



Re: TERRY YUMBULUL And: RESERVE BANK OF AUSTRALIA; ABORIGINAL ARTISTS AGENCY LIMITED and ANTHONY WALLIS No. D G26 of 1989 FED No. 448 Trade Practices - Aborigines - Copyright 21 IPR 481

COURT
IN THE FEDERAL COURT OF AUSTRALIA
NORTHERN TERRITORY DISTRICT REGISTRY
GENERAL DIVISION
French J. (1)
HRNG
DARWIN
#DATE 25:7:1991

Counsel for the Applicant:	Mr C. Golvan
Solicitors for the Applicant:	McCormack and Co.
Counsel for the Respondents:	Mr D. Catterns
Solicitors for the Respondents:	Phillips Fox

ORDER

The application is dismissed.

The applicant to pay the second and third respondents' costs of the application.

The time limited for an appeal be extended to 35 days from the 2 August 1991.

The Morning Star Pole, Exhibit 1, be retained in the custody of the Court pending the hearing and determination of any appeal, provided that the Registrar may release the Pole into the custody of the Northern Territory Museum pending the hearing and determination of the appeal, provided that the Australian Museum has first provided written authority for it to be so released.

Note: Settlement and entry of Orders is dealt with in Order 36 of the Federal Court Rules.

JUDGE1

Introduction

In 1988 the Reserve Bank of Australia released a special \$10 bank note to commemorate the first European settlement of this country. The note incorporated elements of Aboriginal artworks including, in part, a reproduction of the design of a Morning Star Pole made by Mr Terry Yumbulul in 1986. The reproduction was made under a sub-licence of the copyright in the work granted to the Bank by the Aboriginal Artists Agency Limited. That company in turn, had an exclusive licence from Mr Yumbulul. He now contends

that he was induced to sign the licence by misleading or deceptive conduct on the part of the Agency. His action against the Bank for infringement of his copyright has been settled by a consent order made earlier in these proceedings. He has continued the proceedings against the Agency and its director, Anthony Wallis, seeking injunctive and declaratory relief and damages. The action was heard over the last two days on the issue of liability only. It demonstrates difficulties that arise in the interaction of traditional Aboriginal culture and the Australian legal system relating to the protection of copyright and the commercial exploitation of artistic works by Aboriginal people.

Factual Background

2. Terry Yumbulul is an Aboriginal artist of considerable skill and reputation. He was born on Wessel Island on the north-east coast of Arnhem land on 11 September 1950. He is a member of the Warimiri clan group and the second eldest son of its leader, David Burrumarra. His mother, who is deceased, was a member of the Galpu clan. Mr Yumbulul began his career as an artist by producing paintings depicting traditional Aboriginal stories which he learnt as part of his schooling in Aboriginal culture. Since he began painting about ten years ago, he has been selling his works. They have been exhibited in the Northern Territory Museum and some have been purchased by the Northern Territory Government as official gifts for visiting foreign dignitaries. He has had a number of exhibitions of his works at private galleries.

3. Mr Yumbulul has authority within his own clan to paint certain sacred designs. He has passed through various levels of initiation and revelatory ceremonies in which he has gradually learnt the designs and their meanings. The authority to paint them derives from his father. During the last initiation rite in which he participated, he was presented by the elders of his clan with two sacred bags. Their presentation reflected the power and title he has been given to paint the sacred objects of his people. It is from his mother's clan group, however, that Mr Yumbulul has inherited the right to make Morning Star Poles, one of which is the subject of these proceedings.

4. The poles have a central role in Aboriginal ceremonies commemorating the deaths of important persons, and in inter-clan relationships. They are wooden, decorated with painted designs, feathers and string. Different clan groups make them in different ways, and the identifying attributes of the Morning Star Pole of a particular group may be maintained jealously. Traditional belief has it that the Morning Star Pole is imbued with the power to take the spirits of the dead to the Morning Star, which will return them to their ancestral home. According to the evidence of Dr. Ian Keen, an anthropologist who is a senior lecturer at the Australian National University, the pole and banyan fibre string that goes with it, is made as a gift. A Morning Star ceremony is commissioned by one group who may send various objects belonging to, or associated with particular persons, to be incorporated in the pole or string. The ceremony is said to be a way of establishing ties of friendship and gift exchange between groups which are geographically, and in kin terms, distant. While a pole intended for ceremonial use is displayed in public as part of the ceremony, it is made in secret in a men's ceremonial shelter. According to Dr. Keen, the making of the pole must be done in accordance with religious rules. There is nothing inconsistent with this tradition and the making of a Morning Star Pole specifically for public display in a museum. Aboriginal people often believe that it does not matter if some such designs or objects are revealed to non-Aboriginal people because they will not know their meanings. This evidence was borne out by that of Roy Marika, the senior male member of the Rirratjingu clan, who has been a leader among Aboriginal people in north east Arnhem land for many years. He said that some traditional objects, such as

the Morning Star Pole, can be made for sale to a museum or craft shop. It is regarded as important that white people learn to respect the Aboriginal people and their land. He understood that Mr Yumbulul had the right to make the Morning Star Pole for ceremonial purposes and also for sale to places such as museums in order to educate people. However, to do this he would need to make sure that the clan people involved, that is, the traditional owners and managers of the rights to the pole and the ceremony, knew what he was doing. Mr Marika said that the subject of mass reproduction of paintings and important objects is very sensitive because it takes the ability and right to produce and supervise the production of these objects out of the hands of the Aboriginal people. He said:

"Objects such as the Morning Star Pole are only meant to be made in a sacred camp by men who have been properly taught the rules relating to their production. It is not right for such objects to be made by children, women or men who do not understand their meaning and power and who have not been given the right to make such things."

Another witness, Mandawuy Yunupingu, of Yirkala in the Northern Territory, said of the Morning Star Pole and ceremony that it brings together people of different areas and clan to perform rituals relating to the remembrance of important people who have died:

"The ceremony is always concerned with groups of people coming together usually from different clans and an important part of the ceremony involves the presentation of a ceremonial pole, the Morning Star Pole to the family of the dead person who is being commemorated. It is a very important ritual which reinforces the mutual respect between clan groups. It also serves to diffuse (sic) any tension or disharmony between clans."

And further:

"The attainment of the right to make such a pole is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity amongst people who believe in the Morning Star Ceremony and of the ceremonial Morning Star Pole."

5. None of this or other similar evidence was challenged, and I accept the inference that flows from it that the Morning Star Pole, whether made specifically for ceremonial use or for public display in museums or other places in wider Australian society, is of considerable significance to the clans who are concerned with the rights to its creation and use. I accept also, that the maker of such poles for public display, other than in a ceremonial context, has a cultural obligation to those clans to ensure that it is not used or reproduced in a way that offends against their perceptions of its significance. This is reflected in Mr Yumbulul's evidence on affidavit. In 1985 he created five Morning Star Poles, on commission from a company called Inada Holdings Pty Ltd. They were sold to five different museums, one of which was the Australian Museum in Sydney. He had previously created other poles for ceremonial use which were not appropriate for public display. He said, however, that those made for public display were examples of poles used in ceremonies. Although made for public exhibition, they have sacred power deriving in part from the images they bear which embody the creative spirits which he believes created the land of his mother's people.

6. Mr Yumbulul created the pole the subject to this proceeding in 1986. He was then living on Cotton Island in the vicinity of the English Companies Islands off the north east coast of Arnhem land. He made it from cotton wood,

which he cut and shaved to the right shape. He wove string and attached it to the top of the pole, which bore a crown of lorikeet and white cockatoo feathers, representing the rays of the Morning Star. He painted on the pole a yam leaf design, representing the yam spirit man who climbs up it bearing the spirit of the deceased person to the Morning Star. The design, he said, was based upon a story told to him by his grandfather and other relatives on his mother's side. There are a number of feathered bands or ruffs at different intervals on the pole and coloured bands painted on to it. Some of these represent different clan groups. There is a delicate feathered string which represents the rays of the Morning Star. It is attached to the pole below the crown of feathers representing the star itself. I accept the description in Mr Yumbulul's affidavit evidence, which says that the feather work on the pole is intricate, and the design complex and unique to him. I also accept his affidavit evidence, which was not disputed, that he made the pole without assistance from any other person and that its creation was the subject of considerable care and attention on his part. In the sense relevant to the Copyright Act, there is no doubt that the pole was an original artistic work, and that he was its author, in whom copyright subsisted. Mr Yumbulul sold the pole to Inada Holdings Pty Ltd in 1986 for about \$500. He said that he was entitled to sell it because the eventual destination, the Australian Museum, was, in his opinion, an appropriate place for its display. It is nevertheless the fact that he sold the pole without imposing any restriction on its subsequent use. I should add that Mr Yumbulul's reputation as an artist long preceded this sale. In January 1983, the Curator of Anthropology of the Australian Museum, wrote a memorandum recommending the purchase of two of his bark paintings and a pole with the comment that:

"The works are excellent, well documented examples of the output of a young artist who is rapidly becoming famous."

7. Anthony Wallis is a director of Aboriginal Artists Agency Limited. That company was formed in 1976 by the Aboriginal Arts Board of the Australian Council for the Arts, now known as the Australia Council. At that time, Mr Wallis was working for the Council as an Aboriginal arts project officer. He has a Bachelor of Arts degree with an anthropology major from Sydney University. In 1978 he was appointed as its manager. He remained in that position until 1986 when funding for the company was discontinued and he obtained employment as managing director of Aboriginal Arts Australia Pty Ltd. The latter company was that previously known as Inada Holdings Pty Ltd, and later as Aboriginal Arts Australia Limited. According to Mr Wallis, it was set up by the Australian Government to market Aboriginal artworks and has galleries in Darwin, Alice Springs and Sydney.

8. Mr Wallis continued as a director of Aboriginal Artists Agency Limited after 1986 and agreed that he was more active than the other directors in relation to its day to day affairs. The business of the Aboriginal Artists Agency Limited is essentially to act as a collecting society for Aboriginal artists. It acquires exclusive licences to their works, which it then sub-licences to commercial users. The standard form of licence agreement, which it used in 1987, was in the following terms:

"Form of Licence:

1. I, of, hereby licence Aboriginal Artists Agency Limited of 12 McLaren Street, North Sydney, hereinafter referred to as "the Agency" to reproduce my work by mechanical reproduction throughout the world and to licence others to do so subject to the following conditions:

1. The Agency shall pay to me all the sums it receive for the mechanical reproduction of my works less fifteen per cent (15%) of such sums not later than thirty (30) days

- after their receipt by the Agency.
2. Amounts of less than One hundred and fifty dollars (\$150) may be held in trust on my behalf until the total amount due to me exceeds this amount whereupon it shall be paid to me less the percentage due to the Agency under paragraph 1.
 3. The term of the licence shall be for the duration of the copyright in the work/s subject to termination by giving not less than three (3) months written notice to the Agency.
 4. This licence shall be an exclusive licence.
- I hereby warrant that I have the right to grant this licence.
Signed.....
- | | |
|--------|---------|
| Artist | Witness |
|--------|---------|

Date:

Location:"

I do not take "mechanical reproduction" to be a term of any technical meaning, but one which embraces all forms of mechanical reproduction inclusive of photocopying and printing.

9. Although Mr Wallis, in his affidavit, spoke of Aboriginal people joining the collecting society, there was no evidence to suggest any indicia or incidents of membership other than execution of the standard form licence set out above. According to Mr Wallis, the Agency has, over the years, received considerable press coverage which has generated inquiries from users of visual material. In addition, major holders of Aboriginal art collections in Australia refer inquiries about the right to use visual material to the Agency. These are the principal ways in which it finds sub-licensees willing to pay to use its member artists' work. It does not actively promote the use of any particular artist's work unless specifically asked to do so "as many Aboriginal artists are sensitive to commercial uses of their work, particularly in the souvenir industry". And although the Agency is exclusive licensee of the copyright in its members' work, it sometimes refers potentially sensitive uses back to the artists for approval. Occasionally, it acts as an agent for particular artists, but such activities are subsidiary to its principal operations as an exclusive licensee.

10. Mr Yumbulul first became involved with the Aboriginal Arts Australia Limited in 1981 when he sold that company some paintings in Darwin for exhibition in Sydney. He was invited to travel to Sydney for the exhibition and it was then he said that he first met Mr Wallis who offered, on behalf of the agency, to help him with any copyright matters. This was an offer that Mr Yumbulul did not take up. Mr Wallis had no recollection of the 1981 meeting and said that the earliest occasion on which he believed he met Mr Yumbulul was in 1986. I consider that there is no reason to distrust Mr Yumbulul's recollection on this point, and that it is probable that Mr Wallis would not recall a meeting which led to no further action in any event, but nothing turns on that discrepancy.

11. In 1985, Mr Wallis was approached by the Reserve Bank of Australia to assist it in locating suitable Aboriginal artwork for use in the design of a \$10 note to be produced as part of the Australian Bicentennial celebrations in 1988. On 23 December 1985, he wrote to the Bank in his capacity as manager of the Agency thanking it for the invitation to "...join the design team on the above project" and advising of arrangements he had made for officers of the Bank to travel with him to Arnhem land to contact Aboriginal artists. In a separate letter of the same date he outlined, on agency letterhead, what he described as "(t)he services I can offer". These were:

1. serve as the contact between the Reserve Bank or its

- designer and Aboriginal artists;
2. make all contractual arrangements during the course of any commission;
3. serve as general adviser to the Reserve Bank or its designer on all relevant aspects of the commission or the consultancy process;
4. serve as the contact for all matters relating to copyright and documentation of the work of Aboriginal artists;

A fee of \$50 per hour "for formal consultation situations in Sydney" was quoted. Although the nature of these arrangements was not explored in the evidence, I am satisfied that Mr Wallis was proposing a consultancy role and fees for the Agency.

12. In January 1986, following the field trip which had been arranged by the Agency, commissions were offered to two artists, George Milpurrurr and Paddy Carroll Tjungurrayi. A commission was also offered to Ms. Banduk Marika, who lived in Sydney. Each of the three artists was sent a letter dated 13 January 1986 on Reserve Bank letterhead signed by the head of its Central Bank Services department. The letter was forwarded to each of them by Mr Wallis, with a duplicate for signature acknowledging receipt of a deposit of \$500 on a \$2,000 agreed fee and execution of an assignment of the copyright of the proposed design to the Bank. Each letter advised its recipient that the design was being commissioned "in the context of the Reserve Bank's ongoing responsibilities in the area of bank note production". Each letter also said that "You will appreciate the need for confidentiality about the work". Ultimately, each of the three artists commissioned by the Bank was paid the full fee. Elements of the work of Mr Milpurrurr and Mr Tjungurrayi appeared on the Bicentennial bank note that was issued in 1988. Ms. Marika's work did not appear on the note as it was delivered late.

13. In 1987, Mr Wallis was telephoned by David Reynolds of the Reserve Bank's Currency and Operations Department. Mr Reynolds said that Mr Harry Williamson, the designer of the commemorative note, had seen a sculpture called "Morning Star Pole" in the Australian Museum and wanted to use it in the design. This was the pole which had been made by Mr Yumbulul in 1986. Mr Reynolds asked if the Agency could arrange copyright clearance. Mr Wallis said that the Agency had had dealings with Mr Yumbulul and he would speak to the staff there and see if anything could be arranged. He was at that time no longer a full-time officer of the company, but one of its directors. He spoke to Bridget Tang, who then worked for the Agency, and told her that the Bank wanted to use the pole in its note design. She said she would get in touch with the Bank. On 24 March 1987, Mr Mulvaney, the Manager of the Currency and Operations Department, wrote to Ms Tang in the following terms:

"We refer to recent telephone discussions regarding the Morning Star Pole work by Yumbulul, exhibited in The Australian Museum.

As part of our responsibility for the printing and issuing of currency notes, we monitor technological developments which may have an impact on note security. New designs are prepared from time to time embodying new security features.

One such design that has been prepared draws on the Morning Star Pole by Yumbulul. It is, therefore, perhaps possible that a depiction of the Morning Star Pole eventually could become a design element on a note. As already discussed, however, should this material ever be used in any design work, we would want to have copyright protection.

In the circumstances, we wonder if you could indicate the consideration which would be involved in respect

of a licence arrangement covering the Morning Star Pole by Yumbulul and let us sight the form of licence involved. You will appreciate that the development of new note designs involves security considerations and accordingly we must ask you to treat this matter with the utmost confidentiality."

Ms Tang replied by a letter dated 23 April 1987 enclosing a copy of the Agency's standard form Exclusive Licence Agreement. She promised to write again, "(w)hen we have completed the research necessary to establish whether we can deal with the copyright for this artist".

14. According to Clely Yumbulul, Mr Yumbulul's wife, she had a conversation in April 1987 with Ms Jan Gaynor, on behalf of the Agency. She said that Ms Gaynor told her that an approach had been made to the Agency by an important government body which might be interested in reproducing some of Mr Yumbulul's work and that they wanted the right to look at some of it. When she asked Ms Gaynor to tell her what work was going to be considered and the name of the government agency involved, she said Ms Gaynor told her that she could not give further details, but that she would send a letter about it. Ms Gaynor is an employee of the Aboriginal Artists Agency Limited and her duties include management of its office in North Sydney. She said, however, that at the time of her alleged conversation with Mrs Yumbulul she was not employed by the Agency and did not start to work for it until June 1988. In 1987 she was employed by Aboriginal Arts Australia Limited, but denied that she had had the conversation with Mrs Yumbulul, which Mrs Yumbulul said had taken place in April. There is some evidence to suggest that there was a time when the Agency and Aboriginal Arts Australia Limited had a common telephone and premises, and it is clear that Mr Yumbulul had had dealings with the latter company in 1985 and 1986. Ms Gaynor was not required to attend to be cross-examined on her affidavit, although an unsworn version of it in exactly the same terms as the version sworn and filed in Court, had been made available to Mr Yumbulul's solicitors several days prior to the hearing. The affidavit evidence was thus not challenged in cross-examination. In my opinion, while it is possible that some communication occurred between Mrs Yumbulul and Ms Gaynor in relation to Mr Yumbulul's works, and while it is possible that some reference was made to the interest of the Bank, I cannot be satisfied, on the balance of probabilities, that the conversation as alleged by Mrs Yumbulul took place. In particular, I cannot be satisfied that Ms Gaynor said that the important government agency wanted the right to look at Mr Yumbulul's work. There is an inherent improbability in such a finding. The Bank had seen Mr Yumbulul's work, it was on public display in the Australian Museum. The letter to Ms Tang of 24 March 1987 was not inquiring about the right to look at the work, nor was her reply of 23 April, couched in such terms. What was under consideration from the outset, was the possible reproduction of the pole and the possibility of making licence arrangements under which that could be done. There is no reason to suppose that Ms Tang, or Ms Gaynor, or the Agency, would have had anything to gain by pretending to Mrs Yumbulul, in April 1987, that the Bank wanted only the right to look at Mr Yumbulul's work. According to Mr Yumbulul, his wife told him what Ms Gaynor had said. It is possible that his wife spoke to him about a government agency that wanted to look at his work, but I am not satisfied, if she did say that, that it was an accurate account of anything Ms Gaynor, or any other representative of the Agency, had said to her.

15. On 14 May 1987, Bridget Tang, the Executive Officer of the Agency, wrote to Mr and Mrs Yumbulul attaching a standard form Licence Agreement. The covering letter was in the following terms:

"Dear Terry and Clely,

Re: Copyright Agreement

It would be appreciated if you would sign and return

as soon as possible the attached copyright agreement. Once I have received this I will be able to collect \$850.00 for you on one particular clearance for an important government organisation. Copyright payments are very useful for an artist because they are received on top of the money you can earn for the actual works. Yours sincerely,
Bridget Tang,
Executive Officer"

Mr Yumbulul said in evidence that he did not understand the letter and telephoned Mr Wallis to find out what it was all about. Mr Wallis, he said, told him not to worry, and that the agreement that he was being asked to sign was just a legal document. Mr Wallis, he said, told him that he would look after him and send him money. When he asked Mr Wallis what he was signing the agreement for, Mr Wallis told him that it would be giving the Agency authority for an important government agency to look at his work. The document that was being sent was just a usual document, and a further agreement would be sent which properly reflected what was going on. If the government agency were interested in reproducing any of the work, there would be another contract sent which would specifically permit such reproduction.

16. Mr Yumbulul said he read the form of licence and it did not make a great deal of sense to him. There was, he said, no mention at the time of the Morning Star Pole, and no mention of the Reserve Bank or the use of his work on the currency. He said that he trusted Mr Wallis to tell him all of what was going on. Initially, he was not happy about simply signing the form, but Mr Wallis rang him again and again and said he should sign the form, and he did so. At that time, he was in financial difficulty and needed the money. He signed the form although he said he did not really know what he was entering into except that Mr Wallis told him that what he was doing was giving an important government agency the right to look at his works. Mr Wallis, on the other hand, said he had no recollection of such a conversation, and did not believe that it ever took place. He did, however, say that on a date in 1987, which he could not remember, he was telephoned by Mr Yumbulul who told him that he needed to make a lot more money for a tourist resort he was operating at Wigram Island. Mr Wallis said he told him that the Reserve Bank was interested in using the Morning Star Pole on a bank note and that he should speak to the Aboriginal Artists Agency Limited who were handling it. They would want Mr Yumbulul to sign an agreement before they could act for him. This rather suggests that the initiative leading to the execution of the agreement came from Mr Yumbulul, and I do not accept that that was so. The documentary evidence establishes that the Reserve Bank approached Mr Wallis, who passed the matter over to Bridget Tang. She communicated with the Bank and then approached Mr Yumbulul to sign the exclusive licence agreement.

17. There is no doubt that Mr Wallis was in communication with Mr Yumbulul at the time, on matters related to the sale of his paintings by Aboriginal Arts Australia Ltd. A diary entry of 14 May 1987, the same day that Bridget Tang wrote to him, evidences this. But I do not accept that Mr Wallis had any more reason to pretend that the Bank was only interested in a right to inspect the work than Ms Gaynor or Ms Tang would have had. Nor, having regard to the disclosure made to the Aboriginal artists previously commissioned by the Bank, was there any particular reason for him not to say that the Bank was interested in using the Morning Star Pole on a bank note. While Bridget Tang was fairly circumspect in her letter to Mr Yumbulul, I am satisfied on the balance of probabilities that Mr Wallis did refer to the proposed use in conversation.

18. Mr Yumbulul said in cross-examination, that he thought the government

agency to which Mr Wallis referred, wanted to look at paintings which he was exhibiting in Darwin through Aboriginal Arts Australia Limited and this, he suggested, was after the exhibition. But as the evidence showed, the exhibition was not held until August 1987. According to Mr Yumbulul's evidence in cross-examination, he knew that the form he was being asked to sign was a licence which gave to another party permission to use his work in some way or other. He qualified this by saying that the permission only went to a certain point or limit. The limit was defined in his own mind by reference to the sacred nature of the objects in question.

19. I am satisfied on the evidence, that Mr Yumbulul understood the general nature of the licence he was signing, and that it went beyond merely conferring the right to inspect his works. While his evidence indicated that he had some difficulty with particular words of the English language, he showed a grasp of the concept of royalty and the general notion of a licence. He had discussed the matter with his wife, Clely, who, although of Italian birth, came to Australia at age 12, and was educated in Adelaide to Year 10 level. They delayed some three weeks before he signed the licence and she witnessed his signature. At one stage she said in her evidence that she believed that the works covered by the licence were simply going to be looked at. At another point she said "We didn't really know at that time what it was supposed to be used for". I do not accept her evidence on that point, and I am satisfied that she understood that the licence permitted reproduction of her husband's works and that she would have explained this to him. While they may have been reluctant to enter into such an all embracing agreement with the Agency, they were in need of money urgently. In April and May 1987 they were living at an island outstation, earning something less than the amount payable under unemployment benefits. Mrs Yumbulul's father was then in Adelaide and seriously ill and she wanted to get down to see him. Their need for funds overcame the reluctance to sign the licence agreement and on 11 June 1987 they executed it.

20. Subsequently, the Agency signed an agreement with the Reserve Bank of Australia granting it a non-exclusive licence to reproduce the Morning Star Pole as a design element on a bank note. The licence fee agreed was \$1,000. A cheque for that amount was sent to the Agency by the Bank on 30 June 1987 with a request that the matter be treated "with the utmost confidentiality". A fee of \$850 was paid to Mr Yumbulul in advance of this receipt, by telegraphic transfer to his account on 22 June. The Morning Star Pole was ultimately embodied in the Bicentennial bank note which was made available to the public in 1988. It is not necessary for present purposes to traverse the detail of the correspondence between solicitors acting for Mr Yumbulul and the Agency that led up to this action.

The Causes of Action

21. There was evidence that Mr Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the Bank. It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations. Certainly, it appears to be the case that neither Mr Wallis, nor anyone else at the Agency, felt a need to explore these ramifications with him. Mr Wallis saw that as a matter which was Mr Yumbulul's responsibility. It may be that greater care could have been taken in this case. And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin. But to say this, is not to say that there has been established in the case, any cause of action. Central to Mr Yumbulul's claim is the plea at paras. 13 and 14 of the statement of claim. These are in the following terms:

"13. The first agreement (which is a reference to the

agreement of 11 June 1987) was signed by the Applicant on the faith of and acting in reliance upon representations of the Second and Third Respondent that ("the representations"):-

- (a) an important government agency, which the third Respondent said he could not name, had approached the Second Respondent to arrange for the inspection of artworks or (sic) the applicant in order to consider the reproduction of one or more of the artworks for a purpose for which the Third Respondent said he could not divulge;
- (b) in return for permitting such inspection, the important government agency would pay to the Applicant a sum of money;
- (c) if the important government agency determined that it wished to reproduce one or more of the Applicant's artworks, it would enter into a subsequent agreement for such reproduction with the Applicant;
- (d) the first agreement gave the important government agency only the right to inspect artworks of the Applicant.

PARTICULARS

The representations were made by the Second and Third Respondent to the Applicant in telephone conversations which took place in May and June 1987.

A copy of the first agreement may be inspected at the offices of the Applicant's solicitors by appointment.

14. The representations were false in that:-

- (a) The first agreement did not give the Second Respondent the right to permit the First Respondent to inspect the Applicant's artworks.
- (b) The first agreement purported to give the Second Respondent the right to reproduce the Applicant's artwork by mechanical reproduction throughout the world and to licence others to do so."

As is apparent from the findings of fact which I have made, the representations alleged are not made out. The primary case based on misleading or deceptive conduct must fail. So too, and for essentially the same reasons, do the causes of action based upon estoppel and unilateral mistake, the latter being not expressly pleaded but raised in argument by counsel for Mr Yumbulul.

22. Relief was also claimed based upon unconscionable conduct which was pleaded in para.20 of the statement of claim in the following terms:

"20. Furthermore or alternatively, the first agreement constituted an unconscionable contract between the Applicant and the Second Respondent by reason of the following matters:-

- (a) the Applicant, whose native language is Warrimiri, (sic) did not comprehend the language used in the first agreement or its effect;
- (b) the Second Respondent was aware, or should have been aware, that the Applicant did not comprehend the first agreement and was relying on the Second Respondent to properly represent its contents;
- (c) the Second Respondent failed to arrange

- for the Applicant to obtain independent (sic) advice concerning the first agreement or propose that the Applicant obtain such advice; and
- (d) the consideration received by the Applicant in the sum of \$650 was totally inadequate for the rights purportedly conferred.

PARTICULARS

The Applicant refers to an (sic) repeats the Particulars sub-joined to paragraph 13 herein."

Again, having regard to my findings of fact, the allegations supporting this claim are not made out. The plea of inadequate consideration is misconceived. The consideration under the licence agreement was 85% of the fee received by the Agency. There is no basis for concluding that the consideration thus provided was inadequate, and it is to be noted that unlike agreements in the manager-performer agreement cases, to which I was referred, the licence in this case was terminable by the applicant on three months' notice.

23. The secondary case of misleading or deceptive conduct pleaded in paras. 22 and 23 of the statement of claim relied entirely on the proposition that there was no valid licence agreement in force at the time that the Agency entered into the sub-licence with the Reserve Bank of Australia. That proposition is not made out because the primary claims necessary to establish it, have not succeeded. I should add that insofar as any argument that the Agency was not authorised to grant the sub-licence it did to the Reserve Bank is dependent upon a limitation of the exclusive licence by reference to the words, "mechanical reproduction", I am satisfied that that terminology is sufficiently wide to cover the rights conferred upon the Bank.

24. By its defence, the Agency invoked ss.65 and 68 of the Copyright Act 1968, contending that the Morning Star Pole is either a sculpture or a work of artistic craftsmanship on display other than temporarily at the Australian Museum. On this basis, it was said, the allegation that the Reserve Bank had infringed Mr Yumbulul's copyright, and that the infringement was authorised by the Agency, could not be made out. In the event, it is not necessary for me to make any finding on the validity of this defence. But if it be correct, then it may be the case that some Aboriginal artists have laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. This question and the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators. For what it is worth, I would add that it would be most unfortunate if Mr Yumbulul were to be the subject of continued criticism within the Aboriginal community for allowing the reproduction of the Morning Star Pole design on the commemorative banknote. The reproduction was, and should be seen, as a mark of the high respect that has all too slowly developed in Australian society for the beauty and richness of Aboriginal culture.

25. For the reasons which I have given I will order that:

1. The application is dismissed.
2. The applicant to pay the second and third respondents' costs of the application.
3. The time limited for an appeal be extended to 35 days from the 2 August 1991.
4. The Morning Star Pole, Exhibit 1, be retained in the custody of the Court pending the hearing and determination of any appeal, provided that the Registrar may release the Pole into the custody of the Northern Territory Museum pending the hearing and determination of the appeal, provided that the Australian Museum has first provided written authority for it to be so

released.