Strike out under s. 84C — constitution of claim group, authorisation

Colbung v Western Australia [2003] FCA 774

Finn J, 29 July 2003

Issue
This decision deals with an application under s. 84C of the *Native Title Act* 1993 (Cwlth) (NTA) to strike out two claimant applications because they did not comply with the requirements of s. 61(1), i.e. the native title claim group was not properly constituted and the applicant was not properly authorised to make the application.

Background
Those bringing the strike out application (the applicants to a claim brought on behalf of the South West Boojarah) are referred to here as the Colbung claimants. They sought strike out of two overlapping claimant applications (referred to here as the Harris and Isaacs applications) for failure to comply with s. 61(1).

Harris application
The Harris application was amended under s. 64 of the NTA after the 1998 amendments to the NTA. It was amended subsequent to those amendments and so was subject to the requirements of the new Act including s. 61(1)—at [7], relying upon *Dieri People v South Australia* [2003] FCA 187 (summarised in *Native Title Hot Spots* Issue 5) at [18].

While the title of the application stated that it is brought 'on behalf of the Harris Family', the court noted that the claimants are 19 named people and the biological descendants of their children.

The Colbung claimants contended that the claimants in the Harris application are part of the broader Noongar group that holds common or group rights to the area covered by the Harris application. Therefore, the Harris application was neither brought by a properly constituted claim group nor properly authorised by that group: see *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) and *Tilmouth v Northern Territory* [2001] FCA 820.

Schedules E and F of the Harris application stated (among other things) that:
- the rights and interests claimed are 'the rights *together with other Noongar people who are native title holders* to the possession, occupation, use and enjoyment as against the whole world (subject to any shared right of exclusivity) of the area and any right or interest included within the same' (emphasis added); and
- the claimant group are descended from 'the Noongar people who occupied the claim area at the time of sovereignty';

- the traditional laws and customs acknowledged by the claimant group are derived from and based on the traditional laws and customs acknowledged and observed by the Noongar people who occupied the claim area at the time of sovereignty;
- the rights and responsibilities of the claimant group in relation to the claim area are recognised by others and *'the claimant group recognise other family groups who also hold rights and interests in the claim area'*.

The court found that the evidence provided a further indication that the Harris application clearly acknowledged that there are a number of families with connection to the area the subject of the Harris application and that the laws and customs relied upon in that application are commonly held and shared by other Noongar families.

Decision on Harris

Justice Finn dismissed the application for strike out on the basis that:

- it asked the court to anticipate or predetermine what might be the outcome of the Harris application after a full hearing, which the court was not prepared to do because there was enough in the application to preclude it being doomed to failure as a claim by a sub-group (or family within) a larger group;
- there was no descriptive uncertainty in the identification of the claim group and the application did not make an exclusive claim but, rather, recognised that other family groups also hold rights and interests in the area;
- the evidence was very limited and did not demonstrate any matter that was fatal to the claim;
- the application merely asserted that the particular rights and interests claimed by the Harris family group were held in virtue of their membership of that group and that group alone;
- the description of the rights and interests claimed found in Schedule E had in it a level of ambiguity which, on a strike out application and in the early state of evidence, should be interpreted in favour of the Harris claimants;
- The characterisation of the claim area in Schedule F as 'the family lands of the claimant group' supported such an interpretation. It may be that the Harris family are able to establish rights to the whole or part of that area where other Noongar people cannot—at [21] to [27].

Isaacs application

As this was an old Act application, the motion was decided in light of s. 61 in its pre-amendment form. The application was brought on behalf of 'the Isaacs Family and other Related People including George Webb'. On 28 March 2001, Mr Webb (now deceased) swore an affidavit denying that he had authorised the Isaacs application to be brought on his behalf and confirming that he was a named claimant in the Colbung application.

Decision on Isaacs

Finn J struck out the application on the basis that it did not comply with s. 61, finding that the description of the native title claim group was:

- inadequate because the words 'family' and 'related' are capable of a variety of interpretations;
- ambiguous in that it was unclear whether the formula was intended to be definitive (i.e. a related person was a member) or permissive (i.e. included those related persons who wished to participate in the claim); and
- too uncertain and was not one in whose favour a determination of native title could be made—at [38] to [42].

Comment

The comments made here in relation to the Harris application may have some impact on the application of the principles in *Risk* to the registration test. The Registrar is currently considering the matter. However, as a preliminary comment, these were strike out proceedings where the traditional approach of the court is one of extreme caution unless the matter is, prima facie, completely without merit. The role of the Registrar when applying the registration test can be distinguished from the role of the court in strike out proceedings and, in any case, was not before the court in this matter, as it was in *Risk.*