maintain the premises as a nursing home under the Act
expectation was not based upon the statutory framework
t. Rather, it was based upon a misconception in relation to
d interest in the allocated places, or more accurately, the
absence hts or interest. The problematic nature of Corio Bay's
commercial "interest" serves to reinforce the difficulties confronting the holder of indirect or consequential commercial interests in establishing an entitlement to be heard in respect of a decision that is alleged to affect those interests.

Accordingly, for the above reasons, neither the minister nor the delegate was obliged to afford Corio Bay an opportunity to be heard prior to making a decision to approve the transfer of the places to premises other than the Geelong premises. In these circumstances, the application is to be dismissed with costs.

Order

(1) The application be dismissed.

(2) The applicant pay the respondents' taxed costs of and incidental to the proceeding.

Solicitors for the applicant: *Dean Beveridge & Associates.*

Solicitor for the first and second respondents: *Australian Government Solicitor.*

Solicitors for the third respondent: *Swersky & Velos.*

Solicitors for the fourth respondent: *Coltmans Price Brent.*

ADAM ANASTASI
SOLICITOR

Australian Law Reports 157
(1998): 192-212

BULUN BULUN and ANOTHER v R & T TEXTILES PTY LTD; MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS, intervening

FEDERAL COURT OF AUSTRALIA

VON DOUSSA J

22, 23 September 1997 — Darwin; 3 September 1998 — Adelaide

Intellectual property — Copyright — Aboriginal artwork — Whether traditional owners of Aboriginal land could claim equitable ownership of artwork — Whether communal title can exist in a copyright work — Infringement of copyright — (CTH) Copyright Act 1968 ss 8, 8A, 10(1), 35(2) — (CTH) Aboriginal Land Rights (Northern Territory) Act 1976 s 24 — (CTH) Federal Court of Australia Act 1976 ss 33H, 33J, 33X — (CTH) Native Title Act 1993 ss 74, 213(1) — Federal Court Rules O 6 r 13.

Equity — Trust — Copyright — Whether Aboriginal artist held artwork and copyright on trust for traditional owners of Aboriginal land — Fiduciary relationships — Whether Aboriginal artist held artwork and copyright as a fiduciary — Extent of fiduciary obligations imposed — Obligation not to exploit artistic work in manner contrary to customary law — Obligation to take appropriate action against third party to restrain infringement of copyright — Circumstances in which equity will impose a constructive trust.

Evidence — Admissibility of evidence of customary Aboriginal law.

The first applicant, John Bulun Bulun (Bulun Bulun), and the second applicant, George Milpurrurru (Milpurrurru), were leading Aboriginal artists. They were also senior members of the traditional Aboriginal owners of Ganalbingu country, located in Arnhem Land in the Northern Territory (the Ganalbingu People).

Bulun Bulun was the legal owner under the Copyright Act 1968 (Cth) of the copyright subsisting in the artistic work known as "Magpie Geese and Water Lilies at the Waterhole" (the artistic work). He painted the work in 1978 with the permission of senior members of the Ganalbingu People. Evidence demonstrated that the artistic work derived from the corpus of ritual knowledge which the Ganalbingu People inherited from their ancestors. In accordance with customary law, members of the Ganalbingu People had an obligation to foster and, with the necessary permission, create such artworks that were associated with their ownership of the land.

The respondent imported and sold in Australia fabric that infringed the copyright in the artistic work. The applicants brought a court proceeding against the respondent for copyright infringement. Bulun Bulun sued as legal owner of the copyright in the artistic work. Milpurrurru sued in his own right and as representative of the Ganalbingu People. Milpurrurru claimed that the Ganalbingu People were the equitable owners of the copyright in the artistic work. This equitable interest arose as an incident of the Ganalbingu People's ownership of, and relationship to, the land.

The respondent admitted infringement and consented to final declarations and orders, including permanent injunctions, in respect of the claim brought by Bulun Bulun. However, the respondent did not admit Milpurrurru's claim that the Ganalbingu People were the equitable owners of the copyright in the artistic work. This aspect of the matter proceeded to trial. Milpurrurru argued that because the Ganalbingu People had the power under customary law to control the reproduction of manifestations of the corpus of ritual knowledge, Bulun Bulun held the copyright in the artistic work on trust for the Ganalbingu People or, alternatively, as a fiduciary.

Held, finding that Bulun Bulun owed fiduciary obligations to the Ganalbingu People in respect of the artistic work:

Evidence of customary law

(i) Evidence of customary law can be used to provide a foundation for rights recognised within the Australian legal system. Evidence about Ganalbingu law and customs was admissible.

Communal title in copyright works

(ii) Customary Aboriginal law relating to group ownership of artistic works survived the reception of the English common law in Australia in 1788. But whether or not communal title in artistic works may once have been recognised by the common law, the codification of copyright law by statute now prevents communal title being successfully asserted as part of the general law.

Did Bulun Bulun hold copyright in the artwork under an express trust?

(iii) The existence of an express trust depends on the intention of the settlor. No particular form of words is required, and any apt expression of intention will suffice.

Registrar, Accident Compensation Tribunal v FCT (1993) 178 CLR 145; 117 ALR 27, followed.

(iv) An intention to create a trust can be inferred from conduct.

Gissing v Gissing [1971] AC 886, followed.

(v) Instances of commercial sale of the artwork by Bulun Bulun were seemingly not contrary to customary law and Bulun Bulun was able to retain proceeds of sale for his own use. The evidence was inconsistent with Bulun Bulun holding the artwork and copyright on an express trust.

Did Bulun Bulun hold copyright in the artwork as a fiduciary?

(vi) In accordance with their customary law, the Ganalbingu People permitted Bulun Bulun to create the artistic work that embodied part of their ritual knowledge derived from their ancestors. The relationship was predicated on the trust and confidence the Ganalbingu People had in the artist. A fiduciary relationship existed between Bulun Bulun and the Ganalbingu People.

(vii) Having regard to the customary law of the Ganalbingu People and the circumstances in which Bulun Bulun was permitted to create the artistic work, equity imposed fiduciary obligations on Bulun Bulun:

- not to exploit the artistic work in a manner that is contrary to customary law; and
- to take appropriate action against third parties to restrain and remedy any infringement of copyright in the artistic work.

(viii) The mere identification of a fiduciary relationship does not, without more, require equity to impose a constructive trust on property held by a fiduciary. Equity will impose a constructive trust where it is necessary to achieve a just remedy and to prevent the beneficiary from retaining an unconscionable benefit.

Muschinski v Dodds (1985) 160 CLR 583; 62 ALR 429; *Baumgartner v Baumgartner* (1987) 164 CLR 137; 76 ALR 75, followed.

(ix) The existence of fiduciary obligations owed by the legal owner of the copyright, Bulun Bulun, to the Ganalbingu People did not, without more, vest in them an equitable interest in the ownership of the copyright. If Bulun Bulun were to breach one of his fiduciary obligations, the Ganalbingu People's primary right would be a right in personam to bring an action against him to enforce the obligation. In particular circumstances of fiduciary neglect, equity might impose a remedial constructive trust against the copyright owner.

(x) In the present circumstances, Bulun Bulun had fulfilled the fiduciary obligations imposed on him by taking appropriate action to enforce the copyright. There was no occasion for equity to provide any additional remedy to the Ganalbingu People, as beneficiaries of the fiduciary relationship. Accordingly, the proceeding by Milpurrurru should be dismissed.

C D Golvan and *M P Hardie* for the first and second applicants.

There was no appearance for the respondent.

D S Mortimer and *G Loughton* for the Minister for Aboriginal and Torres Strait Islander Affairs, intervening.

T Pauling QC for the Attorney-General (NT) as amicus curiae.

von Doussa J. These proceedings arise out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the first applicant, Mr Bulun Bulun, in the artistic work known as "Magpie Geese and Water Lilies at the Waterhole" (the artistic work).

The proceedings were commenced on 27 February 1996 by Mr Bulun Bulun and the second applicant, Mr George Milpurrurru. Both applicants are leading Aboriginal artists. The respondents were, at that time, R & T Textiles Pty Ltd (the respondent) and its three directors. Mr Bulun Bulun sued as the legal owner of the copyright pursuant to the Copyright Act 1968 (Cth) for remedies for the infringement, for contraventions of sections of Pt V of the Trade Practices Act 1974 (Cth) dealing with misleading or deceptive conduct, and for nuisance. Mr Milpurrurru brought the proceedings 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 claims that the traditional Aboriginal owners of Ganalbingu country are the equitable owners of the copyright subsisting in the artistic work.

These proceedings represent 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. The inadequacies of statutory remedies under the Copyright Act as a means of protecting communal ownership have been noted in earlier decisions of this court: see *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481 at 490 and *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240 at 247; 130 ALR 659; see also McKeough and Stewart, "Intellectual Property and the Dreaming", published in *Indigenous Australia and the Law*, Johnston, Hinton & Rigney eds (1997); Henderson, "What's in a Painting? The Cultural Harm of Unauthorised Reproduction" (1995) 17 *Syd Law Rev* 591 at 593; Ellison, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17 *UNSWLJ* 327; and "Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples" (1994, National Capital Printing) where it was said at 6:

> While 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.

Mr Bulun Bulun's claim

As soon as the proceedings were served the respondent admitted infringement of Mr Bulun Bulun's copyright in the artistic work, and pleaded that the

infringement had occurred in ignorance of the copyright. The respondent immediately withdrew the offending fabric from sale. At that time approximately 7600 metres of the fabric had been imported and approximately 4231 metres sold in Australia.

On 27 June 1996 an administrator of the respondent was appointed under Pt 5.3A of the Corporations Law, and on 5 July 1996 receivers and managers were appointed.

On 20 January 1997 the applicants were granted leave by consent to proceed against the respondent pursuant to s 440D of the Corporations Law. The applicants informed the court that the proceedings would be discontinued against the directors of the respondent, and leave was given to the applicants to file an amended application and statement of claim. The respondent then consented to final declarations and orders on the claim by Mr Bulun Bulun. These included a declaration that the respondent had infringed Mr Bulun Bulun's legal title to the copyright in the artistic work, and comprehensive permanent injunctions against future infringement.

The amended application and amended statement of claim continued to plead a claim by George Milpurrurru on his own behalf and in a representative capacity for the Ganalbingu People in respect of equitable ownership of the copyright in the artistic work. The claims under the Trade Practices Act were abandoned. A claim in nuisance was repleaded, but that claim was also abandoned before trial.

In its defence filed to the original statement of claim the respondent pleaded that Mr Bulun Bulun had full legal rights under the Copyright Act to recover in respect of any infringement of copyright in the artistic work, and that it was therefore unnecessary to consider whether the Ganalbingu People or any of them were equitable owners of the copyright. In any event the respondent did not admit the allegations concerning equitable ownership of the copyright.

Counsel for the applicants informed the court that the artistic work incorporates within its subject matter much that is sacred and important to the Ganalbingu People about their heritage. Counsel emphasised that copyright infringements of artworks such as the artistic work affect interests beyond those of the copyright owner, and that the Ganalbingu People considered it to be of great importance that the court recognise the rights of the Ganalbingu People and the injury caused to them by the respondent's infringement. Counsel said that Mr Milpurrurru therefore proposed to continue with his claim notwithstanding the consent orders in favour of Mr Bulun Bulun.

Accordingly, on 20 January 1997 directions were given for the filing of affidavit evidence, and generally to bring the claims pleaded by Mr Milpurrurru to readiness for trial.

Evidence in Mr Milpurrurru's claim

It will be necessary to return in due course to consider procedural matters relating to the state of the proceedings when they came on for trial, but it is convenient first to record the nature of the case and the evidence which Mr Milpurrurru filed in support of the claim that he and the Ganalbingu People are equitable owners of the copyright in the artistic work.

Much of the evidence in these proceedings relates to customary rights and obligations recognised and observed by the individual members of the Ganalbingu People and the group as a whole. For a discussion of the reception of customary law into evidence, see *Delgmuukw v British Colombia* (1997) 153 DLR (4th) 193 at para 81-87, per Lamer CJ. Counsel for the minister submitted

that customary rights and interests are not enforceable in Australian courts. As Lamer CJ in the Supreme Court of Canada observed in *Delgmuukw v British Colombia*, customary rights and obligations are not easily explicable and definable in terms of ordinary western jurisprudential analysis or common law concepts. The High Court's decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 shows that customary indigenous law has a role to play within the Australian legal system. Indeed the conclusion that native title survived the Crown's acquisition of sovereignty was dependent upon the court's acceptance of antecedent traditional laws and customs acknowledged and observed by the indigenous inhabitants of the land claimed. While Mason CJ observed in *Walker v New South Wales* (1994) 182 CLR 45 at 49-59; 126 ALR 321 that it is not possible to use evidence about indigenous customs and traditions to operate as "customary law" in opposition to or alongside Australian law (see also *Coe v Commonwealth* (1993) 118 ALR 193 at 200, and *Wik Peoples v Queensland* (1996) 187 CLR 1 at 214; 141 ALR 129 per Kirby J) Australian courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law. Evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system. Native title is a clear example. In *Milpurrurru v Indofurn* the court took into account the effect of the unauthorised reproduction of artistic works under customary Aboriginal laws in quantifying the damage suffered. In my opinion the evidence about Ganalbingu law and customs is admissible.

The amended application in this case alleges that the Ganalbingu People are the traditional Aboriginal owners of Ganalbingu country who have the right to permit and control the production and reproduction of the artistic work under the law and custom of the Ganalbingu People. It is pleaded that the traditional owners of Ganalbingu country comprise:

(i) Members of the Ganalbingu People.

(ii) The Yolngu People (Aboriginal people of Arnhem Land) who are the children of the women of the Ganalbingu People.

(iii) The Yolngu People who stand in a relationship of mother's-mother to the members of the Ganalbingu People under Ganalbingu law and custom.

(iv) Such other Yolngu People who are recognised by the applicants according to Ganalbingu law and custom as being traditional Aboriginal owners of Ganalbingu country.

The amended statement of claim pleads that the Ganalbingu People are the traditional Aboriginal owners of the corpus of ritual knowledge from which the artistic work is derived, including the subject matter of the artistic work and the artistic work itself.

Mr Milpurrurru is the most senior person of all the Ganalbingu People. The Ganalbingu People are divided into "top" and "bottom" people, as is the Ganalbingu country. Mr Milpurrurru is a "top" Ganalbingu. Mr Bulun Bulun is the most senior person of the "bottom" Ganalbingu and is second in line to Mr Milpurrurru of the Ganalbingu People generally.

Djulibinyamurr is the site of a waterhole complex situated close to the eastern side of the Arafura Swamp between the Glyde and Goyder river systems and the Woolen River. Djulibinyamurr, along with another waterhole site, Ngalyindi, are the two most important sites on Ganalbingu country for the Ganalbingu People. Mr Bulun Bulun describes Djulibinyamurr as the ral'kal for the lineage of the bottom Ganalbingu People. In his affidavit evidence Mr Bulun Bulun says:

Ral'kal translates to mean the principal totemic or clan well for my lineage. Ral'kal is the well spring, life force and spiritual and totemic repository for my lineage of the Ganalbingu People. It is the place from where my lineage of the Ganalbingu People are created and emerge. It is the equivalent of my "warro" or soul.

Djulibinyamurr is the place where not only my human ancestors were created but according to our custom and law emerged, it is also the place from which our creator ancestor emerged. Barnda, or Gumang (long neck tortoise) first emerged from inside the earth at Djulibinyamurr and came out to walk across the earth from there. It was Barnda that caused the natural features at Djulibinyamurr to be shaped into the form that they are now.

Barnda not only created the place we call Djulibinyamurr but it populated the country as well. Barnda gave the place its name, created the people who follow him and named those people. Barnda gave us our language and law. Barnda gave to my ancestors the country and the ceremony and paintings associated with the country. My ancestors had a responsibility given to them by Barnda to perform the ceremony and to do the paintings which were granted to them. This is a part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation. Djulibinyamurr is then our life source and the source of our continuing totemic or sacred responsibility. The continuity of our traditions and ways including our traditional Aboriginal ownership depends upon us respecting and honouring the things entrusted to us by Barnda.

Djulibinyamurr is my ral'kal, it is the hole or well from which I derive my life and power. It is the place from which my people and my creator emerged. Damage to Djulibinyamurr will cause injury and death to the people who are its owners. Damage to a ral'kal is the worst thing that could happen to a Yolngu person. It is the ultimate act of destruction under our law and custom — it upsets the whole religious, political and legal balance underpinning Yolngu society. It destroy [sic] the relationship and the maintenance of the trust established between the creator ancestor and their human descendants and also between traditional Aboriginal owners. This relationship controls all aspects of society and life, for example, ownership of country, relations with other clans, marriage and ceremonial life and its attributes. If the life source is damaged or interfered with in any way the power and stability derived from it and the power and stability which has continued from the time of creation is diminished and may collapse.

In the same way my creator ancestor formed the natural landscape and granted it to my human ancestors who in turn handed it to me. My creator ancestor passed on to me the elements for the artworks I produce for sale and ceremony. Barnda not only creates the people and landscape, but our designs and artworks originate from the creative acts of Barnda. They honour and deliberate the deeds of Barnda. This way the spirit and rule of Barnda is kept alive in the land. The land and the legacy of Barnda go hand in hand. Land is given to Yolngu People along with responsibility for all of the Madayin (corpus of ritual knowledge) associated with the land. In fact for Yolngu, the ownership of land has with it the corresponding obligations to create and foster the artworks, designs, songs and other aspects of ritual and ceremony that go with the land. If the rituals and ceremonies attached to land ownership are not fulfilled, that is, if responsibilities in respect of Madayin are not maintained then traditional Aboriginal ownership rights lapse. Paintings, for example, are a manifestation of our ancestral past. They were first made in my case by Barnda. Barnda handed the painting to my human ancestors. They have been handed from generation to generation ever since.

The creation of artworks such as "at the Waterhole" is part of my responsibility in fulfilling the obligations I have as a traditional Aboriginal owner of Djulibinyamurr. I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such words, as part of my traditional Aboriginal land ownership obligation. A painting such as this is not separate from my rights in my land. It is a part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law. Interference with the painting or another aspect of the Madayin associated with Djulibinyamurr is tantamount to interference with the land itself as it is an essential part

of the legacy of the land, it is like causing harm to the spirit found in the land, and causes us sorrow and hardship. The land is the life force of our people. It sustains and nurtures us, as it has done for countless generations. We are very troubled by harm caused to the carrying out of the rituals which are such essential part of the management of our land, like the making of paintings or performances of ceremony. It is very important that ceremonies are carried out precisely as directed by Barnda, and that the ceremonies are respected.

"At the Waterhole" is the number one item of Madayin for Djulibinyamurr — it is the number one Madayin for Ganalbingu — Gurrumba Gurrumba People. It has all the inside meaning of our ceremony, law and custom encoded in it. "At the Waterhole" has inside meaning encoded in it. Only an initiate knows that meaning and how to produce the artwork. It is produced in an outside form with encoded meaning inside. It must be produced according to specific laws of the Ganalbingu People, our ritual, ceremony and our law. These things are not separate from the manner in which this painting is produced. To produce "at the Waterhole" without strict observance of the law governing its production diminishes its importance and interferes adversely with the relationship and trust established between myself, my ancestors and Barnda. Production without observance of our law is a breach of that relationship and trust. The continuance of that relationship depends upon the continuance and observance of our customs and law, it keeps the people and land healthy and strong. This work has within it much that is sacred and important to our people about heritage and right to claim Djulibinyamurr as our land. It is like the title of our people to his land.

Unauthorised reproduction of "at the Waterhole" threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threatens our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations.

The correctness of this evidence is confirmed by Mr Milpurrurru, and by Mr Djardie Ashley, himself a noted artist, who is married to Mr Milpurrurru's sister, Mrs Dorothy Djukulul, another noted artist. Mr Ashley through clan relationships to the Ganalbingu People and his marriage to Mr Milpurrurru's sister stands him in the position of Waku or Djungayi to Mr Bulun Bulun. Mr Ashley describes this role as follows:

> Sometimes Balanda (non Yolngu People) refer to Djungayi as meaning manager. Other times Balanda (non Yolngu People) refer to a Djungayi as a policeman. This is because among a Djungayi's responsibilities is the obligation to ensure that the owners of certain land and Madayin associated with that land are dealt with in accordance to Yolngu custom, law and tradition. A Djungayi sometimes might have to issue a warning or advice to a traditional Aboriginal owner about the way certain land or the Madayin associated with that land is used. A Djungayi has an important role to play in maintaining the integrity of the land and Madayin.
>
> Djungayi learn the paintings of the land that they manage. They produce paintings and other aspects of the Madayin for ceremony and for sale where appropriate. Some Djungayi may take a leading role in performing and/or producing aspects of Madayin. More senior Djungayi should be consulted about important decisions concerning their "mothers" country, and its Madayin. For example, during the preparation of this case I needed to be consulted and be present when Bulun Bulun gave statements to our lawyer. I did most of the talking as it is more appropriate for the Djungayi to speak openly about land and Madayin. I also had to be consulted when Bulun Bulun wished to take our lawyer to Djulibinyamurr.
>
> . . . My rights as Djungayi of Djulibinyamurr include the right to produce paintings related to that place, and the right to be consulted by Bulun Bulun about the use of

Djulibinyamurr and the Madayin related to it. I am able to speak about the law and custom of the Ganalbingu People, in particular that associated with Djulibinyamurr because of my position as Bulun Bulun's Djungayi.

Mr Bulun Bulun explained that the classes of people, described earlier in these reasons, who comprise the traditional Aboriginal owners of Ganalbingu country have interests in Djulibinyamurr and also in the Madayin including paintings such as the artistic work. Many of these people would need to be consulted on any matter that concerned Djulibinyamurr. He went on to say:

> In . . . cases where it has been agreed in principle that the types of uses in question are allowable, direct consultation and approval may not be necessary. If Bulun Bulun wanted to license "at the Waterhole" so that somebody could mass produce it in the way that the respondents have he would need to consult widely. If he wanted to license "at the Waterhole" to a publisher to reproduce the painting in an art book he probably would not need to consult the other traditional Aboriginal owners at all.
>
> The question in each case depends on the use and the manner or mode of production. But in the case of a use which is one that requires direct consultation, rather than one for which approval has been already given for a class of uses, all of the traditional Aboriginal owners must agree. There must be total consensus. Bulun Bulun could not act alone to permit the reproduction of "at the Waterhole" in the manner as was done.

Evidence from Professor Howard Morphy, Professor of Social Anthropology at University College London, and Associate Professor Joseph Reser of the James Cook University of North Queensland, both of whom have conducted extensive research into the cultures of the peoples of eastern Arnhem Land, supports this evidence and gives emphasis of the importance of inherited designs as part of the "sacred" Madayin of the peoples of Arnhem Land. Similar evidence was given in *Milpurrurru v Indofurn Pty Ltd* (at FCR 245-6).

The artistic work was painted by Mr Bulun Bulun in 1978 with permission of senior members of the Ganalbingu People. He sold it to the Maningrida Arts and Crafts Centre. At that time Mr Peter Cooke was the arts adviser at the centre. Mr Cooke then arranged the sale of the artistic work to the Northern Territory Museum of Arts and Sciences. It was reproduced with Mr Bulun Bulun's consent in the book *Arts of the Dreaming — Australia's Living Heritage* by Jennifer Isaacs at p 198. The artwork was copied without the consent of Mr Bulun Bulun by a Queensland T-shirt manufacturer in 1988, which led to proceedings being taken by Mr Bulun Bulun in the Federal Court of Australia in 1989. These proceedings received wide publicity. They were settled prior to a hearing. In the present case, the artistic work has not been exactly reproduced on the infringing fabric, but the design of the fabric obviously reproduces substantial aspects of the artwork, and constitutes a substantial reproduction of it. So much was acknowledged by the respondent as soon as the copyright was brought to its attention.

The proceedings after 20 January 1997

I return to procedural aspects of the proceedings. Following the directions hearing on 20 January 1997 affidavit evidence was filed on behalf of Mr Milpurrurru. The respondent, however, took no further part in the proceedings. The evidence does not indicate the precise status of the respondent at the time of trial. It is unlikely that the respondent remains in administration. If it is being wound up in circumstances that require the leave of the court under s 471B of the Corporations Law for the action to proceed, leave has not been

granted. If that is the only matter that stands between the applicants and the relief they seek, it will be necessary to consider whether leave can be given nunc pro tunc.

Further procedural issues arise in respect of Mr Milpurrurru's claim made in a representative capacity. The amended application says that he brings this claim pursuant to Pt IVA of the Federal Court of Australia Act 1976 (Cth). The originating process gave the particulars required by s 33H of the Federal Court of Australia Act and identified the group members on whose behalf the proceedings were brought as the traditional Aboriginal owners of Ganalbingu country. However, other procedural requirements of Pt IVA have not been observed. The court has at no stage been asked to fix a date before which a group member may opt out of the representative proceeding as required by s 33J(1), nor has leave of the court been sought to proceed with a representative hearing earlier than the date fixed pursuant to s 33J(1): see s 33J(4). Nor is there any indication that notice has been given to the group members as required by s 33X. Again, if an entitlement to the relief claimed by Mr Milpurrurru in his representative capacity is otherwise established, these procedural issues will require further attention. These omissions cannot be rectified by relying upon O 6, r 13 of the Federal Court Rules. In this case the people on whose behalf Mr Milpurrurru sues have a common interest, a common grievance, and seek relief which is beneficial to all of them, namely the declaration. These are the traditional requirements of a representative action under a rule like O 6, r 13: see *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 and *Gaetjens v Arndale (Kilkenny) Pty Ltd* [1969] SASR 470 at 483 (affirmed by the High Court of Australia (1970) 44 ALJR 434). However, O 6, r 13(7) provides that the rule does not apply to a proceeding concerning property subject to a trust. It is logical to conclude that this rule incorporates proceedings where the existence or otherwise of a trust forms part of the subject of the dispute. The copyright subsisting in the artistic work is property, and the representative claims assert that the copyright is held in trust for the Ganalbingu People. Consequently O 6, r 13(7) does not overcome the procedural issues outlined above.

The fact that these procedural difficulties were not identified before the matter came on for trial illustrates the problems which can arise where there is no contradictor to the applicants' claims. The trial was specially listed in Darwin, and arrangements had been made by the applicants for the trial judge to visit Ramangining which is situated on the western side of the Arafura Swamp, and from there to fly over Djulibinyamurr. These arrangements were made as the applicants were most anxious that the court be left in no doubt as to the existence of the sacred place, and its importance to the Ganalbingu People. Once the matter was called on, it was not feasible to defer these arrangements or the hearing until the procedural issues had been explored. The view of Djulibinyamurr took place as arranged, and the applicants and Mr Ashley gave oral evidence at Ramangining. Submissions were made by counsel in Darwin the following day. It then became clear that there were many issues that required further consideration. Directions were given for the parties to file supplementary written submissions. It was necessary to extend the time for compliance on several occasions. While the trial commenced on 22 September 1997, the last of the written submissions was not filed until 8 April 1998.

Intervention and amicus curiae

As the trial date approached it was plain that no one would appear on the respondent's behalf to act as a contradictor either on matters of fact or law. The applicants brought the proceedings to the notice of the Minister for Aboriginal and Torres Strait Islander Affairs (the minister). When the matter was called on for trial, the minister appeared by counsel and sought leave to intervene for the purpose of making submissions on legal issues, and in particular the construction and operation of the Native Title Act 1993 (Cth) (the NTA), the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Copyright Act, and on the claim for recognition of an equitable interest in the copyright. The claim raises important and difficult issues regarding the protection of the interests of indigenous peoples in their cultural heritage. Further, the pleadings (referred to below) appear to assert that intellectual property rights of the kind claimed by the applicants were an incident of native title in land. As there would otherwise be no contradictor, the application to intervene by the minister was welcomed, and leave was granted. The court has an inherent power to grant leave to intervene to ensure that it is properly informed of matters which it ought to take into account in reaching its decision, particularly in judgments which may affect the community generally and involve questions of public policy on which the executive may have a view: see *Adams v Adams* [1971] P 188 at 198.

The Attorney-General for the Northern Territory of Australia also appeared at the trial and sought leave to make a submission, as amicus curiae, on the power of the court to make a determination as to the existence of native title rights. The court granted leave.

Interest in these proceedings by the minister and the Attorney-General for the Northern Territory was excited by the following paragraphs of the amended statement of claim:

> 1. The first applicant is a senior member of the Ganalbingu People, who are an Aboriginal people who are the traditional Aboriginal owners within the meaning of that term as defined in s 3 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), and the native title holders within the meaning of that term as defined in s 224 of the Native Title Act 1993 (Cth) and the native title holders at common law of land described as Ganalbingu country (the traditional Aboriginal owners), including the site known as Djulibinyamurr in the Arafura Swamp region, all of which is situated within the Arnhem Land Aboriginal Trust established pursuant to s 4 and Sch 1 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), in the Northern Territory of Australia.
>
> 5. At the time of acquisition of sovereignty over the Northern Territory of Australia by the Crown, the applicants' ancestors were the traditional Aboriginal owners.
>
> 6. The applicants' traditional Aboriginal ownership, including all of the rights, interests and incidents of that ownership, were inherited from their ancestors who were the traditional Aboriginal owners of Ganalbingu country, including Djulibinyamurr, in accordance with the custom and law of the Ganalbingu People.
>
> 8. According to Ganalbingu custom and law, the first applicant's creator ancestor caused Djulibinyamurr to be formed and settled the traditional Aboriginal ownership of that site upon the ancestors of the first applicant to be held with the other traditional Aboriginal owners, on the condition that they and their descendants perpetuate and maintain the integrity of the corpus of ritual knowledge (madayin) of the Ganalbingu People associated with Ganalbingu country and in particular, Djulibinyamurr, for the benefit of the Ganalbingu People, including, inter alia, the songs, dances and paintings associated with Djulibinyamurr, such being an obligation arising from the granting to the applicants and their ancestors of traditional Aboriginal ownership of Ganalbingu country.

> 9. The first applicant's right to paint and permit the reproduction of the artistic work is subject to the conditions and obligations referred to in para 8 herein and is an incident of his traditional Aboriginal ownership of the land at Djulibinyamurr.

The minister and the Attorney-General were concerned that the pleadings claimed that (1) the intellectual property rights in the artistic work were an incident of native title; (2) being an incident of native title the intellectual property rights constituted an interest in land; and (3) the Ganalbingu People were entitled to a determination in these proceedings that they were the native title holders of the Ganalbingu country. The outline of submissions presented by the applicants at the commencement of the trial appeared to support this interpretation of their claim.

Both the minister and the Attorney-General draw attention to s 213(1) of the Native Title Act which provides:

> (1) If, for the purpose of any matter or proceeding before the Federal Court, it is necessary to make a determination of native title, that determination must be made in accordance with the procedures in this Act.

In *Yarmirr v Northern Territory of Australia* (Fed C, 4 April 1997, unreported) Olney J said, at 4:

> . . . s 213(1) of the [Native Title] Act provides that if, for the purpose of any matter or proceeding before the court, it is necessary to make a determination of native title, that determination must be made in accordance with the procedures contained in the Act. The procedures in question do not admit of an application for a determination of native title being made otherwise than pursuant to s 13 and Pt 3 of the Act. In the absence of an application by Ms Henwood pursuant to s 61 and the lodging of such an application with the court pursuant to s 74, the court has no jurisdiction to make a determination in respect of her claimed native title rights.

In the present case there is no application for determination of native title pursuant to s 74 of the Native Title Act 1993, and this court is without jurisdiction to make a determination of native title in these proceedings.

The submissions of the minister went on to contend that, while native title to an area of land may exist without a judicial determination as to its existence (*Mabo (No 2)*), the necessary elements of proof of native title are not made out in this case in any event. As this court does not have jurisdiction to make a determination of native title in land, it is not appropriate to consider those submissions save to note that the evidence does not address at all a number of issues that would arise in a proceeding commenced and resolved in a State or Territory court in accordance with the principles expressed in *Mabo (No 2)*.

The pleadings also allege that the Ganalbingu People are the traditional Aboriginal owners of country which includes Djulibinyamurr situated within the Arnhem Land Aboriginal Trust established under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). That Act vests the power in the relevant land council, in this case the Northern Land Council, to compile and maintain a register setting out the names of persons who, in the opinion of the council, are the traditional Aboriginal owners of Aboriginal land in the area of the land council: see s 24 and *Tapgnuk v Northern Land Council* (1996) 108 NTR 1. The evidence does not address the question whether the applicants, or any other of the Ganalbingu People, are registered as traditional Aboriginal owners of Djulibinyamurr.

In *Mabo (No 2)*, Brennan J said (at CLR 43; ALR 59):

> However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.

In order to be successful, the applicants' foreshadowed argument that a right of ownership arises in artistic works and copyright attaching to them as an aspect of native title would appear to require that the court accept that the inseparable nature of ownership in land and ownership in artistic works by Aboriginal people is recognised by the common law. The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as "skeletal" and stand in the road of acceptance of the foreshadowed argument.

However, it is not necessary to further consider these issues, as the initial suggestion in the submissions that intellectual property rights are an incident of native title in land such that they constituted some recognisable interest in the land itself was not pressed. Rather, the submissions were modified to assert that the claimed equitable interests in the copyright subsisting in the artistic work were incidental to the applicants' claimed land ownership, and to their perception of their relationship with the land. Their traditional use and occupation of the land is the basis for the continuing existence of and adherence to Ganalbingu laws and customs concerning the creation, reproduction and use of traditional art. In their final form, the applicants' submissions did not seek to have the court declare by some indirect route that the Ganalbingu People were the holders of native title in the Ganalbingu country.

Why the claim is confined to one for recognition of an equitable interest

The 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. This exercise was painstakingly pursued by counsel for the applicants (and later by counsel for the minister). That the claim was ultimately confined to one for recognition of an equitable interest in the legal copyright of Mr Bulun Bulun is an acknowledgment that no other possible avenue had emerged from the researches of counsel.

While it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so. There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal peoples did not cease to observe their sui generis system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown. The question, however, is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem.

In *Mabo (No 2)* Deane and Gaudron JJ, after analysing the effects of the introduction of the common law of England into Australia in 1788 said (at CLR 79):

> The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was "reasonably applicable to the circumstances of the colony". This left room for the continued operation of some

> local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law [some footnotes omitted].

In 1788 there may have been scope for the continued operation of a system of indigenous collective ownership in artistic works. At that time the common law of England gave the author of an artistic work property in unpublished compositions which lasted in perpetuity: *Mansell v Valley Printing Co* [1908] 1 Ch 567 and Laddie Prescott and Vitoria, *The Modern Law of Copyright* 1980 para 4.64. That property was lost upon publication of the artistic work. Exhibition for sale or sale constituted publication: *Britain v Hanks Bros and Co* (1902) 86 LT 765. This property interest was separate from the right recognised in equity to restrain a breach of confidence, a right which continues and was invoked in *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71. The common law of England did not protect an author of an artistic work after publication. If the common law had not been amended in the meantime by statute, an interesting question would arise as to whether Aboriginal laws and customs could be incorporated into the common law. However, the common law has since been subsumed by statute. The common law right until first publication was abolished when the law of copyright was codified by the Copyright Act of 1911 in the United Kingdom. That Act, subject to some modifications, became the law in Australia by s 8 of the Copyright Act 1912 (Cth). Copyright is now entirely a creature of statute: McKeough and Stewart, *Intellectual Property in Australia* (1991) at para 504; *Copinger and Skone James on Copyright* (13th ed) para 1-43. The exclusive domain of the Copyright Act 1968 in Australia is expressed in s 8 (subject only to the qualification in s 8A), namely, that "copyright does not subsist otherwise than by virtue of this Act".

Section 35(2) of the Copyright Act 1968 provides that the author of an artistic work is the owner of the copyright which subsists by virtue of the Act. That provision effectively precludes any notion of group ownership in an artistic work, unless the artistic work is a "work of joint ownership" within the meaning of s 10(1) of the Act. A "work of joint authorship" means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors. In this case no evidence was led to suggest that anyone other than Mr Bulun Bulun was the creative author of the artistic work. A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist: *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99. Joint authorship envisages the contribution of skill and labour to the production of the work itself: *Fylde Microsystems Ltd v Kay Radio Systems Ltd* (1998) 39 IPR 481 at 486.

In *Coe v Commonwealth* (1993) 118 ALR 193 at 200 Mason CJ rejected the proposition that Aboriginal people are entitled to rights and interests other than those created or recognised by the laws of the Commonwealth, its States and the common law. See also *Walker v New South Wales* (at 45-50) and Kirby J in *Wik Peoples v Queensland* (at CLR 214). To conclude that the Ganalbingu People were communal owners of the copyright in the existing work would ignore the provisions of s 8 of the Copyright Act, and involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia.

Do the circumstances in which the artistic work was created give rise to equitable interests in the Ganalbingu People?

The statement of claim alleges "on the reduction to material form of a part of the ritual knowledge of the Ganalbingu People associated with Djulibinyamurr by the creation of the artistic work, the first applicant held the copyright subsisting in the artistic work as a fiduciary and/or alternatively on trust, for the second applicant and the people he represents". The foundation for this contention is expanded in written submissions made on Mr Milpurrurru's behalf. It is contended that these rights arise because Mr Milpurrurru and those he represents have the power under customary law to regulate and control the production and reproduction of the corpus of ritual knowledge. It is contended that the customs and traditions regulating this use of the corpus of ritual knowledge place Mr Bulun Bulun as the author of the artistic work in the position of a fiduciary, and, moreover, make Mr Bulun Bulun a trustee for the artwork, either pursuant to some form of express trust, or pursuant to a constructive trust in favour of the Ganalbingu People. The right to control the production and reproduction of the corpus of ritual knowledge relating to Djulibinyamurr is said to arise by virtue of the strong ties which continue to exist between the Ganalbingu People and their land.

Was there an express trust?

The possibility that an express trust was created in respect of the artistic work or the copyright subsisting in it was not at the forefront of the applicants' submissions. In my opinion that possibility can be dismissed on the evidence in this case. The existence of an express trust depends on the intention of the creator. No formal or technical words constituting an expression of intention are necessary to create an express trust. Any apt expression of intention will suffice: *Registrar, Accident Compensation Tribunal v FCT* (1993) 178 CLR 145 at 166; 117 ALR 27. What is important is that intention to create a trust be manifest in some form or another. There must be an intention on the part of the putative creator to divest himself or herself the beneficial interest, and to become a trustee of the property for another party: *Garrett v L'Estrange* (1911) 13 CLR 430. An intention to create a trust may be inferred even where the creator has not in words expressed such an intention: see *Jacobs' Law of Trusts* (6th ed) para 309. The intention to create a trust may be inferred from conduct: *Gissing v Gissing* [1971] AC 886 at 900, 906 and *A-One Accessory Imports Pty Ltd v Off Road Imports Pty Ltd* (1996) 143 ALR 543 at 557. A trust created in such circumstances remains an express trust based on the actual intention of the creator as inferred from his or her conduct: *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618-19; 78 ALR 1.

In the present case it is suggested that it should be inferred that, by creating the artistic work with the permission of those of the Ganalbingu People who had the right to control the corpus of ritual knowledge associated with Djulibinyamurr, Mr Bulun Bulun intended to hold the copyright subsisting in the artistic work for the benefit of the Ganalbingu People.

The artwork, when completed, was sold by Mr Bulun Bulun to the Maningrida Arts and Crafts Centre. It is not suggested that he did not receive and retain the sale price for his own use. Moreover, the evidence indicates that on many occasions paintings which incorporate to a greater or lesser degree parts of the ritual knowledge of the Ganalbingu People are produced by Ganalbingu artists for commercial sale for the benefit of the artist concerned.

On the evidence there is no suggestion that ownership and use of the artistic work itself should be treated separately from ownership in the copyright to the artistic work. The evidence was directed to uses made of the artwork itself that were permissible or impermissible under Ganalbingu law and customs. Notions of copyright ownership have not developed under Ganalbingu law. If it were possible to infer an express trust, on the evidence the subject matter of the trust would be the artistic work itself and all the rights that attach to its creation under the Australian legal system.

There is no usual or customary practice whereby artworks are held in trust for the Ganalbingu People. In the present case neither Mr Bulun Bulun's Djungaye nor Mr Milpurrurru suggests that the commercial sale of the artwork by Mr Bulun Bulun was contrary to customary law, or to the terms of the permission which was given to him to produce the artwork. In these circumstances, the fact of the sale and the retention of the proceeds for his own use are inconsistent with there being an intention on the part of Mr Bulun Bulun to create an express trust. Further, the fact that the artwork was sold commercially, and has been the subject of reproduction, with the apparent permission of those who control its reproduction, in *Arts of the Dreaming — Australian Living Heritage* forecloses any possibility of arguing that the imagery in the artwork is of such a secret or sacred nature that it could be inferred that the artist must have had the intention in accordance with customary law to hold the artwork for the benefit of the Ganalbingu People.

If the evidence were consistent with there being an intention by Mr Bulun Bulun to hold the artwork and the copyright on an express trust, a further question would arise whether the express trust was for a charitable purpose. If not, the trust might fail for want of certainty as to the identity of the objects of the trust. This would be so if the intention were to create a trust in favour of both present and future members of the Ganalbingu People. While it could be argued that the requisite certainty existed because the trust should be construed as being for the immediate beneficial enjoyment of present members of the clan (*Leahy v Attorney-General (NSW)* [1959] AC 457 at 478-9), the nature of Aboriginal communal ownership, in so far as it is described in the evidence, suggests that the beneficiaries of such a trust would be regarded as being all present and future members of the clan as a whole and not for the immediate enjoyment of present members. These questions are not addressed either by the evidence or by the applicants' submissions.

Did Mr Bulun Bulun hold the copyright as a fiduciary?

In *Breen v Williams* (1996) 186 CLR 71 at 82; 138 ALR 259, Brennan CJ identified two sources of fiduciary duties, the first being the circumstances in which a relationship of agency can be said to exist, and the other is founded in a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other. The applicants' counsel did not seek to characterise the fiduciary relationship for which he contends as derived from either source in particular. The existence of a fiduciary relationship is said to arise out of the nature of ownership of artistic works among the Ganalbingu People.

In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; 55 ALR 417 Mason J noted that the accepted fiduciary relationships are often referred to as relationships of trust and confidence or confidential relations, such as those that exist between trustee and beneficiary, company director and shareholder, principal and agent, solicitor and client, employee and employer. The critical question is whether the transaction satisfies criteria which justify the

characterisation of the relationship between the parties as fiduciary: J R F Lehane, "Fiduciaries in a Commercial Context", in P D Finn, *Essays in Equity* (1985), p 104; *Hospital Products Ltd v United States Surgical Corp* (at CLR 112-13). Those criteria were discussed by a Full Court of this court in *News Ltd v Australian Rugby Football League Ltd* (1996) 139 ALR 193; 35 IPR 446 at 565-6. Fiduciary relationships have been characterised as "vertical", such as a relationship between principal and agent or employer and employee or "collaborative" or "horizontal" such as a partnership or joint venture: G M D Bean, *Fiduciary Obligations and Joint Ventures* (1995) p 117. While the notion of "mutual trust and confidence" can be applied to both types of fiduciary relationship, it is perhaps more readily applied to collaborative undertakings: *News Ltd v Australian Rugby Football League Ltd* (at IPR 565). A horizontal relationship is more likely to involve an undertaking, actual or imputed, that the parties act only for their mutual advantage.

The factors and relationships giving rise to a fiduciary duty are nowhere exhaustively defined: *Mabo (No 2)* (at CLR 200) per Toohey J; *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 at 68, 96-7; 55 ALR 417; P D Finn, *Fiduciary Obligations* (1977), p 1, and *News Ltd v Australian Rugby Football League Ltd* (at IPR 564). It has been said that the term "fiduciary relationship" defies definition: *Breen v Williams* (at CLR 106) per Gaudron and McHugh JJ; see also Gibbs CJ in *Hospital Products v United States Surgical Corp* (at CLR 69). For this reason the fiduciary concept has developed incrementally throughout the case law which itself provides guidance as to the traditional parameters of the concept. The essential characteristics of fiduciary relationships were referred to by Mason J in *Hospital Products* (at CLR 96-7; ALR 454):

> The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position . . . It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.

In *Mabo*, Toohey J said (at CLR 200; ALR 156):

> Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position.

In *Wik Peoples v Queensland* (1996) 187 CLR 1 at 95; 141 ALR 129 at 160 Brennan CJ said with respect to the asserted existence of a fiduciary duty owed by the Crown to the indigenous inhabitants of the leased areas under consideration:

> It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed: *Breen v Williams* (1996) 186 CLR 71 at 82; 138 ALR 259. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary [some footnotes omitted].

See also the discussion of fiduciary relationships in *News Ltd v Australian Rugby Football League Ltd* (at IPR 563-7) and Weinrib, "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1 at 4-8.

In *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, La Forest J expressed the question whether a fiduciary relationship existed as being "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": see also *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 40. As the statement of Brennan CJ in *Wik* (at CLR 95) reflects, 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: see also *The Principles of Equity* (Parkinson (ed)) (1996), P D Finn, "The Fiduciary Principle" in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), p 46, and *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 476.

The court was not referred to any authority in support of the imposition of equitable principles to govern relations among members of a tribal group. However, the application of the principles of equity in this situation is not unknown to the common law as it has been applied outside of this country. Among tribal communities of African countries tribal property is regarded as being held on "trust" by the customary head of a tribal group: see S K B Asante, "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana" (1965) 14 *International & Comparative Law Quarterly* 1144 at 1145. This principle received judicial recognition in *Kwan v Nyieni* (1959) 1 GLR 67 at 72-3 where the Court of Appeal of Ghana held that members of the tribal 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 tribal group is regarded as a fiduciary: Asante, at 1149.

The relationship between Mr Bulun Bulun as the author and legal title holder of the artistic work and the Ganalbingu People is unique. The "transaction" between them out of which fiduciary relationship is said to arise is the use with permission by Mr Bulun Bulun of ritual knowledge of the Ganalbingu People, and the embodiment of that knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu People.

The grant of permission by the Djungayi and other appropriate representatives of the Ganalbingu People for the creation of the artistic work is predicated on the trust and confidence which those granting permission have in the artist. The evidence indicates that, if those who must give permission do not have trust and confidence in someone seeking permission, permission will not be granted.

The law and customs of the Ganalbingu People require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu People to preserve the integrity of their culture, and ritual knowledge.

This 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 the integrity of the Ganalbingu culture where action for that purpose is required.

In my opinion, 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.

The conclusion that in all the circumstances Mr Bulun Bulun owes fiduciary obligations to the Ganalbingu People does not treat the law and custom of the Ganalbingu People as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu People as part of the factual matrix which characterises the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it.

It is convenient at this point to dispose of an alternative submission raised as a possibility by the applicants in argument, although not seriously pressed. That is that the facts are open to the construction that there was a contract between Mr Bulun Bulun and those who gave him permission to create the artistic work (acting on behalf of the Ganalbingu People), and that the contract imposed obligations akin to fiduciary obligations, or even created an equitable interest, in the artwork. It is not inconceivable that contractual arrangements could be made between representatives of a clan and a particular artist as to the circumstances in which ritual knowledge could be incorporated into an artistic work. Arrangements between members of tribal groups have been characterised as contractual creating personal rights and obligations in Ghana: see H A Amankwar, "Recognition of Customary Law" (1994) 18 *UQLJ* 15 at 19. In accordance with ordinary principles, it would be necessary to identify the parties, the terms, the consideration for the contract and an intention to create legal relations. In the present case the evidence does not address the last three of these matters. There is no suggestion in the evidence that there was any form of express agreement of a contractual nature in which terms were agreed. It is possible, of course, for there to be a contract the terms of which arise by implication. In *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 283; 16 ALR 363 the Privy Council said that, for a term to be applied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be applied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract. While general evidence has been given as to the nature of Aboriginal law and customs governing the use of traditional ritual knowledge, that evidence does not descend to the level of detail which would permit terms to be implied in accordance with these conditions. The evidence does not suggest that permission to create the artwork was given in circumstances which were intended to create a contractual relationship.

The fiduciary obligation

Central to the fiduciary concept is the protection of interests that can be regarded as worthy of judicial protection: Glover, *Commercial Equity — Fiduciary Relationships* (1995) para 3.4. The evidence is all one way. The ritual knowledge relating to Djulibinyamurr embodied within the artistic work is of great importance to members of the Ganalbingu People. I have no hesitation in

holding that the interest of 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.

Under the Copyright Act, the owner of the copyright has the exclusive right to reproduce the work in a material form, and to publish the work. The copyright owner is entitled to enforce copyright against the world at large. In the event of infringement, the copyright owner is entitled to sue and to obtain remedies of the kind actually obtained by Mr Bulun Bulun in this case.

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.

While the nature of the relationship between Mr Bulun Bulun and the Ganalbingu People is such that Mr Bulun Bulun falls under fiduciary obligations to protect the ritual knowledge which he has been permitted to use, the 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.

In the present case Mr Bulun Bulun has successfully taken action against the respondent to obtain remedies in respect of the infringement. There is no suggestion by Mr Milpurrurru and those whom he seeks to represent that Mr Bulun Bulun should have done anything more. In these circumstances there is no occasion for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship.

However, had the position been otherwise, equitable remedies could have been available. The extent of those remedies would depend on all the circumstances, and in an extreme case could involve the intervention of equity to impose a constructive trust on the legal owner of the copyright in the artistic work in favour of the beneficiaries. Equity will not automatically impose a constructive trust merely upon the identification of a fiduciary obligation. Equity will impose a constructive trust on property held by a fiduciary where it is necessary to do so to achieve a just remedy and to prevent the fiduciary from retaining an unconscionable benefit: *Muschinski v Dodds* (1985) 160 CLR 583 at 619-20; 62 ALR 429 and *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148; 76 ALR 75. By way of example, had Mr Bulun Bulun merely failed to take action to enforce his copyright, an adequate remedy might be extended in equity to the beneficiaries by allowing them to bring action in their own names against the infringer and the copyright owner, claiming against the former, in the first instance, interlocutory relief to restrain the infringement, and against the latter orders necessary to ensure that the copyright owner enforces the copyright. Probably there would be no occasion for equity in these circumstances to impose a constructive trust.

On the other hand, were Mr Bulun Bulun to deny the existence of fiduciary obligations and the interests of the parties asserting them, and refuse to protect the copyright from infringement, then the occasion might exist for equity to impose a remedial constructive trust upon the copyright owner to strengthen the standing of the beneficiaries to bring proceedings to enforce the copyright. This

may be necessary if the copyright owner cannot be identified or found and the beneficiaries are unable to join the legal owner of the copyright: see *Performing Right Society Ltd v London Theatre of Varieties* [1924] AC 1 at 18.

It is well recognised that interlocutory injunctive relief can be claimed by a party having an equitable interest in copyright (Laddie, Prescott and Vittoria, *The Modern Law of Copyright* (1995) at 11.79-11.81), although as a matter of practice injunctive relief will not be granted without the legal owner of copyright being joined: *Performing Right Society Ltd v London Theatre of Varieties* at 19-20, 29; *Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd* (1984) 57 ALR 389 at 394. For an example of proceedings brought to establish the existence of an equitable interest in copyright based on a constructive trust imposed in consequence of a breach of fiduciary duty, see *Missinglink Software v Magee* [1989] 1 FSR 361 at 367.

I do not consider Mr Milpurrurru and those he seeks to represent have established an equitable interest in the copyright in the artistic work. In my opinion they have established that fiduciary obligations are owed to them by Mr Bulun Bulun, but as Mr Bulun Bulun has taken appropriate action to enforce the copyright, he has fulfilled those obligations and there is no occasion to grant any additional remedy in favour of the Ganalbingu People. However, in other circumstances if the copyright owner of 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 copyright, the Australian legal system will permit remedial action through the courts by the clan.

For these reasons, the proceedings by Mr Milpurrurru must be dismissed.

Order that the proceedings by the second applicant be dismissed.

Order

The proceedings by the second applicant be dismissed.

Solicitor for the first and second applicants: *Martin Patrick Hardie.*

Solicitor for the Minister for Aboriginal and Torres Strait Islander Affairs, intervening: *Australian Government Solicitor.*

Solicitor for the Attorney-General (NT): *Solicitor for the Northern Territory.*

DAVID KELL
SOLICITOR