PARTIES:	**ARTHUR QUE NOY, MARJORIE FOSTER, MAXINE HILL, MICKEY FOSTER AND RHONDA FOSTER** Appellants AND: **JIMMY TAPGNUK, TOMMY WURRA, ALBERT MYOUNG AND BIDDY LINDSAY** First Respondents AND: **NORTHERN LAND COUNCIL** Second Respondent
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	CIVIL
FILE NO:	AP9 OF 1996
DELIVERED:	10 APRIL 1997
HEARING DATES:	12 OCTOBER 1996
JUDGMENT OF:	KEARNEY, MILDREN, THOMAS JJ

CATCHWORDS:

Appeal against a refusal to order that the second respondents also pay the appellant's costs.

Statutes - Interpretation - s. 23 (1)(f) of the *Aboriginal Land Rights (N.T.) Act* creates no duty to provide legal aid in proceedings in the Supreme Court, but confers a discretion.

If a duty exists, it must be found in the wording of the Act.

Leave to amend the Kamu people's Notice of Appeal by reason that the litigation is properly characterised as litigation concerning the identity and nature of the proper beneficiaries of a trust; principles upon which a fresh ground be argued at appeal level.

Legislation

Aboriginal Land Rights (Northern Territory) Act 1974 (Cth)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Cases

Majar v The Northern Land Council (1991) 37 FCR 117 not followed

Julius v The Lord Bishop of Oxford (1880) 5 App. Cases 214 approved

Ward v Williams (1954-5) 92 CLR 496 approved

Jungarrayi v Olney (1991-92) 105 ALR 527 approved

Khoury (M & S) v Government Insurance Office of New South Wales (1984) 54 ALR 639 approved

Varga v Jonger (1970) 92 WN 1032 approved

Trengrove v Repatriation Commission (1994) 122 ALR 271 approved

Bennett and Fisher Ltd v Electricity Trust of South Australia [1961-62] 106 CLR 492 approved

R v Derby Justices, ex parte Kooner & Others [1971] 1 QB 147 referred to

Bradley v The Commonwealth (1973) 128 CLR 557 approved

Mudginberri Station Pty Ltd v Langhorne and Another (1985) 7 FCR 482 referred to

Zachariassen v The Commonwealth (1917) 24 CLR 166 approved

R v Mahoney; Ex parte Johnson (1931) 46 CLR 131 referred to

Coulton v Holcombe (1986) 162 CLR 1 followed

Water Board v Moustakas (1987-88) 77 ALR 193 approved

In re *Buckton, Buckton v Buckton [1907]* 2 Ch 406 approved

Texts

Principles of the Law of Trusts 2nd Edition

Underhill's Law of Trusts & Trustees 13th Edition.

REPRESENTATION:

Counsel:

Appellant:	Mr McDonald Q.C.
First Respondent:	Mr Barr
Second Respondent:	Mr Levy

Solicitors:

Appellant:	Ward Keller
First Respondent:	Cridlands
Second Respondent:	Northern Land Council

Judgment category classification:	A
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP9 OF 1996

BETWEEN:

ARTHUR QUE NOY, MARJORIE FOSTER, MAXINE HILL, MICKEY FOSTER AND RHONDA FOSTER
Appellants

AND:

JIMMY TAPGNUK, TOMMY WURRA, ALBERT MYOUNG AND BIDDY LINDSAY
First Respondents

AND:

NORTHERN LAND COUNCIL
Second Respondent

CORAM: KEARNEY, MILDREN AND THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 10 April 1997)

KEARNEY J

I have had the benefit of reading the judgment of Mildren J in draft. I concur in his Honour's reasons and in his conclusion that the appeal should be dismissed with costs.

MILDREN J

This is an appeal by the appellants against a refusal by Angel J, having ordered that the first respondents pay the appellants' and the second respondents' costs, to order that the second respondents also pay the appellants' costs.

The proceedings which give rise to this appeal were commenced by the first respondents, (the Malak Malak people) against the second respondent (the NLC) and the appellants (the Kamu people) by originating motion, in which the Malak Malak people sought declarations that they, and the people they represent, had been found by Toohey J to be traditional owners of the Daly River Malak Malak Land Trust Area, and that that finding was binding upon the NLC.

The Malak Malak people brought the action as representatives of the traditional Aboriginal owners of an area of land which Toohey J, as Aboriginal Land Commissioner, had, by a report dated 12 March 1982, recommended be granted to an Aboriginal land trust, under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1974* (Commonwealth). In consequence of that Report, a grant of the land in fee simple was made to the Daly River (Malak Malak) Land Trust.

Part of the function of Toohey J, as Aboriginal Land Commissioner, was to report to the Minister for Aboriginal Affairs, the names of the persons who are the traditional owners of the land. In his report, Toohey J identified a

number of traditional Aboriginal owners whom he listed. The first respondents' names appeared in this list, but the names of the appellants, who identify as representatives of a Kamu descent group found in the area, did not. Toohey J concluded that the Kamu were not capable of constituting a local descent group as defined in the Act. The Kamu people claim nevertheless to be traditional Aboriginal owners of certain segments of the land.

Pursuant to the provisions of the Act, the NLC has certain functions and responsibilities in relation to land granted under the Act, which includes a duty to have regard to the interests of, and consult with, the traditional owners of the land and obtain their consent before taking any action in relation to the land. In addition, the NLC has a statutory power inter alia, to compile and maintain a register of the names of the persons, who, in its opinion, are the traditional Aboriginal owners of the land in question.

The Kamu people requested the NLC to recognise their claims. The Malak Malak people do not recognise the claim of the Kamu people. The NLC resolved to give substantial consideration to this dispute at full council meetings to be held in 1995. Before the NLC had resolved the dispute, the Malak Malak people lodged the originating motion previously referred to.

Angel J identified the question he had to resolve as this: if the Land Commissioner's findings covering Aboriginal traditional owners are such that a grant of land is made, are such findings binding on the NLC so as to

preclude it from undertaking its own investigation as to who the traditional owners may be subsequent to the grant of land?

His Honour concluded that the power of the NLC to determine, in accordance with the Act, traditional Aboriginal owners, may be exercised innumerable times once a grant of land is made, and that the NLC is not precluded from reaching conclusions which, at the time those conclusions are reached, differ from the conclusions which the Aboriginal Land Commissioner had reached. His Honour therefore refused to grant any declaratory relief. After hearing further submissions, Angel J ordered that the Malak Malak people pay the costs of the Kamu people and the NLC, and refused an application by the Kamu people that the NLC also pay their costs.

The sole ground of appeal by the Kamu to this Court concerns his Honour's refusal to also order that the NLC pay the Kamu people's costs. His Honour recognised that the Malak Malak people sought declaratory relief in order to exclude the Kamu people from pursuing a traditional claim to the land. S. 23 (1)(f) of the Act provides that the functions of a Land Council are inter alia, "to assist Aboriginals claiming to have a traditional land claim to an area of land within the area of the Land Council in pursuing the claim, in particular, by arranging for legal assistance for them at the expense of the Land Council." His Honour held that s. 23 (1)(f) was concerned with land claims pursuant to the provisions of the Act, and was not concerned with, and did not address, private litigation in the Courts. Accordingly, he held that s. 23 (1)(f) was not relevant to the exercise of his discretion, and that there was

no other reason to depart from the normal practice that costs should follow the event.

The Kamu people contend that his Honour erred in finding that s. 23 (1)(f) of the Act was not relevant to the exercise of his discretion. Their argument is that the power conferred by s. 23 (1)(f) is not confined to the provision of legal assistance for the pursuance of a land claim by means of a land claim hearing conducted by an Aboriginal Land Commissioner. They submitted that these proceedings were an attempt by the Malak Malak people to prevent the pursuit of their claims as traditional owners over portion of the land with the NLC, and that in defending these proceedings, the Kamu people were protecting their ability to make such a claim. As the NLC was the ultimate decision-maker, they submitted that it was not open to it to protect their interests at the hearing before Angel J by putting forward a substantive case. They submitted that the powers conferred by s. 23 (1)(f) to grant legal assistance to the Kamu people applied to these proceedings, and that the power was coupled with a duty. As the NLC had granted no legal assistance to them, it was submitted that this amounted to special circumstances justifying a departure from the rule that costs should follow the event.

Alternatively, the appellants seek to amend their Notice of Appeal to argue that the NLC should pay their costs on an indemnity basis, or alternatively, on a party party basis, by reason of the fact that the litigation is properly characterised as litigation concerning the identity and nature of the proper beneficiaries of a trust.

In support of the first ground of appeal, the appellants rely upon the decision of Olney J in *Majar v The Northern Land Council* (1991) 37 FCR 117. In that case, the NLC conducted a hearing to determine who were the traditional owners of certain land granted to a land trust. The hearing was conducted in pursuance of s. 24 of the Act. The applicants were denied legal assistance to prepare and present their case that they were traditional owners of the land in question. The result of the hearing was that the applicants' claim failed. The applicants sought review under the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Commonwealth). One of the grounds relied upon was that the applicants were denied natural justice. Central to this argument was that s. 23 (1)(f) imposed an obligation on the NLC to provide them with both legal and anthropological advice and assistance in pursuing their claim to be recognised as traditional Aboriginal owners of the land. Olney J held that s. 23 (1)(f) was not confined to the pursuance of a land claim under s. 50(1) before the Aboriginal Land Commissioner, but extended to include a claim to be decided by a land council itself when exercising its powers under the Act in respect of Aboriginal land. His Honour also held that s. 23 (1)(f) imposed a statutory obligation upon the land council to assist the applicants in pursuing their claim to be recognised as the traditional owners, and, in particular, the land council was obliged to arrange for their legal assistance at the expense of the land council, although his Honour recognised (at p. 139) that the duty was not open-ended and that in some cases it would not be unfair for the land council to refuse assistance. Angel J, after referring to Majar's case, distinguished it on the basis that s. 23 (1)(f) "is concerned with land claims pursuant to the provisions of the

Aboriginal Land Rights (N.T.) Act. It is not concerned with, nor does it address private litigation in the Courts. It was argued that the litigation is incidental to a land claim. That may be so, but the litigation is not a land claim and s. 23 (1)(f) simply has no application to the litigation." The appellants submit that this finding by Angel J is wrong in law. The NLC, submits that Angel J is correct, and in any event, that *Majar* was wrongly decided on two principal grounds: first, Mr Levy for the NLC submitted that s. 23 (1)(f) was confined to hearings before an Aboriginal Land Commissioner; secondly, he submitted that s. 23 (1)(f) imposed a power, but not a duty.

I am not persuaded that s. 23 (1)(f) is confined to land claims conducted by an Aboriginal Land Commissioner, nor that the NLC had no power pursuant to that section to grant legal aid to the appellants who were vitally interested in the outcome of the litigation, given that the purpose of it, had the Malak Malak people been successful, was to prevent the NLC from considering the appellant's claims to be traditional owners. In this sense, the appellants, although defendants to the proceedings, were pursuing a claim to an area of land within the area of the Land Council, and I can detect nothing in the wording of the statute which confines the power of a land council to grant legal aid to hearings before the Aboriginal Land Commissioner or to hearings before the land council itself. However, it is not necessary to finally decide that question. Assuming that to be so, I consider that s. 23 (1)(f) creates no duty to provide legal aid in proceedings in this Court but merely confers a discretion, which is not reviewable in this Court. If that discretion is

reviewable administratively in the context of the *Administrative Decisions (Judicial Review) Act* 1977 (Commonwealth) the appellants' remedy is to apply to the Federal Court for judicial review under that Act, and it may be, for example, that in the context of a duty on the part of a land council to act fairly in conducting a hearing, different considerations arise.

In *Julius v The Lord Bishop of Oxford* (1880) 5 App. Cas. 214, Earl Cairns L.C., said at 225:

> "... Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislation of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

In *Ward v Williams* (1954-5) 92 CLR 496 at 505, the High Court said:

> "…. it is necessary to bear steadily in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning."

I accept that the *Aboriginal Land Rights (Northern Territory) Act* is beneficial legislation which should be interpreted liberally*: Jungarrayi v Olney* (1991-92) 105 ALR 527 at 537-8, and cases therein cited; so that, where a provision intended to benefit a particular class of persons is ambiguous, it is preferable for the ambiguity to be resolved in favour of the intended beneficiaries. But, as the High Court said in *Khoury (M & S) v Government Insurance Office of New South Wales* (1984) 54 ALR 639 at 650:

> "... the rule that remedial provisions are to be beneficially construed so as to provide the most complete remedy of the situation with which they are intended to deal, must, as has been said, be restrained with the confines of "the actual language employed" and "what is fairly open" on the words used."

S. 23 (1) sets out the "functions" of a land council. The word "function," by itself may indicate no more than a power, or corporate capacity to act in a particular way (see, for example, *Varga v Jonger* (1970) 92 WN 1032 at 1039-40, per Sugerman P), although it may also create a duty; but whether it does so, is to be determined by reference to the provisions of the Act as a whole.

Similar principles to which I have referred have been applied to statutory corporations upon which statutory powers have been conferred: *Trengrove v Repatriation Commission* (1994) 122 ALR 271. But even in the case of public utilities which exercise an exclusive franchise, there is no principle of law that implies a duty to provide the service covered by the franchise: *Bennett and Fisher Ltd v Electricity Trust of South Australia* [1961-62] 106 CLR 492. If a duty exists, it must be found in the wording of the Act.

S. 23 (1)(f) identifies the class of persons for whose benefit the power to grant legal aid exists, namely, "Aboriginals claiming to have a traditional land claim to an area of land within the area of the land council," and the purpose of the grant, namely, "in pursuing the claim"; but it does not identify the circumstances under which the beneficiaries of the power may call upon the land council to exercise the power. This indicates that the power is discretionary, for otherwise the land council would be obliged to grant legal aid even to claimants whose claims are patently spurious, or not sufficiently meritorious to warrant the expenditure, or who are not in need of financial

assistance, or whose claims are not opposed, or whose claims will be recognised as the result of some other process or procedure.

Further, as Mr Levy points out, a land council has many functions, apart from granting legal assistance to claimants, and there is nothing in the Act which indicates that the granting of legal assistance is to be given priority over the performance by the land council of other beneficial functions which may be more pressing.

The presence, or absence, of criteria, which if not met, would preclude the exercise of a power, or, if met, would suggest an entitlement to its exercise, is often crucial: see *Julius v The Lord Bishop of Oxford*, supra; *R v Derby Justices, ex parte Kooner and Others* [1971] 1 QB 147 at 149-50, and the approach of the High Court in *Bradley v The Commonwealth* (1973) 128 CLR 557, esp. at 570; but not always: c.f. *Mudginberri Station Pty Ltd v Langhorne and Another (*1985) 7 FCR 482. Other relevant factors include (1) whether the functionary has an exclusive monopoly; see *Bradley,* at 565. In the case of legal aid, at least so far as these proceedings are concerned, there is nothing to suggest that legal aid was unavailable from other sources, for example, the North Australian Aboriginal Legal Aid Service, or the Northern Territory Legal Aid Commission; (2) whether the refusal to exercise the power would unduly interfere with the appellant's common law rights*: Mudginberri*, supra, at 489, 493; *Bradley*, supra, at 566; *Zachariassen v The Commonwealth* (1917) 24 CLR 166; *R v Mahoney*; *Ex parte Johnson* (1931) 46 CLR 131. There is no common law right to legal aid in civil proceedings; (3) whether the objects or the scheme of the Act, or the provision itself would be frustrated if power was discretionary: *B v B* (1961) 1 All ER 396. This does not appear to be the case. Therefore, to the extent that *Majar's* case suggests that s. 23 (1)(f) imposes a duty, I respectfully disagree with it. This being so, I consider

that it has not been shown that Angel J was in error to disregard s. 23 (1)(f) in the exercise of his discretion.

As to the proposed amendment, reliance was placed upon *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9 to support the fresh ground, which was not argued before Angel J. The guiding principle is that,

> "it is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial... The powers of an appellate court with respect to amendment are ordinarily to the exercised within the general framework of the issues so determined and not otherwise." see: *Coulton*, supra, at p7).

It is well established that if, had the issue been raised in the court below, evidence could have been given which might possibly have prevented the point from succeeding, the point cannot be taken on appeal. On the other hand, if the new point is a question of law dependent upon the construction of a document, or a statute, or upon facts which are admitted or not in controversy, it may be expedient in the interests of justice to allow the point to be argued. However, the circumstances which permit this course are exceptional: see *Coulton*, at p. 8; *Water Board v Moustakas*, (1987-88) 77 ALR 193 at 196-198.

Circumstances which have apparently been identified as being exceptional include the interpretation of a public statute, involving the powers of a statutory commission; the fact that other persons, not parties, to the litigation, intended to raise the same issue in other proceedings; or the fact that the issue was of general public importance and of interest to others beyond the parties: see *Coulton*, at 8-9.

In my opinion the proposed new ground does not rest entirely upon the interpretation to be given to the Act. Assuming that, upon the proper interpretation of the Act, the NLC is in the same or similar position to that of a trustee of trust property, and the other parties are beneficiaries, or potential beneficiaries, so that an analogy can be drawn on the basis that the Malak Malak people, as beneficiaries, sought to have determined some question as to who may fall within the class of beneficiaries, for example, as a matter of the construction to be given to the Act, the question still arises as to whether or not the litigation should properly be characterised as one of construction of the statute which established the trust, or one determining rights as between adverse litigants: see *In re Buckton, Buckton v Buckton* [1907] 2 Ch 406 at 414-15; Ford and Lee, *Principles of the Law of Trusts*, 2nd Edn., p.639; *Underhill's Law of Trusts and Trustees*, 13th Edn., at 689-90. If the latter, the general rule is that the unsuccessful parties pay the costs. In this case Angel J concluded that "the litigation was commenced in an effort to exclude the [appellants] from pursuing their claims to the land." It is not clear whether his Honour viewed the application as 'hostile litigation' or one purely of construction, but even if it could be contended that it was the latter, it does not automatically follow that the discretion of the court as to costs would have been exercised differently. The question of construction may have been too clear for argument, for example, as there may be other reasons why the order should not be made in the proper exercise of the trial judge's discretion. I note that in this case questions of res judicata and issue estoppel were also raised. The issue to be raised is not one which falls within any other class of exceptional case. I am not satisfied that the appellants have established any exceptional circumstances, which would justify this Court in allowing the amendment, which must therefore be refused.

Accordingly, I would dismiss the appeal with costs.

THOMAS J

I have read the draft Judgment of Mildren J. I agree with his decision and would dismiss the appeal.