Determination of native title — Darug people

Gale v Minister for Land and Water Conservation (NSW) [2004] FCA 374

Madgwick J, 31 March 2004

Issue
The issue before the Federal Court was whether or not the Darug people held native title to an area subject to a claimant application made on their behalf near Sydney in New South Wales.

Background
The background to these proceedings is somewhat unusual, which (with respect) limits the precedent value of this case.

A claimant application was made on behalf of the Darug people over 10 hectares of land in the lower Portland area on the northern side of the Hawksbury River in NSW. The principal respondents to the application were the Minister for Land and Water Conservation for NSW (the Minister) and the Deerubbin Local Aboriginal Land Council (Deerubbin), a body constituted under the *Aboriginal Land Rights Act 1983* (NSW) (the Land Rights Act).

In 1999, Deerubbin made a claim to the land the subject of this application pursuant to the Land Rights Act, which the Minister approved in 2000. Both the Minister and Deerubbin contended (albeit for different reasons) that native title was wholly extinguished over the area concerned. In view of this, the applicant wanted to withdraw from the case without prejudice to the claimant group's interests in another claimant application filed on its behalf over other parcels of land (the other application).

An agreement was reached under which the applicant, on the undertaking of the principal respondents not to claim any issue estoppel in relation to the other application, elected to offer no evidence and withdrew from further participation in the proceedings. The understanding of all parties was that the respondents would seek a determination of the non-existence of native title in relation to the land and that the applicant was not further opposing that. It remained for the court to be satisfied on the evidence before it that this was a legally proper course.

Approach in the light of lack of evidence
As the applicant had withdrawn from the proceedings, the claimants declined to call witnesses. Therefore, in a technical sense, there was no evidence for the applicant before the court.

However, at the request of the applicant, the intended evidence of members of the claimant group and of witnesses (including an expert in pre-history) as exhibits had been marked up and the court had made inspections of the subject land and other areas, the record of which might also have become evidence. Along with the application itself, Justice Madgwick had regard to this other material:

> [F]or the purpose of considering whether it seems proper to uphold the contention of the Minister and Deerubbin that native title rights and interests had ceased to exist in any person before any question arose of extinguishment by virtue of the NSW Act [the Land Rights Act] ... . The weight to be given to the applicants' material must however suffer by reason of its not, in the main, having been tested by cross-examination, when the respondents wished to do so—at [11].

The Minister tendered a report by Professor Ward, an historian, and Professor Maddock, an anthropologist. Deerubbin tendered expert reports by Ms Waters, an historian, and a joint report from anthropologists Mr Wood and Dr Williams. This evidence was not tested either.

Main questions

The main questions for the court were:

- whatever were the intrinsic merits of what the court called 'the overarching Darug land polity theory', would any such polity extend north of the Hawkesbury, at least so as to include the claimed land i.e. was there a Darug-speaking society of which its members had native title rights and interests in the land?
- has any such society or polity continued to exist as a body united by its acknowledgement of traditional laws and its observance of traditional customs?
- have those traditional laws and customs been continued to be acknowledged and observed substantially uninterrupted since sovereignty, including until now, by members of the claimant group?

Put shortly:

- was the claimed land ever within a Darug domain?
- what was the nature of the relevant pre-sovereignty land-owning and using society or societies relied on as the progression of the asserted Darug people?
- has there been the requisite continuity of such a society and acknowledgement of traditional laws and observance of traditional customs?—at [36] and [37].

History of the application area

His Honour summarised the history of the area by the reports that were available as evidence in the following way:

- as the claimants' statements and evidence acknowledged, the remnants of the clans in occupation at the time of sovereignty who survived initial epidemics and dispossession came together in new assemblages, with names like 'South Creek Tribe', 'Kissing Point Tribe'. Until the 1830s, these were led by 'full-blood men' who still practiced traditional rituals, fought in traditional ways and kept the 'half-castes' subordinate;

- by the 1840s, however, with the further impact of disease, even these 'tribes' ceased to be viable, and new communities formed, dominated by the 'mixed-race';
- among these were the Locks and their associates at Black Town and the Barbers and others on the Sackville Reserve;
- somewhere between this period and when they were first published in 1897, the language names such as Darug and Darkinjung came to be identified and applied to wide groupings — though rather loosely and unclear in areas where the various clan clusters intersected;
- the language names began to be used in reference to social groupings, but there was no indication that these groupings functioned as what the applicant's expert Professor Ward called 'social entities';
- the nearest one gets to that is a tendency for kinship to affect marriage and residence patterns e.g. the Lock families showed a marked tendency (though by no means an exclusive one) to find marriage partners from among their own lineages or with close connections, and to cluster together on or near the Black Town land. So did the Barbers and their Darkinjung connection at Sackville—at [104].

Madgwick J held that, although the evidence before the court was both limited and to some extent contradictory, there was little to suggest that, in fact, a 'Darug' social order functioned across the whole of the Sydney basin, wherever the descendants of 'Darug' language speakers lived. This was largely because there was simply not enough land left in Aboriginal de facto ownership and control to foster such a social order—at [106].

His Honour concluded that:

> The surviving Aboriginal or part-Aboriginal people may well, of course, combine in new voluntary associations such as Darug Link. Such groupings can draw identity and legitimate pride from the historical evidence about their forebears. But that evidence does not easily lend itself to definition of the Darug as a corporate group with corporate property rights derived from the on-going rights of the smaller traditional groups, including the land which is the subject of this claim. Nor, I would add, does the oral history reported by the claimants' intended witnesses adequately support such a thesis—at [107].

Connection with the land claimed

The court, in considering whether there was a present connection with the area covered by the application as required by s. 223(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA), held that:

> There is scant evidence of any considerable, actual link possessed by any member of the claimant group to the claimed land or the land surrounding it that might have significance for a claim to native title rights and interests. No one, apparently, had been on the land before the claim made in respect of it by the institution of these proceedings. There used to be an Aboriginal Reserve at Sackville Reach, not far from the claimed land, but Mr Colin Gale, the main spokesman for the claimant group and a man in his sixties, was unfamiliar with the history of that land and had not visited it until 20 years ago—at [109].

Language

Madgwick J also considered that it might 'more likely' be that the area in question 'was primarily the domain of people who spoke a different language — Darkinjung' but that Darug people may have had traditional rights and interests of some non-exclusive kind in relation to the claimed land. However, his Honour found that there was neither an oral tradition of this nor any reason to form a positive conclusion about it. While members of the claimant group did have traditional links with the Sackville Reach area, there was nothing to link any such visiting person or clan to any identifiable member of the claimant group nor even to any undifferentiable party of the group nor to the group as a whole—at [110].

Madgwick J held that while:

- there was some oral tradition of some Aboriginal words among some of the claimant group, there was no evidence that anyone now alive speaks the Darug language;
- a living society may with time change its language the inference in this case was of immense change that caused virtually a complete loss of a language and this confirmed every other indicator that the changes since sovereignty have amounted to a complete rupture with traditional ways, not their live maintenance through adaptation—at [111].

Knowledge of bush foods and medicines

The court acknowledged that:

- some members of the claimant group may have knowledge of bush foods and may still use them as a minor supplement to an otherwise conventional modern diet; and
- this kind of knowledge was likely to have been handed down from generation to generation of people of at least partial Aboriginal descent—at [112].

However, Madgwick J concluded that:

> There was, however, no suggestion that the present knowledge is accompanied by an actual sense of any right, privilege, liberty or immunity in relation to entering or being upon any particular land for the purpose of putting the knowledge to use, nor did I get any impression of a live sense of actual and immediate deprivation arising out of exclusion from any particular land, except that in the Plumpton area, which was long ago alienated from the Crown.
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> There was, in any case, nothing to set that knowledge in a wider framework of related knowledge so as to amount even to a remnant system of thought which might be expected in a living society bound by traditional laws and practising traditional customs which any claimant could access—at [112] to [113].

Traditional mythic beliefs

The court found that there were some oral traditions handed down from before 1788 but it appeared that, for the most part, they were scarce and many were remnants without any detail of the belief lost—at [114].

Artefacts and places of special significance

The court found that few artefacts survive in the hands of applicants and, likewise, evidence as to places of special significance, particularly of great spiritual significance, was 'very sparse'—at [115].

Way of life

Madgwick J stated that evidence in this regard did not rise higher than the way of life lived by Mr Gale. His Honour found as follows:

> That Mr Gale is living a suburban way of life largely indistinguishable from that of many non-Aboriginal Australians could, of itself, hardly be decisive. Mr Gale has, for many years, set out to learn and to teach, whenever he can, and so much as he deems appropriate, what he knows of the culture of his forebears. He appears, at least by modern standards, to be a considerable bushman. He knows and believes some things from family sources that would likely not be available to a non-Aboriginal person. Mr Gale is conscious of historical loss and injustice, of both material and non-material kinds, to Aboriginal people, including his own extended family and other people whose understanding is that they are descendants of Darug people. He has spent many years trying to recover some of so much that has been lost. He essentially seeks for the claimant group and himself recognition that they are the authentic descendants of people who, before the coming of the British, lived in some part or parts of the Sydney basin and that, accordingly, they have a moral right to be consulted as to use of unalienated Crown lands in that region and as to issues of local aboriginal heritage. But the overall impression is firmly not of a man actually acknowledging traditional laws or observing traditional customs (including in relation to land rights and interests). Inescapably, what is essential for a native title claim appears to have been irretrievably lost.
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> Further, should what has been lost now or in the future somehow be substantially recovered, according to Yorta Yorta the severance with the past could not be thereby undone—at [116] and [117].

Is there a 'society'?

His Honour noted that, in order to establish a native title claim, it must be shown that:

- a society existed that has continued to exist since before sovereignty, which was and is united by its acknowledgement of traditional laws and observance of traditional customs; and
- the governing laws and identifying customs have had a 'continuous existence and vitality' since sovereignty.

Madgwick J held that:

- on the limited available evidence, the claimant group did not constitute a society that, in any presently relevant sense, acknowledges traditional laws or observes traditional customs;
- there was a modern association of Aboriginal people who wished to have recognition of their claims to be, and who have a sense of themselves as, direct descendants of Aboriginal people who lived in the Sydney basin before the coming of the British;

- however, by reason of the devastating and thoroughly pervasive effects of the coming of the British and of subsequent Australian history, they do not constitute a society sufficiently organised to create or sustain rights and duties;
- even if they did so, this would not be a continuation by tradition but, at best, an attempted re-creation of a society—at [118] to [119].

Identification of nature of pre- and post-sovereignty rights and interests in land
The court held that there was no acceptable evidence of:
- what rights or interests actually existed before sovereignty in relation to the application area;
- the actual traditional laws or customs, in relation to land use custodianship of any group, that embodied the norms that supported any such right or interest;
- the existence of anything like a body of traditional laws and customs having a normative content in relation to rights or interests in land, which any member of the claimant group now acknowledges or observes—at [120] and [121].

Madgwick J was prepared to infer that, before sovereignty, there may have been periodic necessities, following disasters inflicted by nature or human beings or from other causes, for regrouping by the original Aboriginal inhabitants of what is now the greater Sydney area and its north-western environs. However, in this case, the available evidence did not permit any inference as to how these processes occurred.

His Honour was not prepared to infer that the rise of any felt primary identity as Darug people in the nineteenth and twentieth centuries among the claimants and their forebears was of a kind with traditional pre-sovereignty regroupings, and considered that the scale and intensity of the post-sovereignty rearrangements seemed to have been quite unprecedented in pre-sovereignty time—at [124].

Therefore, the court was of the view that:
- any rearrangements were of a kind quite different from what occurred before sovereignty, so as to indicate not the survival of traditional kinds of laws and customs concerning periodic necessities for clan adaptations, but a break with anything previously known;
- any present agreement among the claimants that 'all Darug people' are now the owners of custodians of 'all Darug land' was not shown to have come about by any traditional kind of process;
- there was no reasonable evidence of which classes of people in which kind of grouping traditionally made any such decisions or a traditional continuity of such a position, even making very large allowances for probable adaptation;
- the evidence was lacking as to the content of the pre-sovereignty norms as to relations to, and in connection with, land inherent in traditional laws and customs. Knowledge of those norms had apparently been irretrievably lost—at [124], [125] and [126].

Effect of colonisation
Madgwick J concluded that:

> [T]he coming of the British and their colonisation of New South Wales meant in time the destruction of all traditional Aboriginal societies, in the sense of peoples, in those parts of New South Wales relevant to this claim, though fortunately not of people of degrees of Aboriginal descent. The evidence suggests that this had largely occurred by the middle of the 19th century. That may overstate the matter: as late as the 1950s there may have been one or more Darug—speakers still living; as between different families and individuals, change in ideation and ways of living is hardly likely to have been uniform. Nonetheless, there is now no real doubt that for a long time there has been no acknowledgement or observance by any known person, including members of the claimant group of anything like the body of traditional laws and customs that regulated pre-1788 Aboriginal life, including people's relations to and in respect of land. A few beliefs, stories, values and family traditions, which it is fair to call vestigial, and some surviving practical bush knowledge in relation to gleaning food and medicine from the land and any still unpolluted streams, do not begin to amount to such a body—at [127].

Misunderstanding of *Mabo*

His Honour was of the view that the claimants misunderstood the effect of the decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, noting that:

- it appeared that they viewed their claimed authentic descent from Aboriginal people who were identified in viewing written records very soon after British colonisation, together with the survival of vestigial elements of traditional culture, as 'more or less' sufficient to show both the survival of a people, rather than of descendants of one or more peoples, and, in large part, continued connection for the purposes of establishing legal recognition of their claimed native title in respect of the claimed and associated lands;
- what those things may well show, along with the facts of uncompensated historical dispossession, is a claim telling in fact and morality for due recognition as the historical descendants of the original owners and occupiers, in a generic sense, of the lands that have become greater Sydney, and for reparation for the effects of that dispossession;
- however, the fact of Aboriginal descent, either alone or taken with the survival of some remnants of Aboriginal people's pre-1788 culture, falls both wide and short of showing the survival of a people with live traditional laws and customs stemming from any such original people—at [129].

His Honour went on to say that:

> The decision in Mabo was regarded in various quarters as heralding a new dawn for at least a modest degree of reparation to Aboriginal people generally, by way of according them an ability to reclaim unalienated Crown lands. The decision in Yorta Yorta has confirmed that such was not the effect of Mabo. The ability to obtain a declaration of native title under the Native Title Act is, at least after Yorta Yorta, strictly limited.
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> The reality seems to be that the present idea of a Darug *land-owning polity* is an aspiration which arose, after Mabo, out of the process, more generally, of the Darug Link group's earlier efforts, in rather less of a "land rights" context, to recover some of their lost history and to have public recognition of and respect for their ethnic and cultural roots and their historic losses and injustices—at [130] to [131], emphasis in original.

Decision

Despite ‘the usual, requisite and exhaustive processes undertaken [under s. 66] to attract to the proceedings anyone who might have an interest’, no-one but the claimant group came forward. Therefore, the court saw no adequate reason why it should not make a determination that native title did not exist in relation to the subject land. The first and second respondents were ordered to file minutes of a proposed formal order to reflect the court’s findings.