Public works and s. 47A — Full Court

Erubam Le (Darnley Islanders) 1 v Queensland [2003] FCAFC 227

Black CJ, French and Cooper JJ, 14 October 2003

Issue

This case concerns two separate questions that were referred to the Full Court of the Federal Court under Order 29 rule 2 of the Federal Court Rules, namely:

- whether native title has been extinguished by the construction or establishment of certain public works on land presently held in fee simple pursuant to a Deed of Grant in Trust (DOGIT); and
- if so, whether that extinguishment had to be disregarded by operation of s. 47A for all purposes under the *Native Title Act 1993* (Cwlth) (NTA).

In a unanimous decision, the Full Court decided (among other things) that public works that were constructed or established before 24 December 1996 extinguished all native title to the area affected and that s. 47A did *not* apply. Therefore, the act of constructing or establishing those public works completely extinguished native title over the affected areas.

Background

The Erubam Le (Darnley Islanders) sought a determination of native title in respect of the island of Erub in the Torres Strait. The effect of certain works on native title was a 'sticking point' in reaching a proposed consent determination of native title. In order to break the deadlock, the applicants applied successfully to Justice Drummond under O29 r2 of the Federal Court Rules, which provides that the court may make orders for 'the decision of any question separately from any other question, whether before or after any trial or further trial in the proceedings', for an order referring separate questions in respect of the impact of these works on native title to the Full Court for determination. The questions were referred in February 2003.

The area on which the works in question were situated was held in fee simple in trust 'for the benefit of Islander inhabitants' by the Erub Island Council (the council) pursuant to a DOGIT dated 17 October 1985. These works were (with the approximate date on which each was constructed or established in brackets):

- a windmill for the purposes of supplying water to residents (1977), a windmill, earth dam storage, reservoir and pipes (1985-1986), residential house (1993-94), residential house (2000), reticulated sewerage scheme (2002); sport and recreation stadium (2002), all of which were the property of the council; and
- a state school (1988), where there was no lease of the area concerned to the state.

The questions

In summary, the questions were:

- putting to one side the operation of s. 47A of the NTA, whether the construction or establishment of the works in question extinguished native title in relation to the area affected by them; and
- if native title had been extinguished by the construction or establishment of any of these works, whether s. 47A mandated that such extinguishment must be disregarded for all purposes under the NTA, including for the purpose of making a determination of native title under s. 225.

Agreed facts

It is important to note that, for the purposes of dealing with the separate questions put to Chief Justice Black and Justices French and Cooper, it was agreed that the works in question were:

- validly done; and
- public works as defined in s. 253 of the NTA—at [6] and [28].

As a result, this case may be of limited precedent value and should, therefore, be treated with some caution. In this context, it is noteworthy that during the hearing, counsel for the applicants sought leave to withdraw their agreement that the works in question were public works as defined in the NTA. The court refused leave both because the application to withdraw was made so late in the proceedings and because granting leave would be to the detriment of the other parties who had acted on the understanding that this fact was agreed. In any case, the court was of the view that 'most of them fall indisputably within that definition'—at [6].

Q 1: Extinguishment of native title by the construction of the public works

As the High Court has emphasised (see *Western Australia v Ward* [2002] HCA 28 and *Wilson v Anderson* [2002] HCA 29, both summarised in *Native Title Hot Spots* Issue 1), the starting point in any analysis in relation to the extinguishment of native title is the NTA and, in this case, its Queensland analogue, the *Native Title (Queensland) Act 1993* (Qld). As the latter adopts the provisions of the NTA in relation to acts that are attributable to the State of Queensland, the court chose to refer directly to the provisions of the NTA for the sake of convenience. However, the provisions of the Queensland analogue are the operative provisions.

Acts 'attributable' to the State of Queensland

The court accepted that the public works under consideration were all acts 'attributable to the State of Queensland' without any discussion of the issue. All bar one of the acts were done by, or on behalf of, the council. Section 239 provides that, in order for an act to be 'attributable' to the state, it must have been done either by the State of Queensland or by the council under a law of the State of Queensland. Whether or not the latter was the case was not discussed—at [19] but see [64].

Were the public works done pre-24 December 1996 previous exclusive possession acts?

An act is a 'previous exclusive possession act' if (among other things) it:

- consists of the construction or establishment of a public work where construction or establishment of the work commenced on or before 23 December 1996;

- is valid — as it was agreed that the acts in question were valid, no question as to why this was so arose for determination; and
- is not excluded from the definition of excluded previous exclusive possession act operation of s. 23B(9).

If the acts in question were previous exclusive possession acts, then the effect of them on native title was complete extinguishment—s. 23C(2).

Exclusions to the PEPA provisions

The applicants contended that the acts in question were not previous exclusive possession acts because s. 23B(9) applied to exclude them from the class of acts so defined. That subsection provides that an act is not a previous exclusive possession act if it is:

- the grant or vesting of anything that is made or done by or under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
- the grant or vesting of anything expressly for the benefit of, or to or in a person to hold on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
- the grant or vesting of anything over particular land or waters, if at the time a thing covered by either of the preceding paragraphs is in effect in relation to the land or waters.

The applicants argued that the construction or establishment of a public work was a 'vesting' because the construction of a fixture vests title to that fixture in the owner of the freehold, which, in this case, was the council—at [31].

The court rejected this submission, saying that:

> The public work is neither 'granted' nor 'vested'. In truth, there is no change at all in the fee simple interest as such, even if the land becomes, as a practical matter, more valuable or more useful—at [32].

Their Honours supported their conclusion by referring to:

- the clear distinction drawn in the NTA between acts that are or consist of a grant or vesting and acts that consist of the construction or establishment of any public work;
- the definition of a public work in s. 253, which recognises that such works may become fixtures yet remain previous exclusive possession acts; and,
- the fact that the approach contended by the applicants would create uncertainty since, in the context of ss. 23B(7) and (9), where the public work became a fixture, native title would not be extinguished but where it did not, native title would be extinguished—at [32] to [34].

The court also rejected an argument that s. 23D had any application in this case:

> The text of s 23D makes it clear that the section has no application to protect native title rights and interests from extinguishment by previous exclusive possession acts as provided for by s 23C; its only application is to protect reservations, conditions or rights

and interests "other than native title rights and interests". Section 23D confirms that these other interests are not extinguished by previous exclusive possession acts, but it does not operate to restrict the extinguishment of native title rights and interests. The submission must therefore be rejected—at [36].

Conclusion on pre-24 December public works
The court held that the public works that commenced to be constructed or established on or before 24 December 1996 were previous exclusive possession acts and completely extinguished native title—at [37].

Note that the court was not asked to, and did not, consider the operation of the extended definition of a public work found in s. 251D. Further, because it was agreed that the acts in question were valid, the court did not look to whether or not the construction or establishment of the works in question were past or intermediate period acts, which would be relevant to any question of compensation for extinguishment.

Did the public works done after 23 December 1996 extinguish native title?
As the answer to this question depended upon the nature of the act as defined in the NTA, the court dealt with each possible category in turn: past, intermediate and future act.

Extinguishment as a result of the effect of the validation of a past act
Most past acts occurred on or after the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) on 31 October 1975 but before 1 January 1994, when the NTA commenced. However, in this case, the court had to determine whether the public works that were constructed or established after 23 December 1996 (when the previous exclusive possession act provisions cease to apply) were included in the definition of a 'past act' by operation of s. 228(9). This provision extends the definition of a past act to include certain acts that happened on or after 1 January 1994, where the act in question has a particular 'connection' with an act that happened before that date. If the public works in question here were past acts, then they would be category A past acts—see ss. 15, 228 and 229.

For the sake of the argument, the court assumed that native title existed in the relevant area at the time when the works in question were constructed or established, which satisfied the requirements of s. 228(9)(a).

Invalid to some extent but validated
For the public works in question to be past acts, they must have been acts that were 'invalid to any extent' but would have been valid to that extent if the native title did not exist at the time: s. 228(9)(a) and s. 228(2)(b). On this point, the court assumed 'for the sake of argument' that the construction of the public works in question was 'inconsistent with native title interests' and, implicitly, that this led to invalidity that was cured by the application of the past act provisions.

With respect, for the purposes of the past act provisions, it is not the fact that these acts created rights that were inconsistent with the native title that gives rise to the invalidity that is required in order to attract the past act provisions. Rather, it is the fact that, by operation of s. 10 of the RDA, the acts in question would have been invalid. Section 10 appears to have this effect only in circumstances where the statutory authority for doing the act in question allows for the 'uncompensated destruction' of native title rights and interests while leaving other titles intact. Therefore, it appears that while the creation of inconsistent non-native title rights is a necessary condition in defining a past act, it is not of itself sufficient. Acts creating inconsistent rights can be done after the RDA commenced without there being any question of the invalidity required to attract the past act provisions arising—see *Ward* at [108]ff.

Connected to an earlier valid act relating to use for a particular purpose?
For the purposes of the analysis, the court assumed the DOGIT granted in 1985 was an 'earlier act' as defined in s. 228(9)(b). The question was then whether the grant of the DOGIT contained or conferred a:

> [R]eservation, condition, permission or authority under which the whole or part of the land or waters to which the earlier act [the DOGIT] related was to be used at a later time for a *particular purpose*—see s. 228(9)(c), emphasis added.

The DOGIT, in part, stated that the 'grantee is to hold the said land in trust for the benefit of Islander inhabitants and for no other purpose whatsoever'. The court accepted that the phrase 'for the benefit of Islander inhabitants' was a 'purpose'—at [55].

The question then was whether there was a reservation etc. for a particular purpose within the meaning of s. 228(9)(c). The court held that the purpose of 'the benefit of Islander inhabitants' was not a 'particular' purpose in the sense contemplated by the NTA. It was emphasised that this conclusion was based on the facts of the case in question, particularly the wording of the DOGIT itself—at [57].

The DOGIT contained a number of other reservations and conditions (e.g. in relation to minerals, petroleum, forest products, quarry material and public purposes). It was held that the construction or establishment of the public works in question was not done pursuant to any of those reservations or conditions and, therefore, s. 228(9)(d) did not apply—at [62].

The court also briefly discussed the provisions of the *Community Services (Torres Strait) Act 1984* (Qld), which conferred the power under which the public works were constructed by the council. The court held that this Act did not impose any relevant reservation etc. that the land be used for a particular purpose and thus s. 228(9)(c) did not apply—at [63] to [66].

Therefore, it was concluded that the acts in question were not category A past acts.

Intermediate period acts

Since the acts in question were done after 23 December 1996, they could not (by definition) be intermediate period acts—at [67] and see s. 232A.

Future acts other than intermediate period acts

In considering the application of the future act provisions, the court focussed on Subdivision J of Division 3 of Part 2 of the NTA, pursuant to which native title may be extinguished as the result of the doing of a future act covered by that subdivision. The court assumed, for the purposes of this analysis, that the construction or establishment of the public works in question were future acts—at [71] to [74], referring to s. 233(1).

The relevant provision in this case was s. 24JA(1)(d), which is similar to, but broader than, s. 228(9)(c) discussed above. It provides as follows:

> [T]he earlier act [the DOGIT] contained, made or conferred a reservation, proclamation, dedication, condition, permission or authority (the reservation) under which the whole or part of any land or waters was to be used for a *particular purpose*—emphasis added.

Essentially for the same reasons given above in relation to past acts, the court concluded that s. 24JA(1)(d) was not satisfied—at [77].

Assumptions in relation to future acts

In making the assumption that the acts in question were future acts, the court again used inconsistency as the touchstone for validity, when this does not (with respect) appear to be the correct analysis — see s. 233(1). The court also spoke of a future act being either 'valid' or 'validated'. Again, with respect, this does not appear to be the correct analysis. In most cases, a future act (other than an intermediate period act) is either valid when done because the conditions of the relevant subdivision of the future act regime are met or it is invalid. The fact that the doing of the act creates inconsistent rights is not relevant. If a future act (other than an intermediate period act) had been done invalidly, then it can only be validated under a registered indigenous land use agreement—see s. 24AA, s. 24OA and s. 233(1)(c).

Other future act provisions not considered

There was no discussion of the other subdivisions of the future act regime, such as Subdivision K, that may have been relevant at least to the construction of the reticulated sewerage scheme—see s. 24KA(1)(b)(ii).

However, this may have been because the question before the court was whether or not the public works in question (which it was agreed were valid) extinguished native title. A future act covered by Subdivision K is one to which the non-extinguishment principle found in s. 238 applies. Therefore, it was not relevant to the question the court was asked. The only other subdivision of the future act regime that may have been relevant and pursuant to which native title may be extinguished is Subdivision M, which deals with compulsory acquisitions. However, it appears that this subdivision was not relevant in the circumstances of this case both because there was nothing to indicate that any such acquisition had occurred and because it

had been agreed that the acts in question was valid. Under Subdivision M, the latter could not be the case in the absence of the former.

Extinguishment at common law

The court was of the view that it was not necessary to consider the application of the common law test for extinguishment (the inconsistency of incidents test) because extinguishment brought about by the construction or establishment of a public work is now governed by the provisions of the NTA—at [78].

Conclusion on Q 1

The court concluded that, in the circumstances of the questions put to it:

- the construction or establishment of public works before 24 December 1996 extinguished native title rights and interests in respect of the land on which they are situated; and
- the construction or establishment of public works after 23 December 1996 did not extinguished any native title rights and interests that might otherwise exist.

Q 2: Must extinguishment caused by pre-24 December 1996 public works be disregarded?

Section 47A is a special provision of the NTA that only operates in relation to, essentially, lands expressly held or granted for or on behalf of Aboriginal peoples or Torres Strait Islanders. It was agreed between the parties and 'clearly the case' that, as the grant made under the DOGIT resulted in the area concerned being held on trust expressly for the benefit of Torres Strait Islanders, s. 47A(2)(a) applied to the grant made by the DOGIT. Therefore, any extinguishment of native title that occurred by reason of that grant must be disregarded for all purposes under the NTA—at [82].

The question was whether s. 47A(2) applied to the construction or establishment of the public works in question here. If so, then all extinguishment brought about by the construction or establishment of those works would also have to be disregarded for all purposes under the NTA, including for the purposes of making a determination of native title under s. 225. The relevant provision was s. 47A(2)(b), which provides, among other things, that any extinguishment of native title brought about by the creation of 'any other prior interest' must be disregarded for all purposes under the NTA. In this case, the issue was whether or not the construction or establishment of a public work could be characterised as the 'creation of any other prior interest'.

Black CJ, French and Cooper JJ noted that:

> Taken in isolation, the definition of "interest" [in s. 253] extending, as it does, beyond legal and equitable interests to "any other right" in connection with land, might extend to the right that the owner of land has to deal with things that have become parts of the land such as dams, pumps, houses, pipes and other such things which, in this case, are in the nature of public works. It seems to us however that in the context of the Native Title Act such a consequential or derivative interest cannot fall within the definition, wide though it is, of "interest" and it certainly sits uncomfortably with the notion of "the creation of any other prior interest" for the purposes of s 47A(2)(b)—at [89]

However, the court was of the view that it did not need to resolve this question because it could not be said that the construction or establishment of the public works in question were 'properly to be characterised as "the creation of a prior interest" in the land'. Therefore, s. 47A(2)(b) did not apply—at [90], emphasis in original.

Conclusion on Q 2
It was decided that s. 47A(2) did not apply to the public works in question. Therefore, any extinguishment brought about by the construction or establishment of public works prior to 24 December 1996 was *not* to be disregarded under the NTA.

Comment
The referral of separate questions to the court was effectively by way of a stated case. As noted above, certain assumptions were made to facilitate this process and the analysis of the questions put. They were:

- the acts in question were valid;
- they were attributable to the state (see s. 239);
- the acts affected native title.

These assumptions affected the conclusions reached. For example, there was no need to conduct any analysis of whether the acts in question 'affected' native title (a requirement under the definition of a future act found in s. 233) to any greater degree than did the grant made under the DOGIT. While that would not have affected the conclusion in relation to pre-24 December 1996 public works, it may have rendered the post-23 December 1996 analysis unnecessary. Similarly, if any of the acts in question could not be characterised as 'acts attributable' to the state, then they would not have been previous exclusive possession acts because of s. 19 of the *Native Title (Queensland) Act 1993* and s. 23E of the NTA. While this is unlikely in this case, in another case, such an analysis would need to be undertaken.

In applying the NTA in this case, the court was assessing how extinguishment could arise on the agreed facts. As noted, the result was that it was unnecessary to look at other future act provisions in relation to the post-24 December 1996 acts where the non-extinguishment principle would apply, for example s. 24KA(4). It was also unnecessary to resolve the question of whether the acts in question, if future acts, were done validly because it was agreed, for the purposes of this case, that the acts in question were valid. (An invalid future act cannot extinguish native title.) Therefore, as noted above, in terms of precedent value, the case should be treated with some caution except in so far as it relates to the application of s. 47A to valid public works.

Special leave sought
On 10 November 2003, an application for special leave to appeal to the High Court against this decision was made on behalf of the Erubam Le (Darnley Islanders).