Appeal in compensation claim – Full Court

Jango v Northern Territory [2007] FCAFC 101

French, Finn and Mansfield JJ, 6 July 2007

Issue

This case deals with an appeal to Full Court of the Federal Court against the dismissal of an application for a determination of compensation made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA). The main issues were whether the primary judge either:

- misread the compensation claim group's case;
- or should have made a decision in their favour outside of the nature of their case as formally stated.

The Commonwealth filed a notice of contention in the appeal proceedings to support the judgment.

Background

The compensation application was brought in 1997 on behalf of a group of Yankunytatjatjara and Pitjantjatjara people whose native title rights and interests were said to have been extinguished in land around the town of Yulara in the Northern Territory. Their claim to hold native title at the time of the alleged extinguishment was based on the traditional laws and traditional customs of the Western Desert Bloc, i.e. the members of the compensation claim group claimed native title as people of the eastern Western Desert.

Questions relating to both the existence (and extinguishment) of native title and any subsequent liability to provide compensation were heard as preliminary issues pursuant to orders made under Order 29 rule 2 of the Federal Court Rules. The determination of quantum was 'deferred pending resolution' of the preliminary issues. After a 42 day hearing, Justice Sackville (the primary judge) delivered a 'careful, lengthy and comprehensive' judgment—at [6].

Decision at first instance

In a joint judgment, Justices French, Finn and Mansfield outlined at some length the terms of the application and points of claim filed at first instance, the pre-trial directions and the main points of the reasons for judgment—at [7] to [61].

According to their Honours, the primary judge dismissed the application on the basis that:

- it had not been shown that the compensation claim group had, at the relevant time, any native title rights and interests the compensation claim area;
- the evidence presented did not prove the case for the existence of native title as formulated in the application and points of claim that were filed as a formal statement of the nature of the compensation claim group's case—at [31] and see

Jango v Northern Territory (2006) 152 FCR 150; [2006] FCA 318, summarised in *Native Title Hot Spots* Issue 19.

The court noted that the primary judge:

- emphasised that what was addressed was the case as put to the court on behalf of the compensation claim group;
- stated that finding this did not necessarily imply that none of the members of the claim group could establish native title had the case been conducted differently;
- took the view that the court was not entitled to consider a case that might have put to it but was not;
- pointed out this was not a criticism of the way the case was presented but that, nevertheless, the compensation claim group was bound by the conduct of their case—at [58].

The appeal

There were essentially two points to the appeal:

- the primary judge 'misread the pleaded case';
- '[q]uite apart from the pleadings', either ss. 51(1) and 94 of the NTA or the terms of the separate issue obliged the primary judge to determine who held native title at the relevant time because it was found at first instance that some members of the compensation claim group may have held native title rights and interests over the compensation claim area at the relevant time—at [65] and see also [62].

Function of the application and points of claim in native title proceedings

Their Honours said:

- there was no express requirement in the NTA for the filing of pleadings in the usual sense of a statement of claim or defence;
- the court frequently ordered the filing of 'points of claim' in native title matters that set out contentions of fact and law in 'a less elaborate fashion' than a statement of claim;
- whether or not a document setting out the points of claim was a 'pleading' in the strict sense, its essential function was to define the case being put to the court;
- in native title proceedings, if the original application complied with the requirements of ss. 61(1) and 62, then the essentials of the case should have been disclosed in that application;
- points of claim may be filed to provide greater particularity and, to the extent that they define the nature and basis of the applicant's claim, will limit the range of matters that can be put before the court both in evidence and in argument;
- amendments may be made from time to time to the application and the points of claim, subject to the availability of appropriate measures being taken by the court to avoid unfair prejudice to the respondents—at [75] to [76].

In this case, it was agreed that the pleadings should 'state with sufficient clarity' the case to be met by the respondents. What was at issue was that the direction to file points of claim required the applicant 'to address [such] a host of specified matters' that it was a 'misnomer' to call such a document a 'pleading'—at [77].

Their Honours dismissed this point, saying that:

- what was important was not the term 'pleading' but the function it described, which was a fair and efficient system of procedure with clear rules governing the definition of the case;
- the question was not one of technicality but principally of practical fairness between parties and finality in the litigation;
- this was a matter 'of substance and not of form';
- there was nothing unique or *sui generis* (as had seemed to be implied by the appellants) about the court's function in native title proceedings—at [78] to [81].

Function of the court in compensation proceedings

The function of the court in an application for a determination of compensation was to be found by looking to ss. 50(2), 61 and 62 of the NTA. However:

> It is important to observe that these requirements do not limit the power of the Court to direct particularisation of the claim so that the case is more precisely defined and limited for the purpose of the proceedings.
>
> What the Court is then required to decide ... is whether the right to compensation which is claimed is made out. That requires the antecedent determination whether there were in existence at some relevant time native title rights and interests whose extinguishment or impairment has given rise to the compensation right. It is for the applicants to assert and identify the native title rights and interests and the factual basis upon which they rest as part of their case for compensation. It is for the Court to determine whether those assertions are established—at [82] to [83].

Court's function does not entail a roving inquiry

Their Honours observed that:

> The Court cannot, in hearing a native title determination application or a compensation application, conduct a roving inquiry into whether anybody, and if so who, held any and if so what native title rights and interests in the land and waters under consideration. Such an inquiry is an administrative rather than [a] judicial function. Indeed, recent amendments to the NTA allow such inquiries to be carried out under certain circumstances by the National Native Title Tribunal—at [84].

Did the primary judge misunderstand the pleaded case?

On appeal, it was said that the finding that the case failed, because the evidence did not support a 'dichotomy' between (or 'combination' of) the pleaded 'conditions' and 'additional factors', reflected a fundamental misreading of the pleaded case which, it was said, made plain that native title rights and interests were held if a person satisfied 'at least one' of the pleaded conditions—at [87].

Their Honours dismissed this point, saying that:

- the trial judge did not misread or misunderstand the case;
- there was no doubt that both the application and the points of claim identified conditions, at least one of which was necessary (and any of which was sufficient) to identify a person as holding native title rights and interests;
- the 'additional factors' were not propounded as criteria for the identification of a person as a holder of native title rights and interests but were formulated as

relevant to the nature and extent of the rights and interests attributable to particular persons and their seniority and authority relevant to others;
- in this case, the 'dichotomy' was found in both the application and the points of claim;
- although the claimants' closing written submissions departed from that dichotomy, in closing oral argument, counsel for the claim group came back to the case set out in both the originating process (i.e. the application) and the points of claim—at [88] to [89].

Should the primary judge have made findings outside the pleaded case?
The appellants argued that the primary judge, having made findings as to the manner in which native title rights are acquired under the traditional laws and customs of the Western Desert bloc, ought to have proceeded to give effect to those findings in relation to all or some of the members of the compensation claim group, even where doing so meant departing from the case put to the court—at [90] to [91].

This was rejected, with their Honours reiterating that:

> [T]he NTA does not mandate the approach proposed by the appellants. It would have been inconsistent with the case presented by the appellants and which the respondents were prepared to meet ... . His Honour was entirely correct in making his decision within the framework of the case presented by the appellants. In so doing it must be emphasised that he recognised that an unduly rigid view should not be taken of the pleadings—at [92].

Their Honours also recognised the more fundamental difficulty facing the trial judge, which was that the evidence before him reflected 'such a variety of opinions, practices and assertions' that it could not be taken as establishing that the compensation claim group observed and acknowledged at the relevant time laws and customs of the Western Desert cultural bloc as pleaded in the points of claim—at [92].

Commonwealth's contentions on appeal
The only ground raised by the Commonwealth on appeal was that no compensation liability arose under the NTA because native title was validly extinguished before the NTA came into force—at [64].

Although the decision to dismiss the appeal made it unnecessary for the court to deal with the Commonwealth's notice, nonetheless their Honours considered it appropriate to indicate their views on those submissions—at [94].

The Commonwealth conceded that the various grants of estates in fee simple relevant to this case were, subject to the NTA, invalid by reason of inconsistency with s. 10(1) of the *Racial Discrimination Act 1975* (Cwlth) (RDA). It was also conceded that the grants of the fee simple estates in question were 'previous exclusive possessions acts' (PEPAs) attributable to the territory for the purposes of *Validation (Native Title) Act 1994* (NT) (Validation Act). The Commonwealth's contention was that no liability for compensation arose. This rested on its view as to the effect of the registration of

the grants pursuant to the *Real Property Act* 1886 (SA) (RPA), notwithstanding the invalidity of the grants themselves.

Their Honours said the answer to the Commonwealth's submissions lay in:

> [T]he text, structure and purpose of Div 2 and 2B of Pt 2 of the NTA and in the complementary provisions of the Northern Territory's Validation Act, both statutes for present purposes confirming the extinguishment of native title rights and interests by 'previous exclusive possession acts'—at [98].

Among other things, it was noted that:

- according to s. 23C(1) of the NTA (and the Validation Act equivalent), a PEPA extinguished any native title in relation to the area covered by that act and the extinguishment was taken to have happened when that act was done;
- in this case, the PEPAs were done when the various fee simple grants were made by the Northern Territory;
- under s. 23J of the NTA, native title holders are entitled to compensation for any extinguishment by a PEPA but only to the extent (if any) that their native title rights and interests were not extinguished 'otherwise than under the NTA';
- the purpose of s. 23J is to limit, so far as possible, the entitlement to compensation to cases where the PEPA was invalid by reason of the RDA but subsequently validated by s. 14 of the NTA (actually, in this case, s. 8 of the Validation Act);
- under s. 23J (and s. 9H(2) of the Validation Act), compensation for extinguishment is to be assessed at the date at which the invalid acts (i.e. the grants of the freehold estates) were done—at [102] to [106], referring to *Wilson v Anderson* (2002) 213 CLR 401at [51], summarised in *Native Title Hot Spots* Issue 1.

It was noted that the PEPAs in question were acts that had been 'validated' i.e. they were 'past acts' for the purposes of the NTA and the Validation Act. In other words, they were acts that, in the absence of the subsequent intervention of the NTA (and, via s. 19 of the NTA, the Validation Act) would have been invalid by virtue of the operation of the RDA and s. 109 of the Commonwealth Constitution. The invalidity was 'cured' by the intervention of the past act provisions of the NTA and the Validation Act.

In relation to s.19, at [109] their Honours referred to the joint judgment in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 455, where it was said that:

> Section 19 ... does not purport to deny the overriding effect of the ... [RDA] upon any inconsistent law of a State in the past. Section 19 removes any invalidating inconsistency between, on the one hand, a State law enacted in the future that purports to validate past acts attributable to a State and, on the other, the ... [RDA] or any other law of the Commonwealth (including the *Native Title Act* itself). The validation of past acts attributable to a State is effected by a State law [e.g. the Validation Act] which, at the time of its enactment, is not subject to an overriding law of the Commonwealth. The force and effect of a past act [i.e. its validity] ... is recognised only from and by reason of the enactment of the future State law but, from that time onwards, the force and effect of the past act is determined by the terms of the State law enacted in conformity with s 19.

After noting that the grants of fee simple (i.e. the previous exclusive possession acts) predated registration under the RPA, their Honours concluded that, whatever the consequence of registration might have been:

> [O]n and from the enactment of the Validation Act,...[native title] rights and interests were taken **for the purposes of NTA** [and the Validation Act] to have already been extinguished "completely" ... by the anterior previous exclusive possession acts of the Northern Territory ... i.e. by the making of the grants [in fee simple] ... . Nothing in the NTA provided for, or warranted, the undoing of that complete extinguishment ... . [R]egistration did not ... affect in any way an entitlement to compensation under the NTA given by s 23J. For its purposes, notwithstanding the later registration of the grants, the native title rights and interests in the lands granted would not have been extinguished "otherwise than under this Act"—at [111], emphasis in original, referring to *Fejo v Northern Territory* (1998) 195 CLR 96 at [43].

This construction of s. 23C of the NTA (and s. 9H(1) of the Validation Act) also meant that the Commonwealth's alternative submission in relation to the 'gap' between the grant of the fee simple estates and registration must be rejected—at [111].

Decision

For the reasons given, the compensation claim group's appeal was dismissed—at [121].