Customary Aboriginal law v common & statute law

Jones v Public Trustee of Queensland [2004] QCA 269

McPherson, Williams, Jerrard JJA, 6 August 2004

Issue
The issue of interest in relation to native title in this case was whether customary Aboriginal law prevailed over common and statute law.

Background
This was an appeal from a decision in the Supreme Court of Queensland in relation to an intestacy. The deceased was a member of the Dalungdalee people of Fraser Island. The appellant, John Dalungdalee Jones, apparently a senior elder of the Dalungdalee people, considered the moneys from the deceased's estate had not been properly accounted for, and ''in the interests of those entitled to it and as an aspect of his duty as senior elder ... he instituted these proceedings'. Mr Jones argued that, under the customary law of the Dalungdalee people, as the eldest member of the group, he had the right to insist on representing individual members, without their consent and in spite of their expressed wish that he should not do so—at [3].

Mr Jones argued that Aboriginal traditional and customary law prevailed over the relevant state law because of:

- the provisions of the *Native Title Act 1993* (Cwlth) (NTA); and
- the operation of s. 10 of the *Racial Discrimination Act 1975* (Cwth) (RDA)—at [12]. NTA

The court found there was insufficient evidence as to the existence of such a claimed traditional or customary law:

> There is no evidence that among the Dalungdalee people of Fraser Island there was or is a continuing custom that the eldest member is entitled to insist on representing individuals ... without their consent and in spite of their expressed wish that he should not do so—at [13].

Further, the claim represented a 'misconception' of *Mabo v Queensland* (No 2) (1992) 175 CLR 1 and the NTA, which gave effect to that decision. It was not the case that Aboriginal customary law prevailed over common and statute law but rather that the common law, in certain circumstances, recognised customary laws relating to land and waters—at [14].

Justice McPherson, who gave the leading judgment, rejected the suggestion that the application of state laws depended on the absence of rules to the contrary under customary law and, in any case:

> There is nothing in the present case to link with land or water the traditional right or duty asserted by Mr Jones of representing members of the Dalungdalee people, or that constitutes a "connection" [as required under s. 223(1) of the NTA] with any land or water—at [15] to [16].

RDA

Regarding the application of s. 10 of the RDA, McPherson JA found the relevant part of the state law made no distinction between peoples of any race or origin. If there were traditional rights to inherit property special to Aboriginal people that are interfered with, or restricted by, the application of the state law, it had not been shown in evidence. However, his Honour left open the possibility that the evidence in some circumstances might allow for a broader interpretation of family relationships for succession purposes—at [18] to [20].

Decision

The appeal was dismissed.