Interests held in DOGIT area

Combined Gunggandji People v Queensland [2009] FCA 979

Dowsett J, 31 August 2009

Issue

The main issue in this case was whether a person who built improvements on part of an area later subject to a deed of grant in trust was entitled to a lease under the repealed *Land Act 1962* (Qld). The person concerned was found to be so entitled.

Background

On 27 October 1986, an area subject to a reserve for the benefit of Aboriginal and Torres Strait Islander people was vested in the Yarrabah Aboriginal Shire Council (the council) under a deed of grant in trust (DOGIT). The area subject to the DOGIT was covered by the Combined Gunggandji People's claimant application, which was made under the *Native Title Act 1993* (Cwlth) (NTA). A block of land known as the Bukki block was included in the DOGIT area. The 'block holder' was Harry Ludwick, an Aboriginal person who did not claim to be either a member of the Combined Gunggandji People's claim group or a traditional owner of any part of the claim area.

Mr Ludwick claimed he was entitled to either a lease of the Bukki block or a licence to occupy it pursuant to ss. 361A or 452A of the now repealed *Land Act 1962* (Qld) (the 1962 Act) respectively. On the evidence, it was found (among other things) that, prior to 27 October 1986 (the date of the DOGIT), Mr Ludwick:

- built two small huts on a concrete slab on the Bukki block (in or around 1974);
- made other improvements to the block, including establishing gardens and building fences and a pit lavatory—at [54].

Justice Dowsett was satisfied that Mr Ludwick's occupation of the block was 'tolerated by the relevant authorities', i.e. the council and the responsible state government department. It was also found on the evidence that Mr Ludwick had lived on the Bukki block from the early 1980s until sometime late in 1986 or 1987, when he left, intending to return. He returned to live permanently in 1990—at [53] to [54].

Entitlement to a lease

Section 361A of the 1962 Act provided (among other things) that:

> (1) If it is shown to the satisfaction of the Minister [for Lands] and the trustees of land granted in trust [the council] that at the date of issue of the ... [DOGIT] evidencing the grant any improvement on the land was owned by any person, that ownership shall not be prejudiced by the grant.

(2) The person shown to own such improvement shall be entitled to the grant by the trustees of a lease that accords with the provisions of this Division of-
    (a) the land on which the improvement stands; and
    (b) where the improvement is a building or structure used as a residence or for business or in connexion with educational or religious purposes, a reasonable area of land being the immediate environs of the improvement.

Section 5 of the 1962 Act defined 'improvements' as:

> Any building, yard, fence, well, bore, reservoir, artificial water course or watering-place, apparatus for raising, holding or conveying water, garden, orchard, plantation, cultivation, or any erection, construction or appliance being a fixture for the working or management of a holding or of any stock depastured thereon or for maintaining or increasing the natural capabilities of the land.

Ownership of the improvements

The court noted that s. 361A empowered someone other than the Crown to own improvements 'situated on Crown land'. Both the state and the council were satisfied that two sheds stood on the area concerned as at the date of the DOGIT and that Mr Ludwick owned those 'improvements'. Pursuant to s. 361A(1), ownership of such improvements at the time of issue of a DOGIT was preserved, with s. 361A(2) addressing the question of the grant of a lease of the area on which the improvements were located. The owner of those improvements was entitled to a grant of such a lease and the trustee (the council in this case) was empowered to apply to the relevant minister for the grant of that lease—at [57] to [58], [62] and [78].

Effect of repeal of the 1962 Act

Pursuant to s. 520(b) of the *Land Act 1994* (the 1994 Act), the repeal of s. 361A was expressly limited so that it 'continues to apply to deeds of grant in trust granted before' the 1994 Act commenced, including the one considered in this case. However, there was a dispute as to which of the other provisions were relevant i.e. those found in the 1962 Act or those found in the 1994 Act.

Under s. 361A(3) of the 1962 Act, it was not 'competent' for the Minister of Lands to refuse an application by a trustee for a lease if ss. 361A(1) and (2) were satisfied. However, under s. 57 of the 1994 Act, a trustee (the council in this case) 'may' grant a lease only if the trustee first obtained the minister's written 'in principle' approval to do so and the minister's approval 'may include conditions'. The state submitted s. 57 of the 1994 Act applied, so that ministerial approval was required, and that the conditions of any lease were to be regulated by s. 61 of that Act. Mr Ludwick submitted that the relevant provisions of the 1962 Act continued to apply. According to his Honour, it 'may not matter' whether ministerial approval was required under either the 1962 Act or the 1994 Act because s. 361A(3) 'will compel ministerial consent' in both cases. However, there was one 'potentially' important difference the 1962 Act and the 1994 Act; the

former provided for a much longer maximum term (i.e. 75 years as opposed to 30 years)—at [60].

Section 361A provided the terms of any lease were to be in accordance with 'the provisions of this Division', i.e. 'prima facie', Division V of Part XI of the 1962 Act. However, as was noted, Division V 'seems not to deal with leases at all' apart from s. 361A and said 'nothing' about the terms of s. 361A lease. Dowsett J decided to construe the legislation such that Division II of Part XI of the 1962 Act regulated the terms of any lease granted pursuant to s 361A 'in order to give effect to the legislative intention to grant leases to the owners of improvements'. Division II (among other things) dealt with the powers of the trustee of a DOGIT—at [62].

Policy behind s. 361A

Dowsett J was of the view:

> It is likely that the enactment of s 361A gave effect to a policy decision to transfer from the Crown the ownership of reserves held for the benefit of Aboriginal and Torres Strait people. Such transfer was to be to Councils, primarily or solely representative of, and constituted by, indigenous people. It was probably intended that s 361A would be a mechanism for regularising regimes of informal occupation existing in such reserves. There is no reason to assume that the informal system of land occupation at Yarrabah was, in any way, unique—at [61].

Later, it was said that, when characterising the rights conferred by s. 361A:

> [O]ne should keep in mind the apparent purpose of its enactment, namely to recognize and preserve the interests of Aboriginal people who have, whilst residing on reserves, expended time, effort and money in constructing improvements thereon. In a broad sense the provision is remedial, designed to deal with an awkward situation created by changes in the non-indigenous community's attitude towards indigenous people—at [74].

As noted earlier, the remedial nature of the provision was instrumental to the court's consideration of the proper construction of s. 361A.

Was Mr Ludwick's entitlement an accrued right?

The parties' arguments as to which of the two Land Acts applied revolved around the nature of Mr Ludwick's entitlement under s. 361A. He claimed it was a right to a lease in accordance with the provisions of the 1962 Act that was preserved by s. 20(2)(c) of the *Acts Interpretation Act 1954* (Qld) (Interpretation Act). The state submitted that Mr Ludwick had no accrued right to a lease, rather, a right to take action in accordance with the law as it stands at the time such action is taken.

After surveying the case law on point, Dowsett J noted that there were three distinct situations that might engage the Interpretation Act in this case:

- if s. 361A created a right which, by force of the 1962 Act, accrued without any qualification or requirement for further action, the right survived repeal;

- if s. 361 conferred a right upon persons 'having certain qualifications', and the 1962 Act contemplated 'an investigation to determine whether a particular person has the relevant qualifications', once the requirements were satisfied, the right conferred would survive repeal; or
- where a particular procedure has been commenced, there may 'be a right to have the procedure completed in accordance with the statute in its unrepealed form'—at [73].

It was found that the effect of s. 361A was to confer a right upon the owner of improvements that was subject only to the satisfactory investigation of the question of ownership. It was held to be a right within either the first or second category identified above. Prior to the repeal of the 1962 Act, the right held by an owner pursuant to s 361A was a right to a lease in accordance with that Act—at [79].

Before coming to this view, Dowsett J noted (among other things) that:
- it would be 'clumsy to try to imply into s. 361A some obligation' to act reasonably on the council or the minister and no criteria were prescribed by guide the decision-making process in any case;
- since s. 361A of the 1962 Act seemed to be directed at 'acknowledging and protecting individual rights', any power to fix a maximum term (whether derived from that Act or the 1994 Act) did not limit 'the actual entitlement of a relevant owner of improvements';
- the effect of s. 361A(1) was that ownership of improvements was 'not to be prejudiced' by a DOGIT i.e. the owner of the improvements continued to own them after the date of the grant and the relevant inquiry as to ownership in order to found an entitlement under s. 361A could be made after that date;
- it was the council, as trustee, that could make 'application' to the Minister pursuant to s. 361A(3), not the owner of the improvements—at [75].

According to the court, making satisfaction of the minister and the council as to ownership of the improvements a 'condition precedent' to any right being conferred upon the owner put 'too much emphasis upon the form of the section and too little upon its clear intention':

> It was necessary for the Council (as trustee) and the Minister ... to be satisfied that a particular person was the person entitled to a lease relating to the improvements in question. However that requirement seems to be ... an investigation necessary in order to give effect to an entitlement, rather than a condition precedent to such entitlement—at [77].

According to his Honour, the owner of the improvements (Mr Ludwick) was not required to 'take any step for the purposes of s. 361A'. Rather, the legislature apparently assumed the council or the minister would make the necessary inquiries to regularise the 'position as to ownership and occupancy' of improvements as at the date of the DOGIT. The likelihood that this was Parliament's intention increased 'when one considers that the legislation was ... designed to remedy some of the disadvantage suffered by a severely disadvantaged group in our society'—at [78].

Entitled for life to more than one lease

It was noted that, if the entitlement was to one lease only, 'for whatever period' the council decided, then that was a right that would survive pursuant to s. 20 of the Interpretation Act. However, Dowsett J concluded that s. 361A should not be construed as authorising the grant of only one lease. It was found that:

- section 361A confers an entitlement upon a person who owns improvements on relevant land at a particular point in time (i.e. the date of the DOGIT) and did not limit the period during which that person held that entitlement;
- a person so entitled as at the date of the DOGIT remained so entitled for life and such an entitlement may be 'addressed many years after' the date of the DOGIT—at [80].

Despite the fact that s. 361A(2) of the 1962 Act only provided for the grant of 'a lease', the singular should be read to include the plural (see s. 32C(a) of the Interpretation Act) because this was 'more in accordance with the intention of the section'. Therefore, it was found that:

- section s. 361A authorised the grant of a lease 'at any time during the life of a relevant person, regardless of whether any such lease had previously been granted, and if the lease expired during the owner's lifetime, another may be granted;
- while the right to the grant of a lease vested in the owner at the date of the DOGIT and could not be transferred (or passed by will or on intestacy), where it was a lease for a fixed term, and the lessee died during that term, the right to the balance of the term was 'an asset of the estate'—at [79] to [80].

Given that the entitlement was to receive a lease from time to time, any such lease should be granted pursuant to the law 'as it stands at the time at which each lease is granted' and s. 361A 'should now be read as referring to the relevant provisions' of the 1994 Act, pursuant to s. 511 of that Act—at [79] to [80].

Effect of removal of improvements

His Honour rejected the state's submission that s. 361A required that the improvements exist both at the date of the DOGIT and the date of the grant of the lease:

> In my view s 361A should be construed as creating an entitlement to a lease as at the date of the deed of grant, and that subsequent removal of the improvements is irrelevant. The huts were still on the Bukki block as at date of the deed of grant. The foundation slab was, and remains, on the block, having been extended and incorporated into the larger hut. It is probable that there were also gardens, fences and a lavatory on the land at the date of the deed of grant. At least some of the fencing and gardens presently on the block probably pre-date the deed of grant. There is no doubt that there were improvements on the land on 27 October 1986, and that the slabs and, probably, some remnants of earlier fencing and gardens remain at the present time—at [81].

Use as a residence and effect of temporary vacancy

In relation to whether the land was used as a residence for the purposes of s. 361A(2)(b), the relevant time was the date of the DOGIT. It was found that it was 'more probable than not' that either Mr Ludwick or his niece 'was so residing, or about to commence doing so' at that time and that it was 'reasonable to infer' that, as at that date (i.e. 27 October 1986), the land was being 'used as a residence'. His Honour was also satisfied that:

> [A] period of temporary vacancy [as alleged in this case] would not detract from the fact that the improvements were being used as a residence. This is particularly so, given that when he left, Mr Ludwick apparently intended to return to the Bukki block after his sojourn at Bilma. His plans changed when he met Ms Yeatman in 1987, but it seems that he (and perhaps they) always intended to move to the Bukki block eventually—at [81].

Reasonable area

In relation to improvements used as a residence, s. 361A(2) provides that the leased area is to be a 'reasonable area of land, being the immediate environs of the improvement'. Dowsett J gave the following non-exhaustive list of some 'relevant considerations':

- the size of other blocks in the area;
- access to the creek by Mr Ludwick and others (including traditional owners);
- the area actually occupied and cleared by Mr Ludwick;
- other community needs;
- the value of the improvements; and
- the area needed for use for residential purposes, including conditions peculiar to the local community.

Statutory licence to occupy

Among other things, s. 452A(1) of the 1994 Act provides that a person who occupied 'any building or structure as the person's residence, as an authorised resident on the land' 'at the time' the DOGIT was granted under the 1962 Act was 'entitled to continue' in occupation 'upon the same terms and conditions' until:

- the trustee of the land determined otherwise and terminated the person's right to occupy the building or structure; or
- the trustee of the land and that person agree to new terms and conditions for the person's occupation of the building or structure.

It was clear Mr Ludwick was residing lawfully on the Bukki block prior to the grant of the DOGIT with at least tacit acceptance by the relevant authorities, including the council. Dowsett J was prepared infer Mr Ludwick was occupying the Bukki block as his residence in October 1986. However, s. 452A contemplated the continuation of such occupation. In this case, there was a three year break but the question as to its effect 'was not really ventilated in argument'. Since Mr Ludwick was entitled to a lease, Dowsett J was of the view that it was 'probably not necessary' to reach any conclusion as to any entitlement to a licence—at [86].

Decision

While submissions were made as to the effect of Mr Ludwick's entitlement to a lease (or a licence) on native title, his Honour thought it best to leave that question until the parties had considered the reasons given in this case. Therefore, the matter was listed for further directions to determine (among other things) whether the court should consider the effect of his entitlement 'in connection with the operation of the NTA'.

On 3 November, the court made declaratory orders to the effect that Mr Ludwick is (and had been since 27 October 1986):

- the owner of 'improvements', within the meaning of the 1962 Act, located on the Bukki block;
- entitled to the grant by the council of a lease of the area on which the improvements stand and, in relation to the improvements used as a residence, a reasonable area in the 'immediate environs', with the precise area to be determined by the council.

The court also declared that:

- pursuant to s. 452A of the 1994 Act, Mr Ludwick is entitled to continue to occupy the Bukki block on the same terms and conditions as he occupied it at 27 October 1986 until the council decides to terminate his right to occupy or Mr Ludwick and the council agree to new terms and conditions for his occupation pursuant to the lease;
- this 'statutory licence' is a category D past act for the purposes of the NTA;
- any application to oppose the issue of a lease to Mr Ludwick pursuant to s. 57 of the 1994 Act it was to made by the applicant for native title on or before 24 November 2009.

The matter was then adjourned to a date to be fixed with liberty to apply.