Future act injunction proceedings

Turrbal People v Queensland [2002] FCA 1082

Spender J, 30 August 2002

Issue

The question in this case as whether a registered claimant application was sufficient to support injunctions to stop future acts from being done in relation to the area subject to a claimant application made under the *Native Title Act 1993* (Cwlth).

Background

The whole of the land in question was granted to the Brisbane City Council (BCC) in 1965 pursuant to a deed of grant in trust (DOGIT) to be held in trust as a reserve for recreational purposes only. (There were some previous grants over the same area but these were not noted as being of particular significance by the court.) The land was subdivided in 1967 into three lots. In August 1999, pursuant to a DOGIT, the Crown granted freehold over the lot that was relevant to these proceedings. Under this grant, BCC held the land on trust for 'Aboriginal and no other purpose'. BCC leased part of the land to the State of Queensland for 30 years for the purpose of building and operating an Aboriginal cultural centre. Prior to the grant of that lease, notification was provided to the registered native title claimant pursuant to s. 24JA of the NTA. On 28 March 2002, the Musgrave Park Cultural Centre Inc (allegedly a non-Turrbal organisation) subleased the land from the state. The first motion filed was against the state, BCC and an architect seeking an injunction on the construction of an Aboriginal cultural centre at Musgrave Park. The second motion was against the state, the BCC and three other city councils and sought 'an injunction on [sic] all current and future acts occurring on' the area covered by the registered claim, except with consent of the Turrbal people.

Submissions

In relation to the first notice of motion, it was alleged that:

- the DOGIT to the BCC in 1999 was racially discriminatory 'because the Turrbal Traditional Land Owners, whose native title claim had already been lodged in May 1998 [over the area in question] were neither consulted nor negotiated with by the State ... prior to the granting of the Deed. Musgrave Park was specifically identified in the Turrbal native title claim';
- the granting of the DOGIT by the state to the BCC was inconsistent with the NTA and Aboriginal customary practices;
- the lease of the land to the Musgrave Park Cultural Centre was contrary to s. 61 of the Aboriginal Land Act 1991 (Qld) as it favoured Aboriginal groups with historical association over those with traditional association to the land—at [6].

The allegation in relation to the second motion was that 'the Turrbal people have experienced, and continue to experience contemptuous acts by the State of Queensland and the Brisbane City Council, which attempt to deny the Turrbal

people of their rights and interests as claimed in the registered native title application'. An example of a failure to notify them over dealings in the claim area was given in support of this allegation—at [7].

Findings regarding traditional law submission

Justice Spender held that the claim of a breach of Turrbal customary law was not a relevant factor in the proceedings. The application of state law to Aboriginal people is not in any way subject to their acceptance, adoption, request or consent, and he cited *Walker v NSW* (1994) 182 CLR 45 as authority for this—at [8].

No evidence of native title before the court on final injunction

His Honour noted that:

- there was 'a dearth of material by the applicant indicating the basis upon which ... the Turrbal [have] an interest in the land upon which the proposed development is to occur', apart from the fact that there is a registered native title claim over that area;
- registration of a claimant application 'does not put the question of title beyond debate on an application by a registered claimant for an injunction'*: Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 (*Lardil)* and *Fejo v Northern Territory* (1998) 195 CLR 96 at 125-126;
- the applicant's motions did not identify whether the injunctions sought were final or interlocutory;
- in *Lardil* at [107], it was held that an applicant must demonstrate that they have native title if a final injunction is sought;
- if final injunctions were sought in this case, then the failure to demonstrate the existence of native title would be fatal—at [28] to [30].

Observations on interlocutory injunctions, future acts and native title

His Honour noted that:

- in *ABC v Lenah Meats Proprietary Limited* (2001) 208 CLR 199; [2001] HCA 63, the majority of the High Court held that there was no basis for the injunction where there is no underlying cause of action to be tried;
- an interlocutory injunction should only be granted to preserve the subject matter of a dispute or to maintain the status quo pending the determination of the rights of the parties;
- there has been no identification of a right that an injunction against the construction of the cultural centre would preserve, or which access to the site for the purpose of constructing a cultural centre would infringe;
- the applicant for an interlocutory injunction must show that there is a serious question to be tried and that the balance of convenience favours the granting of an injunction;
- in this case, the procedural rights given in Part 2 Division 3 of the NTA only arise when an act or proposal would constitute a future act as defined by s. 233 of the NTA;
- if the applicant wished to successfully argue that act of granting the DOGIT was racially discriminatory, then the DOGIT must be shown to be a future act i.e. an act that affected native title;

- no assessment could properly be made upon the material presently before the Court about the merits of the applicant's claim for native title—at [31] to [34].

Decision

Each application was dismissed and costs were awarded to the state and the architect because:

- it had not been shown that any lack of consultation or negotiation with Turrbal People in relation to the grant of the DOGIT to the BCC was racially discriminatory and the provisions of the *Racial Discrimination Act 1975* (Cwlth) (RDA) 'in so far as they may be relied upon by the applicant, yield to specific provisions of the NTA', relying upon the High Court's findings in *Western Australia v Commonwealth* (1995) 183 CLR 373;
- the claim that the grant of the DOGIT is inconsistent with the objects of the NTA was no basis for an injunction and no breach of a specific provision of the NTA was shown;
- no serious question to be tried was shown in the first motion. In any event, the balance of convenience was overwhelmingly in favour of the rejection of any relief. The three year delay in bringing the injunction proceedings was also of relevance to the question of convenience, as was the provision for compensation under ss. 24JB(4) and (5) of the NTA;
- the reasons applicable to the first motion applied to the second and, further, the relief sought was unspecific and uncertain and ought not be granted — all at [36] to [42].

Effect of *Ward*

Spender J commented that there were 'possible grave difficulties' confronting the native title claim relevant to these proceedings. Following the decision in *Western Australia v Ward* (2002) 191 ALR 1; [2002] HCA 28 at [224] to [229], which deals with the effect of the vesting of a reserve under s. 33 of the *Land Act 1933* (WA), there is 'a very real question' as to whether the deed of grant to BCC made in 1965, a date prior to the commencement of the RDA, wholly extinguished native title—at [34] to [35].