JANGO V NORTHERN TERRITORY OF AUSTRALIA

Full Court of the Federal Court of Australia (French, Finn and Mansfield JJ)
6 July 2007
[2007] FCAFC 101

NATIVE TITLE- compensation claim – nature of native title rights and interests extinguished – criteria for identification of native title holders – criteria presented in application and points of claim – evidence insufficient to support existence of traditional laws and customs asserted in criteria – whether trial judge ought to have determined pre-existing native title on other bases – function of pleadings – inability of court to undertake general inquiry – whether trial judge misunderstood pleaded case – no error by trial judge – appeal dismissed – notice of contention – whether registration of title under *Real Property Act 1886* (SA) validly extinguished native title – effect of indefeasibility provisions – effect of validation provisions of *Native Title Act 1993* (Cth) and *Validation (Native Title) Act 1994* (NT).

Facts:

The appellants, the applicants at trial, applied for a determination of compensation under section 61(1) of the *Native Title Act 1993* (Cth) ('*NTA*') based on the extinguishment of native title rights and interests around the town of Yulara in the Northern Territory. Their points of claim outlined certain 'conditions' for being a native title holder and a set of 'additional factors'. Both the conditions and additional factors were said to be relevant to whether an individual held native title and, if so, the nature of the interests held. The trial judge, Sackville J, dismissed the application on the basis that the evidence did not support the existence of those conditions. He left open whether, independent of the pleaded case, the appellants, or some of them, could have succeeded.

The appellants appealed against that decision, arguing that Sackville J misread their pleaded case and that because of his Honour's determination that certain members of the Compensation Claim Group held or may have held native title rights over the claim area, his Honour was obliged by sections 51(1) and 94 of the *NTA* to determine the persons who held such rights. The respondent sought to support Sackville J's judgment by way of a notice of contention, on the ground that no liability to compensate arose under the *NTA* since any rights and interests were validly extinguished prior to the *NTA*'s enactment by the registration of estates in fee simple under the *Real Property Act 1886* (SA).

Held, unanimously dismissing the appeal:

1. In a native title compensation application, it is for the applicants, as part of their case for compensation, to assert and identify in their points of claim the native title rights and interests and the factual bases upon which they rest. It is for the Court to determine whether those assertions are established: [83].

2. The Court cannot, in hearing a native title determination application or a compensation application, conduct a roving inquiry into whether anybody, and if so who, held any and if so what native title rights and interests in the land and waters under consideration: [84]. This is so even if the matter involves a determination of proprietary rights *in rem*. The Court is authorised only to adjudicate the matter before it and not to embark upon an inquiry into issues which are not raised for its determination: [85].

3. Indigenous law and custom will not always be susceptible to precise and concise expression in points of claim. Where appropriate, courts should consider the points of claim in substance, not form: [80].

4. The native title rights and interests, if any, were extinguished by the making of the grants in fee simple, not by the subsequent registration of those grants: [111].