aboriginal society for Larrakia lands; and
- the laws and customs acknowledged and observed by the Larrakia peoples at sovereignty have been subject to substantial interruption between that time and the present day—at [45].