

Separate question on s. 47B rejected — Timber Creek

Griffiths v Northern Territory [2003] FCA 1177

Mansfield J, 31 October 2003

Issue

An application was made to the Federal Court to have it determine, as a separate question under Order 29 rule 2 of the Federal Court Rules (FCR), whether s. 47B of the *Native Title Act* 1993 (Cwlth) (NTA) applied to a particular area in Timber Creek so that any extinguishment that had occurred in relation to that area had to be disregarded for all purposes under the NTA. In declining to determine this question, the court gave some useful guidance as to the principles applying in relation to applications made under O29 r2.

Background

The applicants claimed 'exclusive' native title rights and interests over all of the vacant Crown land in Timber Creek. That land had previously been subject to a commonage reserve and a pastoral lease, both of which may have extinguished certain native title rights and interests if they existed at the time the reserve was created or the lease granted.

Application of s. 47B

Subsection 47B(2) of the NTA provides that:

For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

However, s. 47B has a limited application. It only applies if, when a claimant application is made in relation to the area, one or more members of the native title claim group occupied the area and the area was not:

- covered by a freehold estate or a lease; or
- covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a state or a territory, 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; or
- subject to a resumption process, as defined in s. 47B(5)(b).

The town boundary of Timber Creek had been gazetted. Without determining the issue, the court noted that this gave rise to the issue of the area was 'covered by a proclamation ... made or conferred by the Crown in any capacity under which the land is used for public purposes or for a particular purpose'.

Section 47B has been applied to land within the Alice Springs town boundary: *Hayes v Northern Territory* (1999) 97 FCR 32 at [162] to [168].

However, in *Daniel v Western Australia* [2003] FCA 666 (summarised in *Native Title Hot Spots Issue 6*), Nicholson J found that s. 47B did not apply to the Karratha townsite area both because that area was covered by a temporary reserve and because it was:

[C]overed by a ... proclamation, [and/or] dedication ... made or conferred by the Crown in any capacity ... under which the whole ... of the land ... in the area is to be used for public purposes or for a particular purpose. The original declaration of the ... townsite was made by the Governor...who is "the Crown in any capacity". The boundaries of the townsite were defined ... and set apart as town and suburban lands ... which constitutes a proclamation or dedication. A townsite is a public purpose, as well as a particular purpose—at [970] to [971].

In this case, the applicants contended that:

- the decision in *Daniel* was either specific to certain land in Western Australia or was in error; and
- the proclamation excising the Timber Creek from a commonage reserve did not have the effect that the land 'be used for public purposes or for a particular purpose'.

The Northern Territory argued that it was inappropriate to determine the proposed preliminary question.

Other proceedings

The claimant applications in this case were made in response to notice of a proposal to compulsorily acquire the area given under s. 32 of the *Lands Acquisition Act (NT)* (the LAA). The compulsory acquisition went ahead but the applicants successfully challenged the validity of the acquisition notice in the Supreme Court of the Northern Territory: see *Griffiths v Lands and Mining Tribunal* [2003] NTSC 86 (summarised in *Native Title Hot Spots Issue 6*). That decision is subject to an appeal to the Full Court of the Supreme Court.

Separate questions

Order 29 r 2(a) of the FCR 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', which includes any question of law or fact in issue in the proceeding—see O 29 r (1).

Justice Mansfield identified the following matters as being relevant to the exercise of the discretion available under O 29 r 2:

- while there are circumstances when it will be in the interests of justice for the separate trial of a question in a proceeding, '[t]here should be some identifiable benefit in directing the separate trial of a question;

- generally, the question should be one that, if determined, would or may make a substantive hearing unnecessary or lead to the real prospect of informal resolution of the entire proceeding;
- it is unlikely that a separate trial of a question would be ordered in cases where there was potential overlap of factual issues on separate questions arising in the proceeding;
- unless it leads to an overall resolution of the proceeding however answered, resolution of a separate question in a proceeding may delay the proceedings if the parties pursue appeal rights;
- where the separate question sought to be tried was (as in this case) a question of law, it was 'desirable that facts upon which that question of law is to be tried should be clearly and definitively established';
- there was a risk that the preliminary trial of the issue would become pointless, or may need to be qualified if the factual foundation upon which a separate question was determined shifted or was expanded as a result of evidence later given at the trial;
- it was also undesirable that the separate trial of a question should be ordered where the background and factual matrix on which the question arises is not agreed or might not be fully determined—at [4] to [8].

Decision

Mansfield J decided that it was inappropriate to make the order sought because:

- the resolution of the question would not lead to the determination of the proceedings. The nature of native title rights and interests which may exist in relation to the area would still need to be determined and there may be other issues as to extinguishment;
- if the question was determined consistently with *Daniel*, the case would proceed in any event and the benefit of having the issue determined at this point 'would not be substantial';
- if the point was so significant, it would be unlikely that the determination of the issue by a single judge would not be subjected to appeal proceedings that could take a considerable time to resolve;
- this case was likely to be listed for hearing soon and dealing with the separate question now might cause considerable delay in allocating it for listing, particularly if appeal proceedings were taken;
- resolution of the question would not make any significant impact upon the preparation of the matter for trial;
- the basis upon which the application was made was insufficiently clear to warrant the separate question being tried at this stage. There was no agreement between the parties as to the facts upon which the question should be determined;
- if the appeal in the Supreme Court was successful and restored the validity of the compulsory acquisition process, that might put an end to the claimant applications in a practical sense:

[T]he process of having determined the validity of the acquisitions should be permitted to proceed before the trial of issues in this matter, except for its general preparation towards a hearing. If the proposed acquisitions are held to be valid, the question which is now sought to be asked will become academic—at [22] to [25].