Appeal by Wong-Goo-TT-OO – Full Court

Dale v Moses [2007] FCAFC 82

Moore, North and Mansfield JJ, 7 June 2007

Issue

The main issue in this appeal to the Full Court of the Federal Court was whether the primary judge was right in deciding that the appellants, as a group (called the Wong-Goo-TT-OO), did not hold native title rights and interests. In a joint judgment, the court dismissed the appeal.

Background

In 2005, Justice Nicholson made a determination, subject to ss. 94A and 225 of the *Native Title Act 1993* (Cwlth) (NTA), recognising the native title rights and interests of the Ngarluma and Yindjibarndi peoples in the West Pilbara in Western Australia—see *Daniel v Western Australia* [2005] FCA 536.

At trial, and as required by s. 67, to the extent of any overlap with the area covered by the Ngarluma and Yindjibarndi peoples' application, orders were made to ensure that the Wong-Goo-TT-OO's application (among others) was dealt with in the same proceeding. The principal reasons for judgment in relation to the rejection of the Wong-Goo-TT-OO's claim were given in *Daniel v Western Australia* [2003] FCA 666 (*Daniel* , summarised in *Native Title Hot Spots* Issue 6).

Area claimed

The Wong-Goo-TT-OO claim area was divided into:

- a 'core' area, in which Wong-Goo-TT-OO claimed native title rights and interests to the exclusion of all others, which consisted of the *Thaluntha* estate (an area west of the Nickol River), the *Pularra* estate (between the Nickol and George Rivers) and the Dampier Archipelago;
- a 'non-core' area, in which they claimed shared native title with the Yindjibarndi People.

Claim group

The Wong-Goo-TT-OO claim group was made up of the Hicks, Ramirez and Douglas families, which were said to form a cognatic kin group. It was contended that:

- the Wong-Goo-TT-OO claim group was differentiated from the Ngarluma and Yindjibarndi peoples; and
- there was a separate and distinct law which gave rise to a separate and distinct native title west of the George River, an argument that rested primarily on the evidence of Tim Douglas, one of the Wong-Goo-TT-OO claimants.

Their claim to the Burrup was based upon a transmission of native title in the 1930s and early 1940s to Jack Hicks from two Aboriginal men, called Maitland and Island,

who the Wong-Goo-TT-OO said were the last of Yaburara, i.e. the tribe that lived on the Burrup at that time.

In final submissions at trial, the Ngarluma and Yindjibarndi people asserted that some of the members of the Wong-Goo-TT-OO claim group were included in their claim group, a proposition the primary judge was prepared to entertain.

Summary of primary judge's findings:
The primary judge dismissed the Wong-Goo-TT-OO's claim because:

- as a group, they had not shown they hold native title (a finding that was without prejudice to any rights that members of their claim group may have as Ngarluma or Yindjibarndi people);
- the Wong-Goo-TT-OO native title claim group did not form a single cognatic kin group and had not made out a claim to be a traditional group.

The primary judge also found that the Wong-Goo-TT-OO claimants could not establish continuity of existence as a group since sovereignty because:

- there was no evidence that the families whose history could be traced back to sovereignty had any common relation or purpose, other than their familial commonality (if it could be made out) before the constitution of the Wong-Goo-TT-OO group for the purposes of making a claim under the NTA;
- it could 'not be safely inferred that the actions of any one family were taken on behalf of the three families now constituting the group'.

Since their claim to be a traditional group was not made out, the primary judge found they could not establish connection, as a group, for the purposes of s. 223(1). Nor could they establish that they held native title rights and interests as such a group.

The claims in relation to connection to the *Thaluntha* area, based on the Hicks family's association, were rejected because:

- Jack Hicks was Yindjibarndi (a people whose traditional country did not include the *Thaluntha* area);
- Wilfred Hicks gave evidence that he had not asserted his rights to the *Thaluntha* area 'because he had been over-run by others';
- connection to the *Thaluntha* area from sovereignty had not been maintained.

The claim that the Wong-Goo-TT-OO were different from the Ngarluma and Yindjibarndi peoples failed because (among other things) the primary judge found that:

- there was a lack of reciprocity of recognition by the witnesses for Ngarluma and Yindjibarndi as to the status, authority and traditional connection of Tim Douglas and Wilfred Hicks;
- while Tim Douglas was 'unquestionably a witness of subjective truth ... he could not be relied upon in making objective findings of fact';
- the recall evidence of Kenny Jerrold, a senior law man of the Yindjibarndi people (now deceased) should be accepted 'circumspectly';

- the evidence of a distinct *Bidara/bundut* law practised by the Wong-Goo-TT-OO, which was the basis for the claimed distinction with them and the Ngarluma and Yindjibarndi peoples '[could] not be accepted' because, apart from Mr Douglas, the other Wong-Goo-TT-OO claimants did not practise the distinct law so that it was not being practised in their core area;
- the Hicks and Ramirez claimants had not been initiated in accordance with *Bidara* law and the evidence established that Mr Ramirez did not acknowledge traditional laws and observe traditional customs in any case.

The Wong-Goo-TT-OO's claim to the Burrup, based upon an alleged transmission in the late 1930s and early 1940s from two men from a different native title 'society', was rejected, with the primary judge noting that, even if was assumed that the transmission did take place under the law and custom of whatever society Maitland and Island came from:

> [T]he assumption of that law and custom by ... the Wong-Goo-TT-OO ... would be a later adoption by a new society. ... Adoption by ... [the Wong-Goo-TT-OO] through the Hicks family, if it occurred, had the consequence that the laws and customs so adopted were not laws and customs which could then be properly described as being the existing laws and customs of the earlier society; rather they owed their life to the later transmittee society. Consequently, the transmittee society [the Wong-Goo-TT-OO] ... cannot establish their continuity from sovereignty under those laws and customs because to do so would involve them relying impermissibly on another society—*Daniel* at [383].

Having found no transfer either at law or in fact, the primary judge went on to find that:

- connection to the Burrup had not been maintained, since continued acknowledgement or observance of the traditional laws and customs of whatever native title holding group or society Maitland and Island belonged to had not been shown;
- even if the evidence of the Wong-Goo-TT-OO was accepted as establishing traditionality of their law and custom, the evidence did not establish a continuing connection to the Burrup from the 1930s to the present.

The appeal

The Wong-Goo-TT-OO appealed against the decision at first instance, alleging it involved both a wholly inadequate appraisal of the Wong-Goo-TT-OO's evidence and a misdirection of what was required to establish the elements of native title under s. 223(1) of the NTA. The State of Western Australia cross-appealed.

The appeal court noted that:

> The notice of appeal ... identified ten grounds. ... Most of the grounds incorporated a number of alleged errors. The significance of each alleged error was not entirely clear from the appellants' oral or written submissions. Similarly, it was often not readily apparent how the grounds were said to amount to appealable error, whether separately or together—at [35].

The court was of the view that these grounds could be 'usefully ... understood as directed towards three main issues', which were that that the primary judge did not accept that the Wong-Goo-TT-OO claim group:

- was a cognatic kin group with continuous existence which had maintained connection with their core area since sovereignty;
- was separate and distinct from the Ngarluma and Yindjibarndi peoples;
- held native title to the Burrup—at [36].

However, after outlining the submissions of the principal parties on each of these issues at [37] to [105], the court considered the appeal grounds separately as outlined below.

Fact finding and the 'truth'

The primary judge concluded that that Tim Douglas, for the Wong-Goo-TT-OO, was 'unquestionably a witness of subjective truth'. However, the primary judge said that:

> [A]part from internal contradictions in his evidence, it became apparent in the course of the trial that, considered in the context of all the evidence ... , he could not be relied upon in making objective findings of fact. His fervent belief in his subjective views stood out as unique and generally unsupported by other evidence—at [313] of *Daniel*.

In the Full Court's view, the primary judge was:

> [N]ot prepared to accept Mr Douglas' evidence as proof of the existence of facts which required objective proof. It was no different to saying, as trial judges often do, that while they accept a witness genuinely believed what he or she said had occurred was what had in fact occurred that their belief was misplaced. The account given by such a witness reflects that witness's conviction about what happened but not what in fact happened. It is true that his Honour did not explain in detail why he reached this conclusion nor did he set out the other evidence he accepted which pointed to that adverse conclusion. While it is something his Honour might have done ... in a judgment of over 400 pages dealing with a multitude of issues, some economy in expression and reasoning was unsurprising. In any event, the conclusion expressed by his Honour reflected the singular advantage he had of seeing Mr Douglas and other witnesses give evidence as well as hearing all the evidence—at [107].

The court was of the view that there were only two possible matters of substance to which the appellants pointed that might demonstrate that the primary judge erred in rejecting Mr Douglas' evidence: reliance on Mr Douglas' evidence in some areas and the fact that Mr Douglas' evidence was said to be corroborated. However, it was necessary for the appellants to demonstrate that there was 'cogent and compelling evidence' establishing that the primary judge's conclusion concerning the credibility of Mr Douglas was wrong and they had not done so—at [110].

Misapprehension of the meaning and probative value of Mr Douglas' evidence

The appellants argued that the primary judge misapprehended the meaning and probative value of Tim Douglas' evidence regarding the practice of traditional laws and customs for the Roebourne area. The court commented that ground two failed because 'that evidence was the focus of' the comments at [313] of the decision at first instance quoted above in relation to the first ground of appeal—at [110].

Error in the treatment of Mr Douglas' evidence

The appellants argued that, if the primary judge been wrong in his treatment of the evidence of Tim Douglas, he should have made certain findings, including that the Wong-Goo-TT-OO held native title in their core claim area. The court found that the first and second grounds of appeal having failed, this ground could not be made out either—at [111].

Error in the interpretation of Mr Douglas's evidence

The fourth ground of appeal concerned the primary judge's observations that, if Mr Douglas' evidence was accepted, neither the Hicks nor Ramirez claimants would have any rights in the core area because they had not been initiated. The court was of the view that this ground raised a false issue because Mr Douglas' evidence was generally not accepted:

> All the primary judge appeared to be doing in making the observation was highlighting an inconsistency, or tension, in the appellants' case. It was a legitimate comment. ... There was evidence which would sustain a finding that Dallas Hicks and his sons and Ernie Ramirez and his son had not been initiated and without initiation their traditional rights as a land owner were incomplete—at [113].

Error in the treatment of recall evidence

The fifth ground of appeal was that the primary judge erred in his treatment of the recall evidence of Kenny Jerrold, a Yindjibarndi man who, when recalled by counsel for the Wong-Goo-TT-OO was cross examined about (among other things) a letter he had apparently signed that was sent to the Commonwealth Minister for Aboriginal Affairs.

The court noted that:

> At the outset of the cross examination it was apparent that Mr Jerrold had not read the letter even though he had subscribed to it. This set the tone for the cross examination and further examination of the witness who accused other witnesses, adverse to the appellants' case, of lying. There was no reason why, in the circumstances, the primary judge was obliged to treat this evidence uncritically. It was well open to the primary judge to indicate that this evidence given by this witness at this time should be treated circumspectly and no error arises from him having done so and, in substance, rejecting it—at [114].

Reciprocation and recognition

The sixth ground was that insufficient weight was given to the alleged reciprocal recognition of status and authority of Tim Douglas and Wilfred Hicks in their traditional country west of the George River. The court found that:

> The last particular in this ground concerns the observation of the primary judge ... that in the case of the evidence of Wilfred Hicks regarding the Thaluntha area, it had spoken of him not having asserted his rights because he had been overrun by others. The evidence his Honour was referring to was evidence elicited from Wilfred Hicks in chief. He gave evidence that he had full rights to the core area. ... However he qualified this evidence by saying ... that the he did not exercise what he described as his full rights (to tell people which way they are allowed to go and where they are not allowed to go) because he had been overrun by other people. The word "overrun" was volunteered by the witness. He repeated the observation a little later and a clear import of his evidence was that he did

not exercise the rights he was asserting he had. The primary judge was entitled to view this evidence as not supporting the appellants' contention that they held and exercised a native title right to possess, occupy, use and enjoy the land in question—at [115].

Connection and continuity

The seventh ground of appeal concerned the claim to constitute a group capable of holding native title, based on a familial relationship between the three families. The court noted that, while the primary judge accepted the Wong-Goo-TT-OO as a group for the purposes of standing to make their application, this said nothing about their claim to hold native title. The primary judge said that whether the requisite relationship in fact existed was a matter to be determined on the evidence and, ultimately, did not accept that the Wong-Goo-TT-OO claimants had discharged the evidentiary onus of establishing that relationship—at [116].

The court was of the view that:

- on the evidence, it was open to the primary judge to make the finding that there was no genealogical connection between the Ramirez family and the other two families, although there was some anthropological evidence of a link;
- the finding that the Wong-Goo-TT-OO were not a cognatic kin group 'was destructive, at a fundamental level', of their case as to how they presently, and had since sovereignty, constituted a group possessing and exercising native title rights and customs over their claim area—at [117].

The Wong-Goo-TT-OO also alleged that the primary judge was wrong in not finding that the Ramirez family were members of the group based on their self-identification as members and their acceptance as members by the group. The appellants also argued that his Honour could have concluded that the Ramirez applicants were not members of the group and still found that the group had continuity back to sovereignty—at [118].

As the appeal court understood it:

- these issues were not raised at trial;
- no separate native title application brought by the Douglas and Hicks families seeking a determination of native title;
- in any case, other findings stood against these alternative arguments—at [118].

Given the rejection at first instance of 'a more fundamental aspect' of the Wong-Goo-TT-OO's case referred to in the previous paragraphs, it was not necessary to address the subsidiary issue raised concerning whether the Hicks family had maintained a connection to the *Thaluntha* area—at [119].

Transmission of rights and interests

The court summarised the primary judge's findings in relation to the Burrup as follows:

- the evidence did not establish that the Wong-Goo-TT-OO were a society in the relevant sense i.e. in the context of s. 223(1);

- there was no direct evidence to support a finding that the traditional laws and customs in issue included a right of transmission;
- the evidence did not support a finding that there had, in fact, been a transmission of native title to the Burrup;
- even if a transfer had occurred, as a matter of both fact and law, the Wong-Goo-TT-OO would need to establish that such a transfer was permitted by, or was consistent with, the traditional law or custom of both the Wong-Goo-TT-OO and of the society to which the transferred land belonged and no such evidence was given—at [120] to [121].

Transmission of native title from one society to another

On appeal, it was argued that the primary judge erred in applying the principles discussed in *Yorta Yorta* at [44], where Gleeson CJ, Gummow and Hayne JJ spoke of the 'efficacy of rules of transmission of rights and interests'. The court concluded that the members of the High Court's discussion in *Yorta Yorta* was:

> [P]robably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty. The observations of the members of the High Court do not establish a principle of the type apparently relied on by the appellants, namely that where the traditional laws and customs of one society provide for the transmission of rights and interests in land recognised by those laws and customs, then transmission to another society can be effected and the acquisition of the transferred rights in interest can ultimately be recognised as rights and interests of the transferee society for the purposes of the NTA. The primary judge was probably correct in rejecting this contention. However it is not an issue which it is necessary for us to explore as the legal proposition, if correct, would only be engaged and operate in the appellants favour if certain matters of fact were established. In the present case, the required factual foundation is lacking in several important respects—at [120].

Succession and judicial notice

On appeal, it was also argued that the existence of the right should be inferred from all the evidence and the fact that succession was well-known in traditional Aboriginal law and custom within Australia. However, the court noted that

> [T]he appellants bore the burden of establishing the existence of a right of transmission ... . It was not a matter about which, in effect, judicial notice could be taken. Additionally, the evidence relied on to support the inference that a right of transmission existed was identified at a high level of generality. The appellants have not demonstrated that the primary judge erred in concluding that the appellants had not established the existence of a right of transmission—at [121].

Transmission as a matter of fact

It was found that the appellants had not demonstrated that the primary judge was wrong to conclude that they had not established a transfer as a matter of fact because:

- the evidence of the central witness on this point, Dallas Hicks, was 'equivocal' as to whether there had been a transmission of rights to his father and whether the Burrup had been his father's country before his father met Maitland and Island;

- the closest Mr Hicks came to giving direct evidence that transmission had, in fact, occurred was by agreeing to propositions put to him in re-examination which embodied that conclusion—at [122].

It was found that the evidence relied upon by the appellants did not compel the conclusion that there had been a transmission and the primary judge was entitled to conclude that it was not demonstrated that transmission had occurred—at [122].

Decision
The Wong-Goo-TT-OO appeal was dismissed with no order as to costs—at [123].