Western Division Leases in NSW – High Court appeal

Wilson v Anderson [2002] HCA 29

Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 August 2002

Issue
The central issue for resolution by the High Court was, assuming that native title rights and interests existed, whether they had been extinguished by the grant in 1955 of a lease in perpetuity pursuant to s. 23 of the *Western Lands Act 1901* (NSW).

Background
Douglas Wilson, who holds a perpetual lease under the Western Land Act 1901 (NSW), had previously sought an answer to the question of whether native title had been extinguished by the grant of the pastoral lease both in the Supreme Court of New South Wales and, later, before the Full Court of the Federal Court.

Mr Wilson argued that the existence of his lease provided 'a complete answer' to the native title claim made over it by Michael Anderson on behalf of the Nyoongah Ghurradong Murri (Granny Ethel) Euaylay-i People. He submitted that native title could not exist over the land in question because any accessorial native title rights and interests in relation to the land were extinguished by the Western Lands statutory regime in NSW and/or the grant of his lease.

In April 2000, the Federal Court found that it could not be said that native title rights were extinguished by the grant of the lease in question on the information before it. To determine that, it would be necessary to show that the rights granted under the lease were inconsistent with all native title rights that may be held in relation to the land. Having no evidence of the native title rights before it, the court could not decide the matter. Mr Wilson applied for special leave from the High Court to appeal against the decision of the Federal Court. This application was heard by all the members of the High Court on the basis that it was necessary to hear all the arguments in relation to the matter before the special leave application could be determined.

Decision
The outcome of the application was a decision by the majority of the High Court (6:1) that:

- special leave to appeal be granted and that the appeal be deemed to have been instituted and heard;
- the lease in question conferred upon the lessee a right of exclusive possession over the land covered by the lease;

- therefore, the lease was a previous exclusive possession act (PEPA), as the term is used in s. 23B of the NTA, and native title had been extinguished in relation to the leased area.

Gleeson CJ

According to Chief Justice Gleeson, the approach to be taken by the court required consideration of the confirmation of extinguishment provisions of the NTA and the mirror provisions of the *Native Title (New South Wales) Act 1994* (NT (NSW) Act). If the lease granted exclusive possession, then the grant of the lease was a previous exclusive possession act as set out in s. 23B(2)(c)(viii) of the NTA and native title had been extinguished by the combined operation of the NTA and s. 20 of the NT (NSW) Act.

Gleeson CJ states that:

> [W]hen regard is had to the genesis of the interest in land referred to in the Western Lands Act as a lease in perpetuity, its affinity with freehold title, the inference that it was the intention of the legislation that the Minister should be empowered to grant leases which conferred upon lessees a right of exclusive possession is compelling—at [21].

His Honour also doubted that a different result would arise in relation to a term lease (a non-perpetual lease) granted under the same section or whether the land was set apart for grazing, agriculture, or mixed farming—at [20].

Gaudron, Gummow and Hayne JJ

In analysing the NTA provisions, the joint judgment of Justices Gaudron, Gummow and Hayne gives a useful analysis of the relevant provisions of the NTA— see [52] to [56].

To be a PEPA, the lease could either be:

- an exclusive pastoral lease — see ss. 242 (lease), 248 (pastoral lease), 248A (exclusive pastoral lease) and 23B(2)(c)(iv); or
- a lease (other than a mining lease) that conferred a right of exclusive possession over the land or waters concerned(s. 23B(2)(c)(viii)).

As their Honours noted, an exclusive pastoral lease is, among other things, a pastoral lease that confers a right of exclusive possession over the land or waters concerned and so the test is the same i.e. does the lease confer a right of exclusive possession over the land or waters concerned—at [60].

The joint judgment surveys the history of this type of lease and the steps taken to strengthen them so that they become more attractive to lenders as security for loans. Their Honours then review the classificatory controversy concerning the nature of an estate in fee simple and leases in perpetuity. The question of whether such a lease is the grant of a freehold estate is not pursued and the inquiry is then focussed upon the legislative genesis of the term 'lease in perpetuity'. From a review of the literature and Parliamentary speeches, their Honours draw the implication that a perpetual lease was intended to 'contain all the advantages and essences of a freehold' grant

without the Crown relinquishing its capacity to put conditions upon the grant such as requirements for development and personal residence and the like—see at [93], [102], [107] and [116].

Their Honours conclude that the conditions and restrictions upon the perpetual lease did not detract from the conclusion that the grant was, in substance, freehold (this is not to say that the lease was a 'freehold estate' — that point was unnecessary to determine). Thus the grant of a perpetual lease gave rise to a right to exclusive possession and, therefore, the grant of the lease was a previous exclusive possession act and native title had been extinguished—at [109] to [119].

Callinan J (McHugh J agreeing)
Justice Callinan distinguished the decision in *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40 (*Wik*).on the basis that the pursuit of pastoral purposes, 'properly understood, is incompatible with the pursuit of any other activity involving unrestricted access to or physical presence upon the land'. His Honour went on to say that much weight should be given to the use of the word 'lease' and that even very extensive reservations are compatible with ordinary leasehold and, for that matter, freehold. Thus, his Honour was of the view that the lease gave rise to a right to exclusive possession and is therefore a PEPA—at [194], [203] and [205].

Kirby J (in dissent)
Justice Kirby, having recognised the complexities of interpreting the NTA, stated that the meaning of the term 'exclusive possession' should be consonant with the majority decision in *Wik*. The NTA, he says, proceeds on the basis that 'leases' may, or may not, grant exclusive possession and thus the reference to the grant being a lease is insufficient to determine the issue. Of importance to his Honour were the facts that the lease was not a scheduled interest (see s. 249C) and that the legislation did not, in words, afford a right of exclusive possession. The consent requirements for the transfer of the land, the regulation of the use of the land, the exceptions and reservations that applied and the power reserved to resume parcels of the land were, in Kirby J's view, evidence that its likeness to the statutory regime in the *Wik* case was 'overpowering'. Thus, he was of the view that the lease did not confer a right to exclusive possession and was not a PEPA—at [126], [127], [153] and [163].

Ramifications of the decision
Native title is wholly extinguished over much of the Western Land Division of NSW. Native title applications would need to exclude these areas for registration test purposes. This decision may also have implications for perpetual pastoral leases in other areas of Australia.