Strike out under s. 84C

Wharton v Queensland [2003] FCA 1398

Emmett J, 3 December 2003

Issue
This decision concerns an application under s. 84C of the NTA to strike out a claimant application, made under the old Act and subsequently amended, on the ground that the applicant was not authorised by the native title claim group to bring the proceeding.

Background
On 18 June 2003, the Honourable Justice Emmett heard the strike out application and concluded that the claimant application should be struck out for failure to comply with s. 61 of the NTA on the basis that the applicant was not authorised to bring the application by a process that satisfied s. 251B(b). However, before making orders in these terms, his Honour adjourned the proceeding to allow the parties opportunity to consider his conclusions and the reasons for them: *Wharton v Queensland* [2003] FCA 790. The July 2003 decision is summarised in Hot Spots no. 6, August 2003.

These reasons addressed submissions by the applicant and the State of Queensland in reliance on item 21 of Schedule 5 to the Native Title Amendment Act 1998 (Cwlth) (transitional provisions). Item 21 provides:

> Section 84C of the [N]ew Act applies where the main application mentioned in that section was made either before or after the commencement of that section. If the main application was made before the commencement, the reference in that section to section 61 or section 62 is a reference to section 61 or section 62 of the [O]ld Act.

The strike out applicants contended that item 21 had no application to the claimant application as that application had been amended after 30 September 1998 and was therefore required to comply with s. 61 of the new Act. In so contending, the strike out applicant relied on a principle said to be derived from the decision of O'Loughlin J in Quall v Risk [2001] FCA 378 (Quall).

It was common ground that the claimant application did not fail to comply with s. 61 and s. 62 of the old Act and there was no suggestion that the application did not comply with s. 61A.

Operation of item 21 of the transitional provisions
Emmett J found that the second sentence of item 21 is unambiguous in providing that, if the application was made before commencement, that is, 30 September 1998, the references in s. 84C to s. 61 or s. 62 are references to s. 61 or s. 62 of the old Act.

His Honour did not consider that the provisions of the NTA and item 11 of the transitional provisions concerning registration require a reading of item 21 that departs from its clear and unambiguous terms—at [28].

In relation to the protection afforded to old Act applications by item 21, his Honour stated:

> If an application were made under s. 84C to strike out a native title determination application filed prior to the commencement of the Amendment Act, item 21 of Sch 5 makes quite clear that the strike out application would fail if the main application complied with s. 61 of the Old Act, even if it did not comply with s. 61 of the New Act. That is so whether or not the application would pass the registration test. There is no reason to conclude that, just because an amendment were made after the commencement of the Amendment Act, the application would no longer have the protection clearly intended by item 21—at [23].

In relation to the strike out applicants' contention that, if an amendment is made to an application (including one made under the old Act) the combined effect of the registration provisions and s. 64 is that the applicant must lodge with the court a fresh application that complies with all the requirements of s. 61 and s. 62 of the NTA, his Honour stated as follows:

> An amendment to the main application does not give rise to a new application. The scheme of the Act recognises that applications may be amended. There is nothing to suggest that, when an application is amended, it should thereupon be treated as a new application so as to lose the protection afforded by item 21—at [27].

***Quall v Risk* distinguished**

In Quall, O'Loughlin J concluded that the scheme of the NTA relating to registration of native title claims indicates that an application that is amended 'by changing the particularity of the claimants' must comply with the provisions of s. 61.

In considering O'Loughlin J's reasoning, Emmett J stated that it was not entirely clear what O'Loughlin meant by reference to an amendment made 'by changing the composition of the claimants' and concluded that:

> There may be some justification for treating as a fresh application, an application purporting to be made on behalf of a native title claim group different in substance from the group named pursuant to s. 61(2) of the Old Act. Where there was an amendment to that effect, the application as amended might fairly be characterised as a fresh application—at [29].

His Honour distinguished Quall on the basis that, in the present case, there had not been a change in substance in the group on whose behalf the claimant application was brought—at [30] to [33].

Decision

Emmett J concluded that the strike out application should be dismissed. His Honour allowed the parties opportunity to consider his conclusions and the reasons for them prior to any orders being made—at [36].