Evidence—exceptions to hearsay

Neowarra v Western Australia [2003] FCA 1400

Sundberg J, 8 December 2003

Issue
The issue in this case was whether prior statements relating to traditional laws and customs made by the applicants were admissible in evidence as exceptions to the hearsay rule under s. 64 of the *Evidence Act 1995* (Cwlth) (Evidence Act).

Background
This decision was handed down in conjunction with the decision in *Neowarra v Western Australia* [2003] FCA 1402, summarised in *Native Title Hot Spots* Issue 8.

The prior statements in question were attributed to two of the persons named as the applicant and were contained in a book entitled *Gwion Gwion* which also contained photographs and text written by others. The statements had been collected over a period between 1992 and 1999 and related either to the recounting of stories recorded in the art work shown in the photographs or to accounts of practices and customs that had been handed down to the authors by their forebears.

The applicant sought only to tender the statements attributed to those two named persons and two now deceased persons, together with related photographs. The respondents raised no objection to the tender of either the statements of the deceased persons or any photographs related to those particular statements.

The two claimants said in oral evidence that the statements attributed to them in the book had been told by them to the person collecting the material for the book. They identified several photographs in the book. Justice Sundberg accepted that oral evidence—at [3].

The applicant relied upon s. 64(3) of the Evidence Act but made no submissions on this provision, did not explain their reliance upon it, and referred to no authorities. The respondents did not make any submissions.

Subsection 64(3) provides that in civil cases, if the person who made the previous representation has been, or is to be, called to give evidence, the hearsay rule does not apply to evidence of the representation that is given either by that person, or by a person who saw, heard or otherwise perceived the representation being made if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

Sundberg J referred to *Graham v The Queen* (1998) 195 CLR 606; [1998] HCA 61, in which the High Court considered the term 'fresh in the memory of the person who made the representation' in s. 66 of the Evidence Act, which is similar in context to s.

64. His Honour considered the phrase related to applying the notion of contemporaneity to the 'occurrence of the asserted fact'—at [10].

In the present case, the two authors were recounting stories, rules, customs and practices handed down by their forebears. They were not speaking of facts that occurred ('the occurrence of the asserted fact')—at [11].

Decision
It was held that s. 64(3) of the Evidence Act did not apply to the statements in question. The book was admitted but reliance was limited to the statements attributed to the two deceased authors and related photographs and the photographs that had been identified in court by the two claimants.