IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2020

IN THE MATTER OF	section 3 of the Declaratory Judgments Act 1908
AND IN THE MATTER OF	an application for declarations as to the construction of certain leases entered into by the Crown and pastoral lessees
BETWEEN	THE NEW ZEALAND FISH AND GAME COUNCIL Plaintiff
AND	HER MAJESTY'S ATTORNEY-GENERAL IN RESPECT OF COMMISSIONER OF CROWN LANDS First Defendant
AND	CHRISTOPHER DEAN MOUAT, DONALD ANDREW AUBREY, ANDREW WILLIAM SIMPSON AND JONATHAN ARTHUR WALLIS as Trustees of the High Country Accord Trust Second Defendant

Hearing: 26 March 2009

Counsel: F B Barton and J C McLeod for Plaintiff
M T Parker for First Respondent
N R W Davidson QC, B E Ross and C D Mouat for Second Respondent

Judgment: 12 May 2009

JUDGMENT OF SIMON FRANCE J

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Introduction

[1] The law generally provides that people who occupy property pursuant to a lease enjoy "exclusive possession". That means that they can prevent people from coming on to the property. A landlord will have a right to inspect and repair, but is otherwise equally excluded unless the lease specifically allows greater or different access.

[2] The issue that arises in this case is whether a pastoral lease granted under the Land Act 1948 has that effect. Pastoral leases are the means by which vast tracts of land in the South Island High Country are farmed. The farmers (represented in these proceedings by the High Country Accord Trust), and the Crown as landlord, both

think the farmers have been granted exclusive possession. Fish and Game says otherwise, and seeks a declaration that its view is correct.

Issue

[3] When the proceedings were filed, Fish and Game (which is a body representing hunters and people who fish and which is recognised in the Conservation Act 1987) sought two declarations:

1. A declaration pursuant to section 3 of the Declaratory Judgments Act 1908 that pastoral leases granted under the Land Act 1948 do not confer exclusive possession or exclusive occupation of the land contained in the leases.

2. A declaration pursuant to section 3 of the Declaratory Judgments Act 1908 that pastoral leases granted under the Land Act 1948 allow public access to the land contained in the leases provided such access does not interfere with the exclusive rights of pasturage.

[4] At the oral hearing, in response to the defendants' written submissions, declaration two was abandoned. Fish and Game accepted that success on the first declaration would not have the consequence that the second was true. Even if the farmers' rights to legal possession were limited, that would not mean members of the public thereby had rights of access to the Crown's property.

[5] However, Fish and Game still wished to pursue the first declaration. Its purpose was to establish that the Crown had given the farmers only a right to use the land for pasturage, together with any necessary incidental uses arising from that. If correct in that proposition, then the Crown still retained legal possession and could therefore still also give other people access to the land (so long as such access did not interfere with the right to pasturage). If that was the true legal position, Fish and Game would then be in a position to approach the Crown to allow greater public access over these high country stations.

[6] The battlefield, as seen by the parties, is between exclusive possession (the farmers and the Commissioner of Crown Lands) or only a right to pasturage and no legal possession (Fish and Game).

[7] As noted, one of the hallmarks of a lease is that it conveys to the person taking the property – the lessee or in residential situations the tenant – legal possession of the property. It means that for the period of the lease the property becomes their own from the viewpoint of having sole possession and use. There will of course be limits. Everyone who has rented property knows this. These limits will be imposed by the owner of the property and agreed to by the tenant before taking possession. But, subject to those limits, the tenant or lessee obtains exclusive possession.

[8] Whenever over the years leases have been the subject of court proceedings, the concept of exclusive possession has played a central role. Most land law texts will state that exclusive possession is one of the three essential components of a lease.[1] McHugh J in *Western Australia* v *Ward* (2002) 213 CLR 1 emphasised that exclusive possession was synonymous with legal possession, and brings the right to exclude all others save as is provided for in the lease.[2] A legal right to exclusive possession is what distinguishes a lease from a licence, which by contrast gives rights to be on the land but does not give rights to eject or bring actions in trespass. The legal right of exclusive possession represents an interest in the land, and is protected by what is commonly referred to as the right to quiet enjoyment.

[9] These principles were confirmed as the law of New Zealand in *Fatac Ltd* v *Commissioner of Inland Revenue* [2002] 3 NZLR 648. There the Court of Appeal confirmed exclusive possession to be the fundamental touchstone of a lease (or tenancy). The importance of exclusive possession is highlighted in this passage from the judgment of Fisher J:

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1 An exception, which I have not seen, appears to be Woodfall's *Law of Landlord and Tenant* (20th ed) discussed by Callinan J in *Ward* (at 297).

2 McHugh J (at 223) cites various authors, including both Dr McMorland and Salmond on Jurisprudence, who highlight that "exclusive" adds nothing to the concept of legal possession, which necessarily involves exclusivity.

Rationale for the exclusive possession test

[38] In our view first principles support the right to exclusive possession as the litmus for tenancies. Exclusive possession allows the occupier to use and enjoy the property to the exclusion of strangers. Even the reversioner is excluded except to the extent that a right of inspection and/or repair is expressly reserved by contract or statute. A tenant [or lessee] enjoys those fundamental, if temporary, rights of ownership that stem from exclusive possession for a defined period. Stipulated reservations stem from that premise. The reverse is true for a licensee. Lacking the right to exclusive possession, a licensee can merely enter upon and use the land to the extent that permission has been given. It is this reversal of starting point that provides the rationale for recognising an estate in the land, in the one case, and a mere personal right or permission to enter upon it, in the other: see further *Street* v *Mountford* at p 816.

[39] Because the tenancy/licence distinction turns on those substantive rights granted to the occupier, it remains unaffected by the label which the parties choose to place upon their transaction. It has sometimes been said that the distinction between tenancies and licences turns on the intention of the parties. This can be misleading unless it is appreciated that the only intention that matters is intention as to substantive rights, not intention as to legal classification. As Lord Templeman put it in *Street* v *Mountford* at p 819:

> **"…** the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

Windeyer J made the same point in *Radaich* v *Smith* when he said at p 222:

> "Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land."

[10] So, to restate again the key issue in these proceedings:

> Is a pastoral lease a lease in the ordinary sense of the word? Subject to the limits found in the Land Act 1948, and the lease document itself, does it confer on the farmer as lessee exclusive legal possession of the farm property?

Why might they not be leases?

[11] Pastoral leases call themselves leases. The operative words of the lease use classic words of lease terminology:

the lessor doth demise and lease.[3]

[12] The terms of the lease call the parties "lessor" and "lessee" and impose requirements and rights on both parties. The leases are for thirty-three years (perpetually renewable) and stipulate a rent to be paid.

[13] On its face none of this is particularly encouraging for the plaintiff who seeks to argue a pastoral lease is not a lease – it just likes to call itself one. Powerful assistance is, however, close at hand. In *The Wik Peoples* v *Queensland* (1996) 187 CLR 1 a majority of the High Court of Australia held that pastoral leases issued under the equivalent Queensland legislation – the Land Act 1910 – were not leases, and more particularly they did not confer exclusive possession on the farmer.

[14] The plaintiff's argument very much reflects the majority reasoning in that case, and urges this Court to a similar outcome. The essence of the majority's analysis is that:[4]

a) the pastoral lease is a novel type of lease created for the specific difficulties presented by the vast land areas of Australia;

b) the lease is a creature of statute and not to be burdened by common law concepts;

c) consistent with that, the use of traditional lease terminology is to be noted, but is far from decisive;

d) the leases in issue do not expressly state that the lessee obtains exclusive possession. Instead they specifically limit the rights granted under the lease to a right of pasturage;

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[3] "In the context of leaseholds, a demise means the grant of an estate in the land … Subject to any reservations or exceptions in the instrument [lease] the grant gives legal possession to the grantee sufficient to exclude any person, including the lessor, whose right of entry is not within the reservations or exceptions". (McHugh J in *Western Australia* v *Ward* at p 217.)

[4] There are four majority judgments which to a certain extent take different routes to the same outcome. The points set out here are necessarily a broad overview but reflect the four factors identified by Gummow J at 201.

e) the number and nature of the limits on the lessee's taking of the property mean that exclusive possession is not given. The limits are too extensive to sensibly sit alongside the legal concept of exclusive possession.

[15] The plaintiff's position is that a like analysis applies in New Zealand.

The New Zealand Context

[16] The Crown's ability to rid itself of unwanted land (a process called "alienation") is based in statute. The Land Act 1948 classified unwanted Crown land into one of four different categories. It then set out the method by which each different class of land could be alienated from the Crown.

[17] Although the 1948 Act is the key piece of legislation because it is the Act under which these pastoral leases are created, it was by no means the first legislation of its type. In helpful submissions the second defendant traverses the history of land enactments in New Zealand starting with the Waste Lands Ordinance of 1849 (seemingly also referred to as the Crown Lands Ordinance). There was an amendment Ordinance in 1851, a Waste Lands Act of 1858, and then Land Acts in 1877, 1885, 1892, 1908, 1924 and 1948. The 1948 Act was amended on numerous occasions, and in 1998 there was enacted the Crown Pastoral Land Act.

[18] Throughout this history of this legislation different methods have been adopted by which Crown land could be occupied for pasturage purposes. In 1877, for example, "pastoral lands" were defined to include all Crown lands occupied as "runs". One such run, Run 79, incorporated a present high country station known as Glenmore. Glenmore provides an example of the tenure history of these properties.

[19] Mr James Murray (the current lessee) filed an affidavit for the proceedings. He notes that Glenmore was acquired by the Crown as part of the Kemp purchase in 1848. It was first taken up for pastoral farming in the late 1850's, and in terms of the legislation just mentioned, was initially identified as "Run 79".

[20] When purchased in 1914, it was held under a "Licence to occupy Crown Lands for Pastoral Purposes". That licence ran for twenty-one years, and then was extended by fourteen years, two years and a final two year extension. These licences contained no right of automatic renewal. There was a specific provision allowing general access for deerstalkers. In 1951 the licence was replaced by a Pastoral Lease of Pastoral Land under the Land Act 1948. The lease's number, P01, suggests it may have been the first pastoral lease entered into under that new Act. A new lease was entered into in 1987 to reflect changes in the Land Act concerning rent reviews amongst other things.

[21] Turning then to the 1948 Act under which Glenmore was given its pastoral lease, it was s 51 of the Act that divided all Crown land available for disposal into one of four categories – farm land, urban land, commercial and industrial land, or pastoral land. Section 67 completed the classification process by providing that if the Land Settlement Board considered that some Crown land did not fit properly into one of these four groupings, the Board:

> [M]ay sell that land or grant a lease thereof for any term not exceeding 33 years, with or without a right of renewal, perpetual or otherwise, for the same term.

[22] Leases under s 67 are known as special leases, and some high country stations are still held under them.[5]

[23] As noted, pastoral land is one of the four types of Crown land identified by s 51. Concerning pastoral land, s 62(1) of the Act provided that:

> **62 Tenures on which land may be acquired**
>
> Crown land may be acquired under this Act on any of the following tenures:
> …
>
> (c) Pastoral land may be acquired on pastoral lease or on pastoral occupation licence as the Board determines.[6]

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[5] The Government is currently engaged in a tenure review exercise concerning these high country stations. The relevant website identifies that presently there are three properties held under such special leases.

[6] There appear to be six pastoral land properties currently held under occupation licenses, and the rest under leases.

[24] Section 66 stipulated that such pastoral leases:

a) shall entitle the holder thereof to the exclusive right of pasturage, but give no right to the soil;

b) may be subject to restrictions as to the numbers of stock;

c) should be for 33 year terms, perpetually renewable but with no right to acquire the fee simple.

[25] Pastoral occupation licences were similar to pastoral leases but were for 21 year terms, and had no renewal rights.[7]

[26] Pastoral land was initially defined as being:

> Land suitable or adaptable only for pastoral purposes (s 51(d)).

[27] In 1979 this was amended to read:

> Land suitable or adaptable primarily for pastoral purposes only.

[28] However, in 1998 the Crown Pastoral Land Act repealed s 51(d) altogether, which has the effect of preventing the creation of new pastoral leases. That Act otherwise restates the mandatory statutory terms of the existing leases in a largely unchanged way from as they were stated in the Land Act 1948.

[29] Turning to the leases themselves, clause (h) of the mutual agreements reads into the lease all the provisions of the Land Act 1948 as if fully set out in the lease.

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[7] For completeness it can be noted that s 68 of the Act provided for a further type of occupation, namely grazing licences which were not to exceed five years and which could be terminated earlier. Finally, in relation to other classes such as farm land, in addition to a purchase of the fee simple, there was an alternative form of alienation known as a renewable lease that included an ability to subsequently acquire the fee simple.

[30] The operative part of the lease document, which effects the leasing, uses the traditional common law language of:

> demise and lease … all of the parcels ….

[31] The lessee:

a) is given "the exclusive right of pasturage over the said land, but shall have no right to the soil";

b) has no right to any minerals, and must give access to allow extraction or removal of minerals by the Commissioner;

c) is given a right to a new lease at the end of the term in accordance with s 66(3) of the Land Act 1948, such lease to include all the same provisions and conditions (including the right of renewal, thus having the effect of the lease being perpetually renewable);

d) is given no right to acquire the fee simple.

[32] Further, the lessee covenants:

a) within a year of the lease to take up residence on the land, and reside continuously thereon;

b) to use the land for his own use and benefit;

c) to farm diligently;

d) to cut and trim live hedges, and clear and keep the land clear of all noxious weeds;

e) to keep the land free from wild animals, rabbits and other vermin;

f) to keep all creeks, drains and watercourses clean and free of weeds;

g) to repair and maintain all Crown improvements;

h) to not fell, sell or remove timber other than as needed for agricultural, fencing or building purposes on the land, and to prevent such destruction;

i) to not burn tussock, scrub, fern or grass, or permit such burning to occur;

j) to not overstock, with allowed stock numbers expressly stated.

Australian Decisions

[33] There are three decisions of the High Court of Australia – *The Wik Peoples* v *Queensland* (1996) 187 CLR 1, *Western Australia* v *Ward* (2002) 213 CLR 1, and *Wilson* v *Anderson* (2002) 213 CLR 401 – that address the issue of pastoral leases, and exclusive possession.

[34] It is possible to focus within those decisions on the factors in the specific legislation or lease that lead the majority to conclude that the leases did not confer legal possession (the outcome of *Wik*, and *Ward*) or did (the outcome of *Wilson*). It is impossible to do so, however, without acknowledging that the analysis is affected by the context in which the decisions arose.

[35] In the well-known decision of *Mabo* v *The State of Queensland* (No 2) (1992) 175 CLR 1, the High Court of Australia confirmed that native title could still exist in Australia. Native title is a generic label for all or some of a bundle of rights and interests in land that an indigenous group might have. Crown acquisition of a radical title did not, of itself, extinguish such title, but subsequent conduct such as alienation of the freehold to a third party might.

[36] The issue then arose whether the grant of pastoral leases was an example of subsequent conduct extinguishing native title. The High Court of Australia split 4:3 in *Wik*, the majority holding that the leases in issue in that case did not generally

extinguish title. Parts of a lease might extinguish some aspects of some native title claims, but that was a specific inquiry which required identification of the exact nature of the native title claim (i.e. which part of the bundle of rights and in relation to what part of the land in issue) and the particular lease.

[37] This context of whether a pastoral lease ends native title influenced the starting point, and the focus, of the majority judgments. Clear legislative words are needed to extinguish native title. Since exclusive possession would exclude native title, clear legislative words were therefore needed before it could be said that exclusive possession was being conveyed to the lessee. The exercise was therefore an open construction of the Act, but rather a specific inquiry to discern if a specific consequence was intended.

[38] The judgment of Toohey J, for example, is redolent with this overlay. These brief passages are I consider a fair reflection of the emphasis within his reasoning:

> the basic question [is] whether the grant of a pastoral lease was so inconsistent with the existence of native title rights that those rights must be regarded as having been extinguished; (p 116)
>
> [speaking of previous law authorities]: [it] is a mistake to apply what is said in these passages to the present appeals unless it accords with the relevant statute and has regard to the presence on the land of the indigenous people; (p 117)
>
> [and again when emphasising the commercial context of many previous decisions]: those authorities … are not concerned whether something that is underpinned by common law recognition, namely, native title rights, are excluded by the grant by the Crown of what is described as a pastoral lease over land to which those rights attach; (p 118)
>
> [a]gainst this background, it is unlikely that the intention of the legislature in authorising the grant of pastoral leases was to confer possession on the lessees to the exclusion of Aboriginal people even for their traditional rights of hunting and gathering. (p 120)

[39] In *Wik*, Kirby J noted that the effect of *Mabo* (No 2) might well be significantly undermined if pastoral leases were viewed as per se extinguishing native title. He noted (at 220) that the estimates were that about 42% of Commonwealth land, and between 70% and 80% of state land was subject to such leases.

[40] It is not necessary to dwell on this context other than to make two points. There cannot sensibly be any dispute that it influenced the reasoning of Judges in these cases. The citations already taken from Toohey J show this, since the context altered the starting point of the analysis. Further, a consideration of the dissenting judgments of McHugh J and of Callinan J in *Ward*, where both judges analyse *Wik*, reveals the emphasis that those two judges consider the context had on the majority judgments. Second, however, I do not consider the defendants correct in their submission that this context means the Australian decisions are of little relevance. The statutory factors that influenced the majority in *Wik* and *Ward* to conclude exclusive possession was not given remain arguments that are available to, and made by, the plaintiff. They are not explained away solely by context.

[41] The Court was divided in all three cases, but less so in *Wilson* v *Anderson* which was a 6:1 decision in concluding that the NSW pastoral leases there in issue did confer exclusive possession on the lessee. What these different results emphasise is that whilst context plainly played a role, especially in *Wik*, the particular leases differed widely.

[42] The essential reasoning in *Wilson* v *Anderson* was that the leasehold interest given by the lease was very similar to, if not identical with, a grant of the fee simple (i.e. full ownership). Of interest, aspects of those leases that were identified by the High Court of Australia as significant to its conclusion included:

a) the fact that they were perpetual leases;

b) the obligation on the lessees to make improvements;

c) the obligation on the lessee to occupy the property;

d) that the lessor's objective in creating these types of lease of strengthening the lessee's tenure was to encourage the availability of finance to the lessee and the proper use of the land; and

e) the limits on the lessee assigning the property assignment without the lessor's consent.

As will be seen many of these features arise in the New Zealand leases.

[43] Again to highlight the "lease specific" inquiry that is required, it is important to note that the Western Australian lease, which was held in *Ward* not to confer exclusive possession, reserved to the Minister the power to dispose of any portion of the land under the lease at any time. Further, the Government could build roads over it, and could depasture its own stock. There was also:

> a right for any person to pass over any such land which may be unenclosed, or enclosed but otherwise unimproved, with or without horses, stock or vehicles, on all necessary occasions.

[44] The terms of the lease were therefore quite different from the NSW lease at issue in *Wilson* v *Anderson*. As for the lease at issue in *Wik,* details of the lease itself are sparse, since the focus was on the intention of the particular words used in the Act. One thing that emerges, however, is the different nature of the property and farming enterprise compared to the New Zealand situation. Kirby J notes that in some cases in Queensland the lessees never took occupation of the property. One lease at issue in *Wik* covered 283,000 hectares, which can be contrasted with the 19,000 hectares of Glenmore Station.

[45] In relation to that very large Queensland property, there was no irrigation, and in 1984 the entire stock numbers were estimated to be 1,000. This figure declined by 1988 to 100 feral cattle. When applying for a renewal of the lease (suggesting no automatic renewal), the lessees described the property as having natural waters only, having some spear grass, being purely cattle breeding country capable of sustaining one beast to 60 hectares, being unsuitable for grazing and having no improvements and no accommodation. There is very little parallel to the type of operation being carried out under the New Zealand leases.

[46] Other conditions that emerge include a requirement that the lessee, within five years, erect a manager's residence on the property and effect some improvements. There was apparently no obligation to reside on the property. One of

the two leases in *Wik* was described as being for pastoral purposes only, although its successor lacked that term.

[47] Kirby J also notes (at 229) that the Land Act 1910 (Qld) contained reservations allowing inspection, the search for, and working of, minerals; third parties could be authorised by the lessor to cut and remove timber, stone, gravel and clay without the consent of the pastoral lessee being needed; and there was a general right of pasturage for travelling stock.

Competing submissions

(a) The Plaintiff's Case

[48] The plaintiff's primary arguments are that:

a) pastoral leases are creatures of statute. They are not common law leases but are merely rights to use Crown land for pastoral purposes;

b) exclusive possession is not expressly given, and is not needed in order for a lessee to use the land for pastoral purposes;

c) the only express right is to pasturage, which is the act of feeding animals such as in allowing cattle to graze;

d) given these features, the leases do not convey exclusive possession.

[49] In support of these arguments, it is submitted that whilst some of the terminology used is consistent with common law concepts of a lease, what matters is the substance. The pastoral lease, being a creature of statute, should not be burdened with a common law overlay.

[50] Further, it is submitted that the various reservations that are found in the legislation must negate any suggestion of exclusive possession being granted:

a) the right of the Director-General of Lands to enter and inspect at all reasonable times;

b) the existence of restrictions on stock numbers;

c) the limits on the use of timber on the land;

d) the existence of forfeiture rights, and the capacity of the Crown to resume the land if needed;

e) the various instances where consent is required to act in relation to the land such as burning vegetation;

f) the need for a lessee to obtain a recreation permit before commencing any commercial undertaking on the land.

[51] The plaintiff further contends that exclusive possession is not necessary in order to give effect to the pasturage rights conveyed under pastoral leases. The farmer can still farm even if others have general rights of access. In this regard, the plaintiff relies on the evidence of a Mr Daniel Rae who farmed a High Country block in Central Otago. He is also an office holder in the Otago Fish and Game Council and has been since its inception in 1990.

[52] Mr Rae divides the land found in high country blocks into four categories – valley floor, and then low, mid, and high altitude land. It is his evidence that "as-of-right public access to pastoral lands" would vary in its significance to the farming operation depending on the type of land in issue. As regards high altitude land, in Mr Rae's view there would be little or no impact. Generally, having a right to exclude other people is only necessary for the farmer in critical times such as calving and lambing. Mr Rae accepts greater issues will arise in relation to valley lands where the farming is more intense and in the low altitude lands (300-600 metres) during lambing time.

(b) The Defendants' Case

[53] The defendants' submissions overlap but take a different focus. It is not necessary to separately outline these submissions since they are reflected in the Court's discussion and reasoning.

Discussion

[54] In some ways the *Wik* idea of the pastoral lease being a creature of statute has attractions in that it frees one from a constant attempt to pigeon-hole terms or conditions into a common law equivalent. There is no doubt that the legislation does things, and uses terms, that are not consistent with classic common law theory, or indeed with an absolute concept of exclusive possession. As an example, if pastoral leases are rightly seen as instruments that have the effect of conveying exclusive possession, then I have little doubt that the statutory instrument known as a "pastoral occupation licence" does likewise even though it is called a licence. The only real difference between a pastoral lease and a pastoral licence is the right to renew it.

[55] Ultimately, as was said in *Fatac*, the issue is the substance of the interest conveyed, not the label.

(a) The Legislation

[56] Looking first at the Land Act 1948, in my view the *language* of the statute is a mixed bag. It certainly uses common law terms, such as lease and licence, but it does not always do so in a way consistent with the common law concept underlying the term. Overall the terminology is undoubtedly that of a classic lessor/lessee relationship, but the concepts are not necessarily consistent.

[57] However, even though the language is not determinative, I do consider there are numerous instances of context that point irresistibly towards the idea that it is a true lease which conveys exclusive possession.

[58] A repeated point of difference is what significance is attached to the existence of the many restrictions on the lessee's enjoyment of the land. These restrictions cover use of the land – e.g. for pasture, but no right to the soil; stock numbers; not to cut timber – and also access to the land – rights to inspect, and as regards minerals. The majority in *Wik* saw such limits as inconsistent with exclusive possession. The minority took the view that there would be no need to specifically provide for such restrictions unless there otherwise existed in the lessee a right of exclusive possession.

[59] The judgments in the High Court of Australia illustrate that eminent jurists can reasonably disagree on this. I make no attempt to add to the debate, but note that, with respect, I prefer the minority reasoning. It is best captured, for me anyway, by McHugh J's judgment in *Ward*. A lengthy citation will suffice, with the need for only further comment:

> The same comment can be made in respect of reservations that allowed third parties to enter the demised premises for various purposes. Anyone at that time who thought that such reservations were inconsistent with the legal right to exclusive possession simply did not understand the law relating to leases. No doubt then, and certainly now, few leases drawn by conveyancers did not contain one or more reservations and exceptions. But as *Glenwood Lumber Co* v *Phillips* (660), *Dalton* v *Eaton* (661), *Whangarei Harbour Board* v *Nelson* (662), *Goldsworthy Mining Ltd* v *Federal Commissioner of Taxation* (663) and numerous other cases show, the reservation of a right of entry to the grantor or others is not only consistent with, but indicative of, the grantee having the legal right to exclusive possession. To reject that proposition would be to deny the efficacy of the work of generations of conveyancers who have never doubted that they were creating leases although the instrument of grant contained extensive reservations and exceptions in favour of others. Exceptions and reservations are not inconsistent with the right of the grantee to exclude any person who does not come within an exception or reservation. They are not inconsistent with the right of the grantee to bring ejectment or sue for damages for trespass to land. Exceptions and reservations do not put the grantee in the position licensee who by definition, cannot bring an action for ejectment or trespass to land but must depend on his or her contractual rights.
>
> Nor did the fact that the lease was for pastoral purposes only indicate that the lessee did not have the legal right to exclusive possession. Indeed, the objection that no right of exclusive possession could have been intended because the lease was for pastoral purposes is the one that I find most difficult to understand. Until the seventeenth century, leases were usually for a life or lives. The concept of a lease for a term of years was introduced into the law mainly because of the need for leases for agricultural purposes for a term of years, which was usually twenty-one years (664). A very large number of leases now demise, and for 300 years have demised, land and

> premises for particular uses. Common examples are leases for agricultural, agistment or mining purposes and leases of land or premises for use as an hotel, hospital, crematorium, industrial site or shop. The modern shopping-centre lease almost invariably confines the use of the individual shops to the sale of particular classes of merchandise or the provision of particular services. Building leases for ninety-nine years – where land is leased for the purpose of subdivision and the building and renting of houses on the subdivided lots – have long been common in England and are not unknown in Australia (665). As Callinan J points out in his judgment, there is nothing about the grant of a lease for pastoral purposes that is inconsistent with the lessee having the legal right to exclusive possession of all the holding.

[60] The one further comment I make is to note that included in the cited authorities is a New Zealand decision – *Whangarei Harbour Board* v *Nelson* [1930] NZLR 554. In that case the Harbour Board had leased land subject to an obligation on the lessee to allow picnic parties and excursionists to land on the beach and to remain there for the purposes of picnic or excursion. In an oral decision Ostler J held this obligation did not undermine the document's status as a lease. Its evidence was seen as being consistent with what otherwise must be exclusive possession in the lessee.

[61] An aspect relied on by the plaintiff as indicating non exclusive possession was that a pastoral lessee is required to seek a recreation permit before being able to use the land "for any commercial undertaking involving the use of the land for any recreational, tourist, accommodation, safari or other purpose" (s 66A). However, I agree with the defendants that it is more significant that a recreation permit can be granted by the Crown to a third party only with the lessee's consent. The need to obtain the lessee's consent is, in my view, a very clear indication of the nature of the lessee's possession. Conversely, the fact that the lessee has to apply if it is the lessee who wants a permit is wholly consistent with the very rationale for these leases. They were designed to ensure that the Crown maintained control over the land so as to be able to preserve it from an environment viewpoint. Any proposed use other than pasturage would clearly need Crown consent.

[62] Turning to other contextual clues, as noted earlier, s 67 provides for special leases in relation to land that did not fit neatly within any of the four classes of Crown land established by s 51. In relation to these special leases, s 67A of the Act provided that such a lease:

> may provide that specified people or kinds of people have the right to enter and remain on the land held under it or any specified part of it without the consent of the lessee, either unconditionally or subject to the observance of any conditions specified in the lease.

[63] This authority for the Crown to allow third party access without the lessee's consent exists only for special leases. Its absence elsewhere suggests that in relation to a pastoral lease the Crown as lessor does not have that power.[8]

[64] Another statutory clue is s 68A which relates to grazing permits and which specifically provides that such a permit does not confer "the exclusive right to occupy the land". One can always argue that such provisions do not necessarily tell you anything about the nature of different interests created by the Act. However, it is an example of legislation making the issue clear where that was thought necessary, albeit the concept is occupation rather than legal possession.

[65] Mr Parker also refers to s 110 of the Act (now reflected in s 22 of the Crown Pastoral Land Act 1998) which allows travelling stock to be depastured for a period of twenty-four hours on any unfenced or uncultivated pastoral lands "(whether let on licence or not)". The section does not seem to apply to land subject to pastoral leases, which arguably reflects the nature of the lessee's interest. In terms of travelling stock, this provision is much more limited in scope than the equivalent provision in the Western Australia lease considered in *Ward*.

[66] Both defendants emphasise the complete absence of any control regime in the Act for dealing with public access if indeed, as the plaintiff submits, exclusive possession and control has not passed. There is some merit in the point, but on the other hand, for the same reason that the plaintiff abandoned the second declaration, such a mediation scheme was arguably unnecessary. As the defendants have shown, a lack of exclusive possession in the lessee does not translate into access rights for the public.

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[8] The supplementary agreed bundle of documents contains the special lease known as the "Branches Special lease". It was a 1988 lease. Clause (i) provided that the lessee "shall allow the public free and unrestricted foot access over the said land".

(b) Lease Document

[67] The bulk of terms in the lease reflect the provisions of the Act. It may be helpful, if repetitive in places, to identify the aspects of the lease that flow directly from the Land Act 1948.

[68] First, as to the alienation itself:

a) the Act establishes the option of alienation by a pastoral lease;

b) the lease shall be for thirty-three years, perpetually renewable;

c) it shall give an exclusive right of pasturage but no right to the soil;

d) it shall be for rent fixed according to a stated formula, and commence on a date fixed in accordance with the prescribed formula;

e) it gives no claim of any sort to minerals on or under the surface of the soil;

f) the form is to be determined by the Board which can include any conditions or covenants it considers necessary as long as not inconsistent with the Act;

g) it need not be registered under the Land Transfer Act, but the DLR must keep a copy.

[69] Second, as to the lessors' rights:

a) the lessor may require the lessee to purchase existing improvements;

b) the lessor may require the lessee to undertake improvements;

c) the lessor may enter to inspect.

[70] Third, as to the lessees' rights:

a) A lessee's "interest in the land" can be assigned with consent;

b) the lessee can elect to purchase any Crown improvements;

c) the lessee can mortgage the interest, but conditions to be implied into any such mortgages are set out; the lessee can also "surrender" the lease.

[71] Fourth, as to the lessees' obligations and limits:

a) must move onto within a year and reside continuously thereafter unless exempted from doing so;

b) must farm diligently, not commit waste, keep the land free from rabbits, wild animals, other vermin, and weeds;

c) cannot take timber without consent unless for agricultural, pastoral, household, road making or building purposes;

d) must maintain improvements, fences, insure etc;

e) must pay all rates, taxes, and assessments;

f) must not burn any tussock, scrub, fern or grass;

g) may with consent cultivate for winter feed; may crop or plough and sow paddocks in grass, and may clear paddocks for purposes of grass;

h) the maximum stock numbers which are allowed to be prescribed.

[72] The Crown is authorised:

a) to lend money to facilitate improvements;

b) to give a rent holiday at the outset to assist with improvements in productivity and profitability;

c) have access for purposes of removing minerals, subject to not being able to do so in relation to land under crop, or land situated near "yard, garden, orchard, vineyard, nursery or plantation";

d) to allow a lessee access to minerals for agricultural, pastoral or braising purposes;

e) to forfeit on occurrence of stated events.

[73] Against that background it can be said that the lease document itself adds little to these provisions. In terms of clauses additional to the Act's requirements, in the lease being used for this case as representative of such leases, there is a specific condition that the lessee not overstock, and a condition that reserves to the Crown the right to use existing water races.

Decision

[74] In my view the whole scheme is consistent with a lease of the land that confers on the farmer exclusive possession. The obligations the lessee undertakes would make it surprising if he or she were obtaining only a licence to occupy. There is no suggestion anywhere that the Crown is retaining for itself legal possession, or the right to authorise, without the agreement of the lessee, access by other groups or by the public generally. Such a suggestion is inconsistent with the whole tenor of the Act, and makes a section such as 67A inexplicable.

[75] The Minister of Lands at the time of the Land Act 1948 was passed, the Hon C F Skinner, observed (Hansard, Vol 284 NZPD p 3999) that the purpose of establishing pastoral leases was that "it may be necessary for some control to be exercised over the type of land contained in these leases for soil conservation purposes, to prevent erosion, and regenerate some of the hill country contained in the leases".

[76] There is nothing in this that suggests the nature of the lessee's interest was to be other than that normally acquired by a lessee. The whole reason for such leases is to control the *use* of the land, and s 51 of the Act which recognises that farmland and pastoral land are different makes this clear. The limits have nothing to do with the nature of the lessee's interest, and everything to do with the permitted use of the land. As McHugh J points out, such a restriction on use hardly compares with the restrictions found in shopping mall leases, but it has never been suggested those are not true leases.

[77] Following the passing of the Land Act 1948, the Minister sent a form letter to all current occupiers. I do not suggest the letter can be a source of interpretation, but it is of historical interest to record its existence. The Minister wrote:

> Office of the Minister of Lands
> Wellington, 15 March, 1949
>
> You are no doubt aware that Parliament last session passed the Land Act, 1948, consolidating the many laws affecting lands of the Crown ; the Act comes into force on 1st April next. The newspapers throughout the country commented extensively on the Bill when it was before the House, and, of course, the debates on the measure were broadcast. It is possible, therefore, that you have a good knowledge of its contents and purposes, but I think it desirable that, as a Crown tenant, you should be given a general explanation of some of the more important provisions which are likely to interest you.
>
> …
>
> I referred previously to pastoral land being held on pastoral lease or pastoral occupation licence. Neither of these tenures gives the lessee the right to acquire the freehold, for the reason that there are special circumstances relating to pastoral lands (soil erosion, control of rabbits, prevention of overstocking, prevention of indiscriminate burning, and so on) which can best be provided for if the land is held under lease or licence rather than on freehold tenure. However, to give as many holders of pastoral land as possible absolute security of tenure, provision is made for pastoral

> lands to be let on lease for thirty-three years, perpetually renewable as of right. This will be a considerable advance on the present pastoral run licence, under which on expiry the Governor-General determines whether or not the land is to be again let on licence and, if it is to be let again, whether the run should be subdivided. Where the land is not suitable for a pastoral lease, it will be let on pastoral occupation licence for any term up to twenty-one years.
>
> You will see, therefore, that the tenancy of pastoral lands is definitely improved by abolishing the possibility of subdivision on expiry, and by making provision for a pastoral lease perpetually renewable as of right where the land is suitable for such a tenancy.
>
> …

[78] The focus on security of tenure, and the decision to give perpetual rights of renewal, reflects similar features to those that caused the High Court of Australia, in *Wilson*, to see the NSW leases as conveying exclusive possession, and as distinguishing the leases from the other cases. It will be recalled a desire underlying the NSW changes was to make the leases more attractive as security for financing.

[79] The plaintiff, and the second defendant, both filed evidence concerning the feasibility of farming these high country stations without concurrently enjoying exclusive possession. Most people no doubt appreciate that this issue is presently one of considerable public debate, and I am loathe to comment in circumstances where there is relatively limited written evidence, and no testing of that evidence. I do observe, however, that it would in my view be surprising if lessees were expected to meet the requirements of their lease without being given by the lessor the capacity to control access to the property.

Limit of judgment

[80] In this judgment I have not considered the relationship of these leases to native or customary title. Whether such claim could be or would ever be made, and what form it might take, cannot be known. Whether such a claim, if ever brought, might require a different analysis could only be ascertained at that time. Accordingly, I expressly record that I am not purporting to comment on what effect, if any, these leases had on any native title claims that might have existed.

Conclusion

[81] Apart from the Australian cases, there are no previous decisions directly on point. Such authorities as were cited were generally relied upon for observations made by the Court about the leases but in a different context. For example, in *Attorney-General* v *Feary* (HC, Christchurch CP 89/97, 12 November 1993) the issue was whether a lessee was required to obtain the Crown's consent to establish a track across parts of the leased land. The issue was whether such conduct would breach the provision that the lessee obtained no rights to the soil. In the course of resolving that, Chisholm J noted "the restricted characteristics of a pastoral lease", and the "confined scope of the pastoral lease". The plaintiff relies on these to support its argument, but they are passages that cannot be given any wider meaning than their own context.

[82] In my view the proposition that these leases do not convey legal possession of the land, albeit a legal possession that is subject to considerable restrictions, is not really arguable. It is not just a case of the language used (which is redolent with the terminology of leasing), but the whole substance of the leases established by the Act. The very purpose of these leases is to alienate the land from the Crown, but in circumstances that limit the type of activity that may be carried out on the land. An aim of the leasing exercise is clearly to see the land utilised and improved.

[83] The instruments create an interest in the land that can be assigned, mortgaged, surrendered, or forfeited. The lessee farmer is not just a person authorised to graze but is required to farm the property, to improve it, and to keep it pest free. The lessee farmer, subject to very little exception, is entitled to renewals of this lease <u>forever</u>, on the same conditions and terms. It is unrealistic to suggest that anything other than legal or exclusive possession is thereby given to the lessee. There are strong similarities to the leases in *Wilson* v *Anderson* which the High Court of Australia considered conferred exclusive possession. I am confident the same outcome is required here and for the reasons given by McHugh J, I do not see that the various limits on the lessee's right to enjoy the land alter the essential nature of the relationship, which is lessor/lessee.

[84] I decline the declaration sought on the basis that the opposite proposition is correct. A lessee under a pastoral lease issued pursuant to the Land Act 1948 does acquire exclusive possession. If the parties cannot agree, costs memoranda may be filed.

Simon France J

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