

Equity to the Rescue: A Fiduciary Duty to an Aboriginal Clan

By Paul Kelly*

In the recent case of *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*¹ a single judge of the Federal Court of Australia (Justice von Doussa) held that an Aboriginal person could be conceptualised as standing in a fiduciary relationship towards their clan in certain circumstances. The case concerned an admitted copyright infringement of an Aboriginal artwork.

The Proceedings and Issues

The case arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of Mr John Bulun Bulun in his painting "Magpie Geese and Water Lilies at the Waterhole" ("the artistic work").

The proceedings were commenced by Mr Bulun Bulun and a second applicant, Mr George Milpurrurru, both of whom are leading Aboriginal artists. Mr Bulun Bulun sued as the legal owner of the copyright of the artistic work pursuant to the *Copyright Act 1968* (Cth), as well as for contraventions of sections of Part V of the *Trade Practices Act 1974* (Cth) dealing with misleading or deceptive conduct, and for nuisance. Mr Milpurrurru brought the proceedings both in his own right and as a representative of the traditional Aboriginal owners of Ganalbingu country, which is situated in Arnhem Land in the Northern Territory of Australia. He claimed that the traditional Aboriginal owners of Ganalbingu country (which included Mr Bulun Bulun) were the equitable owners of the copyright, on the basis that Mr Bulun Bulun held the copyright "as a fiduciary and/or alternatively on trust" for Mr Milpurrurru and the people he represented.

As soon as the proceedings were served, the respondent admitted its infringement of Mr Bulun Bulun's legal copyright, pleading in its defence that the infringement had occurred in ignorance of that copyright. It immediately withdrew the offending fabric from sale, shortly after which it went into

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¹ (1998) 41 IPR 513;

<http://www.austlii.edu.au/au/au/cases/cth/federal_ct/1998/1082.html>.

receivership. It did not admit Mr Milpurrurru's claim concerning equitable ownership.

The claims under the *Trade Practices Act* and in nuisance were both abandoned before the trial. Mr Bulun Bulun's copyright claim against the respondent was subsequently settled by consent orders between those parties, but the claim by Mr Milpurrurru in relation to the equitable ownership of the copyright remained unresolved. It was ultimately 'contested' in the absence of the respondent (which had taken no further part in the proceedings after the making of the consent orders, its precise status at the time of trial being unknown) by The Attorney-General for the Northern Territory (as *amicus curiae*) and the Minister for Aboriginal and Torres Strait Islander Affairs (as intervenor) who between them made submissions on issues raised by the claim pertaining to the *Native Title Act 1995 (Cth)* and the *Aboriginal Land Rights (Northern Territory) Act 1978 (Cth)*, as well as to the *Copyright Act* and the claim for recognition of the equitable interest in the copyright.²

The Facts

The Court accepted evidence given on behalf of both applicants:

- (i) that the Ganalbingu people, under their law and customs and as traditional Aboriginal owners of Ganalbingu country, have the right to permit and control the production and reproduction of artistic works which are based on or incorporate elements of the corpus of ritual knowledge ('Madayin') associated with their land and which is 'sacred' to their clan and central to its beliefs, its rituals and the identities of its members;
- (ii) that the artistic work was painted by Mr Bulun Bulun in 1978 with the permission of senior members of the Ganalbingu people (in accordance with such law and customs) and was subsequently sold by Mr Bulun Bulun to a local arts and crafts centre, with the sale

² The Attorney-General's and the Minister's interest in the proceedings were sparked by the pleadings, which appeared to assert that the intellectual property rights claimed by the applicants in the artistic work were an incident of native title to land. The Court held that it lacked jurisdiction to make any determination as to native title because no such application for determination had been lodged with it pursuant to s 74 of the *Native Title Act 1993 (Cth)*.

- proceeds being received and retained by him for his own use;
- (iii) that the artistic work incorporates within it much of the ritual knowledge associated with Djulibinyamurr, the site of a waterhole complex in Ganalbingu country from which – according to Ganalbingu law and customs - their creator ancestor Barnda or Gumang (long necked tortoise) and their human ancestors first emerged;
- (iv) that under such law and customs, unauthorised production or reproduction of such artistic works threatens “the whole system and ways that underpin the stability and continuance of ...[Ganalbingu] society” as it “... interferes with the relationship between people, their creator ancestors and the land given to them by their creator ancestors”.

The Decision

In the words of His Honour, the claim raised “important and difficult issues regarding the protection of the interests of indigenous peoples in their cultural heritage”³ and represented “another step by Aboriginal people to have communal title in their traditional ritual knowledge, and in particular in their artwork, recognised and protected by the Australian legal system.”⁴ It was acknowledged that “[w]hile joint authorship of a work by two or more authors is recognised by the *Copyright Act*, collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest the community with ownership of any creation of its members is not recognised.”⁵ Under such circumstances, His Honour observed that “[t]he submissions of counsel for the applicants reflected a wide ranging search for a way in which the communal interests of the traditional Aboriginal owners in cultural artworks might be recognised under Australian law. ...That the claim was ultimately confined to one for recognition of an equitable interest in the legal copyright of Mr Bulun

³ (1998) 41 IPR 513 at 522.

⁴ id, at 515.

⁵ id, at 515, quoting from “Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples”, National Capital Printing, 1994, p 6.

Bulun is an acknowledgment that no other possible avenue had emerged from the researches of counsel."⁶

While the court was not referred to any Australian authority which supported "the imposition of equitable principles to govern relations amongst members of a tribal group",⁷ His Honour noted that in tribal communities of African countries, tribal property is regarded as being held on "trust" by the customary head of the group,⁸ and that this principle had received judicial recognition by the Court of Appeal of Ghana⁹ and was thus "not unknown to the common law as it has been applied outside of this country."¹⁰

Dismissing any claim based on an express trust on the ground that the evidence did not support any express or inferred intention of Mr Bulun Bulun to hold the artistic work itself or the copyright in it for the benefit of any other party, His Honour proceeded to examine the claim based on fiduciary obligations.

Referring to recent decisions of the High Court of Australia,¹¹ the Full Court of the Federal Court of Australia,¹² the Canadian Supreme Court¹³ and the views expressed on the fiduciary concept by several leading commentators,¹⁴ His

⁶ (1998) 41 IPR 513 at 524.

⁷ id, at 529.

⁸ ibid, citing Asante, S.K.B., "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana" (1965) *International & Comparative Law Quarterly* 1144, p 1145.

⁹ *Kwan v Nyieni* (1959) 1 GLR 67 at 72-73, holding that members of the group were entitled to initiate proceedings for the purpose of preserving family property in the event of the failure of the head of the tribal group to do so - the head of the group being regarded as a fiduciary.

¹⁰ (1998) 41 IPR 513 at 529.

¹¹ *Breen v Williams* (1996) 186 CLR 71, esp per Brennan J at 82; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, esp per Mason, J at 96-97 and 112-113; *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1, esp per Toohey, J at 200; *Wik Peoples v State of Queensland* (1996) 187 CLR 1 per Brennan J, at 95.

¹² *News Ltd v ARL* (1996) 35 IPR 446 at 563-567.

¹³ *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 40; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161; *Delgmuukw v British Colombia* (1997) 153 DLR (4th) 193 at para 81-87.

¹⁴ Including Lehane, JRF, "Fiduciaries in a Commercial Context", in Finn, PD, *Essays in Equity*, Law Book Co, Sydney, 1985, p 104; Bean, GMD, *Fiduciary Obligations and Joint Ventures*, Clarendon Press, Oxford, 1995, p 117; Finn, PD, *Fiduciary Obligations*, Law Book Co, Sydney, 1977, p 1;

Honour found support for the propositions: (i) that "the law of fiduciary relations in this country has followed that of Canada in recognising the protection of reasonable expectations as a fundamental purpose of the fiduciary concept"¹⁵; and (ii) that the question of whether a fiduciary relationship will be found to exist in a given situation is ultimately dependent on "whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue."¹⁶

In the circumstances of the present case, given: (i) the interests of the Ganalbingu people in preserving the integrity of their culture and ritual knowledge; (ii) the "trust and confidence" which the clan's representatives had placed in Mr Bulun Bulun in giving him permission to incorporate that ritual knowledge in the artistic work; and (iii) the "unique" relationship which therefore existed between the clan and Mr Bulun Bulun as author and legal copyright owner of the work, His Honour had "no hesitation in holding that the interest of the Ganalbingu people in the protection of that ritual knowledge from exploitation which is contrary to their law and custom is deserving of the protection of the Australian legal system"¹⁷ and that "the nature of the relationship between Mr Bulun Bulun and the Ganalbingu people was a fiduciary one which gives rise to fiduciary obligations owed by Mr Bulun Bulun."¹⁸

Having held that fiduciary obligations were owed to the clan by Mr Bulun Bulun with respect to his ownership of legal copyright in the artistic work, his honour went on to hold that "[t]his is not to say that the artist must act entirely in the interests of the Ganalbingu people. The evidence shows that an artist is entitled to consider and pursue his own interests, for example by selling the artwork, but the artist is not permitted to shed the overriding obligation to act to preserve

Weinrib, E, "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1, pp 4-8; and Finn, PD, "The Fiduciary Principle" in Youdan, TG (ed), *Equity, Fiduciaries and Trusts*, Carswell Press, Toronto, 1989, p 46.

¹⁵ (1998) 41 IPR 513 at 529.

¹⁶ id, quoting *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 per La Forest, J.

¹⁷ (1998) 41 IPR 513 at 530-531.

¹⁸ id, at 530.

the integrity of the Ganalbingu culture where action for that purpose is required."¹⁹ He stated that:

"Having regard to the evidence of the law and customs of the Ganalbingu people under which Mr Bulun Bulun was permitted to create the artistic work, I consider that equity imposes on him obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work. ... [t]he existence of those obligations does not, without more, vest an equitable interest in the ownership of the copyright in the Ganalbingu people. Their primary right, in the event of a breach of obligation by the fiduciary is a right in personam to bring action against the fiduciary to enforce the obligation".²⁰

In the present case as Mr Bulun Bulun had taken appropriate action against the respondent to enforce the copyright, and as there was no suggestion by Mr Milpurruru and those he sought to represent that Mr Bulun Bulun should have done anything more, His Honour held that there was no occasion for the intervention of equity to grant any additional remedy in favour of the Ganalbingu people and dismissed Mr Milpurruru's claim. Had the position been otherwise, in His Honour's opinion, "equitable remedies could have been available ... and in an extreme case could involve ... [the imposition of] a constructive trust on the owner of the copyright ... in favour of the beneficiaries"²¹ if that was necessary "to achieve a just remedy and prevent the beneficiary [sic] from retaining an unconscionable benefit."²²

¹⁹ id, at 529-530.

²⁰ id, at 531.

²¹ ibid.

²² ibid. By way of example, according to His Honour, if Mr Bulun Bulun merely failed to take action to enforce his copyright but did not deny his fiduciary status, an adequate remedy might be provided by allowing the beneficiaries to bring action against the infringer to restrain the infringement (by way of interlocutory relief) and against Mr Bulun Bulun to ensure that he enforced the copyright. On the other hand, if Mr Bulun Bulun were to refuse to protect the copyright from infringement

Conclusion

The case makes fascinating reading purely for its concise elucidation of the traditional beliefs and customary laws of the Ganabingu people, which are eloquently explained through the judge's liberal use of direct quotations from the testimony of witnesses. From a legal perspective, it is also interesting for its examination of the trust and fiduciary concepts, and particularly its adaptation of equitable fiduciary principles to "fill the gap" left by the failure of common law and statute to recognise and protect the communal rights and interests of indigenous people in preserving the integrity of their culture. The express finding by His Honour that Mr Milpurrruru and those he sought to represent had not established any equitable interest in Mr Bulun Bulun's copyright has prompted some commentators to suggest that special legislation is needed to effectively protect the communal interests of indigenous peoples in preserving the integrity of their culture and heritage.²³ In the interim, however, the holding that fiduciary obligations can be owed by an indigenous person to her or his clan has at least created a means by which those communal interests can be recognised and protected under Australian law. As Fitzgerald acknowledges, "[t]he decision of von Doussa J in *Bulun Bulun* can be taken as demonstrating an increased willingness on the part of the judiciary to consider submissions based on equitable principles in order to overcome the limitations of intellectual property law in protecting indigenous interests."²⁴

In the words of His Honour:

"...if ... an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the

and also denied the existence of his fiduciary status and the interests of those beneficiaries, a constructive trust might be imposed so as to strengthen the standing of the beneficiaries to themselves enforce the copyright, especially if Mr Bulun Bulun could not be found so that the beneficiaries were unable to join him in such an action (at 530-531).

²³ See, for example, Fitzgerald, A, *LBC Nutshell – Intellectual Property Law*, LBC Information Services, Sydney, 1999, p 177.

²⁴ *ibid.*

copyright, the Australian legal system will permit remedial action through the courts by the clan."²⁵

²⁵ (1998) 41 IPR 513 at 532.