Compulsory acquisition of native title — Timber Creek

Griffiths v Lands & Mining Tribunal [2003] NTSC 86

Angel J, 31 July 2003

Issue

This decision of the Supreme Court of the Northern Territory is about an application brought on behalf of the Ngaliwurru and Nungali people under s. 45A of the *Lands Acquisition Act 1978* (NT) (LAA) seeking orders:

- setting aside a decision of the Minister for Lands, Planning and Environment (the Minister), to compulsorily acquire unalienated Crown land under the LAA; and
- restraining the Minister from acting on that decision.

Background

Three notices were issued under s. 32 of the LAA by the Minister, who sought to compulsorily acquire certain unalienated Crown lands (the lands) and 'all interests including native title rights and interests' therein. The plaintiffs, as registered native title claimants over the lands, objected to the acquisition. The objection was heard by the Lands and Resources Tribunal, which recommended that the Minister compulsorily acquire the land.

The plaintiffs made application to the Supreme Court, submitting (among other things) that:

- the Minister had no power to acquire native title rights and interests under the LAA for the purposes identified in the notices (essentially, in order to grant term leases for pastoral, agricultural or commercial purposes, some of which could later be surrendered in exchange for a freehold grant);
- to the extent that the LAA purported to permit the acquisition of native title for those purposes, it disadvantaged the native title holders as compared to those holding 'ordinary title'—see s. 253 of the *Native Title Act 1993* (Cwlth) (NTA)—and was, therefore, invalid to the extent that it was inconsistent with s. 24MA of the NTA, which deals with the future acts consisting of the acquisition of native title;
- the principle question for the court was whether the power of acquisition contained in the LAA is 'completely untrammelled as to purpose, or whether it is limited by reference to the objects and scope of the LAA and the limits on the Territory's Executive power to expropriate private interests in lands' as sourced in various Acts, such as the *Northern Territory (Self-Government) Act 1978* (Cwlth) and the *Racial Discrimination Act 1975* (Cwlth);
- as one of the purposes of the acquisition here was to extinguish native title in order to grant interests to third parties, the question was whether the LAA authorised the use of the power of acquisition 'for the purpose of depriving one citizen of rights of ownership [i.e. the native title holder] in order to confer

interests on another', when the acquisition served no relevant purpose 'in relation to the Territory'—at [6] to [10].

The Minister relied upon s. 43 of the LAA which states that 'the Minister may acquire land under this Act for any purpose whatsoever' and argued that the purpose of the acquisition was irrelevant and power of acquisition under the LAA was untrammelled.

Compulsory acquisition only in accordance with the *Crown Lands Act*

According to Justice Angel, the first question to be asked was whether the Minister could compulsorily acquire unalienated Crown land (UCL). His Honour was of the view that notices in question seemed to 'demonstrate some confusion as to the nature of Crown lands, of compulsory acquisition, and the interplay between' the LAA and the *Crown Lands Act 1992* (NT) (CLA), going on to state that:

> Unalienated Crown land is land in which there is only radical title. This is not to be confused with beneficial ownership of the land ... Beneficial ownership of an estate in unalienated Crown land can only be acquired by alienation in compliance with the *Crown Lands Act* (NT)—at [13] and [14].

The LAA was the means by which the Minister could acquire the beneficial interest of another, thereby extinguishing that interest and vesting the beneficial interest in the land acquired in the Territory 'freed and discharged of all interests'. In relation to UCL, there were no interests apart from the Crown's radical title. His Honour noted that: 'One cannot acquire what one already has' and it would be pointless for the Crown to purport to acquire what is already Crown land as defined in s. 3 of the CLA (which encompasses both radical title and a beneficial interest in the Crown). As the land was already Crown land, the notice under the LAA could not be effective to vest that land in the Territory. His Honour distinguished cases dealing with an acquisition of UCL in a state or a territory by the Crown in right of the Commonwealth, as this was done under an express statutory power to acquire Crown lands—at [14] to [18].

Angel J summarised the position generally as being that, in the absence of an express power to do so, land in which the Crown has radical title or in which the Territory holds the only beneficial interest cannot be compulsorily acquired. Where there is an unregistered interest in Crown land that is not derived from the Crown (such as native title), the Crown may compulsorily acquire that interest but not the land in which that interest is held—at [23].

Decision

It was found that UCL may only be alienated in the manner prescribed under the CLA. In the absence of an express statutory power to acquire Crown land, the LAA cannot be used in the manner contemplated by the Minister in this case. Therefore, the notices of proposal for an acquisition were invalid—at [21]. The plaintiffs obtained judgment in their favour. Questions of the appropriate form of relief and costs remained to be resolved.