This year marks the 20th anniversary of Mabo, one of the most significant cases in Australian legal history. In ending the legal fiction that Australia was empty before its European occupation, and upholding the claim that Murray Islanders were the traditional owners of the island of Mer in the Torres Strait, the case paved the way for a system of native title in Australia and was a small step in the long pathway towards reconciliation.

Underpinning this monumental victory is the behind-the-scenes story of two Melbourne barristers, who worked tirelessly on the Legal Aid-funded case for more than 10 years in which it ran. Ron Castan and Bryan Keon-Cohen represented the Murray Island plaintiffs in the myriad of interlocutory applications and procedural twists associated with the landmark case from its start to finish.

The case forged a long-standing professional alliance between Castan and Keon-Cohen. At the time it began, Castan was one of the most respected constitutional and commercial barristers at the Victorian Bar while Keon-Cohen had only recently joined the Bar, having worked at Fitzroy Legal Services and been a law lecturer at Monash University.

Reflecting on Mabo over a coffee at the Essoign, Keon-Cohen says that he first met Castan in 1979 at Taylor Square in Sydney, outside what was the then location of the High Court. While Castan was waiting for his case to be heard, Keon-Cohen says that he took the opportunity to ask if he could read with him.

Keon-Cohen was in Sydney because he was working at the Australian Law Reform Commission, where he had been conducting research for the reference on Aboriginal customary law within the Australian legal system. The Commission's two-volume report ultimately put forward a wide-ranging set of recommendations on the recognition of Aboriginal customary law in relation to marriage, children and family property, local justice mechanisms, and traditional hunting, fishing and gathering rights. As part of his research for the Commission, Keon-Cohen had looked at how other jurisdictions, such as Canada and the USA, had recognised indigenous legal traditions in their broader justice systems.

Castan wasn't able to take on Keon-Cohen as a reader, and, in any event, was made a silk soon after their conversation. But a week after Keon-Cohen was admitted to the Bar in September 1981, he received a call from Castan asking if he would be interested in working on the Mabo case. "I didn't know anything about Eddie Mabo or the Torres Straits," says Keon-Cohen. "But I knew about the issues and I came from a philosophy that a lawyer's time is well spent seeking justice for disadvantaged groups by way of law reform within the legal structures."

The case had come to Castan after another Melbourne barrister, Barbara Hocking, attended a land rights conference in Townsville in 1981. Hocking had presented a paper to the conference arguing that a test case should be brought in the High Court to establish the principle of native title as part of Australian law. At the conference, the land claim of
the Murray Islanders became one of two cases selected to be mounted to test the issue of native title. Hocking and Greg McIntyre, a solicitor who was also to remain with the case to the end, were retained to act in both cases. On her return to Melbourne, Keon-Cohen says that Hocking approached Castan asking him to appear in the case.

Hocking was involved in the case for its first five years before leaving the Bar to take an appointment position on a Commonwealth tribunal. Her academic knowledge about indigenous land rights issues was an invaluable foundation for the case, says Keon-Cohen. Richard Brear, who had been in the same readers’ group as Keon-Cohen, was a fourth barrister in the legal team. Brear conducted much of the historical research and undertook a lot of important behind-the-scenes work.

The case was originally brought in the High Court’s original jurisdiction, with the statement of claim being filed on 20 May 1982. The next step should have been for the parties to provide the High Court with an agreed statement of facts to allow it to determine the legal issues. But when they were unable to agree, the case was remitted by Gibbs CJ to the Brisbane Supreme Court to have its factual issues only adjudicated upon.

The trial, which did not begin until 1986, was originally scheduled to run for just three weeks. However, shortly before its commencement, the Queensland Government passed the Coast Islands Declaratory Act 1985, which declared that any traditional rights that had existed, or still existed on the island of Mer, were retrospectively annulled without compensation.

Castan, Hocking and Keon-Cohen appeared for the plaintiffs in the first three weeks of the Supreme Court trial. Much of the time set down for the case was taken up with legal argument. When the case adjourned at the end of its scheduled three weeks, Eddie Mabo, who was only the second witness, was being taken through his evidence. He and his legal team had endured what Keon-Cohen says were “about 150 objections to his evidence on a variety of grounds”.

Back in Melbourne, the frustrated and exhausted barristers were discussing the immense difficulties of running the case, acutely aware that, if the recently passed Coast Islands Declaratory Act was good law, their efforts had most likely been in vain. Castan decided at that point, says Keon-Cohen, that the Queensland Act should be challenged under s 109 of the Constitution for being in conflict with the Racial Discrimination Act 1975 (Cth). Almost three years later, in December 1988, by a slender 4-3 majority, the High Court agreed that it was.

When the trial resumed in the Queensland Supreme Court in 1989 the year after the High Court decision, Keon-Cohen says that he found himself calling Eddie Mabo to continue his examination-in-chief, which had begun three years earlier. The remaining four months of the trial were conducted by Keon-Cohen largely without a leader and, for several weeks, without an instructing solicitor. By that stage, Hocking had left the Bar and there was not the funding to have Castan in Queensland running the trial every day. "He would come up when I rang him in a panic saying, 'Ron, Ron, there is an application to strike us out.'"

Their instructing solicitor, Greg McIntyre, who had been employed by the Aboriginal Legal Service in Perth, had to return to Perth and was unable to find a replacement solicitor. This, says Keon-Cohen, was "unsurprising, given the immense complexity and volume of material, and the hopeless Legal Aid funding".

It was at this point that Castan, who had often supplemented the case’s funding by paying for items himself when he knew that an application to Legal Aid would take too long, made a more personal contribution to the case. He approached his daughter Melissa Castan, now a senior lecturer at Monash University and deputy director of the Castan Centre for Human Rights Law, and asked her to work on the case.

"We thought that we had a High Court that was interested in resolving this issue and that some of the judges were likely to be on side. But, any more than that, you can never predict."

At that time, Melissa Castan had been holidaying at Surfers Paradise with her boyfriend, now husband, Robert Lehrer, having deferred her law degree. While they were up there, she says that her father rang up and said, "Oh, you have to come and do some legal research with us and help Bryan. Neither of us were qualified as lawyers, so we actually were Bryan’s researchers and paralegal support." The two of them organised for the Murray Island witnesses to attend court by booking their flights, helping them to negotiate the airport and find their way to a hotel, and arranging for them to talk to counsel before presenting their evidence to court.

Melissa Castan adds that, in addition to being a help to Keon-Cohen, there was an ulterior motive to her father’s request. Her parents were keen to have her return to studying law and thought that being involved in Mabo might be a way of luring her back. As with many of Castan’s strategic decisions in the case, it was a plan that worked. "I had thought that law was very boring and so I had stopped studying it. They rightly recognised that if I was doing something that was interesting, it wouldn’t be boring. And so, they kind of, entrapped me back into law, but in a very loving, parental way."

As is now well known, when judgment was handed down in the Queensland Supreme Court on November 1990, only two of the five original plaintiffs in the case, Dave Passi and James Rice, succeeded in their claims. Notably, Eddie Mabo, despite being such a driving force in the case, lost all his claims. The legal team made a tactical decision in response to Mabo’s defeat.

“We advised him not to appeal the judge’s adverse findings but to rely on the other plaintiffs and to proceed straight to the High Court,” says Keon-Cohen. "We advised him that a) his appeal would be risky; b) we didn’t have the money; and c) the case might be held up for years and years and years. But we also advised him that his name would stay on the case as he would remain the first plaintiff."

Before the High Court, Keon-Cohen says that he and Castan appeared for Passi and Rice while Greg McIntyre appeared separately for Eddie Mabo. This, says Keon-Cohen, allowed
them to isolate some of the more difficult issues and focus on the successful plaintiffs before the High Court. “Eddie Mabo was at the High Court representing his family and his community group but made no submissions on his own behalf, other than adopting the submissions of law made by Castan on behalf of the two successful plaintiffs. That was very deliberate and was a good call by Ron. These are the procedural subtleties that he alone, with his experience in the High Court, had control of.”

Before embarking on their final journey to the High Court in May 1991, Keon-Cohen says they were anticipating that the High Court, or at least some members of it, would be receptive to their arguments. “Through the mid-’80s, the Mason Court was a reformist Court. It was interested in stating overarching principles, and, if necessary, abandoning precedent to reflect both justice for the parties and the mores of the Australian community. We thought that we had a High Court that was interested in resolving this issue and that some of the judges were likely to be on side. But, any more than that, you can never predict.”

But, after the first day of submissions to the High Court, the legal team was desolate. “We thought that we had lost; we had been given a hard time. Queensland’s position that we had insufficient facts to trigger the questions of law, and that there was no basis to upset established precedent, seemed to be prevailing.” By the end of the third day, says Keon-Cohen, the legal team was feeling more confident. “The Court had shown interest in reshaping the case in order to raise what to it was a fundamental question: native title being an expression not of individual rights but community rights. We figured that, had they not been interested, they would not have raised that question. And that is what we told Eddie Mabo on the last time we saw him at the end of those four days of submissions, when he drove North and we flew South.”

Twenty years after their historic legal victory, Bryan Keon-Cohen is a practising member of the Victorian Bar. He has been a barrister for the last 31 years, the last 16 of those as a QC, and has acted in many subsequent native title claims. On 26 January this year, he was awarded a Member in the General Division of the Order of Australia (AM) for his service to the law, and to the legal profession, through the advancement of social justice and the protection of human rights, particularly in the areas of environmental and Indigenous law reform. This was an award that Castan also was honoured with in 1993.

On 3 May this year, Keon-Cohen graduated with a PhD from Monash University with his thesis being his book, which was published in August 2011, Mabo in the Courts: from Islander Tradition to Native Title: A Memoir. He and Castan worked on many cases together following Mabo and both served on the committee of the Victorian Council for Civil Liberties. During the 1980s, Castan was its president while Keon-Cohen was secretary.

As is well known, six years after his High Court victory in Mabo, Ron Castan passed away in 1999 at the age of 59. In addition to Mabo, he had been involved in many other seminal legal test cases, such as Koowarta v Bjelke-Petersen and the Franklin Dam case, and had drafted what became the solution to the legislative stand off in the Senate over the Wik settlement.

Keon-Cohen says that working as Castan’s junior on Mabo was an invaluable learning experience. “He had the High Court experience, the intellect, the ability to work with people and listen to their ideas and incorporate those ideas into strategy, pleadings and advice and generally move the case forward. He also had great standing with the High Court.

“From him, I learnt a great deal about the law, the High Court, the strategies about procedural options involved, the art of advocacy and the commitment and determination necessary to hang in when the case has lasted a decade.”

“Castan always packaged his intellectual contributions to the High Court in a conversational style, says Keon-Cohen. “He enjoyed discussing and debating with the High Court judges. He would listen to a question and then always came up with an answer; whether it convinced the judges or not is another matter, but he delighted in advocacy on his feet.”

“He always had a fine sense of what was a proper argument to put. He took the view that, however apparently devoid of authority or difficult an argument might be, if it had a proper basis in principle, and it advanced his client’s interests, it should be put.”

Melissa Castan says that her father saw the role of advocacy before the High Court as engaging at a very high level in a discussion with people who were interested, as opposed to it being an adversarial process. “He did have a very low-key style; he was not a very effervescent, actorly person. He was extremely low-key but also warm and quite collegiate.”

Melissa Castan says that her father conducted other long-running test cases, such as Mabo, as part of his practice at the Bar, but that this particular case would have appealed to his great interest in social justice. “He definitely was very deeply motivated from a young age in social justice issues. He was very focused on the idea that the law could be a source of real change for the plaintiff or the appellant but also for society in general. I think that that was probably why he was driven to have a legal career and also then driven to take on causes that might have otherwise have seemed a bit unlikely or a bit ambitious in terms of legal doctrine because he was very keen to test the boundaries of the law as a vehicle for deep change.”

A second edition of Bryan Keon-Cohen’s Mabo in the Courts: A Memoir is in production and has an expected publication date of April 2013. Orders can be made to Bryan Keon-Cohen at bkcchambers@optusnet.com.au

Louise Martin
Annexure 5.2.1
Castan’s Demurrer Doodles: January 1988

1. Assume facts as alleged with bench of 7.
2. Assume facts as alleged with 6-man bench of the League.
3. Facts generally so alleged, with bench of 7.
5. Assume facts as admitted with bench of 7.
6. Assume only admitted facts, with bench of 6.
7. Facts found against us, bench of 7.
8. Facts found against us, bench of 6.

Transcription

“(1) Assume facts as alleged [in the claim] with [High Court] bench of 7 [deciding the ultimate legal issues without any trial];
(2) Assume facts as alleged with bench of 6;*
(3) Prove facts [at a trial] as alleged with bench of 7 [deciding the ultimate legal issues after a trial];
(4) Prove facts as alleged with bench of 6 (v. unlikely);
(5) Assume only admitted facts [ie, accepted by Queensland in its defence] with bench of 7 (v. unlikely);
(6) Assume only admitted facts with bench of 6 (worry!);
(7) Facts found against us, [at a trial] bench of 7;
(8) Facts found against us, bench of 6 (v. unlikely).”

1 Dated circa January 1988: see Ch. 5.2; MC Vol WF 8/1(a).
2 Inserted material [square brackets] introduced by way of explanation.
3 *ie, because of Murphy J’s problems, causing him to stand down from the Court: see Ch 5.2.
4 See Memo, ARC, 2/2/1986 at MC Vol WF 1 pp 15-16.