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FEJO AND MILLS (ON BEHALF OF THE LARRAKIA PEOPLE) v THE NORTHERN TERRITORY AND OILNET (NT) PTY LTD

High Court of Australia (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)
10 September 1998
[1998] HCA 58

Native title to land — extinguishment — whether grant of fee simple extinguishes native title — whether native title can revive when land once again held by the Crown registered native title claimants — right to negotiate — applications for injunction and summary dismissal — whether court can consider merits of native title claim in determining those applications.

Native Title Act 1993 (Cth), Pt 2, Div 3, subdiv B. *Commonwealth v NSW* (1923) 33 CLR 1, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1; *WA v Cth* (the *Native Title Act* case) (1995) 183 CLR 373 at 422; *Wik Peoples v Queensland* (1996) 187 CLR 1 referred to; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 (the *Waanyi* case) considered.

Facts:

The Larrakia people had a registered application for a determination of native title with the National Native Title Tribunal. The action was brought against the Northern Territory Government, and another, in response to the granting of Crown leases, with an option to acquire freehold, over lands within the area subject to the application. The area in dispute was once part of a tract of land granted in April 1882, in fee simple. The land was later acquired by the Commonwealth for public purposes, the proclamations for which were revoked in 1980 so that the land again became vacant Crown land.

In December 1997, in the Federal Court, the Larrakia people sought a declaration that native title exists in relation to the lands in question and that the Larrakia people are the native title holders in respect of those lands. They argued that the Northern Territory government was required by the *Native Title Act 1993* (Cth) (the NTA) to either negotiate with the Larrakia or to compulsorily acquire their native title. The Larrakia people also sought injunctions to prevent any further development on the lands and to prevent the Northern Territory government from accepting any surrender of the Crown leases in exchange for freehold.

The application for injunctive relief was refused by O'Loughlin J and the proceedings dismissed. The Larrakia appealed to the Full Federal Court. The first ground of appeal was removed to the High Court and heard before the Full Bench.

Ground of Appeal:

The High Court was asked to consider a single ground of appeal that:

> The learned trial judge erred in holding that the grant of land made on behalf of Her Majesty by the Governor of South Australia ... was effective to extinguish all native title rights and interests in the land subject of the grant so that, upon the land being re-acquired by the Crown, no native title rights and interests could then be recognised by the common law.

The case raises two important issues. The first issue is whether a grant of freehold extinguishes native title so that no form of native title can co-exist with freehold title. The second question is whether extinguishment was permanent and absolute or whether there was potential for native title under the common law to 'revive' or be re-recognised when the land returned to the Crown. The case also dealt with the issue of injunctive relief available outside the operation of the NTA.

Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, and Callinan JJ gave a joint judgement. Kirby J gave separate reasons but reached the same conclusions.

Held:

Native title is completely extinguished by the grant of a freehold estate. The rights granted under fee simple are inconsistent with the continued existence of any form of native title and no coexisting or concurrent rights can survive.

The test of inconsistency in relation to freehold lies not in the comparison of the facts of inconsistency but the legal rights conferred by the respective titles.

The grant of freehold extinguishes native title permanently, regardless of the land being held by the Crown in the future. Native title cannot revive after a grant of freehold title. While the existence of Indigenous law is necessary to establish native title, it is not sufficient to invite recognition under the common law.

No guidance in these issues can be gleaned from comparative law. The position of indigenous peoples in Australia is distinguished from those in other common law jurisdictions.

The right to negotiate and other statutory rights under the NTA are valuable rights that can may be protected by injunctions. General principles of injunctive relief apply, having regard to whether there is a serious question to be tried and that relief is warranted by the balance of convenience. While acceptance by the Registrar establishes an arguable case, some inquiry may be made into the case of the other parties.

Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ:

1 On 6 December 1996, the Larrakia people, a community or group of Aboriginal Australians whose traditional lands are said to encompass lands and waters around Darwin and the Cox Peninsula in the Northern Territory, lodged an application for determination of native title (the application) with the Native Title Registrar (the Registrar). The application covers extensive portions of land in the area of Darwin, Palmerston and Litchfield. On 1 April 1997 the application was accepted by the Registrar pursuant to s 63 of the *Native Title Act 1993* (Cth) (the Act).[1]

2 The land the subject of the application includes land to the south of what is now the city of Darwin and its suburbs. In 1996, before the application was lodged, that land was subdivided by the Northern Territory into 15 parcels. Between July 1996 and the time at which the application was lodged, the Northern Territory granted Crown leases in respect of eight out of 15 parcels. Each of those leases contained a condition that permitted the lessee, on completion of development in accordance with the terms of the lease, and payment of any sum owing to the Territory, to surrender the lease in exchange for a freehold title at no further cost. Between March and November 1997, Crown leases were issued in similar terms with respect to five of the remaining seven parcels in the subdivision. Two of those leases were issued to Oilnet (NT) Pty Ltd (Oilnet) ...

The Federal Court proceeding

4 The application in the Federal Court sought a number of declarations including declarations that 'native title exists' in relation to the area the subject of the Crown leases to Oilnet, that 'the Larrakia people are the holders of that native title' and that, before it could grant a valid lease to Oilnet, the Northern Territory was obliged by the Act either to negotiate with the Larrakia people or to compulsorily acquire their native title. It also sought injunctions, both interlocutory and permanent, restraining Oilnet from undertaking or continuing to 'undertake any development of, or the erection of improvements on or affecting', the land the subject of those leases, and restraining the Northern Territory from accepting a surrender of the Crown leases that it had granted to Oilnet or exchanging those leases for a freehold title. Various other forms of relief were sought but their details are not important ...

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1 Section 63(1) of the Act provides:

> If the requirements of s 62 are complied with in relation to the application, the Registrar must accept it, unless he or she is of the opinion:
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> (a) that the application is frivolous or vexatious; or
>
> (b) that *prima facie* the claim cannot be made out.

The Act will be amended by the *Native Title Amendment Act 1998* (Cth). Some of those amendments are proclaimed to come into effect on 30 September 1998 and others on 30 October 1998. No question of the effect of any of the amendments to be made by the 1998 Act can arise in these proceedings.

The ground removed

7 The ground that was removed and argued in this Court was:

> 1. The learned trial judge erred in holding that a grant of land made on behalf of Her Majesty by the Governor of South Australia, pursuant to the power vested in the Governor by the Letters Patent establishing the Province of South Australia and under Act No 28 of 1872 entitled 'An Act to Regulate the Sale and Other Disposal of the Waste Lands of the Crown in that portion of the Province of South Australia commonly styled the Northern Territory', was effective to extinguish all native title rights and interests in the land the subject of the grant so that, upon the land being re-acquired by the Crown, no native title rights and interests could then be recognised by the common law.

To explain this ground, it is necessary to say something about dealings with the land before the 1996 subdivision.

Earlier dealings in the land

8 The land that was subdivided in 1996, which included the land the subject of the Crown leases to Oilnet, formed part of a tract of land granted to John James Benham by grant dated 20 April 1882. The Commonwealth acquired the land granted to Benham for the purposes of a quarantine station by notification in the Gazette to that effect on 22 December 1927 ...

9 ... However, the grant of the land to Benham and its later acquisition by the Commonwealth are the only steps that are relevant to the ground of appeal removed into this Court.

The 1882 grant

10 Section 6 of the *Northern Territory Land Act 1872* (SA) (referred to in the ground removed) provided that after the coming into operation of that Act 'all waste lands in the Northern Territory [should] be sold, demised, or otherwise disposed of and dealt with in the manner and subject to the provisions' of that Act and not otherwise ...

11 ... The grant was expressed to be of the land 'together with all Timber Minerals and Appurtenances to hold unto the said John James Benham, His Heirs and Assigns for ever'. Words of limitation in the form 'to A his heirs and assigns for ever' have long been recognised as conveying an estate in fee simple.[2]

The Commonwealth acquisition

12 The Crown grant bears a memorial recording, in accordance with the terms of the notification of 22 December 1927, that the land was acquired by the Commonwealth in pursuance of the *Lands Acquisition Act 1906* (Cth) (the 1906 Act) and the *Lands Acquisition Ordinance 1911* (NT). The memorial also records that 'by virtue of s 8 of the said Ordinance the land is Crown land and until the Governor General otherwise directs reserved' for the purpose of a quarantine station.[3] The land having been acquired by compulsory process rather than agreement, s 16 of the 1906 Act provided that upon publication of the notification of acquisition in the Gazette the land, by force of the Act, was vested in the Commonwealth

> ... freed and discharged from all trusts, obligations, estates, interests, contracts, licences, charges, rates, and easements, to the intent that the *legal estate* therein, together with all rights and powers incident thereto or conferred by this Act, shall be vested in the Commonwealth. (Emphasis added)

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2 Co.Litt.1a 'Tenant in fee simple is he which hath lands or tenements to hold to him and his heiress for ever'. *Sexton v Horton* (1926) 38 CLR 240 at 244 per Knox CJ and Starke J, 249 per Higgins J; *In re Davison's Settlement* [1913] 2 Ch 498 at 502 per Warrington J.

3 Prior to its repeal, the 1906 Act applied to land acquired by the Commonwealth for public purposes. And prior to its repeal, the *Lands Acquisition Ordinance 1911* (NT) applied to land acquired by the Commonwealth in the Northern Territory for the public purposes of the Territory. Subject to the Ordinance, the Ordinance applied the provisions of the 1906 Act to the acquisition 'by the Commonwealth of land in the Northern Territory for any public purpose of the Territory'. It is to be taken from the reference to both the Act and the Ordinance in the Notification of 22 December 1927 that the land was acquired for the public purposes of the Commonwealth and, also, of the Northern Territory. Nothing was said to turn on this.

provisions of that Act, formulated more than a century after the grant of the fee simple interest in question in these proceedings, could not determine the legal effect which that grant had when it was originally made. Once again the appellants and their supporters invoked the authority of United States,[133] Canadian[134] and New Zealand courts.[135] The appellants also emphasised, by reference to local[136] and overseas[137] authority, that if native title were to be extinguished, it would require the clearest authority of law to do so.

111 I have already pointed out that care must be observed in the use of overseas authority in this context because of the differing historical, constitutional and other circumstances and the peculiarity of the way in which recognition of native title came belatedly to be accepted by this Court as part of Australian law. I have some sympathy for the appellants' contentions. In the circumstances described in the facts pleaded in the present case (including the later acquisition of the legal estate by the Commonwealth and the effective reversion of the land in question to a kind of wasteland status in which the incidents of native title could undoubtedly be enjoyed in fact) the attractions of embracing a principle of revival of native title are strong. A rule of the common law could doubtless be formulated which permitted the 'lifting' of the extinguishment for a case such as the present. Such a rule might leave private owners of land in fee simple fully protected but expose to such claims governmental landholdings of the very kinds of land in which native title might often have its most practical meaning.

112 For a number of reasons of legal authority, principle and policy, I cannot accept the proposition that the extinguishment occasioned by the grant of a fee simple interest is other than irreversible.

1. In *Wik* I explained why it was impossible to accept the 'factual conflict test'[138] for resolving the suggested inconsistency between the estate or interest in the land held under Australian law and the actual exercise of surviving native title rights.[139] No member of this Court has expounded such a test. It would be inconsistent with the very nature of the native title interest as recognised by the Court. Although the appellants denied that their concept of 'extinguishment' was an attempt, illicitly, to revive a principle based on the factual use of land, this is what it amounts to. The true test propounded by this Court involves a comparison between the legal character of the interest in the land under Australian law and the native title interest in the same land.[140] By that test there is always inconsistency where the interest in question under Australian law is one of fee simple. So fragile is native title and so susceptible is it to extinguishment that the grant of such an interest, without more, 'blows away' the native title forever.[141]
2. The suggestion that native title might nonetheless revive in certain factual circumstances is incompatible with the explanations of the incidents of fee simple under our law. That form of title is incomprehensible except by reference to the pre-existing common law.[142] There is nothing in *Wik* which is inconsistent with this proposition. On the contrary, it was the peculiar incidents of the pastoral leases examined in that case which led the Court to hold that they fell outside traditional land law. They were to be viewed as a creature of an Australian legislature

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133 *Public Access Shoreline Hawaii v Hawaii County Planning Commission* 903 P 2d 1246 at 1258 (1995); cf McNeil, 'The Extinguishment of Native Title: The High Court and American Law', (1997) 2 AILR 365; Cohen, 'Original Indian Title', (1947) 32 *Minnesota Law Review* 28.

134 *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470. Noted without disapproval in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 213-216.

135 *Manu Kapua v Para Haimona* [1913] AC 761 at 764; *Attorney-General v Ruritana* (1909) 29 NZLR 228 at 231.

136 For example, *Wik* (1996) 187 CLR 1 at 125-126, 130 per Toohey J, 155, 166 per Gaudron J, 168, 184-185 per Gummow J, and 235, 247, 249 in my own reasons.

137 For example, *County of Oneida v Oneida Indian Nation* 470 US 226 at 247-248 (1985); *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 270-271.

138 (1996) 187 CLR 1 at 221.

139 (1996) 187 CLR 1 at 235.

140 *Wik* (1996) 187 CLR 1 at 221.

141 cf. *Mabo [No 2]* (1992) 175 CLR 1 at 69-70; *Native Title Act* case (1995) 183 CLR 373 at 439.

142 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683, 686; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 696.

with features distinguishing their legal character from an ordinary 'lease' with a legal right to exclusive possession and reversion to the Crown. There is no such distinction in the case of a fee simple interest. Once granted, it amounts to the assertion of the sovereign rights of the grantor to establish its power in respect of the land and to exclude any claim not specifically granted by it. There may indeed be exceptions where the particular legislation envisages, expressly or by necessary implication, the co-existence of fee simple and native title rights. There is absolutely no suggestion that this was the case with the *Northern Territory Land Act 1872* (SA). If it be relevant, any such suggestion was expressly excluded by the operation of the *Lands Acquisition Act 1906* (Cth)[143] under which the subject land later became vested in the Commonwealth.

3. In effect, what the appellants are seeking, once extinguishment is acknowledged as the legal consequence of the conferral of an interest in fee simple, is the affirmative provision of new rights arising out of circumstances which occurred after the initial grant. The conferral of such new rights by common law would be completely incompatible with the notion that native title rights have their origin in Aboriginal custom: not in the Australian legal system. There is a difference in principle between the recognition of the native title of the indigenous people of Australia which pre-dated the sovereignty of the Crown and 'revival' of a right which has, in law, earlier been extinguished. To be enforceable under Australian common law, native title must adjust to the incidents of that law.[144] Where one of those incidents is extinguishment, the native title in question cannot be revived. At least, it would require legislation to achieve that result and to confer the 'new rights' propounded by the appellants.
4. Although this result will be disappointing to the appellants, and in some ways understandably so, it follows from Australia's legal history, authority and principle. It is also supported by strong practical considerations. Were the position otherwise, a serious element of uncertainty would be introduced into a body of law which should be as clear and certain as the law can make it.[145] Far from giving any authority for the notion of contingent extinguishment and subsequent revival of native title rights, the law governing the legal incidents of fee simple is clear. The absolute nature of fee simple is a central feature of Australia's land system. It is not susceptible to alteration by the Court as a re-expression of the common law. Even if it were, there are countless practical reasons why the Court would stay its hand on such a matter.

Conclusion and orders

113 The result is that, in the undisputed facts, the Northern Territory demonstrated the 'fatal flaw' which it asserted in the appellants' claim for the relief which they sought before the primary judge. No additional evidence could have altered the position or added substance to the appellants' legal claims[146]. The judge was therefore entitled to make the orders which he did. Accordingly, to dispose of the appeal, I agree in the orders proposed by the other members of the Court.

Order:

1. Remit the matter to the Full Court of the Federal Court of Australia to be dealt with consistently with the reasons for judgment of this Court.
2. The appellants pay the respondents' costs of the proceedings in this Court. ●

143 Section 16(1).

144 *Wik* (1996) 187 CLR 1 at 237-238.

145 *Wik* (1996) 187 CLR 1 at 221.

146 cf *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 693-694; cf *Wik* (1996) 187 CLR 1 at 212.