CASE NOTES

FEDERAL COURT DETERMINATION OF NATIVE TITLE: WESTERN AUSTRALIA

Paddy Neowarra, Paddy Wama and Ors v State of Western Australia and Ors ([2003] FCA 1402, Federal Court of Australia, Western Australia District Registry, unreported, 8 December 2003, Sundberg J)

Application for determination of native title – Native Title Act 1993 (Cth) – Applicants inhabit the region as members of "the three tribes"– Whether entitled to join in one claim – Characteristics of native title – Whether amounts to possession, occupation, use and enjoyment as against the whole world – Extinguishment – Effect on other interests – Interests include pastoral leases, special leases, reserves, mining tenements and public works – Disregarding extinguishment ss 47, 47A and 47B, NTA.

Christopher Stevenson*

OVERVIEW

The Applications

This case concerns three applications for determination of native title relating to land in the Kimberley region of Western Australia. The first (WAG 6016 of 1996) was lodged with the Federal Court in November 1996. The second (WAG 6015 of 1999) was filed by the same applicants in June 1999. It relates to an area adjacent to the first application. The combined area of both applications is about 67,376 square kilometres.

The third application (WAG 6006 of 2002) was filed in December 2002 to enable s 47 or s 47A of the *Native Title Act* (Cth) (the Act) to be applied to 3 areas covered by the second application which had been transferred to the Indigenous Land Corporation since that application was made in 1999.

The Proceedings

Preservation evidence was taken from six witnesses at the Aboriginal community at Mowanjum, near Derby, in November 2000. The applicants' opening address and opening statements by some of the respondents were made in Perth in May 2001.

Oral evidence from 53 Aboriginal witnesses in support of the applicants' case was heard at Mowanjum, various places in the claim area and in Derby over 29 days between July and October 2001. On 10 of those days evidence was taken at locations in the claim area.

The evidence of expert witnesses for the applicants and the respondents, together with evidence as to connection and extinguishment issues for the respondents, was heard in May and June 2002.

---

* Barrister, Francis Burt Chambers, Perth, Western Australia.

Closing submissions were made in Perth in February 2003. In all, the trial occupied 59 hearing days.

Justice Sundberg published his reasons for decision on 8 December 2003. The judgment is 381 pages. The writer understands that the Federal Court has not yet made final orders in accordance with his Honours judgment and presumably therefore the appeal period has not yet started to run.

Given the length of the judgment, the complexity of the relevant statutory provisions and the legal issues, and the wide ranging scope of the oral and documentary evidence adduced at trial (both lay and expert) what follows is a summary of only some of the salient points that arose in the matter. Only by studying the whole of the judgment is it possible understand all the issues that were considered.

The Applicants

The applicants Form 1 described the persons on whose behalf the applications were made as:

> "those people who hold in common the body of laws and customs derived from beliefs about Wanjina/Ungurr. Those people are
>
> (b) the descendants of [some 87 named individuals]
>
> (c) together with the descendants of Dalbi, who was adopted into the native title claimant group." [1]

At [120] Sundberg J made the following finding about the identity of the applicants:

> "(25) Although the term 'Wanjina-Wunggurr community' is an anthropological construct not used by Aboriginals, Aboriginal witnesses did describe the inhabitants of the region as 'the three tribes', 'the Wanjina tribe', and used the composite expression 'Ngarinyin, Worrorra and Wunambal' to describe the members of those tribes or that tribe."

At [394] the court held that the "evidence collected in [164]-[322] identifies the society as the Ngarinyin, Wunambal and Worrorra people who acknowledge and observe the laws and customs there described. They are the people who are 'united' by that acknowledgment and observance."

The court proposed in its draft order (subject to a query) that the native title holders be described as "the members of the Wanjina-Wunggurr community for their respective communal, group and individual rights and interests in the determination area". It remains to be seen how the persons who have been held to have native title rights and interests in the claim area will formally be described.

The Respondents

The respondents to the applications were the State of Western Australia, Sunlight Holdings Pty Ltd, various other pastoral lessees, West Australian Fishing Industry Council, Telstra Corporation Limited and Mitchell Plateau Bauxite Co Pty Limited. Telstra and Mitchell Bauxite were concerned only with issues of extinguishment.

The Pleadings

As is customary with applications for determination of native title the proceedings consisted of a statement of issues, facts and contentions filed on behalf of the applicants. The respondents filed a statement of response, and the applicants joined issue by a reply. Details of the parties statements are set out at [10]-[28].

JUSTICE SUNDBERG'S JUDGMENT

Relevant Law

His Honour sets out the relevant legislation and major judicial pronouncements at [30]-[41] before turning to consider the evidence. It is useful to set out the passage relied upon at [32] from *Western Australia v Ward*[1] at [17] where Gleeson CJ, Gaudron, Gummow and Hayne JJ summarised the effect of s 223(1) of the Act as follows:

> "First, the rights and interests may be communal, group or individual rights and interests. Secondly, the rights and interests consist 'in relation to land or waters'. Thirdly, the rights and interests must have three characteristics:
>
> (a) they are rights and interests which are 'possessed under the traditional laws acknowledged, and the traditional customs observed', by the relevant peoples;
>
> (b) by those traditional laws and customs, the peoples 'have a connection with' the land or waters in question; and
>
> (c) the rights and interests must be 'recognised by the common law of Australia'."

The Expert Evidence

Expert evidence was led by the applicants and in some cases by certain respondents on matters relating to the genealogies of the applicants, the history of the claim area since 1829, Aboriginal archaeology, Aboriginal language, and anthropology generally. Justice Sundberg follows the same format in each case. He considers the evidence of the relevant witnesses and then at the end of each section he sets out his findings based on his acceptance of the evidence. Some of the key findings are set out below. These are intended to provide a guide to the evidentiary issues which arose in the case.

Genealogical Evidence

At [49] Sundberg J made the following findings, amongst others, arising out of the genealogical evidence:

> "(4) The traditional laws and customs acknowledged and observed by the ancestors of the claimant group did not impose a requirement of strict biological or patrilineal descent as a condition of membership of the group.
>
> (5) The members of the claimant group are the descendants of the individuals named in the applications.
>
> (6) The members of the claimant group are the descendants of the Aboriginal people present on the claim area in 1829."

Historical Evidence

At [61] Sundberg J sets out his findings on the expert historical evidence given by the witnesses. These include the following findings:

> "(2) Aboriginal people were seen in the Kimberley region before 1829.
>
> (3) In 1838 there was an established Aboriginal society close to the western boundary of the claim area (Glenelg River). It was an organised society, the members of which built structures and adorned their environment with paintings including Wanjina paintings, made artefacts of wood, and used stone to crush and grind seeds and to shape into spearheads.

---

1 (2002) 191 ALR 1 (*Ward*).

(4) In 1901 Aboriginal people were present over the whole of the claim area, even though there were some places where they appeared to be sparsely scattered. Even where Aboriginals were not to be seen, signs of their existence (camping fires and marks on trees) were everywhere.

(5) It is to be inferred from findings (2), (3) and (4) that the level of occupation by Aboriginal people of the claim area in 1901 would have been the same in 1829."

Archaeological Evidence

Justice Sundberg considers the archaeological evidence at [62]-[69] and sets out his findings at [70]. These include:

"(3) Evidence obtained by Professor Blundell from undated sites in the claim area containing flaked stone artefacts is consistent with pre-contact use, and the presence of flaked glass artefacts and other European material attests to post-contact use.

(5) There is widespread evidence for cultural continuity in the surrounding areas from dated sites that show use from well before 1829 to the post-contact period including well into the late 20th century.

(8) The more widespread evidence consistent with the pre- and post- contact use in undated sites in both the claim area and the surrounding areas suggests that material evidence from cultural continuity over time is more widespread than the number of dated sites would suggest.

(9) Minimum age estimates for a number of Wanjina rock art paintings in the Kimberley range from 600 to 100 years."

Anthropological Evidence

The anthropological evidence was extensive and the most contentious (see commentary below). A number of experts were called and their evidence was challenged on a number of grounds. After reviewing the evidence Justice Sundberg held:

"(7) Professor Sansom [the respondents' expert] has not carried out fieldwork in the Kimberley, and his opinions and conclusions have a desktop or academic quality which renders them of less weight than those of experts who have immersed themselves in the day to day life of the claimant group, as have Dr Rumsey, Dr Redmond and Professor Blundell.

(8) The earliest ethnography shows a high degree of consistency regarding key socio-cultural traditions among the Ngarinyin, Worrorra and Wunambal peoples (Wanjina beliefs, Wunggurr beliefs, named clan countries each associated with its own Wanjina rock painting, exogamous patri-moieties).

(9) These four traditions (and others identified in later ethnography) are part of a cultural complex that is distinctly different from that found in all the neighbouring regions."

Laws Acknowledged and Customs Observed

Justice Sundberg notes it

"is convenient to examine the currently practiced laws and customs individually. But as will become apparent, many of them are related, and at the conclusion of the examination it will be necessary to look back to view them as a whole to obtain a true picture of the way in which they work together." [162]

His Honour found the evidence

> "amply discloses the existence of beliefs about Wanjina. At least forty witnesses gave evidence about the significance of Wanjina to their culture. Whether the witness was Ngarinyin, Worrorra or Wunambal, the evidence about the creative powers of Wanjina and his continuing prevalence was substantially the same." [164] "Not only did Wanjina lay down rules of conduct; he was in the nature of a creator being." [166]

Justice Sundberg was persuaded by the evidence that the Wanjina stories are still handed down from generation to generation.

His Honour rejected the submission that in order for something to qualify as a law or custom there must be a uniformity of practice in respect of the law or custom on the part of the Aboriginal people:

> "Rather than presenting a 'mélange of confusion', the evidence shows that witnesses' used their own language to describe different aspects of Wanjina history, tradition and meaning. That the witnesses do not all say exactly the same thing is not a matter for surprise in a society in which different levels of knowledge about laws and customs exist in different parts of it, and different people are, as it were, custodians of special items of knowledge. It would have been suspicious if witnesses from different parts of such a large territory had given evidence in identical terms." [177]

As to the important concept of place or "Wunggurr" Sundberg J said at [184]:

> "There is a great deal of evidence about peoples' Wunggurr places, how they are acquired, and how such a place gives a person a link to country that may not be his or her own dambun. The failure of some witnesses to mention their Wunggurr places or those of their children, and that some witness were unclear about their or someone else's Wunggurr place, does not, when the evidence is viewed as a whole, demonstrate loss of the conception dreaming place law or custom. Dr Rumsey's footnote that Wunggurr places would seem more prominent than clan affiliation in the consciousness of younger people nowadays reinforces this conclusion."

His Honour noted "The division of society, people, animals and vegetation into one or other of the moieties Jun.gun and Wodoy was a constant feature of the evidence." [199]. He also notes that the evidence discloses that the claimants' society "is divided into clans through a patrifilial connection with a particular tract of country – an estate or dambun" [204] and he records the characteristics of a clan or dambun, and the membership rights which follow. Kinship and marriage are also discussed [211]-[226] and he concluded at [222]:

> "while there may be some departure from the marriage rule amongst younger members of the claimant group, that departure is severely frowned on by the more senior members of the community. The rule is still recognised by the older and middle aged members of the group, though even amongst them, there have been some wrong way marriages. I accept Dr Redmond's evidence that breach of the rule does not show that there is no longer a rule. I agree also that occasional breaches, when accompanied by strong indignation on the part of others, demonstrates the continuing viability of the rule. I find that despite departures from the rule, it has not ceased to be a core element of the society's culture. It has not been washed away. We have not got so far down the track that it can now be said that there has been an interruption in its observance. To use Yorta Yorta language at [87], the rule has continued substantially uninterrupted from sovereignty to the present."

Justice Sundberg notes the evidence relating to matters of traditional law and custom, and there ongoing observance: ceremonial rituals [227]; place specific rituals [230]; widow law and

mourning [237]; traditional burial [244]; instructing young children [253]; name avoidance of the deceased [256]; naming practices of children [258]; cultural knowledge [272]; protection of and speaking for country [275] and the general rule that a "stranger" must always seek permission [302].

At [335] Sundberg J finds that he is "satisfied that the origins of the content of the laws and customs relied on by the claimants are to be found in the normative rules of the societies that existed in the claim area before 1829" and that there has been a continuous existence of such laws and customs since sovereignty. His Honour held that any "adaptations involved in 'relocation' did not involve a change of such a kind that the rights and interests in land asserted by the applicants are no longer possessed under the traditional laws and customs."[349]

Connection of the Claimants with Land or Waters

The court held that there was sufficient evidence to demonstrate the required "connection". At [352] his Honour held:

> "Many of the claimants' laws and customs have a physical connection with land or waters. The central figures of the Wanjina are physically present on land throughout the claim area. Wunggurr places are identifiable locations. The languages of the area are related to the land. They are language countries, not merely languages spoken by people who live on the country. Clans have clan estates - areas of land. Moieties have their own countries - Jun.gun and Wodoy. Claimants travel over the country and practice their laws and customs there. The wurnan, in its various parts, is directly connected to land. There is wurnan rank and wurnan location or direction. Rituals - initiations and junbas - are carried out at special sites. Baran has a physical relationship to land. The widow must leave her camp and live elsewhere for a time. These laws and customs thus have a connection with land or waters, and their observance by the Aboriginal people gives them a connection with land or waters. They are thus connected to the land or waters "by" their laws and customs. The claimants' connection to country is deepened by what the anthropologists called 'multiple cross-cutting links to country'. … There is a network of connections."

Native Title Rights and Interests

There was no competing Aboriginal claim to the area. The court was satisfied on the evidence that native title rights and interests did exist in the claim area and that it was a case where it was appropriate to describe it as "a right to possession, occupation, use and enjoyment to the exclusion of all others" and not a case "where the evidence establishes a more modest collection of rights and interest" such that " it will be necessary to employ a form of words that may amount to a list of the rights and interests or a list of activities." [380].

In addition the court said the "source of the applicants' right to possession, occupation, use and enjoyment of the claim area as against the whole world is their laws and customs. The right is therefore "possessed" under those laws and customs for the purposes of s 223(1)(a)." [382] and such a right could be enforced and protected by the common law [383].

Extinguishment

Having held that native title rights and interests exist in the claim area, the court then considered the issue of extinguishment arising out of inconsistent third party rights. This obviously requires those claimed rights to be identified and this was done by the respondents. His Honour considered the relevant statutory provisions and the third party rights "tenure by tenure" to determine the extent of any extinguishment of the native title rights and interests.

The court derived two propositions from the joint judgment in *Ward,* namely:

> "(1) Whether native title rights have been extinguished by a grant of rights to third parties or an assertion of rights by the executive requires an objective comparison between the legal nature and incidents of the right granted or asserted and the native title right asserted.
>
> (2) Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency. If they are not, there will be no extinguishment. In the absence of statutory provision to the contrary (such as s 23G(1)(b)(ii) of the Act and s 12M(1)(b)(ii) of the State Validation Act), questions of suspension of one set of rights in favour of another do not arise." [416]

Justice Sundberg sets out the legislative scheme and relevant extracts from recent cases [399]-[423] before then considering and applying the law to all of the identified third party interests in the claim area. This involved a consideration of a vast amount of documentary evidence concerning the various types of pastoral leases issued in WA (and their validity), reserves, special leases, mining tenements, public works and other interests. It is not possible to deal with the detail of the judgment here – readers can easily identify the relevant passage for any particular interest from the index to the judgment.

Disregarding Extinguishment

Sections 47, 47A and 47B of the Act are provisions that require prior extinguishment to be disregarded in the circumstances to which they apply. Once again his Honour considers the various granted interests which the applicants sought to apply "disregard" principles and made specific findings in each case [672]-[760].

Fishing

Limited areas of water are included in the claim area**.** His Honour recognised that native title rights and interests may exist seaward of the low water mark, but cannot be exclusive: *Yarmirr* at [76] and that such rights can't be exclusive in tidal waters, that is to say between high water mark and low water mark: *Ward* at [388] because there is a fundamental inconsistency between them and the common law public rights to navigate and fish, and the international right to innocent passage. Justice Sundberg's findings were on this basis. For that reason the general native title right the applicants established – possession, occupation, use and enjoyment as against the whole world – cannot survive. In the court's draft proposed order the areas where the relevant native title rights exist and the specific rights are sought to be identified.

A COMMENTARY

1. The writer understands that the parties have been involved in discussions about the form of the order that the court should make declaring the existence of native title rights and interests in the claim area. Obviously the courts final order will reflect Sundberg J's judgment, but it will also help to clarify the final outcome as some matters have clearly been left for further submission.

2. The judgment is a useful starting point for any person looking for an up to date analysis of native title law, and in particular with respect to the application of the Native Title Act (Cth) and recent case law to third party granted interests. The judgment is easy to read, well set out, has a logical structure and is indexed. Interested parties can quickly ascertain the current legal position with respect to the extinguishing effect, if any, of third party interests on native title rights and interests.

3. The length of the judgment (381 pages) is unfortunately not so much the product of a lengthy trial (59 days), but is rather caused by the tedium of the detail with respect to

affected third party interests that a determination of native tile is required to cover. As is usual in matters of this type, Sundberg J handed down various other judgments concerning interlocutory matters that arose in the course of the hearing at the same time as the main judgment.

4. The case is an important one because of the fact that native title was found to exist notwithstanding that the applicants were, on the evidence, clearly members of three distinct groups, albeit that the anthropological construct of "the Wanjina-Wunggurr community" has been coined to describe the applicants collectively. The discussion of this issue at [398] is of interest and potentially relevant to some of the "amalgamated" claims that are still to be determined in areas of overlapping applications.

5. A matter of importance is the way the courts approach the vexed question of the so-called independence of the expert evidence of the various witnesses allowed to give evidence on the basis of specialised knowledge in their particular area of training, study and experience. It is suggested that there is a real issue about whether such witnesses are really giving "expert" evidence and whether they can in the context of these types of cases be totally impartial and objective, consistent with their duty to the court.

6. An example of this is the importance placed by the anthropological profession on "participant observation" when anthropologists attempt to "imbed" themselves in an Aboriginal community to study first hand the behaviours of people to determine (expertly) whether there are traditional laws and customs which might form the basis of a normative system. There is an obvious conflict which arises from the need to obtain the respect and confidences of the relevant people and at the same time being able to avoid "identifying " with their aspirations and goals – in this context, a determination of native title in their favour. Obviously this was not an issue before native title was recognised. In this case the court rejected the respondents' submission that the applicant's anthropologists "were too close to the applicants" and had become their "advocates" [112] by recognising "the tricky balance" [116] and rejecting the challenge to the evidence [119]. There is no doubt room for different views on whether "judging" is the best way to resolve this dilemma. Perhaps more weight should be given to the works of anthropologists and other observers before the common law recognised native title. Such evidence might properly be regarded as having a greater degree of independence and therefore credibility.

7. The final outcome of this case will not be known until Sundberg J's reasons for decision are made the subject of an order of the court and any appeals (unlikely in the writers view) have been determined.