Dale v Western Australia [2011] FCAFC 46

Moore, North and Mansfield JJ, 31 March 2011

Issue

These appeal proceedings dealt with whether a claimant application should have been dismissed:

- on the grounds of an issue estoppel; and
- for substantially similar reasons to those supporting issue estoppel, because the application was an abuse of process.

The Full Court dismissed the appeal because it would have been an abuse of the court's process to allow the application to proceed.

Background

A determination of native title was sought on behalf of the Wong-Goo-TT-OO (WGTO) in a claimant application made in 1998. It covered part of the Pilbara region in Western Australia, including various town sites. When it was made, parts of the area it covered were subject to other claimant applications, including one made on behalf of the Ngarluma and Yindjibarndi peoples (NY). Subsection 67(1) of the *Native Title Act 1993* (Cwlth) (NTA) requires the 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 NY claim, the court was required to (and did) deal with (among others) the WGTO application but only to the extent that the area it covered overlapped with the area covered by the NY 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, 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 NY application. (The Ngarluma People have since filed a claimant application over those areas.) Those town sites were covered by the WGTO application. Therefore, since the WGTO application was dismissed only to the extent of any overlap with area covered by the NY application, the WGTO application remained on foot over the town sites not covered by the NY application.

The WGTO unsuccessfully appealed against judgment: see *Dale v Moses* [2007] FCAFC 82, summarised in Native Title Hot Spots Issue 25. The remainder of the WGTO claimant application was dismissed in *Dale v Western Australia* [2009] FCA 1201 (summarised in Native Title Hot Spots Issue 31). The decision to dismiss was based on findings concerning WGTO in *Daniel*. The court accepted the State of Western Australia's argument that the conclusion in those proceedings that the WGTO was not, and had never been, a 'society' for the purposes of s. 223(1) raised an issue

estoppel. The state's motion for summary dismissal was allowed and the WGTO application was dismissed. The case summarised here was an appeal by WGTO against that judgment.

Issue estoppel doctrine may not apply in native title proceedings

Justices Moore, North and Mansfield held, in this instance, that it was not necessary for them to resolve the legal question about whether issue estoppel had any field of operation in applications for native title determinations. However, their Honours entertained real doubts as to its applicability—at [88].

Among other things, the court pointed out that s. 67(2) of the NTA provides that, to the extent of any overlap in area, orders must be made to ensure that native title determination applications are dealt with in the same proceedings. The effect of such an order:

> [W]ill typically be to create separate proceedings concerning a particular area with respondents which are only a subset of the respondents to the initial application or applications on which the order operates. Any determination made concerning the area will bind the world at large. It is, in effect, a judgment *in rem*: see *Wik Peoples v Queensland* [1994] FCA 967; (1994) 49 FCR 1. The determination will bind persons beyond parties to the proceedings. Because of the special characteristics of a judgment *in rem*, it operates outside the usual field of operation of the principle of issue estoppel requiring, as the latter does for its engagement, that the same parties (or their privies) were parties in the proceedings in which the issue was earlier determined. That is, a judgment *in rem* involves the determination of the status of the person or thing and binds the world at large and not simply the parties to the litigation—at [92].

Decision

The court held that:

- the primary judge was correct to dismiss the application;
- the WGTO essentially sought to have the same issue as determined in *Daniel* determined differently in the WGTO claimant application;
- the attempt to do so constituted an abuse of the court's process—at [88], [111] and [114].