Timber Creek appeal — exclusive native title

Griffiths v Northern Territory [2007] FCAFC 178

French, Branson and Sundberg JJ, 22 November 2007

Issues

The issues before the Full Court of the Federal Court in these appeal proceedings were whether:

- the finding at first instance that the Ngaliwurru and Nungali Peoples' native title did not amount to a right to possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) was correct;
- section 47B of the *Native Title Act 1993* (Cwlth) (NTA) applied to an area proclaimed pursuant to s. 111 of the Crown Lands Ordinance 1931-1972 (Cwlth) to be a town site;
- a shift under law and custom from patrilineal to cognatic descent meant that the laws and customs of the Ngaliwurru and Nungali Peoples were not traditional, in the sense that word is used in the NTA.

In a unanimous judgment, Justices French, Branson and Sundberg:

- upheld the appeal by the native title holders on the first issue and varied the determination of native title accordingly;
- dismissed the cross-appeal by the Northern Territory, which raised the last two issues noted above.

The case is significant because (among other things) the court explains what is and (more importantly, perhaps) what is not, required for proof of 'exclusive' native title.

Background

Judgment at first instance was delivered by Justice Weinberg in *Griffiths v Northern Territory* [2006] FCA 903, with a determination recognising the existence of native title subsequently made in *Griffiths v Northern Territory (No. 2)* [2006] FCA 1155 (both which are summarised in *Native Title Hot Spots* Issue 21). The area covered by the determination included certain lots in the town of Timber Creek in the Northern Territory. The area had previously been subject to a number of non-exclusive pastoral leases.

Weinberg J found that those who constituted the native title claim group had established they held native title rights and interests in relation to the claim area but that those native title rights and interests did not include the right to exclusive possession of the area. The applicants appealed against that aspect of the judgment. The territory cross appealed.

Grounds of appeal

The appellants argued that Weinberg J erred in considering that:

- the native title holders' right to be asked permission and to speak for country related to safeguarding country and protecting strangers and so the content and operation of those rights were limited to those purposes, i.e. did not extend to the exclusion of all persons other than the native title holders;

- the native title holders' rights to be consulted about matters that might harm country, and to veto any activity that might be detrimental, neither fitted the 'template' of a right to possession to the exclusion of all others nor suggested a general right to control access in any relevantly proprietorial sense;
- it was necessary to establish that native title rights to control, or restrict access, to country had been exercised against strangers to country; and
- the rights and interests possessed under the traditional laws acknowledged and customs observed by the native title holders did not confer a native title right to possession, occupation, use and enjoyment of the determination area to the exclusion of all others.

In its first notice of contention, the territory argued that the finding of non-exclusive native title rights and interests was correct. However, in a notice of further contention filed at the hearing, the territory argued that the existence of a group of traditional owners known as the Kuwang defeated the appellants' claim to exclusive native title. The question of whether or not to entertain this contention was reserved. In the event, the court held it was too late in the proceedings for the territory to raise the further contention because, among other things, if it had been clearly raised at trial, the evidence relied upon by the appellants might well been different—at [108] to [124].

Grounds of territory's cross appeal

The territory cross-appealed on the grounds that:

- the finding at first instance should have been that the laws and customs under which native title was claimed were not traditional because those rights and interests devolved through a process of cognatic descent (i.e. through both father and mother) which represented a fundamental shift from the patrilineal descent 'rule' which had existed at the time of sovereignty;
- Weinberg J was wrong in finding that s. 47B applied within the proclaimed boundaries of the town of Timber Creek, an argument that relied upon distinguishing *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16); and
- there should have been a finding that an area previously the subject of a lease granted under the *Crown Lands Act 1931* (NT) was a previous exclusive possession act and thus expressly excluded from the area covered by the native title determination application.

Application of s. 86

The court considered Weinberg J's reasons for judgment, noting that the history of the claim area was 'uncontentious' and that the appellants had based their case 'in large measure upon findings made by various Aboriginal Land Commissioners' in land claim reports made under the *Aboriginal Land Rights (Northern Territory) 1976* (Cwlth)—at [12] to [54].

Weinberg J had noted that that s. 86(1)(a)(v) of the NTA rendered the land claim reports admissible as 'the transcript of evidence in any other proceedings before ... any other person or body'. French, Branson and Sundberg JJ noted that s. 86(1)(c) empowered the court to adopt any recommendation, finding, decision or judgment of a body of the kind mentioned in s. 86(1)(a)(v), going on to note that:

> There is a distinction between the receipt into evidence of the transcript of proceedings before a person such as a Land Commissioner and the adoption of findings made by that person. The first process involves the receipt of evidence upon which the Court may base its own findings. In the second

> process…the Court may accept a finding of another person or body resulting from a consideration of evidence by that person or body. That does not require that the Court examine for itself the evidence upon which the adopted finding was made. On the other hand it would allow the Court to give some consideration to the evidence underpinning the findings to satisfy itself that the finding was reasonably based on the evidence—at [23].

While Weinberg J 'did not make clear' how he had applied s. 86, the court was of the view that the conclusions reached in the various reports appeared to have been treated as evidence of the facts found without being 'expressly' adopted. Therefore, to the extent that Weinberg J relied upon them 'we treat his reliance as an adoption of the findings'—at [24].

Error of principle - characterisation as usufructuary

The appellants submitted that the Weinberg J was wrong to approach the question of exclusivity by asking whether the rights and interests held by the native title holders under their traditional laws and customs:

- were 'akin to rights that are usufructuary in nature'; or
- rose 'significantly above the level of usufructuary rights'.

After reviewing the findings of the trial judge on the exclusivity issue, the court held that:

- the characterisation of native title as 'usufructuary' did not preclude the inclusion of a native title right of possession, occupation and use arising under traditional law and traditional custom;
- if native title rights are usufructuary (because they involve, at common law, the right to use the sovereign's land), then the usufruct may incorporate rights to exclude others from the land, albeit that the sovereign may, by lawful exercise of power, extinguish such rights;
- the question whether the evidence of native title rights rose above usufructuary rights posed by Weinberg J was, therefore, unnecessary and had the potential to lead into error;
- 'classificatory considerations' may have affected Weinberg J's characterisation of the native title rights and interests in this case—at [67] and [71], referring to *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 3, *Mason v Tritton* (1994) 34 NSWLR 572 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

As the court noted:

> [T]he use of the common law taxonomy of usufructuary and proprietary rights in ascertaining the content of native title … involves a risk of confusion and distraction from the requirement to have regard to what the evidence says about the nature of the native title rights and interests in question… . [T]he question whether the native title rights of a given native title claim group include the right to exclude others … does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71].

Error in fact on the evidence

The second limb of the appellants' argument was that Weinberg J erred in fact, having regard to the evidence which his Honour accepted. The court summarised the evidence at trial relevant to the question of exclusivity and Weinberg J's comments upon it—at [72] to [106].

It was found that:

> The evidence of the Aboriginal witnesses, being uncontradicted, together with the relevant elements of the anthropological report … required the conclusion that the appellants' possession, use and occupation of their country was exclusive—at [125].

While accepting that an appellate court should be cautious when relying upon 'sterile' transcript references in determining whether an error of fact was made, their Honours said they had undertaken a review of the evidence going to exclusivity i.e. this was an appeal by way of re-hearing—at [126] and [144].

Having done so, the court did not accept that the characterisation of native title in this case depended upon 'matters of demeanour or nuance'. Rather:

> The evidence … was clear and unequivocal. The question was whether, having been accepted, it required a finding that the relevant rights were exclusive. Our caution about interfering with his Honour's finding in this respect is mitigated by the evident influence on it of common law classifications of usufructuary and proprietary rights—at [126].

Their Honours were of the view that:

- it is not a necessary condition of exclusivity that the native title holders should, in their testimony, frame their claim as some sort of analogue of a proprietary right;
- nor is it necessary that the native title claim group should assert a right to bar entry on the basis that it is 'their country';
- if control of access to country flows from spiritual necessity, because of the harm that the country will inflict upon unauthorised entry, that control can nevertheless support a characterisation of native title as exclusive, noting that the relationship to country is essentially a 'spiritual affair';
- it is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with Indigenous people;
- the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community;
- if, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry, and if the native title holders are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have what the common law will recognise as an exclusive right of possession, use and occupation;
- the status of the native title holders as gatekeepers in this case was reiterated in the evidence of most of the Indigenous witnesses and by the anthropological report which was ultimately accepted at first instance;
- it is not necessary to exclusivity that the native title holders require permission for entry onto their country on every occasion that a stranger enters, provided that the stranger has been properly introduced to country by them in the first place;
- exclusivity is not negatived by a general practice of permitting access to properly introduced outsiders—at [127].

Therefore, it was held that:

> [A] proper characterisation of the effectively uncontested factual evidence of the indigenous witnesses and the opinion evidence of the anthropologists whom his Honour accepted, leads to one conclusion and one conclusion only and that is that the appellants, taken as a community, had exclusive

possession, use and occupation of the application area. The appeal therefore succeeds on the question of exclusivity—at [128].

Shift from patrilineal to cognatic descent principles

The territory, in its cross appeal, submitted (among other things) that Weinberg J failed to inquire as to whether or not the change from patrilineal principles of descent to cognatic principles was a permissible adaptation of a 'traditional' rule, referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3).

The court noted that:

- the territory's argument on fundamental change in the normative system was founded on a false dichotomy and reflected a misunderstanding of Weinberg J's reasons for judgment, in which the conflict of expert anthropological opinion was resolved in favour of the appellants;
- despite a change in descent principles, Weinberg J accepted expert opinion that the normative system underpinning the acquisition of rights to land had not changed and, accordingly, was not satisfied that an increased reliance on matrilineal descent had so affected the relevant laws and customs that they could no longer be regarded as traditional;
- notwithstanding that this was an appeal by way of re-hearing, there were natural limitations that may render it inappropriate for an appellate court to proceed wholly, or substantially, on the record e.g. an appellate court may be disadvantaged in comparison with the primary judge in respect of the evaluation of the credibility of witnesses, including expert witnesses, and the 'feeling' of the case;
- a trial judge has an advantage over an appeal court in assessing what is the most reliable evidence about the traditional laws and customs of the peoples of an area at the time of European settlement;
- having regard to the evidence before the primary judge, no error was identified that affected his Honour's consideration of whether the claimants no longer acknowledge and observe traditional laws and customs giving rise to rights and interests in land because they presently gain rights to country in part by descent through either the matrifilial or patrifilial line—at [45], [130], [140] to [145], referring to *Yorta Yorta* and *Fox v Percy* (2003) 214 CLR 118.

Vexed question not decided

Their Honours were of the view that, because no error in Weinberg J's approach had been identified:

> [T]his is not an appropriate case for consideration of what has become a vexed question in native title law. That question is whether a change from a law or custom at sovereignty of acquiring rights and interests … by patrilineal descent to a present-day law or custom of acquiring such rights and interests by cognative descent necessarily has the consequence that the rights and interests are not possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant Aboriginal peoples—at [146], referring to s. 223 of the NTA.

Section 47B

The whole of the claim area was previously subject to pastoral leases. Accordingly, unless s. 47B applied (which provides that all extinguishment brought about by the 'creation of any prior interest … must be disregarded' for all purposes under the NTA), native title was, at least to

some extent, extinguished. Section 47B does not apply if the relevant area is covered by, among other things:

> [A] ... proclamation ... made or conferred by the Crown in any capacity...under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose—see s. 47B(1)(b)(ii).

In this case, the town site of Timber Creek was proclaimed pursuant to s. 111 of the *Crown Lands Ordinance 1931-1972* (Cwlth) (the ordinance), which empowered the Governor-General, by proclamation, to constitute and define the boundaries of new towns in the Northern Territory. Subsection 111(3) of the ordinance empowered the Governor–General, by proclamation, to 'set apart as town lands any Crown land within the boundaries of a town'. At first instance, Weinberg J rejected the territory's submission that the area in question was covered by a proclamation under which the land was to be used for public purposes or for a particular purpose within the exception to s. 47B(1)(b)(ii).

Their Honours reviewed:

- the statutory framework of s. 47B;
- the evidence surrounding the proclamation of the townsite Timber Creek and the findings at first instance;
- the decision in *Alyawarr*—at [150] to [156].

The territory submitted that *Alyawarr* was distinguishable because:

- the town site in that case, Hatches Creek, had never become an established town whereas Timber Creek is such a town; and
- there was no holding in that case concerning the operation of a proclamation under s. 111(3) that set apart, as town lands, Crown land within the boundaries of a town.

The court rejected the first submission because:

- in *Alyawarr*, the court held that whether there is a use for 'public purposes' or 'a particular purpose' was to be determined at the date of the proclamation;
- there was no evidence that, at the date of the proclamation in June 1975, there was an established town of Timber Creek;
- even if a town was then in existence, that would not assist the territory because it would still be the case that the proclamation merely 'enlivened power to grant leases for a variety of purposes' and so *Alyawarr* could not be distinguished on this point—at [158].

The court was of the view that a second attempt at distinguishing *Alyawarr* should also fail because (among other things) the structure of the proclamation in *Alyawarr* was the same as the proclamation under consideration in this case and the issue had been squarely addressed in that case—at [159] to [160].

However, because of a concession on the point by counsel for the appellants, the court proceeded on the basis that there was no binding decision in *Alyawarr* on the effect of a proclamation under s. 111(3) of the ordinance. The court did not accept the territory's submission that *Alyawarr* was distinguishable on this point because:

- while it had been said in *Alyawarr* that the power to grant various kinds of leases was not enlivened until a proclamation of the kind provided for in ss. 111(1)(a) 'or' 111(3) of the

ordinance had been made, reading the relevant passage as a whole made it apparent that the 'or' was intended to be 'and';
- the second part of the proclamation, declaring that Crown lands be set apart as town lands, did not define 'public purposes' or 'a particular purpose' within s. 47B(1)(b)(ii);
- the reasoning applied in *Alyawarr* to the first part of the proclamation (i.e. that a townsite 'might comprise largely private property holdings by lease or otherwise') applied to the mere setting apart of Crown land as town lands;
- the mere setting aside of Crown land as town lands, so that it could thereafter be granted for various purposes and to various classes of person, did not define 'public purposes' or a 'particular purpose'—at [161] to [162].

Therefore, it was found that *Alyawarr* could not be distinguished from the present case and that the court was obliged to follow it unless persuaded that it was plainly wrong. In any event, although the territory initially invited the court not to follow *Alyawarr*, it emerged during the hearing that it merely wished to preserve its ability to later contend before the High Court that it was wrongly decided—at [163].

In oral submissions, counsel for the appellant made a new submission in relation to s. 47B and the *Crown Lands Act 1992* (NT), which had replaced the ordinance. The court decided it was 'undesirable to rule upon it' because (among other things):
- if it was 'sound', it merely provided a different reason for the application of s. 47B;
- if it was unsound, s. 47B applied in any case because of the findings noted above—at [164] to [170].

Previous exclusive possession act
This ground of the territory's cross appeal was contingent upon the success of its argument on s. 47B and so could not succeed once that ground failed—at [171] to [172].

Decision
For the reasons summarised above, the appeal was allowed and the cross-appeal dismissed. Orders were also made to vary the native title determination made at first instance to reflect a finding that the native title holders have a native title right to 'possession, occupation, use and enjoyment to the exclusion of all others' in relation to part of the determination area—at [7] and [173].

Having regard to the provisions of s. 85A of the NTA, it was decided that the parties should bear their own costs of the appeal and cross-appeal—at [8].

Special leave refused on s. 47B
The territory's application for special leave to appeal to the High Court against the findings in relation to s. 47B was refused with costs on 7 March 2007 because Justices Hayne and Crennan thought 'an appeal in this matter would enjoy insufficient prospects of success'—see *Northern Territory v Griffiths* [2008] HCATrans 123.