Evidence – admissibility of expert reports & opinions

Jango v Northern Territory (No 4) [2004] FCA 1539

Sackville J, 26 November 2004

Issue

In these proceedings, his Honour Justice Sackville considered (among other things):

- whether disconformities between the applicant's expert report and evidence of the applicant's witnesses should result in the expert report being rejected as irrelevant to the issues in dispute;
- whether opinions based on the analysis of source data should be admitted despite the source data not being in evidence;
- whether general observations by the applicant's expert on the difficulties of language and communication experienced by Aboriginal people when talking about traditional laws and customs was admissible.

Background

This case relates to the hearing of an application under ss. 50(2) and 61(10) of the *Native Title Act 1993* (Cwlth) (NTA) for a determination of compensation in relation to the town of Yulara in the Northern Territory.

In an earlier judgment, Sackville J had rejected substantial portions of a report co-authored by Professor Peter Sutton on the ground that they 'did not comply with the requirements of the *Evidence Act 1995* (Cwlth) applicable to opinion evidence': see *Jango v Northern Territory (No 2)* [2004] FCA 1004, summarised in *Native Title Hot Spots* Issue 11. The report now tendered by the applicants prepared by Professor Sutton was recast in an attempt to comply with the requirements of the Evidence Act—at [2].

Global objection — disconformities between report and indigenous witnesses' evidence

The Solicitor-General for the Northern Territory submitted that, because there were disconformities between the report and the evidence given by the Aboriginal witnesses, the report should be rejected under s. 56(2) of the *Evidence Act* as it was irrelevant to the issues in dispute. His Honour noted that:

> This was said to be illustrated by Professor Sutton's contention that native title rights and interests can exist under the traditional laws and customs of the eastern Western Desert Bloc in persons who are not necessarily ngurraritja for particular places [meaning someone that belongs to a place, traditional owner or custodian]—at [4].

It was submitted that both counsel for the applicant and the Aboriginal witnesses took a more confined view of the rights and interests that could exist under the traditional laws and customs of the Western Desert bloc.

While acknowledging that there may be some force in the Solicitor-General's observations as to possible disconformities, Sackville J was of the view that it was not appropriate to attempt to make that assessment at this stage of the litigation. His Honour observed that he had not been taken in any detail to the evidence of the Aboriginal witnesses. In view of the volume of evidence from those witnesses, heard over some 30 days, and the range of matters dealt with in the report, his Honour felt that he could not yet assess whether any disconformities that may exist were as pronounced as the Solicitor-General suggested. Accordingly, the global objection was not upheld—at [6].

Specific objections

Sackville J observed that the specific objections to the report reflected, in part, the concerns of both the Territory and the Commonwealth that a vast amount of material was referred to in the footnotes and appendices to the report.

His Honour noted that, if this material was admitted into evidence on the basis that it explained Professor Sutton's reasoning process, the effect of s. 60 of the *Evidence Act* may be to prevent the hearsay rule applying. His Honour's initial impression was that the respondents' concerns were well founded. The applicant agreed and indicated an order under s. 136 of the *Evidence Act* limiting the use of that material to ensure that the respondents would not suffer unfair prejudice would not be resisted. A direction to that effect was made in terms agreed by the parties. However, the territory (supported by the Commonwealth) maintained its objection to some sections of the report—at [8] to [11].

Lack of basis

Sackville J further observed that the territory's objection to some paragraphs of the report was on the ground that Professor Sutton had expressed the basis for his opinion in such general terms that the reasoning process was insufficiently clear. This had the effect of making the opinion evidence irrelevant or, alternatively, to render it inadmissible on the basis that it was impossible to distinguish whether the expression of opinion was the product of Professor Sutton's specialised knowledge, as required by s. 79 of the *Evidence Act*—at [12].

His Honour dismissed some objections and admitted various paragraphs of the report on the basis that a fair reading of the report indicated that the opinion expressed was supported by more than the bare assertion contained therein and that Professor Sutton had formed the opinion by reference to his specialised knowledge as an anthropologist—at [15].

On the other hand, his Honour allowed some of the objections and rejected some of the paragraphs of the report, in particular paragraphs where:

- the source data used by Professor Sutton had neither been admitted into evidence nor made available to the respondents in good time;
- it was found that the expression of opinion was not the product of Professor Sutton's specialised knowledge based on his training, study or experience but

rather his opinion based on his assessment of out of court statements made by the very people who gave evidence or who could have given evidence—at [20] to [35].

Language and communication issues

The report contained comments on particular passages of evidence given at the hearing and included some general observations on the difficulties of language and communication experienced by Aboriginal people when talking about traditional laws and customs.

The court noted that:

- the general principle is that the ultimate conclusion as to the credibility or truthfulness of a particular witness is a matter for the trier of fact and is not the proper subject of expert opinion;
- an expert may give evidence as to the existence or possible existence of a disorder or disability affecting the capacity of a witness to give reliable evidence, provided the testimony goes beyond the ordinary experience of the trier of fact;
- no submissions were made as to whether this applied to evidence concerning language or communication difficulties experienced by the Aboriginal witnesses and the court was not directed to any case law on this point—at [38] to [39].

However, his Honour said it was arguable that:

> [A]n anthropologist with extensive experience in communicating with Aboriginal people on matters of traditional laws and customs can give evidence of language or communications difficulties that might have a bearing on the ability of Aboriginal witnesses to give reliable or complete evidence on important issues—at [40].

Therefore, in the absence of full argument on the issue, Professor Sutton's general observations were admitted, as they might be of some relevance and could be said to be the product of relevant training or experience. The court noted that some were well known and could equally be made in submissions—at [40].

However, comments on particular passages of evidence given at the hearing were not admitted because:

- the evaluation of specific evidence is the task of the trier of fact who will have to take account of many factors, with the difficulty of cross-cultural communications being but one;
- the relevant expertise of an anthropologist does not extend to the evaluation of specific evidence given by particular witnesses; and
- even if it was within Professor Sutton's expertise, the proffered evidence evaluating the testimony of particular witnesses should be rejected pursuant to s. 135(c) of the *Evidence Act* because allowing evidence of this kind invites a collateral dispute. This could potentially involve lengthy cross-examination on a matter that is quintessentially for the court to determine. The probative value of the evidence, if any, is substantially outweighed by the danger that the evidence will result in an undue waste of time—at [41] to [42].

Conclusion

His Honour asked the parties to attempt to reach agreement as to which other paragraphs in the report should be rejected or admitted on a limited basis. If no agreement can be reached, his Honour is willing to hear further argument.