THE *MABO* LITIGATION: FROM INDIVIDUAL CLAIMS TO COMMUNAL RIGHTS

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This article analyses procedural aspects of the decade-long Mabo *litigation, 1982–92. The individual claims made by the five original plaintiffs to, in total, 46 identified areas of land and sea; the results of those claims; and the plaintiffs' various roles at the trial of facts are outlined. Eddie Mabo's leadership and rejection by the trial judge; how two plaintiffs — the Passi brothers — withdrew with one returning; and three plaintiffs dying before final judgment, are mentioned. Unusual procedural steps initiated by the High Court in May 1991 — after nine years of litigation — are then examined. Following some judges' suggestions during final oral argument, the plaintiffs' counsel drafted, overnight, and submitted an application to amend the statement of claim. Hitherto pleaded (including at the trial of facts) as a representative action by each plaintiff, on behalf of their respective family groups, the plaintiffs now sought to significantly amend to plead one communal claim to the whole of the three Murray Islands. The Court adjourned without ruling on this very late application.[1] Its final declaration spoke only of 'the Meriam people' enjoying native title to Murray Island. Extensive citations, transcript extracts, and extracts from the Further Amended Statement of Claim are included.*

I INTRODUCTION

On 3 June 1992 the High Court handed down its decision in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*') declaring that the Meriam people enjoyed native title to Murray Island in the Torres Straits.[2] Twenty-five years later, on 16 June 2017, having attended three days of celebrations, the last of the surviving plaintiffs, Reverend Dave Passi, died at Thursday Island.

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1 For further unusual procedures: see Bryan Keon-Cohen, 'Memorable Mabo Moments' [2018–19] (164) *Victorian Bar News* 68; BA Keon-Cohen, 'The *Mabo* Litigation: A Personal and Procedural Account' (2000) 24(3) *Melbourne University Law Review* 893.

2 (1992) 175 CLR 1, 217 ('*Mabo [No 2]*').

During this hard fought, decade-long court case, many individuals and groups — not the least of whom was Dave Passi — made critical contributions to the cause. Sadly, many of these are now also dead.[3] Contributors included the five plaintiffs and their families; the Meriam witnesses who gave evidence both for the plaintiffs and Queensland; the Murray Island residents who made the trial judge, Queensland Supreme Court Justice Martin Moynihan, so welcome during his visit to hear evidence in June 1989; anthropologists who assisted and/or gave expert evidence;[4] and the plaintiffs' lawyers who gave the case top priority for a decade, especially the very distinguished Ron Castan AM QC. Indeed, the *Mabo* litigation was a team effort.[5]

By August 2017, amongst many achievements and failures, 394 claims to land and sea areas had been determined under the *Native Title Act 1993* (Cth) ('*NT Act*') regime. Of these claims, 330 had succeeded, in whole or in part, delivering 'bundles' of specified (and fragile) rights and interests,[6] always to carefully identified traditional owner groups, all pursuant to the *NT Act*.[7] These successful claims covered 2.667 million square kilometres of land, plus a further 110,270 square kilometres offshore.[8] These bald statistics, however, mask many structural failures and significant frustration encountered by claimants and others, all of which has been, and continues to be, the subject of discussion, criticism, and calls for legislative reform.[9]

One major and continuing criticism, especially from claimant groups and their supporters, concerns the excessively legalistic and burdensome evidential hurdles that claimants must satisfy, as set out in the *NT Act* s 223(1), in order to achieve success, either by way of a negotiated settlement, or following a trial before a Federal Court judge. One crucial aspect of these requirements is the need to establish, upon oral and/or genealogical evidence, the composition of the

3 Of the plaintiffs' legal team, Ron Castan AM QC died suddenly following surgery in 1999; junior counsel Barbara Hocking, of the Victorian Bar, died in 2013; Judge Martin Moynihan (mentioned below) died in 2017.

4 Being Dr Jeremy Beckett who gave expert evidence for the plaintiffs, and Dr Nonie Sharp who also provided considerable support: see Nonie Sharp, *No Ordinary Judgment: Mabo, The Murray Islanders' Land Case* (Aboriginal Studies Press, 1996).

5 In this article, the phrase '*Mabo* litigation' collectively refers to *Mabo v Queensland* (1988) 166 CLR 186 ('*Mabo (No 1)*') and *Mabo [No 2]* (n 2).

6 See *Western Australia v Ward* (2002) 213 CLR 1, 66 [17], 95 [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

7 *Native Title Act 1993* (Cth) s 223(1) ('*NT Act*') states that native title rights and interests may be 'communal, group or individual'; s 225(a) requires the Federal Court to specify 'who the persons, or each group of persons, holding the common or group rights comprising the native title are' when making a determination that native title exists over a claimed area.

8 For statistics provided by the National Native Title Tribunal: see 'Statistics', *National Native Title Tribunal* (Web Page, 29 June 2021) <www.nntt.gov.au/pages/statistics.aspx>. These are further discussed in Bryan Keon-Cohen, 'From Euphoria to Extinguishment to Co-Existence?' (2017) 23 *James Cook University Law Review* 9, 10 ('From Euphoria to Extinguishment').

9 See, eg, Keon-Cohen, 'From Euphoria to Extinguishment' (n 7) 11–12; Bryan Keon-Cohen, '"What Happened to the Party?": Native Title 20 Years on' (2012) 19 *Pandora's Box* 21, 39 ('Native Title 20 Years on'). For a convenient summary of both criticism and reform proposals: see Australian Law Reform Commission, *Connection to Country: Review of the* Native Title Act 1993 *(Cth)* (Final Report No 126, April 2015).

claimant group or groups asserting traditional rights to the claimed area. This task is usually pursued by reference to detailed genealogies reaching back to the claimants' apical ancestors who occupied the relevant area as at the date of extension of sovereignty, to that part of the continent, by the British Crown — eg, along the eastern seaboard, 1788; in the Torres Straits, 1879.

The source of this, and further, statutory requirements lies, ultimately, in the High Court's judgments leading to the Court's final declaratory order in *Mabo [No 2],* reproduced below.[10] In this article, I seek to explain how this 'group' or 'community' element arose in the *Mabo* litigation*,* and highlight some remarkable procedures, aimed at achieving that result, that were initiated by some of the High Court judges during the final hearing in Canberra in May 1991. First, I briefly outline the individual 'representative' claims originally pleaded by, and the involvement of, the five plaintiffs who commenced this 'test case' in 1982 until its conclusion in 1992. Second, I examine how these claims to carefully identified areas of land and seas located on and around Murray and its adjacent Dawar and Waier Islands were transformed in 1991 (after nine years of litigation) to enable the delivery, by the High Court, of one communal title vested in a traditional owner group, the Meriam people, to all of Murray Island.[11]

My approach is partly subjective — ie, informed by my observations as the plaintiffs' junior counsel — and procedural, ie, how the abovementioned transformation occurred, in practice. Much has been written by me,[12] and many others,[13] on the *Mabo* litigation, but little on the procedural aspects.[14] Here, for the first time (to my knowledge at least) I discuss amendments to the pleadings, initiated by the High Court justices, that recast the claim 'in the running'. Those amendments facilitated the delivery, by the High Court, to the surviving plaintiffs and the nation, of a 'communal' native title to a nominated group — the Meriam people — which included, but which did not detail, the two surviving plaintiffs as at June 1992, nor their represented family groups, nor anybody else. Nor, save for broad notions of possess, occupy, use and enjoy, to the exclusion of all others,[15] contained in the Court's final declaratory order, was the Court concerned to detail any of

10 See below n 111 and accompanying text.

11 Save for specified leased areas or areas used for administrative purposes: see ibid. For discussion of native title vested in a community, group or individual: see *Mabo [No 2]* (n 2) 50–2, 59–61 (Brennan J), 85, 88, 109–10, 115 (Deane and Gaudron JJ), 156 (Dawson J), 176, 187, 190, 192 (Toohey J).

12 See, eg, Bryan Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, rev ed, 2013) ('*A Mabo Memoir*'). See especially the bibliography: at 639–52. See also Keon-Cohen, 'Memorable *Mabo* Moments' (n 1); Keon-Cohen, 'The *Mabo* Litigation: A Personal and Procedural Account' (n 1); Keon-Cohen, 'From Euphoria to Extinguishment' (n 8); Keon-Cohen, 'Native Title 20 Years on' (n 9).

13 As to substantial legal texts: see Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 4th ed, 2020); Melissa Perry and Stephen Lloyd (eds), *Australian Native Title Law* (Lawbook, 2nd ed, 2018). Concerning the litigation: see Sharp (n 4).

14 But see Keon-Cohen, *A Mabo Memoir* (n 12); Keon-Cohen, 'The *Mabo* Litigation: A Personal and Procedural Account' (n 1); Keon-Cohen, 'Memorable *Mabo* Moments' (n 1).

15 See below n 111 and accompanying text for the Court's final declaratory order.

the surviving plaintiffs' individual, or the traditional owner group's communal, rights and interests based on the Meriam people's customs and traditions. Finally, by way of conclusion, I offer some tentative observations concerning what this litigation history might reveal about the High Court's attitudes and practices — at least during the Mason CJ era, 1987–95 — when dealing with contentious and novel issues having, potentially at least, a significant nationwide impact. Hard conclusions, let alone predictions, I leave to others.

II THE 1981 CONFERENCE

In the immediate sense, the case 'began' at a land rights conference held at James Cook University, Townsville, in September 1981. Eddie Mabo, another Murray Islander Reverend Dave Passi, Cairns Aboriginal Legal Service solicitor Greg McIntyre and Melbourne barrister Barbara Hocking (amongst others) gave presentations. A meeting was held, after which Mabo and Passi instructed McIntyre and Hocking to commence a test case in the High Court designed, in short, to establish their traditional rights and interests to areas of land and waters on, and around, Murray Island ('Mer'), as enforceable property rights in Australian common law.

By November 1981, Melbourne barristers Ron Castan QC, Barbara Hocking and I were formally retained by McIntyre.[16] Following further discussions at Mer, former Council Chairman Deacon Sam Passi JP MBE (Dave's elder brother), Eddie Mabo's maternal aunt Celuia Mapo Salee, and the then Council Chairman and schoolteacher James Rice, also gave instructions to join the case as plaintiffs.

III FIVE 'REPRESENTATIVE' PLAINTIFFS

On 20 May 1982, the claim was issued in the High Court's original jurisdiction, naming these five plaintiffs. Each claimed in a 'representative' capacity, ie, on his or her own behalf, and on behalf of his or her family group. The Writ and accompanying Statement of Claim read:

> IN THE HIGH COURT OF AUSTRALIA
> AT THE BRISBANE OFFICE OF THE REGISTRY
>
> No. 12 of 1982
>
> BETWEEN:
>
> | | |
> |---|---|
> | EDDIE MABO | FIRST NAMED PLAINTIFF |
> | CELUIA MAPO SALEE | SECOND NAMED PLAINTIFF |
> | SAM PASSI | THIRD NAMED PLAINTIFF |

16 Also retained was Richard Brear of the Victorian Bar, who pursued extensive research in archival collections throughout Australia.

DAVID PASSI FOURTH NAMED PLAINTIFF
JAMES RICE FIFTH NAMED PLAINTIFF

(who bring this action own [sic] their own behalf, and on behalf of the members of their respective family groups)

- and -

THE STATE OF QUEENSLAND and THE COMMONWEALTH OF AUSTRALIA

[DEFENDANTS][17]

Pursuant to our instructions, and (at that stage, limited) research, the plaintiffs thus claimed, as individuals and in their representative capacity, 45 identified areas of village and garden land, fish traps and reefs directly offshore, and areas of seas further out. These claims were located on or around the three Murray Islands. An additional small area located on the Great Barrier Reef, located about ten kilometres to the east,[18] was also claimed, making 46 claims in total.

For the next nine years the claim was pleaded, and the case was pursued in accordance with our instructions, as shown in the above extract — save for one (of many) amendments. In 1989, following the *Guerin v The Queen* ('*Guerin*') decision of the Canadian Supreme Court,[19] the claim was amended to include a further cause of action: ie breach of trust and fiduciary duty allegedly owed by Queensland to '(a) the Miriam [sic] people; and/or (b) the plaintiffs …'.[20] Nowhere else in the 28 page claim do the words 'Meriam people' appear. Nor was any claim made by the relevant traditional owner group: the Meriam people of the Murray Islands.

This strategy was pursued for good reasons, and despite our familiarity with the centrality of 'communal' title in relevant common law authorities,[21] not to mention the recently enacted, ground-breaking land rights scheme then operating in the Northern Territory.[22] First and foremost, our instructions in 1982 (they developed and refined over the decade) spoke of individual (usually male) and/

17 See Writ, 20 May 1982, and Amended Statement of Claim, June 1989 in Keon-Cohen, *A Mabo Memoir* (n 12) 64. The word 'defendants' has been capitalised here for consistency.

18 Being beyond Queensland's three-mile territorial limit, thus involving seas over which only the Commonwealth enjoyed jurisdiction — one reason for including the Commonwealth as the second defendant.

19 [1984] 2 SCR 335 ('*Guerin*') established fiduciary obligations between government and traditional owners in Canada when a government sought to deal with traditional land.

20 See below Appendix 1(BX).

21 As at 1982, for Australia: see especially *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141. For Canada: see *Calder v A-G (BC)* [1973] SCR 313 ('*Calder*'); *Guerin* (n 18). For New Zealand: see *R v Symonds* (1847) NZPCC 387. For the United States of America: see *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823) ('*Johnson*'); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

22 See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

or family-group traditional rights to small, defined, land and sea areas, eg, house or garden blocks. Second, tactically, we lawyers, being well aware that the High Court had never faced the ultimate legal issues, sought to avoid overreach before a then (1981–2) 'conservative' Barwick CJ court. We focused, instead (rightly or it now seems, wrongly) on step-by-step reform of Australian common law in a notoriously conservative area: property law. Thus, we sought to establish the fundamental principle first, ie, that Australian common law, since 1788, had recognised and continued to recognise the existence, in principle, of enforceable rights to land based solely on custom and tradition. Who, precisely, held those rights, if found to exist at common law, in any particular circumstances, in any other part of Australia, were, we calculated, secondary questions that could be deferred, if the *Mabo* litigation succeeded, to subsequent claims.

As discussed below,[23] on the last day of the final hearing before the full High Court in May 1991, all that changed.

IV CELUIA MAPO SALEE

I met, and interviewed, Mrs Salee on Mer during the legal team's research visit in March 1983. She was then elderly, frail, and in my best assessment, giving evidence and being subject to cross examination would have proven very difficult for her. She, it seems, had already played an important role in encouraging her nephew, Eddie Mabo, to pursue this test case.[24] In May 1985, Mrs Salee died. Thereafter, she was deleted from the action and Eddie Mabo formally assumed all of her claims.

V THE PASSI BROTHERS WITHDRAW

One week before the trial was scheduled to commence, and to the complete surprise of the plaintiffs' legal team, Dave and Sam Passi instructed new solicitors in Townsville, and abruptly withdrew as plaintiffs. It appears that the Passi brothers had been pressured to withdraw by their elder brother George. At that time, George was employed as a Cultural Officer with the Queensland Department of Community Services.[25] George's conduct raised issues of possible contempt of court, which the plaintiffs' legal team had neither funds nor resources to pursue.

23 See below Part XIV.

24 This led to some to describe her as 'the Mother of Mabo': Personal communications with Murray Islanders (Bryan Keon-Cohen, 25-years-on celebrations, Thursday Island, June 2017).

25 Until 1984, named the Department of Aboriginal and Islander Advancement ('DAIA'). DAIA's long-serving Director, Paddy Killoran, and George, were both called by Queensland in the trial of facts to oppose the claim. Called as a witness for the plaintiffs, Sam stated that '[m]y main reason [for withdrawing] was this: if I lost the case, I haven't got money to pay': Transcript of Proceedings, *Mabo v Queensland [No 2]* (Supreme Court of Queensland, 13 October 1986 – 6 September 1989) 1138 ('*Mabo Trial transcript*').

VI THE TRIAL OF FACTS

The trial (of facts only) began on 13 October 1986 in the Queensland Supreme Court in Brisbane, before Moynihan J.[26] On that day, there were just two surviving plaintiffs: Eddie Mabo and James Rice. Mabo claimed, in total, 36 identified areas and James Rice four. The remaining six Passi-claimed areas, as originally pleaded, were, at that point, effectively abandoned.

VII EDDIE MABO

During this first phase of three torturous weeks, two short witnesses were called, plus most of the evidence-in-chief of the lead plaintiff, Eddie Mabo. Commencing on 17 October, I led substantial evidence from him spread over nine of 14 sitting days. Nearly three years later, on 4 May 1989, following the plaintiffs' successful foray to the High Court in *Mabo v Queensland* ('*Mabo (No 1)*'),[27] Mabo's evidence — still in-chief — continued for half a day in the part-heard reconvened trial. He was then cross-examined by Queensland's junior counsel, Margaret White, for six days spread over the next four weeks, finally concluding on 6 June 1989.[28]

In total, Eddie Mabo occupied the witness box for 28 and a half hours during 19 of the trial's 67 sitting days, produced 447 pages of transcript,[29] and generated 274 objections from Queensland, mostly concerning the admissibility of his evidence as hearsay.[30]

In my view, this astonishing, lengthy effort represented a major contribution despite the disappointing outcome of the trial for him personally. Moynihan J, after observing that 'Mabo was an important witness in the plaintiffs' case',[31] disbelieved much of his evidence and rejected all of his 36 claims. Nevertheless, Mabo's written and oral evidence set the stage for later Meriam plaintiffs and witnesses, making their various ordeals a little less strenuous.

26 See the Order of Gibbs CJ, dated 27 February 1986 in Keon-Cohen, *A Mabo Memoir* (n 12) 104. The plaintiffs had argued before Gibbs CJ, unsuccessfully, that the matter be referred for trial to a Federal Court Judge. They had also argued, successfully, that issues of fact only be remitted for trial: see at 99, 104, 123.

27 *Mabo (No 1)* (n 5).

28 Keon-Cohen, *A Mabo Memoir* (n 12) 215–29.

29 *Mabo Trial transcript* (n 25) 69–597.

30 See Keon-Cohen, *A Mabo Memoir* (n 12) 124–40; See also Eddie Mabo's witness statement (tendered in the *Mabo* litigation) of October 1986 (Exhibit 35, *Papers of Bryan Keon-Cohen, The Mabo Case*, National Library of Australia archives at MS 9518, Mabo Collection vols 17/35, 42/35).

31 *Mabo v Queensland: Determination of Facts* (Supreme Court of Queensland, Moynihan J, 16 November 1990) vol 1, 67 ('*Determination*').

VIII THE TRIAL ADJOURNS PART-HEARD

After four weeks of scheduled sittings, the trial adjourned, part-heard, on 17 November 1986. Progress had been agonisingly slow and disrupted, such that the court sat on only 14 of 20 scheduled days. Castan's opening was deferred (since day one fell on Yom Kippur); both the judge and I fell ill (for different reasons) over several (different) days; and Queensland's frequent objections to the admissibility of Mabo's evidence-in-chief all severely interrupted proceedings. By the end of our scheduled time, only two short witnesses had been completed; and a third (major) witness — Eddie Mabo — had not quite completed his evidence-in-chief and was yet to be cross-examined. Thereafter, the plaintiffs were threatening to call another 20 or so Meriam witnesses, plus two anthropologists. Clearly, we had run out of time, and needed to schedule several more weeks to complete the trial — being a trial of facts only![32]

IX *MABO (NO 1)*

Meanwhile, back in April 1985, the Queensland Parliament intervened, passing legislation which, if constitutionally valid, immediately rendered this torturous litigation worthless. This *Queensland Coast Islands Declaratory Act 1985* (Qld) ('*Declaratory Act*') purported to extinguish, retrospectively to colonisation in 1879 and without compensation, all traditional land rights, if any, vested in the Islanders.[33] The sole and clear purpose of this legislative thuggery was to kill off the *Mabo* litigation.

Thus, following the adjournment of the part-heard trial on 17 November 1986, the plaintiffs initiated proceedings in the High Court to endeavour to have the *Declaratory Act* declared invalid and of no force or effect, as racially discriminatory.[34] The plaintiffs succeeded when *Mabo (No 1)* was handed down on 8 December 1988, meaning that the litigation could continue.[35] This was another critical — and memorable — moment: the High Court 'success' was by a bare majority, the judges splitting 4:3.[36]

32 See Keon-Cohen, *A Mabo Memoir* (n 12) ch 6.2.

33 See *Queensland Coast Islands Declaratory Act 1985* (Qld) ss 3, 5, published in Keon-Cohen, *A Mabo Memoir* (n 12) app 6.

34 Pursuant to *Australian Constitution* s 109 and the *Racial Discrimination Act 1975* (Cth) ss 9–10.

35 *Mabo (No 1)* (n 5) 187.

36 For the majority, Brennan, Deane, Toohey and Gaudron JJ; Mason CJ expressing no opinion, and Dawson and Wilson JJ in dissent: ibid.

X TRIAL RESUMES: DAVE PASSI RE-ADMITTED

The day before the trial recommenced on 2 May 1989, following discussions he held with anthropologist Dr Nonie Sharp, Dave Passi gave instructions that he wished to again become a plaintiff.[37] Thus, on 2 May, he applied (through his counsel, Ron Castan QC) to Moynihan J to be re-admitted as a plaintiff. The hearing and determination of that application was deferred, and the trial promptly resumed in Brisbane leading to Mabo's lengthy cross-examination. Between 22–8 May 1989, the Court visited the Strait — dubbed 'The Great Northern Expedition' — hearing evidence for three days on Mer and one day on Thursday Island.[38]

In June 1989, Dave Passi's application was finally argued in Brisbane. Unsurprisingly, Queensland's lawyers opposed, vigorously. After extensive argument the judge ruled that Dave Passi could again become a plaintiff.[39] As described below, this proved to be one of the most critical moments in the entire decade.

His written and oral evidence, given in Brisbane in June 1989 over four days, traversed many aspects of Meriam traditional life, law, and land arrangements, plus details of the six blocks he claimed located on the three islands, particularly his house block on Mer at the village of Zomared.[40] His claim to Zomared which (as discussed below) on his lawyers' view at least, succeeded, was perhaps the critical result of all the areas claimed.

XI DEACON SAM PASSI JP MBE

Sam Passi did not return as a plaintiff. He suffered a mild stroke early in 1989, and gave limited evidence supporting the plaintiffs during the Supreme Court's visit to Mer in May 1989. Sam Passi died in October 1990, a month before the trial judge handed down his determination of facts.

XII JAMES RICE

James Rice also gave important evidence in Brisbane over two days, and was cross-examined for a solid four hours. He was, I think, an impressive plaintiff and witness, and along with Dave Passi, achieved findings of fact from Moynihan J concerning his house and garden blocks on Mer and the adjacent Dawar Island, that provided a sufficient factual foundation to enable the claim to return to the High Court for ultimate legal argument. He died in February 2008.

37 See Sharp (n 4) 242 n 4 for her observations.

38 Keon-Cohen, *A Mabo Memoir* (n 12) ch 11.

39 Ibid 257–9.

40 Moynihan J's findings regarding Zomared were much discussed in the final High Court hearing. See below nn 62–3, 68–70.

XIII DETERMINATION OF FACTS

On 6 September 1989, Moynihan J adjourned the trial of facts in Brisbane to consider his decision. At this stage, three plaintiffs remained: Eddie Mabo, James Rice, and Reverend Dave Passi. Moynihan J delivered his three-volume *Determination of Facts* ('*Determination*') on 16 November 1990.[41] After reviewing the evidence before him, His Honour rejected all of Mabo's claims and most of Rice's but made reasonably firm findings of fact that Rice and Passi continued to enjoy, under Meriam customs and traditions, traditional rights in about nine[42] blocks of land located on Mer, Dawar and Waier islands: six for Dave Passi, three for James Rice.[43] His Honour listed the plaintiffs' claimed rights: ie, to use land and share in its produce; a right to land within boundaries defined by natural features; entitlement to land by inheritance; a right to dispose of land by transfer as a dowry or gift or by way of lease or loan for use; and a general right to dispose of land.[44] Claims by the three surviving plaintiffs to such traditional rights to the remaining 37 blocks, including to several offshore areas located beyond the high water mark, were all firmly rejected.[45]

Moynihan J observed, ultimately, that Murray Islanders 'have no doubt that the Murray Islands are theirs'.[46] In reaching that critical conclusion, His Honour discussed the question of communal (ie, the Meriam community), group (eg, the Passi family) or individual (eg, Dave Passi's) rights and interests. Amidst, with respect, some confusion, His Honour, despite the above observation, appeared to reject communal title, and found group holding generally to be 'of little significance'.[47] The Judge recorded that:

> The plaintiffs claim various rights as incidents of the entitlement to land which they claim. … [T]hese incidents must vest in or inure to the benefit of particular individuals or specific groups directly connected by some common feature. There was apparently no concept of public or general community ownership among the people of Murray Island.[48]

His Honour then 'postpone[d] consideration of the notion of "group title" until

41 *Determination* (n 31) vols 1–3, discussed in Keon-Cohen, *A Mabo Memoir* (n 12) 364–87. See also *Mabo v Queensland* [1992] 1 Qd R 78 for rulings on evidence.

42 Ie, depending on one's view of the sometimes-unclear findings by Moynihan J: see below nn 62–70 regarding subsequent argument before the High Court on this point.

43 Each of the nine blocks of land are named in the 'Questions for the High Court per s 18 Judiciary Act 1903 Mason CJ in Chambers, 20/3/1991' in Keon-Cohen, *A Mabo Memoir* (n 12) app 16.

44 *Determination* (n 31) vol 1, 161–2.

45 For a discussion of Eddie Mabo's, Dave Passi's and James Rice's claims respectively: see ibid 196–204J, 205–213C, 214–222C.

46 Ibid 156.

47 Ibid 120.

48 Ibid 161.

a consideration of [Dave Passi's] claim … since that claim is founded on such a concept'.[49] Moynihan J later described that claim as a claim to 'a general inchoate right as a Passi to land claimed as Passi land', and concluded:

> [T]he Passi family (and other Islanders it seems) accept that Passi lands are not divided but 'used as a family', that the eldest son is head of the family and 'owns the land on behalf of the family' or is overseer on behalf of the family. Each Passi man has the right to use the land with the permission of the leader of the family.[50]

Moynihan J made no findings of fact regarding the Meriam people but His Honour did refer to the representative aspect of the proceedings and suggested that 'difficulty' may arise 'as a consequence' which would 'need to be addressed at the stage of final relief or at least once the issues of law [have been] resolved'.[51] But the difficulties envisaged did not concern the whole community, rather problems arising from

> a system of land passing by inheritance necessarily to the eldest son [when] questions may rise as to the interest of a wife, younger children, sisters, nephews and so on in respect of land the subject of such a system. If on the other hand there is no constraint on the alienation of land … questions may arise as to the appropriateness of the representative aspects of the proceedings. … [T]he formulation and resolution of such issues should take place in the context of the resolution of the issues reserved to the High Court by the terms of the remitter.[52]

After careful consideration and legal advice, the plaintiffs decided not to appeal any aspects of Moynihan J's adverse findings. Neither did Queensland launch appeals against the plaintiffs' modest 'success'. It can be seen that Queensland's vigorous and well-funded opposition took its toll: of 46 identified areas claimed in 1982, our submissions to the High Court in May 1991 concentrated on only two or three of the nine 'successful' claims — especially Dave Passi's claim to Zomared — being findings of fact that, in our assessment, provided a reasonably firm foundation to trigger, and argue, the ultimate legal issues, ie, whether or not Australian common law recognised traditional rights and interests in land as enforceable property rights.

Thus, the plaintiffs proceeded back to the High Court — still in original jurisdiction — for final argument. As mentioned, this extensive trial process, and Moynihan J's *Determination,* had focused on claims by individuals 'representing' family groups to identified areas located on the three islands, immediately offshore, and

49 Ibid.

50 Ibid 207, 209–10 (citations omitted).

51 Ibid 195.

52 Ibid 195–6. As to the remitter: see Keon-Cohen, *A Mabo Memoir* (n 12) 104.

in more distant seas and reef areas. All this changed, at the last moment during final submissions before the High Court.

XIV HIGH COURT HEARING: INDIVIDUAL CLAIMS AND/OR ONE COMMUNAL CLAIM?

Following the publication of Moynihan J's *Determination,* it and all evidential material submitted to, and received by, the trial judge were forwarded to the High Court — still in original jurisdiction. Questions for the Full Court's consideration, including relating to Dave Passi's claims, and comprehensive written submissions were ordered, filed and served under s 18 of the *Judiciary Act 1903* (Cth).[53] Given Moynihan J's rejection, as matters of fact, of all of Mabo's claims, we lawyers decided that Mabo should be separately represented by Greg McIntyre. Further, no argument would be presented on Mabo's behalf other than that, if claims by Passi and Rice were successful, then, as McIntyre submitted, Mabo 'might then have some rights within his own community' in accordance with traditional law.[54]

Final argument before the full High Court concerning the ultimate legal issues occurred in Canberra during 28–31 May 1991. Queensland's Solicitor General, Geoff Davies QC,[55] (perhaps inspired by the Queensland Parliament), opened with his own 'killer point', arguing that the trial judge's findings of fact were so tenuous and uncertain that the case should be struck out, there and then. Fortunately, this submission failed.

The plaintiffs' legal arguments, presented over two and a half days by Ron Castan QC, were thus founded only upon the 'success', at trial, of Passi and Rice, ie, that since colonisation in 1879, they and their various ancestors had enjoyed, and continued to enjoy, under Meriam custom and tradition, enforceable traditional property rights — now known as 'native title' — to their identified areas as found by the trial judge.

However, on several occasions during oral argument, four judges, of their own initiative, raised the question of communal interests in the three Murray Islands, as against individual or 'family group' interests still pleaded in the Statement of Claim, and reflected in the 'Questions' agreed between the parties for the Court to

53 *Mabo [No 2]* (n 2) 75 (Brennan J).

54 Transcript of Proceedings, *Mabo v Queensland [No 2]* (High Court of Australia, B12/1982, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 28–31 May 1991) 2, 270, 316 ('*High Court transcript*'). McIntyre's submissions were confined to adopting Castan's submissions of law: at 270.

55 Leading Greg Koppenol. The Commonwealth was, by orders of Moynihan J, dismissed from the action on 5 June 1989 following agreement with the plaintiffs that they would defer (not abandon) all claims to areas solely of Commonwealth interest, ie, seas beyond the three-mile territorial limit. Such areas concerned, mainly, the Great Barrier Reef: see Keon-Cohen, *A Mabo Memoir* (n 12) 334–7; *Seas and Submerged Lands Act 1973* (Cth).

answer.[56] For example, during the first morning, when Castan was summarising Moynihan J's findings of fact concerning the plaintiffs' various claims, Brennan J first questioned 'the nature of the interest which you say burdens … the Crown's radical title':[57]

> BRENNAN J: … [Do] you say the Crown's title is burdened with an interest held by the Meriam people and that that interest … is divisible amongst the individual members of the Meriam people, or do you say that the Crown's title is burdened directly with an interest held by particular Meriam people?
>
> MR CASTAN: We submit that the Crown's title is burdened by the interest held by the particular people.
>
> BRENNAN J: So, you do not contend for any community rights other than those held by specific individuals?
>
> MR CASTAN: Yes, Your Honour. … in so far as there were community rights … there were, at one [historical] stage, thought to be additional rights held by various … 'tribal groups' … within Meriam society. … [T]he rights of the individual only exist as part of that community. … [T]hey only exist in that society, and within that society they have these rights and … they are entitled to deal with the land … to alienate it …
>
> BRENNAN J: I appreciate that, it just seems to me that the chain of title is either interrupted by the notion of the community rights out of which individual rights are derived or, alternatively, there is no chain of title and there is a straight conflict between community rights and [the Crown's] radical title. But you do not put it on either of those bases?
>
> MR CASTAN: No, Your Honour. … [O]ne has to start with a society which existed and within that society people had a strong sense of private ownership … [There was a] focus on individuals' separate plots … overridden … by … tribal or territorial divisions between particular groups within Meriam society … [and] the Meriam people, as a whole, having their relationship with other outside communities. … [T]he rights in relation to land … [were] held by … the individual on behalf of his wife and immediate family. It was not held communally in the sense that we are … more familiar with … [such as] Australian Aboriginal interests. … [O]ne can look at this community as a community in which there was private ownership of land within the community …[58]

56 See 'Questions for the High Court per s 18 Judiciary Act 1903 Mason CJ in Chambers, 20/3/1991' in Keon-Cohen, *A Mabo Memoir* (n 12) app 16.

57 *High Court transcript* (n 54) 42.

58 *High Court transcript* (n 54) 42–4. Note that Brennan J refers to the plaintiffs' 'chain of title': at 43. Genealogical charts showing 'chains of title' reaching back to each of the plaintiffs' pre-sovereignty ancestors had been tendered in evidence before Moynihan J. He discussed Eddie Mabo's, Dave Passi's, and James Rice's 'chains of title' respectively: see *Determination* (n 31) vol 1, 199–204, 204E–J, 213A–C, 222A–C.

Castan continued: 'We have two plaintiffs but, as is clear from the material, the whole of the island was owned in a similar way. They are a whole community there and each individual or each family had greater or lesser areas prior to annexation …'.[59]

Considerable discussion followed concerning Dave Passi holding land 'pursuant to', as Mason CJ phrased it, 'a group holding arrangement'.[60] Castan agreed that, for the Passi family

> there is a special arrangement. … [I]n this particular case the ownership happened to be shared, instead of owned by one person, by a particular group who still held their land in common. It is not communal in the sense that as I understood … Justice Brennan was [previously suggesting] …[61]

Later, in relation to James Rice's claims to a village block on Mer called Korog, Toohey J asked:

> TOOHEY J: Mr Castan … [this litigation] is formulated by reference to family groups but … this [Korog claim] is a claim based on individual ownership … not a group holding arrangement? …
>
> MR CASTAN: Yes, Your Honour. It is solely an individual, though he also claims as a representative, representing himself and his wife and children, but … he is the owner. It is not a family claim in the way that the Passi claim was identified.[62]

Deane J then expressed severe frustration with the state of the *Determination's* factual findings and his concern that Castan was

> leading us into a path where we are going to be expected to write six separate judgments on who owns … what interests in six different blocks of land on the basis of findings that you tell us can only be understood by tracing them back to the evidence.[63]

This was a memorable low moment when the entire litigation's basic structure seemed on the edge of collapse. Castan responded:

> Your Honour … the finding in relation to the Passi lands is probably the most explicit. … [Moynihan J] upholds [the Passi claim] in its entirety and upholds the particular arrangement where it happens to be held by more than one person

59 *High Court transcript* (n 54) 45. The two plaintiffs mentioned are Dave Passi and James Rice, whom Castan and I represented before the Court.

60 Ibid.

61 Ibid 46.

62 Ibid 50–1.

63 Ibid 56.

> jointly. … [I]t is the strongest [finding by Moynihan J].[64]

Deane J was not convinced:

> Well … Mr Castan, it is not of great help to your case if these are the best examples you can give of individual ownership of land. … [I]f you cannot point to a better example … in terms of actual findings after all this period, it is not completely irrelevant to the larger issues involved in the case.[65]

Faced with this challenge, Castan reviewed, extensively, the evidence and Moynihan J's findings concerning the Passi brothers and their 'clan' arrangements regarding land.[66] During this submission, Deane J referred to the parties' agreed questions.[67] Question one asked:

1. Is the plaintiff David Passi:

   (a) The owner of rights and interests recognized by and enforceable under Australian law in:

      (i) the area of land located on Murray Island and known as the house block at Zomared? (sic);

      (ii) the two areas of land and beach located on Dauar Island at (sic) Giar and Teg;

      (iii) the areas of land and beach located on Waier Island being the sand spit known at (sic) Waier, the beaches of the Neh lagoon and the area known as Zei-Geitz on the shoreline.

   (b) If so, what are the elements of each right and interest in each case?[68]

Clearly, the plaintiffs' case was still focusing on individual claims, seeking orders in favour of the two remaining individual plaintiffs. To this stage, being 28 May 1991, after nine years of litigation, we had posed no questions, nor sought answers from any court, concerning a communal native title to the Murray Islands and/or surrounding seas vested in the 'Meriam People'. This discussion continued until the luncheon break on day one. I recall a somewhat morose legal team gulping sandwiches and coffee while reviewing our (already much-amended) Statement of Claim. This was not looking good.

After lunch, and for the rest of that first day, Castan took the court to Privy Council

64 Ibid.

65 Ibid 57.

66 Ibid 57–65.

67 Ibid 63.

68 Keon-Cohen, *A Mabo Memoir* (n 12) app 16. Similar questions were asked regarding James Rice's claims.

authority,[69] supporting an argument that the Passi 'clan' land-holding arrangement was in the nature of 'a constructive' or 'implied family trust of these lands' with 'Sam Passi as the trustee' and 'Dave as a beneficiary'.[70] Castan's submissions then focused on responding to challenging issues raised by Brennan J, viz: how would the traditional interests, as claimed, be 'recognized' eg, 'at common law or under any statutory scheme',[71] with much discussion of the relevant authorities, especially from Canada and the United States of America. The 'individual/community claim' question was not further agitated that afternoon, nor during all of day two when Castan's submissions focused on the fundamental legal issues. These included whether the mere act of colonisation in 1879 extinguished, without more, the claimed traditional rights; common law authorities recognising native title;[72] trust and fiduciary duties; and many further issues.[73]

Castan's submissions concluded late in the morning of day three, with no further reference to the 'individual/community' issue. However, at the end of his address, Mason CJ asked a question that stunned me, sitting beside my learned leader at the podium:

> MASON CJ: Mr Castan, can I take you to the questions which this Court has been asked to answer? … [T]he difficulties that confront you in relation to answering questions (a) and (b) of questions 1 and 2 were identified [on day one] and those difficulties have not disappeared. It may be … that the findings made by Mr Justice Moynihan do not enable [this] Court to answer questions 1 and 2. Yet the findings may be such as to satisfy the Court that the plaintiffs, as members of their relevant groups, are still exercising traditional rights in relation to these lands … [leading to] a decision that those traditional rights have not been extinguished.
>
> Now, let us assume that is the position. You would then seek some … relief

69 See, eg, *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 402 (Viscount Haldane) ('*Amodu Tijani*').

70 *High Court transcript* (n 54) 66–7.

71 Ibid 69. Castan replied:

> [T]here are three … alternative ways in which they can be recognized. … [First] under the rubric … of traditional native title … [a] sui generis … interest in property which is a burden on the radical title of the Crown … extinguishable by appropriate clear and plain legislative words … [or] administrative conduct. … [W]e do not say it prevails against an inconsistent Crown grant: at 69–70.

The second was 'the conventional principles of land law for a title founded on … local legal custom … no different than the [feudal English] custom … of gavel kind or of borough English': at 71. The third 'basis … is the presumption of a lost grant or, alternatively, the presumption of title founded on possession per se': at 72. Castan added: 'Our fundamental argument about annexation is that annexation did not, per se, extinguish': at 72. The language and law of terra nullius was not mentioned, neither by counsel nor the Court.

72 See, eg, *Johnson* (n 21); *Calder* (n 21).

73 Castan commenced day two with a discussion of early colonial cases in Australia: see, eg, *R v Bonjon* (Supreme Court of New South Wales, Willis J, 16 September 1841). See also 'Summary of Plaintiffs' Contentions' in Keon-Cohen, *A Mabo Memoir* (n 12) app 17.

> different from the answers that are [now] sought to questions 1 and 2.
>
> MR CASTAN: Yes we would, Your Honour.
>
> MASON CJ: Well now, if that is so, you had better think about formulating what you want the Court to do. If, for example, you want the Court to make a declaration of some kind, you had better put it in appropriate terms.
>
> MR CASTAN: Yes, Your Honour. … I am indebted for that indication. There were various declarations sought in the original form of the statement of claim.
>
> MASON CJ**:** It is not really an indication. It is an identification of difficulties that you face at the present time. … And an indication to you that you ought to give some consideration to your position.
>
> MR CASTAN: If Your Honour please. We will certainly give it attention, and I am indebted to Your Honour for that indication**.**[74]

As I heard it, Mason CJ was suggesting to Castan that the two plaintiffs still in contention (Passi and Rice) might consider amending their claims to include a group claim by all of 'the Meriam People' to all of the three Murray Islands, not merely to the nine identified blocks they continued to pursue as individuals.

Then followed submissions from the Queensland Solicitor-General, Geoff Davies QC. Shortly prior to the luncheon adjournment on this third day, Deane J returned to the individual/communal claim issue: 'Mr Solicitor, what … is the effect of [Moynihan J's] finding in so far as recognition of individual possession of land is concerned under a native communal system?'.[75] After some inconclusive discussion, Deane J suggested to Davies QC that the Court could '[come] to the view that the clear inference from [the trial materials] is that there was a native system under which possession was recognized and under which … land was recognized as being in the possession of a particular individual or family group'.[76] Shortly afterwards, Brennan J asked:

> [A]s to the question of the community's interest in the land as against those of outsiders, is there any finding [by the trial Judge] with regard to that? I am thinking … of … [a] community title, the benefit of which … redounds [sic] to individuals but which may not be allocated by any system of law to individuals?[77]

Davies QC queried whether 'there was any finding with respect to that'.[78] Again,

74 *High Court transcript* (n 54) 261–2. Question 2, which Mason CJ mentioned to Castan in this passage, concerned three identified blocks on Mer claimed by James Rice: see Keon-Cohen, *A Mabo Memoir* (n 12) app 16, 500.

75 Ibid 267.

76 Ibid 268.

77 Ibid 269.

78 Ibid.

Toohey J noted 'the claims are expressed to be brought on behalf of family groups'.[79] Davies QC agreed, but confined the 'group' to 'Mr [Dave] Passi's … nuclear family, his wife and children, not on behalf of Sam Passi or other members of the Passi clan'.[80] He added there was no 'claim against anyone outside'.[81] Much of this discussion also concerned whether Passi and/or Rice, on these findings, would enjoy standing to bring the matter to court.[82]

Davies QC continued his submissions during the afternoon of day three, urging the court to reject any and all claims.[83] At the end of the afternoon, the Court agreed to a short extra hearing the following morning to enable Castan to reply, orally, in '[v]ery short' compass, and to enable he and Davies QC to tender short written submissions including, Castan said, responding to the Chief Justice's 'indication' concerning the individual/community issue.[84] The Chief Justice immediately noted that this foreshadowed document might 'excite some question, if not from the Bench perhaps from the Solicitor-General' and requested that it be provided to the Court before the hearing re-commenced at 10:15am the following day.[85]

This, for me, was yet another astonishing '*Mabo* moment'.[86] We plaintiffs' lawyers were delighted, sensing at last some support from the Court.

That night, locked-down (but not socially isolated) in our Canberra apartment, Castan, McIntyre and I (with no specific instructions)[87] drafted amendments to the (already much-amended) Statement of Claim to introduce, for the first time, *after nine years of litigation,* this additional 'community' claim. This document was presented to Queensland's counsel, and to the Court prior to the commencement of this hastily convened fourth morning. The plaintiffs now sought to add the following to their prayer for relief:

> ***Mabo (No 2)*: Plaintiffs' Proposed Amendments to the Statement of Claim, 31 May 1991**
>
> **'**The plaintiffs Rice and Passi claim:
>
> 1.A. Declaration that:
> The Meriam People are, and have been since prior to 1879, entitled to the Murray

79 Ibid 271.

80 Ibid.

81 Ibid 272.

82 Ibid. I still do not understand how this question was triggered, ie, I, at least, saw no standing issue.

83 Ibid 274–313.

84 Ibid 313.

85 Ibid 313–14.

86 See, eg, Keon-Cohen, 'Memorable *Mabo* Moments' (n 1).

87 Mabo had attended court on all four days but Passi and Rice were, presumably, residing on Murray Island with neither phones nor internet access.

> Islands:
>
> (a) as owners;
> (b) as possessors;
> (c) as occupiers; or
> (d) as persons entitled to use and enjoy the said islands.
>
> B. Declaration that:
> The Meriam people are entitled to such
>
> (a) ownership;
> (b) possession;
> (c) occupation; or
> (d) use and enjoyment as against the whole world.
>
> 2D Declaration that Eddie Mabo is a member of the Meriam People and, as such, is entitled to claim ownership of Mabo family lands, or other lands, on the Murray Island.'[88]

On the morning of this unexpected, specially convened, day four, after discussion of other submissions being handed up, Toohey J asked Queensland's new counsel Hugh Fraser QC:[89] 'Was [Moynihan J] asked to make any findings of fact relating to the Meriam people and any interests that they may have in the Murray Islands as opposed to the interests claimed by the plaintiffs?'.[90] Fraser QC replied, accurately, '[n]ot as a people' and that the question 'was not litigated'.[91] Brennan J interjected, leading to the following significant exchange:

> BRENNAN J**:** Well … the nature of the individual claims which were litigated, as I read them, seemed to me to be claims which were made in right of their status as members of the community.
>
> MR FRASER: Yes.
>
> BRENNAN J**:** And therefore their interests were sought to be established as being carved out of that which the community had.
>
> MR FRASER: Yes. [Moynihan J] seems to have regarded them as claims of private ownership which must owe something to the relationship of the Murray Island people. I accept that … [b]ut the [new] claim [made in the proposed amended prayer for relief] does seem to be a claim that the people as a whole have a public ownership of the lands. …
>
> BRENNAN J**:** Well, if we were to deal with these questions … [by] looking at

88 Keon-Cohen, *A Mabo Memoir* (n 12) app 20, ch 16.3.

89 Queensland's Solicitor-General apparently had prior commitments that clashed with this unexpected fourth day.

90 *High Court transcript* (n 54) 317.

91 Ibid.

> the facts as found and … such inferences as were properly open from [them] … [if the] legal consequences were to *recognize some interest in the community of the Meriam people*, would any injustice be done to … [Queensland]?
>
> MR FRASER**:** I submit it would be because no such claim was put on the basis that there was an interest in the Meriam people in the islands as a whole and [Moynihan J's] findings seem to reflect that. …
>
> BRENNAN J**:** So that if there were *individual or group interests held by individuals or groups* in the Meriam community, *in virtue of the community's arrangements*, those interests could be recognized within the scope of the litigation.
>
> MR FRASER**:** Yes. …[92]

Ron Castan then began his reply submissions, saying: 'The position is that [Moynihan J] did make express findings about the people owning the whole islands'[93] and quoted from the *Determination*:

> [I]t may be accepted on the evidence that Murray Islanders have a strong sense of relationship to their Islands and the land and seas of the islands which persists from the time prior to European contact. They have no doubt that the Murray Islands are theirs**.**[94]

Castan continued:

> [Moynihan J] dealt in great detail … about … ownership of the whole of the people in relation to the Islands. … [I]t is not the case that this is some new concept. … [In our proposed amendments] we have endeavoured to … reflect … the concerns of the Court and identify what are the issues that really emerge from [Moynihan J's] determination**.**[95]

Answering a question from Toohey J, Castan submitted:

> There is not a concept of public ownership … as among themselves … but there is an ownership among all of them as against the whole world … what we have is the strong sense of proprietary ownership internally and then a strong sense that, as against the whole world, these people own the whole …[96]

Then, reformulating his proposition: '[T]here is no sense of public ownership in the sense that they have property that as between themselves is publicly owned,

92 Ibid 317–18 (emphasis added).

93 Ibid 318.

94 Ibid 318–19, citing *Determination* (n 31) vol 1, 155–6.

95 *High Court transcript* (n 54) 319.

96 Ibid.

but all of them between themselves are a community who own the whole of the land as against the rest of the world'.[97]

Deane J then asked a critical question about the declarations sought:

> [Let us] assume … that your main argument is correct … [then] there are three alternatives if you are going to succeed; one … these plaintiffs … [obtain] declarations defining their precise entitlement to particular blocks of land … [two] an order or a declaration … that the land is held for individual members of the Meriam people, according to their rights under the communal system … [three] some general declaration about the Meriam people as a political entity. … [Y]ou have asked for the first originally, you are now asking for the third, but there is nothing that addresses the second … the second is the only general declaration which seems to have been involved in what has been fought between the parties.[98]

Castan replied that Brennan J's second proposition was embraced by paragraph two of the proposed amended claim, included above.[99]

No rulings were made regarding any issue, leaving the fate of the plaintiffs' proposed amendments unresolved. The Court adjourned at 10:44am, Friday 31 May 1991, to consider its decision — a process that occupied just over a year.

XV EDDIE MABO DIES

Eddie Mabo died from cancer in the Royal Brisbane Hospital on 21 January 1992. His tragic passing, five months before final judgment, left the case with just two surviving plaintiffs: Reverend Dave Passi and James Rice. As indicated above regarding Celuia Mapo Salee's death in 1985, we did not (particularly at that late stage, awaiting judgement) agitate the question of what entitlements, if any, Mabo's death might have triggered in those whom he had represented, ie, his 'family group'.[100] The research effort involved, let alone resolving instructions, let alone seeking to reconvene the Court to hear argument, was all far too difficult — and expensive — to contemplate.

XVI THE COURT'S DECISION

97 Ibid 319–20.

98 Ibid 320.

99 Ibid 320–1. He meant, I think, paragraph 2D of the 'Proposed Amendments to the Statement of Claim': see above n 88 and accompanying text.

100 As at November 1995 Eddie and Bonita Mabo's family comprised 10 children (three adopted) and 27 grandchildren. The full extent of Eddie and Bonita's siblings and their families was not known: Noel Loos and Eddie Koiki Mabo, *Edward Koiki Mabo: His Life and Struggle for Land Rights* (University of Queensland Press, 2013) 238.

The High Court delivered its decision on 3 June 1992 when just two plaintiffs remained alive: James Rice and Reverend Dave Passi. The three substantive supportive judgements by Brennan J, Deane and Gaudron JJ, and Toohey J, declined to rule on the plaintiffs' individual claims under Meriam custom and tradition to particular blocks: they spoke only of 'the Meriam people' enjoying native title to Murray Island alone. For example, Brennan J referred to the agreed questions before the Court 'relating to the rights and interests' claimed by Passi and Rice 'in specified blocks of land' on the three islands, and continued:

> In the course of the hearing before this Court, it emerged that it was not practicable to answer those questions by acting upon findings made by Moynihan J. The plaintiffs' statement of claim was then amended to seek declarations relating to the title of the Meriam people. … Passi and Rice claim rights and interests dependent on the native title of the Meriam people … In the absence of any party seeking to challenge their respective claims under the laws and customs of the Meriam people, the action is not constituted in a way that permits the granting of declaratory relief with respect to claims based on those laws and customs — even had the findings of fact been sufficient to satisfy the Court of the plaintiffs' respective interests. Declaratory relief must therefore be restricted to the native communal title of the Meriam people. The plaintiffs have the necessary interest to support an action for declarations relating to that title.[101]

Deane and Gaudron JJ, referring to Privy Council authority,[102] observed that 'a traditional interest [in land] would ordinarily be that of a community or group. It could, however, be that of an individual'.[103] On this individual, family group and/or communal title issue, their Honours concluded:

> [T]he Meriam people lived in an organized community which recognized individual and family rights of possession, occupation and exploitation of identified areas of land. … [U]nder the traditional law or custom of the Murray Islanders, there was a consistent focus upon the entitlement of the individual or family as distinct from the community as a whole or some larger section of it. … [Except for] the area used by the London Missionary Society, those individual or familiar entitlements under traditional law or custom extended to all the land of the [three] Islands.[104]

As to particularising rights and interests vested in one or more of these groups, their Honours considered that, based on the findings of Moynihan J, it was

> impossible to identify any precise system of title … rules of inheritance or …

101 *Mabo [No 2]* (n 2) 75.

102 *Amodu Tijani* (n 69) 403–4.

103 *Mabo [No 2]* (n 2) 85. See also: at 109–10, 115.

104 Ibid 115.

> methods of alienation. Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title. … [T]he effect of the annexation [of 1879] was that the traditional entitlements of the Meriam people were preserved.[105]

Their Honours considered it 'inappropriate … to seek to define the rights of any plaintiffs' in the absence of persons with competing claims, but held that each plaintiff enjoyed

> standing to seek and obtain more general declaratory relief against … Queensland in relation to the question whether all existing entitlements to land within the Murray Islands were … extinguished upon annexation of the Islands to Queensland.[106]

Toohey J recorded the same inability, based on Moynihan J's findings, to articulate 'a precise set of rules' but noted that

> the particular nature of the rules which govern a society or which describe its members' relationship with land does not determine the question of traditional land rights. Because rights and duties inter se cannot be determined precisely, it does not follow that traditional rights are not to be recognized by the common law.[107]

Toohey J determined that 'the Meriam people, represented by the plaintiffs, had traditional title to the Islands which survived annexation'.[108] As to the questions, and amended prayer for relief before the Court, I remain grateful to his Honour for the following:

> [T]he answers which it is possible to give to those questions necessarily speak in general terms rather than deal with particular aspects of the traditional title of the Meriam people. This is not a criticism of the way in which the plaintiffs' claim was formulated; it is simply a recognition that the claim for declaratory relief does speak in general terms.[109]

Dawson J also recorded that that the plaintiffs had 'reformulated the declarations which they sought in the action'.[110] Each of the supportive judgements set out the authors' preferred form of declaratory relief. The Court's formal order reads, in full:

105 Ibid 115–16.

106 Ibid 118.

107 Ibid 191.

108 Ibid 192.

109 Ibid 216. Toohey J began by mentioning the amended prayers for relief where the plaintiffs sought 'declarations as to their entitlement and that of the Meriam people as a whole': at 176.

110 Ibid 174.

In lieu of answering the questions reserved for the consideration of the Full Court,

(a) declare that the land in the Murray Islands is not Crown land within the meaning of that term in s 5 of the *Land Act 1962* (Q.);

(b) putting to one side the Islands of Dauer and Waier and the parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have validly been appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of the Meriam people under native title, declare that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands;

(c) declare that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.[111]

XVII THE MERIAM PEOPLE?

Another difficult question was now triggered: as at June 1992, who comprised the traditional owners of Murray Island, ie, 'the Meriam people'? During the hearing before Moynihan J, in 1989, extensive genealogical charts[112] reaching back five or more generations, well beyond the extension of sovereignty in 1879, were tendered in evidence to support the plaintiffs' claims based on 'particular lines of descent' and historical occupation of the islands by the Meriam people, especially the plaintiffs' ancestors.[113] Queensland also tendered its own extensive genealogical material.[114] Thus, had the parties sought a specific finding from Moynihan J in his *Determination,* identifying the 'Meriam People' as at 1990, that could have been done on substantial evidence. But no such finding was sought nor provided, since, at trial, no party considered this to be necessary. For our part, the only reference to this ill-defined community related to the existence of a trust and fiduciary duty

111 Ibid 217, discussed in Keon-Cohen, *A Mabo Memoir* (n 12) ch 17.2.

112 See especially AC Haddon, *Reports of the Cambridge Anthropological Expedition to Torres Strait* (Cambridge University Press, 1901–35) vols 1–6. Professor AC Haddon (Cambridge University) led an anthropological expedition which visited Mer in 1888–9 and recorded several genealogical charts (Exhibits 60A and 134 of *Papers of Bryan Keon-Cohen, The Mabo Case*, National Library of Australia archives at MS 9518, Mabo Collection vols 42/60A, 44/134); see also Keon-Cohen, *A Mabo Memoir* (n 12) 12–13. Dave Passi's grandfather, Aiet Passi, had worked closely with Haddon in the 1890s, compiling Meriam genealogies.

113 *Determination* (n 31) vol 1, 53.

114 See the evidence of Colin G Sheehan: Keon-Cohen, *A Mabo Memoir* (n 12) 300–1. See also the discussion in *Determination* (n 31) vol 1, 52–4.

claim. In our view, detailing membership of the 'Meriam People' at the trial was not necessary to achieve success in that arena, nor to our fundamental endeavour to establish common law native title. Further delineation could await the outcome of these claims, and then only if either or both succeeded. In the event, the fiduciary duty argument failed.[115] I assume Queensland's lawyers took a similar view.

The question of 'the Meriam People' has been answered, however, in two subsequent native title claims concerning them pursued under the *NT Act*. In such a successful claim, all traditional owners are required to be identified by the Federal Court in its final determination.[116] Such identification is substantially founded upon genealogical descent reaching back to the traditional owners' various ancestors who occupied the claimed land as at the date of British sovereignty, ie, in the Torres Strait, 1879. The first such claim, *Passi v Queensland* ('*Passi*'),[117] was a claim to the two adjacent islands, Dawar and Waier, omitted from the High Court's declaration.[118] That claim, originally brought by one of the eight tribes of Mer, the Dauereb tribe, was amended to include all Meriam People as claimants. In stark contrast to *Mabo,* Queensland and the claimants reached a negotiated settlement under the *NT Act* regime, leading to a consent determination of native title ordered by Black CJ in favour of a delineated group of traditional owners, ie, the Meriam People.

A more recent regional seas claim in the Torres Strait, *Akiba v Queensland [No 3]* ('*Akiba*'),[119] also raised the same issue. In *Akiba,* 13 Islander communities, including the Meriam People, joined together as one 'society' of traditional owners to make a single claim to a large area of seas in the Strait. At trial, Finn J accepted this one overarching 'society', which included the 'Meriam people'.[120]

Presumably, those same descriptions would apply, retrospectively, to the 'Meriam People' named in the High Court's declaration in *Mabo [No 2].* The only difference would be that the *Mabo* genealogies founding the traditional owning group as at June 1992 would be less numerous than those pertinent to 2001 (*Passi*) and 2010 (*Akiba*).

XVIII CONCLUSIONS

These somewhat unusual judicial initiatives, encouraging a substantial reformulation of the claim, ultimately delivered both common law native title

115 Only Toohey J, and to a lesser extent, Deane and Gaudron JJ, supported this claim: see *Mabo [No 2]* (n 2) 199–205 (Toohey J), and speaking of a 'remedial constructive trust': at 112–13 (Deane and Gaudron JJ).

116 *NT Act* (n 7) s 225(a).

117 [2001] FCA 697.

118 Spelling of Meriam words in English can differ — and did differ during the decade.

119 (2010) 204 FCR 1.

120 See ibid, at trial. The composition of this single society was not rejected on appeal.

to the entire nation, and a striking example of how the High Court may seek to adjust procedures and facilitate amendments to reshape an issue in order to suit its view of how matters before the Court — especially when novel, difficult, and of national significance — might be resolved. I here offer three observations.

First, this history highlights, amongst other matters, the power of the High Court as the ultimate court of appeal to declare, and (at least in the case of the 'activist' Mason CJ Court) develop the common law of Australia in response to a changing world, subject to long-established judicial restraints.[121] As such, if the Court was attracted to an issue raised in argument, it may seek to reshape or reformulate that issue in a direction it considers desirable.[122] As a judge has stated anonymously to Pierce: '"We had a very radical High Court for a while, when you had Mason, Deane, Toohey, and Gaudron forming a majority group who were prepared to make changes"'.[123]

Second, and contributing to the Court's new-found activism, was the passage of the *Australia Acts* in both the Australian and British parliaments in 1986 when the *Mabo* litigation was proceeding. These reforms finally achieved Australia's full legal independence from Great Britain, including terminating all remaining appeals to the Privy Council from Australian courts.[124] Thus, from 1986, the High Court became the only avenue of appeal for Australian litigants with 'the sole final responsibility for declaring the law in Australia'.[125] These reforms were seen, by Australian judges, as a '"trigger," "a watershed event"' that '"released a creative impulse" through the Court'. These reforms, four years into the *Mabo* litigation, created '"a feeling of liberation"' amongst the Mason court, a '"greater activism"' and '"a tendency to go its own way and be unbound by English authority"'.[126] The *Mabo* plaintiffs were undoubtedly beneficiaries of this liberation.[127] By May 1991, when before the High Court, the plaintiffs' lawyers knew that the Court was empowered to review and, in Chief Justice Mason's words, '[take] a more

121 As to which, see *Mabo [No 2]* (n 2) 29–30 (Brennan J), referring to the need to maintain 'the skeleton of [legal] principle' while overruling past cases 'if the rule it expresses seriously offends the values of justice and human rights … which are aspirations of the contemporary Australian legal system'.

122 For example, in *Mabo [No 2]* (n 2), the Court decided the central issue was applicable Australia-wide to all Indigenous peoples, and not confined to, eg, one region (Murray Islands) or one race (Islanders). For criticism of this approach: see SEK Hulme, 'Aspects of the High Court's Handling of Mabo' [1993] (87) *Victorian Bar News* 29. For a reply: see Ron Castan and Bryan Keon-Cohen, 'Mabo and the High Court: A Reply to SEK Hulme, QC' [1993] (87) *Victorian Bar News* 47. As to the 'reformist' tendencies of the Mason CJ court: see Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006).

123 Pierce (n 122) 203–4 (citations omitted).

124 See *Australia Act 1986* (UK) c 2; *Australia Act 1986* (Cth). See also several *Australia Acts (Request) Act 1985* of the six states, referred to by Brennan J when considering the Court's powers to override precedent: *Mabo [No 2]* (n 2) 29.

125 Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27(3) *Melbourne University Law Review* 864, 864.

126 Pierce (n 122) 230–1 (citations omitted).

127 Eg, one important adverse precedent, its 'binding' character thereby removed, was *Cooper v Stuart* (1889) 14 App Cas 286 (Privy Council). See also *Mabo [No 2]* (n 2) 29–30 (Brennan J).

independent view of English precedents' if it wished.[128] This is precisely what it did.

A third factor said to have encouraged the Mason court's 'activism' during the 1980s and 1990s was increasing judicial realisation that the political process was unwilling, or incapable, of grappling with some major social issues 'because they were politically too difficult'.[129] According to one federal judge, speaking anonymously:

> '[T]here is much decision-making that governments don't take on, for one reason or another. It's too hard. It's too complicated. They're too worried about the political effects. That means … that if the law isn't to remain totally static then it puts a lot of pressure on courts to make the changes. … *Mabo* … is the great example.'[130]

This tendency by governments to hand-ball political hot potatoes, such as Aboriginal land rights, to the courts — and aggressively criticise the judges when the same governments dislike the outcome[131] — is perhaps emphasised by the fact that never, not once, in the decade 1982–92, when both left- and right-wing governments were in power in Queensland, did the plaintiffs' lawyers receive the slightest suggestion from Queensland's lawyers of entering into settlement discussions. Clearly, the responsible Queensland authorities preferred to leave the problem with the High Court. In 1994 Sir Anthony Mason spoke publicly on this question, saying: 'Sometimes judicial initiative is inevitable. … It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature'.[132]

On this analysis, the High Court in *Mabo [No 2]* not only '"broke a tension which the politicians were quite unable to break"',[133] but, in the words of Justice Michael Kirby, the Court 'beckoned by the advocacy of Ron Castan and those of like cause, rewrote the major premise. In a moment, 150 years of *terra nullius* was cast aside. A new chapter in the legal rights and national dignity of Australia's

128 Prue Innes and Fay Burstin, 'Judicial Evolution' (1995) 69(8) *Law Institute Journal* 745, 746, being an interview with Sir Anthony Mason.

129 Pierce (n 122) 126 (emphasis omitted), quoting an anonymous judge.

130 Ibid 126–7.

131 Following *Wik Peoples v Queensland* (1996) 187 CLR 1, the then deputy Prime Minister, Tim Fischer, denounced the High Court judges as a 'bunch of pissants' in a national television interview in December 1996: see Chief Justice Robert French, 'Seeing Visions and Dreaming Dreams' (Conference Paper, Judicial Conference of Australia Colloquium, 7 October 2016) 5 <http://www.jca.asn.au/wp-content/uploads/2013/11/P01_16_02_54-frenchcj-7Oct2016.pdf>. Chief Justice Gerard Brennan wrote to Fischer, complaining that his criticism could erode confidence in the judiciary: HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 72–3.

132 Sir Anthony Mason, 'The Australian Judiciary in the 1990s' [1994] (Autumn/Winter) *Bar News* 7, 8.

133 Pierce (n 122) 126 (citations omitted). That breakdown is evident in the abandonment of the Hawke government's policy of 'national land rights' announced before the 1982 federal election campaign: see Patrick Dodson, Martin Mowbray and Warren Snowdon, 'Promise, Confrontation and Compromise in Indigenous Affairs' in Susan Ryan and Troy Bramston (eds), *The Hawke Government: A Critical Retrospective* (Pluto Press, 2003) 296, 299–301.

indigenous peoples was begun'.[134]

Clearly, our timorous 'step by step' approach to drafting our pleadings in 1982 was misconceived: by 1992 the Court was ahead not only of the nation's politicians, but also of the plaintiffs' counsel.

This leads to my last observation. Ironically, the many and substantial delays encountered over the decade arguably worked in the plaintiffs' favour. First was the abovementioned 'liberation' from Privy Council precedent, and ongoing philosophical shifts in the Mason CJ High Court towards increased activism, including embracing a flexible approach to issues raised by pleadings, especially when in original jurisdiction. The second benefit arose from common law developments during the decade 1982–92 overseas, particularly emanating from the Canadian Supreme Court, that supported the plaintiffs' arguments.[135]

It is interesting to note that similar characteristics, at least in this area of Indigenous rights, are emerging from the current Kiefel CJ High Court, as evidenced by two recent decisions. These are *Northern Territory v Griffiths*,[136] where the Court for the first time laid down the tests for determining 'just terms' compensation for extinguishment of native title; and *Love v Commonwealth*,[137] where the Court held that Indigenous Australians, due in part to their connection to country reaching back tens of thousands of years, could not be 'aliens' for the purposes of s 51(xix) of the *Constitution*.

Nervous politicians unable or unwilling to deal with current treaty discussions and agitation for the constitutional entrenchment of an Indigenous Voice to Parliament: beware.

134 Justice Michael Kirby, 'Ron Castan Remembered' [1999] (111) *Victorian Bar News* 18, 19 (emphasis in original), speaking at a Koorie Heritage Inc dinner, held on 15 November 1999, to honour the memory of Ron Castan AM QC.

135 Two especially should be mentioned: *Guerin* (n 19); *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185. The trial judge, McEachern CJ, delivered judgement on 8 March 1991 only weeks before the High Court hearing in *Mabo [No 2]*. His Honour rejected the Gitksan and Wet'suwet'en peoples' claims to sovereignty and jurisdiction (not claimed in *Mabo [No 2]* (n 2)); he upheld the existence of fiduciary obligations upon governments when dealing with Indian land, and held that Aboriginal title had survived colonisation at common law but that that title had been extinguished by pre-confederation land legislation: see, on appeal, *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

136 (2019) 364 ALR 208.

137 (2020) 375 ALR 597.

APPENDIX 1: FURTHER AMENDED STATEMENT OF CLAIM — 5 JUNE 1989

EXTRACTS FROM THE PLAINTIFFS' PRAYER FOR RELIEF

AND THE PLAINTIFFS CLAIM:

A A declaration that the Plaintiffs are –
(a) owners by custom;
(b) holders of traditional native title;
(c) holders of usufructuary rights,
with respect to their respective lands. …

BX A declaration that –
(a) the Miriam people; and/or
(b) the plaintiffs and their predecessors in title,
are entitled to the protection of the rights claimed herein by reason of the fiduciary duty owed to them by (Queensland) or by reason of the said trust …

O Further or other relief.[138]

138 See *Determination* (n 31) vol 3, 22–8. Para BX was included by leave of Moynihan J, granted 5 June 1989. Injunctive relief and damages, also pleaded, were not pursued at the trial of facts, nor before the High Court in final argument.