

SUPREME COURT OF QUEENSLAND

CITATION: *Hope Vale Aboriginal Shire Council & Ors v The Minister for Natural Resources and Water* [2011] QSC 272

PARTIES: **HOPE VALE ABORIGINAL SHIRE COUNCIL**
(First Applicant)
GREGORY RAYMOND McLEAN, JUNE EMILY PEARSON, NEVILLE IAN BOWEN
(Second Applicant)
THE HOPE VALE FOUNDATION LIMITED (ACN 135 377 865)
(Third Applicant)
v
THE MINISTER FOR NATURAL RESOURCES AND WATER
(Respondent)

FILE NO/S: 234/09

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 9 September 2011

DELIVERED AT: Cairns

HEARING DATE: 13 May 2011

JUDGE: Jones J

ORDER: **1. Application is dismissed.**
2. The applicants pay the respondent's costs to be assessed on the standard basis.

CATCHWORDS: ABORIGINAL LAND ACT 1991 (QLD) ss 27, 27A, 28, 28A – Where the Minister proposes to appoint a Native Title Body Corporate as the grantee of a Deed of Grant of Land in Trust pursuant to s 28 of the Act – Where historical owners of the land object to the appointment of a Native Title Body Corporate as grantee pursuant to s 28 – Where the applicant submits the appointment should be made pursuant to s 27A – Whether the Minister has the discretion to appoint a grantee pursuant to either s 27A or s 28.

STATUTORY INTERPRETATION – Whether appointment under a general provision precluded by a specific provision – Construction by reference to the text, the context and purpose

of the legislation.

COUNSEL: D J Campbell SC for the applicants
M D Hinson SC for the respondent

SOLICITORS: Bottoms English Lawyers for the first applicant
Crown Solicitor for the respondent

- [1] On 17 July 1986 the first applicant, a body corporate established pursuant to the provisions of *Local Government (Community Government Areas) Act 2004 (Qld)*, was granted a Deed of Grant of Land in Trust for an area of about 110,000 hectares to hold in trust for the benefit of the Aboriginal inhabitants of that area (“the DOGIT”).¹ This Grant was made pursuant to s 334 of the *Land Act 1962* (now repealed). The second applicants are councillors and members of the first applicant. They are also directors of the third applicant which is a company limited by guarantee. The third applicant was incorporated on 13 February 2009 for charitable purposes to benefit persons who are residents of Hope Vale and who lived continuously in the community for a total of two years prior to applying to become members of the Foundation.
- [2] On 20 September 2010, there came into force amendments to the *Aboriginal Land Act 1991 (Qld)* (hereinafter “the Act”) whereby provision was made for the respondent Minister (“the Minister”)² to appoint a new trustee subject to having fulfilled various requirements. The land, the subject of the DOGIT, is “transferable land” within the meaning of Division 3 of the Act.
- [3] As a matter of historical fact, the inhabitants of Hope Vale fall into two classes. Firstly, there are those who have a particular connection with the land under Aboriginal tradition, e.g. the Native Title holders. Secondly, there are those who do not have that traditional association with the land but nevertheless have lived on the lands for a considerable period. They are informally referred to as the “historical owners”. This distinction is captured in the preamble to the Act as follows:-
- “4. *Some Aboriginal people have maintained their ancestors’ traditional affiliation with particular areas of land.*”

¹ Ex GRM1 to affidavit of Gregory McLean filed 16 July 2009

² Then the Minister for Natural Resources and Water but since changed to the Minister for Environment and Resource Management. See the Native Title Determination – December 1997 ex 1

5. *Some Aboriginal people have a historical association with particular areas of land based on them or their ancestors having lived on or used the land or neighbouring land.”*

And again in s 4 of the Act which provides –

- (1) *For the purpose of this Act, an Aborigine is particularly concerned with the land if the Aborigine –*
- (a) *Has a particular connection with the land under Aboriginal tradition; or*
- (b) *Lives on or uses the land or neighbouring land.”*

- [4] These proceedings were commenced in May 2009 seeking an order to Review in the form of a mandamus directing the Minister to carry out the duty required by ss 27A, 28 and 29 of the Act. On 16 March 2011, the Minister gave public notice of an intention to appoint as the new trustee of the said lands, the Hope Vale Congress Aboriginal Corporation (the “Congress”). The Congress is a Registered Native Title Body Corporate (“RNTBC”) formed to perform the functions mentioned in s 57(3) of the *Native Title Act* 1993 (Cth). It represents the holders of the traditional (common law) native title which covers much of the land under the DOGIT³.
- [5] As the review is now not being pursued, each of the applicants seeks an injunction to restrain the Minister from granting the DOGIT to the Congress. They do so contending that the proposed Grant to the Congress cannot be made in terms notified that is pursuant to s 28 of the Act. The applicants argue that the only basis for such an appointment is that prescribed by s 27A of the Act.
- [6] The Minister contends that there is power under the Act to appoint a trustee pursuant to either section and submits that if an appointment is not made under s 27A then there is a duty to make an appointment under s 28 which requires the appointment either of a Registered Native Title Body Corporate or “such persons as the Minister considers necessary...as trustees for the benefit of Aboriginal people”. Thus the proposed appointment of the Congress is permitted under s 28.

Relevant statutory provisions

“27 Deeds of grant to be prepared

(1) *The chief executive must prepare such deeds of grant in fee simple as the Minister considers necessary and directs over transferable lands.*

(2) *...*

(3) *The deed of grant must show that the land is held by the grantees –*

(a) *if the grantee is a registered native title body corporate appointed as the grantee under section 27A – for the native title holders of the land; or*

(b) *otherwise – for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants.*

(4) *If the grantee is a registered native title body corporate appointed under section 27A, the deed of grant also must include information to identify the native title holders of the land.*

...

27A Appointment of registered native title body corporate as grantee to hold land for native title holders

(1) *This section applies to transferable land if –*

(a) *Under the Commonwealth Native Title Act, a determination has been made that native title exists in relation to all or a part of the land; and*

(b) *There is a registered native title body corporate for the determination.*

(2) *The Minister may, with the consent of the registered native title body corporate, appoint the body corporate to be the grantee of the land under a deed of grant prepared under section 27.*

(3) *If the Minister appoints the registered native title body corporate to be the grantee of the land under this section, the body corporate holds the land for the native title holders of the land the subject of the determination mentioned in subsection (1)(a).*

(4) *In considering whether to appoint a registered native title body corporate under this section, the Minister may have regard to any matter the Minister considers relevant to the proposed appointment, including, for example –*

(a) *whether the making of the proposed appointment was a matter relevant to the native title claim under the Commonwealth Native Title Act resulted in the determination that native title existed in relation to all or a part of the land; and*

(b) *whether any Aboriginal people particularly concerned with the land, other than the native title holders of the land, may be adversely affected by the proposed appointment; and*

(c) *if the Minister is satisfied Aboriginal people particularly concerned with the land will be adversely affected by the proposed appointment – any action the registered native title body corporate intends to take to address the concerns of the Aboriginal people.*

(5) *If land is granted to a registered native title body corporate under this section, a provision of this Act about the incorporation of*

grantees as a land trust on the grant of land does not apply in relation to the registered native title body corporate.

28 Minister to appoint particular trustees

(1A) This section applies if the Minister does not appoint, under section 27A, a registered native title body corporate as the grantee of land.

(1) The Minister must appoint a registered native title body corporate or such persons as the Minister considers necessary to be the grantees, as trustees for the benefit of Aboriginal people, of the land.

(2) The Minister may –

(a) remove or suspend trustees appointed under subsection (1); or

(b) appoint other persons as trustees.

(3) Before exercising powers under this section, the Minister must consult with, and consider the views of, Aboriginal people particularly concerned with the land.

(4) In exercising powers under this section, the Minister must, as far as practicable, act in a way that is consistent with any Aboriginal tradition applicable to the land concerned.

(5) Despite subsection (4), the Minister may appoint the trustees of transferable land to be the grantees of a deed of grant over the land, or part of the land, if –

(a) a declaration is in force under section 18(3) in relation to the land; or

(b) the Minister considers that in all the circumstances it is appropriate to do so.

28A Procedure for appointing grantees

(1) Before appointing grantees under this part, the Minister must –

(a) publish notice of the Minister's intention to appoint the grantees in a newspaper or other publication circulating generally in the area in which the land the subject of the deed of grant is situated; and

(b) consider all representations made to the Minister under subsection (4).

... ”

The issue

[7] The issue turns on the proper construction of these sections.

[8] It is apparent from the public notice that the Minister expressly intended to proceed pursuant to s 28 of the Act. The advertisement reads:-

“The Hope Vale Congress Aboriginal Corporation RNTBC, as guarantee, will hold the land in trust for the benefit of Aboriginal people of the land. The appointment is proposed to be made pursuant to s 28 of the *Aboriginal Land Act* 1991.”⁴

- [9] The applicants argue that the terms of the Act, having prescribed the circumstances in which an RNTBC may be granted a DOGIT, the Minister is required under s 27A to have regard to the adverse effects on the “Aboriginal people concerned with the land” other than the Native Title holders. The current beneficiaries under the present DOGIT are, indeed, Aboriginal people concerned with the land as defined by s 4 of the Act. As the Congress only represents the interests of Native Title holders, the Congress represents only a portion of this community.
- [10] The applicants point to the situation that there has in fact been a determination as to the existence of Native Title and the Congress is the relevant RNTBC in relation to that determination.⁵ The applicants do not assert that the Congress cannot be appointed as the grantee of the DOGIT, but only that if that appointment is proposed, the Minister can only proceed after fulfilling the requirements of s 27A. These requirements have not been met in this case. The result would be that the Congress would not be holding the land “for the benefit of Aboriginal people of the land” because s 27A contemplates only that it holds the lands “for Native Title holders”. Consequently, it is submitted that a restraining order should issue until there is compliance with those conditions.
- [11] The applicants rely upon the remarks of Gavin Duffy CJ and Dixon J (as he then was) in *Anthony Hordern and Sons Limited & Ors v The Amalgamated Clothing and Allied Trades Union of Australia*⁶ which was concerned with the application of a preference of employment clause under an industrial award. The Court held that the general power in the Commonwealth Court of Conciliation and Arbitration to make such award was limited in this instance by the specific terms of s 40 of the *Commonwealth Conciliation and Arbitration Act*. Their Honours said (at pp 7 and 8):-

“Extensive and unfettered as the authority of the Court of the Conciliation and Arbitration to award preference in settlement of dispute might have been in virtue of its general power, yet, when sec.

⁴ Ex “GRM-13” to the affidavit of Gregory McLean sworn 27 April 2011

⁵ See Ex 1

⁶ [1932] 47 CLR 1

40 expressly gives a special power, subject to limitations and qualifications, surely it must be understood to mean that the Court shall not exercise an unqualified power to do the same thing. When the Legislature explicitly gives a power particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.... In other words, the power specially given by sec. 40 extends to every case in which preference in employment is sought for members of an organisation over those who are not members. An affirmative grant of such a power, so qualified, appears necessarily to imply a negative. It involves a denial of a power to do the same thing in the same case free from the conditions and qualifications prescribed by the provision.”

- [12] The respondents submit that the relevant sections allow the Minister to have resort to either s 27A or 28 at the Minister’s discretion. Section 28 requires that the grantees act for the benefit “of Aboriginal people”. By subsection (3) the Minister is required to consult with, and consider the views of, “Aboriginal people particularly concerned with the land” as defined in s 4 of the Act. This provides the essential distinction between the sections because under s 27A the grant is held for native title holders only and not Aboriginal people generally.

Discussion

- [13] The subject sections read together show how transferable lands, which include a DOGIT, are to be recognised and by whom the lands are to be held. Section 27 of the Act requires that the lands be held by a grantee under the Act. The alternative potential grantees are –
- (a) an RNTBC for the benefit of Native Title holders; or
 - (b) Otherwise a grantee holding for the benefit of “Aboriginal persons particularly concerned with the land and their ancestors and descendants”.
- [14] It is clear that from s 27A the first of the alternatives is merely permitted – “may appoint” – and it has a more limited range of benefit and can only be made with the consent of the particular RNTBC. The latter alternative, pursuant to s 28, compels the Minister to appoint but allows the Minister more scope as to who can be a grantee and the persons to be benefited are wider in scope.

- [15] The relevant principles for determining the proper construction of a statute have been compendiously applied in *Project Blue Sky Inc & Others v Australian Broadcasting Authority* (1998) 194 CLR 355 by McHugh, Gummow, Kirby and Hayne JJ at 381. Their Honours said:

“The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.”

- [16] Thus textually and contextually, the terms of ss 27A and 28 allow the Minister a choice in the first instance as to which power of appointment is to be exercised. These terms, it seems to me, provides a clear unfettered choice. It is not a case, such as arose in *Anthony Hordern* of using a general power which had been restricted by an express limitation. The limitations imposed on the Minister follow the making of the choice by requiring the Minister’s compliance with the differing consultative processes.
- [17] Once the choice is made as to which group is to benefit from the grant, what is required is compliance with the section appropriate to that choice. In my reading of the terms, I can find no expression in either section such as would impose a

limitation on the other. To suggest that either section imposed such a limitation, would be inconsistent with the objects of the legislation.

- [18] It is clear from the material that the Minister has proposed that the grantee should hold the land “for the benefit of the Aboriginal people of the land”. This manifests the Minister’s choice of the section pursuant to which the Minister intends to proceed, namely s 28. Thus the Minister is compelled to appoint either a RNTBC or such other persons as necessary. The Minister has publicly notified the intention to appoint the Congress as the grantee in accordance with the requirements of s 28 of the Act.

Conclusion

- [19] The applicants have not shown any error on the part of the Minister, nor any circumstances which require the granting of injunctive relief.
- [20] I therefore dismiss the application with costs.

Orders

- [21] I make the following orders –
1. Application is dismissed.
 2. The applicants pay the respondent’s costs to be assessed on the standard basis.