Common law native title holders lack standing

Santo v David [2010] FCA 42

Logan J, 5 February 2010

Issue

The question in this case was whether common law native title holders have standing to bring proceedings seeking injunctive relief when their native title rights and interests are held in trust by a prescribed body corporate (PBC). It was found they did not have standing and so the proceedings were dismissed.

Background

For the purposes of these proceedings, the applicants (Pancho and Cyril Santo) were presumed to be members of the Erubam Le people, the group determined to be the common law holders of native title to Erub (Darnley Island) in *Mye on behalf of the Erubam Le v Queensland* [2004] FCA 1573 (*Mye)*. They sought injunctive relief in relation to a dwelling constructed on a part of Erub called Zaum (or Zaum Keriem) without their permission. They alleged that Zaum was traditionally owned and occupied by members of the Sam-Santo family and, on that basis, sought orders that the land be restored to the state it was in before the dwelling was built.

It was accepted that Zaum was subject to the approved determination made under s. 87 of the NTA in *Mye*. On and from 24 May 2005, the native title recognised in that determination (which includes a right to possession, occupation, use and enjoyment of the determination area) has been held in trust by the Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation (the corporation) pursuant to a determination under s. 56 of the NTA that it was the PBC for the determination area. The corporation holds the native title in trust for the benefit of the native title holders, including members of the Santo family, and is registered on the National Native Title Register as so doing. Therefore, according to s. 224(a) of the NTA, the corporation is the 'native title holder' for the determination area. In these circumstances, a question arose as to whether the Santos had standing to being these proceedings.

This question was explored by addressing three rhetorical questions posed by counsel for the Santos:

- does placing native title rights and interests in trust mean that the common law native title holder retains no 'interests'?
- what, precisely, does it mean to say that the native title rights and interests are held in trust by the prescribed body corporate, e.g. has there been a movement from each individual native title holder to the prescribed body corporate and, if so, does this mean each native title holder now does not hold native title, the prescribed body corporate does?
- has the native title holders' right to pass on their land been lost by the transfer to the trustee?

These questions were posed 'against the background of a reminder' that s. 24OA of the NTA provides that a 'future act' is invalid to the extent it affects native title unless that NTA otherwise provides. The applicants submitted that the construction of the dwelling relevant to these proceedings was an invalid future act.

Does a common law native title holder retain any 'interests'?

The court accepted that the NTA contemplates an individual common law holder retaining some rights even where a PBC holds the native title concerned in trust. Justice Logan summarised the applicants' main submission as being that the applicants retained standing to seek the relief claimed in this case:

> [E]ither because they enjoyed native title rights in respect of the land which were vested in them individually or, even if the native title were to be regarded as communal and that their rights were dependent upon that communal native title, they, as members of the Erubam Le people, were nonetheless entitled to sue to enforce those dependent individual rights—at [24].

It was noted that:

- the native title rights and interests recognised in *Mye* were found to be held by 'the persons who are or are entitled to be or become members of the claim group called the Erubam Le';
- it was not (for example) found that the Santos, as individuals, held any native title right or interest in the subject land—at [25].

Putting the operation of the NTA to one side, his Honour did not think it inconceivable that the Santos might have standing to claim relief in the context of a proceeding for the recognition by judicial declaration of particular native title rights and interests. The following example was given:

> Were it proved that, at the time of the onset of local British sovereignty a body of traditional laws and customs of the Erubam Le people existed, that, under those laws and customs there was provision for the ownership or enjoyment of rights in respect of land by an individual or a particular family, as opposed to communally, that, under those laws and customs, either the Applicants [the Santos] or at least their family were regarded as the traditional owners of or having rights in respect of the land known as "Zaum" ... to the exclusion of all others, that thereafter there had been uninterrupted "connection" by the Applicants and their predecessors and if no act of State had hitherto occurred in respect of that land which was inconsistent with that ownership or continued existence of those rights, the Applicants might well have standing to seek injunctive relief as against a trespasser to what was found to be their land or against a person otherwise violating their native title rights in respect of that land—at [26].

Indeed, the affidavit of Pancho Santo filed in these proceedings made his Honour 'suspect, strongly' that Mr Santos conceived his family to have 'just this kind of native title right or interest' in respect of Zaum. Further, as the court noted, the Santos could have made an application under the NTA for the recognition of their asserted 'individual or familial native title rights and interests ... in respect of ... Zaum ... and, as an associated matter, a claim for related interlocutory or final

injunctive relief as against a person said to be acting in violation of the asserted rights or interests'—at [27] to [28].

If they had, in the light of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51 to 52 and 61 to 62 (where Justice Brennan referred to native title as 'communal title') and the language of ss. 223 and 225, the question of whether it is a 'fundamental principle' that native title rights and interests had a communal character might have been starkly raised. However, in the circumstances of this case, it was 'neither necessary nor desirable further to explore such matters' because the 'existence of the determination is a given'. Therefore, the NTA 'has particular meaning and effect' which had to be considered—at [29], referring to *Bodney v Bennell* (2008) 167 FCR 84 at [151].

Relevant NTA provisions go to jurisdiction

The determination made in *Mye* is an 'approved determination' as defined in s. 13 of the NTA. Therefore, s. 68 operates to prevent the court from conducting any proceeding relating to an application for another determination of native title or making any other determination of native title in relation to the determination area, except in proceedings to revoke or vary the first determination or in review or appeal proceedings relating to the first determination. The Santos did not seek to revoke or vary the determination. Nor was this an application for the review of, or an appeal against, that determination. Logan J noted that, in any case, their application did not comply with the 'manner and form requirements' of a revised native title application found in s. 61(1) and the Santos did not fall within 'any of the listed classes of person who have standing' to make such an application. Further, s. 61A(1) provides that an application must not be made in relation to an area for which there is an approved determination of native title. As his Honour pointed out, these provisions 'transcend a question of standing. They go to an absence of jurisdiction at all to entertain the application'—at [31] to [34].

Nature of native title recognised

Logan J went on to note that, even if the focus was placed on the determination made in *Mye* (rather than provisions such as ss. 61A(1) and 68), the native title recognised in relation to the determination area (including Zaum) 'is *communal, not individual* in character' (emphasis in original). Further, it was determined to be held 'by the persons who are or are entitled to be or become members of the claim group called the Erubam Le' and is now held for such persons 'in trust' by the corporation, not by the Santos 'or even by the Santo family'.

As his Honour observed:

- this was not a result that was dictated by the NTA, i.e. there was no requirement that the native title rights and interests found to exist at Erub had to be held in trust by a PBC;
- native title was determined to be so held because of a nomination made by a representative of the people the court proposed to include as the native title holders i.e. the people s. 56(2) calls 'the common law holders';

- if no such nomination had been made, pursuant to s. 56(2)(c) the court would have been required to determine that the native title rights and interests were held by the common law holders—at [35] to [36].

No residual common law role

In the circumstances of this case, it was found that the PBC, not the Santos, had standing:

> [T]o seek the vindication or enforcement of the native title as determined and held in trust by it by, for example, seeking a declaration that a particular action affecting that native title is an invalid act and consequential relief—at [37].

As noted, instituting such proceedings falls within the functions 'consigned to' a PBC by reg. 6 of the *Native Title (Prescribed Bodies Corporate) Regulations* (the regulations), which are the regulations made for the purposes of s. 56(3) of the NTA. According to his Honour:

> In providing that, on the making of a determination by the Court, the nominated prescribed body corporate holds in trust the rights and interests from time to time comprising the native title, s 56(3) ... leaves no direct, residual or individual role for ... [common law holders] in relation to litigation of the kind just described. In that context, the role envisaged by those regulations for common law holders ... is indirect and found in an ability, evident in reg 6(1)(e) ... , for the common law holders to direct the prescribed body corporate to perform a function relating to native title. ... [T]he effect of the ... [NTA] and these regulations is comprehensive so far as any question as to who has the requisite standing—at [38].

Further, acceptance of the applicants' submission that the term 'trust' was 'not a term of art in public law' did not 'alter the comprehensive managerial function consigned to' a PBC in relation to the determined native title rights and interests and was not 'inconsistent with those rights and interests being held "in trust"'—at [39].

The Santos' submitted that s. 211 indicated the NTA 'envisaged ... an individual must retain some rights even where a prescribed body corporate is appointed' because otherwise 'a literal effect of reading the protection afforded' to a 'native title holder' by s. 211 would mean it was only extended to the trustee PBC and not to the common law holders undertaking the classes of activity covered by s. 211 in the exercise of native title rights. His Honour rejected this submission because:

> Read in context, the reference in s 211(2) to the "native title holders" means no more than, where that "native title holder" as defined is a prescribed body corporate [as in this case], then those on whose behalf the native title is held in trust by that body corporate are not prohibited—at [40].

It was found that, in providing for native title rights and interests recognised in an approved determination to be held in trust by a PBC and for the prescription of the functions for such a body, the NTA and the regulations left 'no common law role' for the Santos. Therefore, they did not have standing to bring the proceedings. If an application was made to have the building of the dwelling declared an invalid future act, it would have to be made by the corporation—at [41] to [42]

Decision
The application was dismissed because the Santos did not have standing to make it.