SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Nixon* [2002] QSC 108
PARTIES:	**STATE OF QUEENSLAND** (Plaintiff) v **EILEEN RUTH NIXON** (First defendant) **DALLAS OSWALD NIXON** (Second defendant) **JOHN NIXON** (Third defendant) **ROGER SPENCER** (Fourth defendant)
FILE NO/S:	167 of 2001
DIVISION:	Trial
PROCEEDING:	Application for Summary Judgment
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	24 April 2002
DELIVERED AT:	Cairns
HEARING DATE:	15 April 2002
JUDGE:	**Muir J**
ORDER:	**Application dismissed.**
CATCHWORDS:	PRACTICE – SUMMARY JUDGMENT – where application for summary judgment under r 292 UCPR – where expiry of pastoral lease and occupation licence – where renewal not granted – where land not vacated – whether real prospect of defence – whether need for trial of claim. RESUMPTION & ACQUISITION OF LAND – COMPENSATION – PROCEDURAL FAIRNESS – where natural heritage and Native title were considerations – whether matters were brought to attention of defendants – whether defendants aware of substance of case. JUDICIAL REVIEW – DECISION – NATURAL JUSTICE, ON GROUND OF BREACH OF – whether matters were brought to attention of defendants – whether defendants were aware of substance of case – construction and meaning of "legitimate expectation".

Land Act 1962 ss 163, 164, 166, 147
Land Act 1994 ss 481(1), 473
Racial Discrimination Act 1975 s 12(e)

Annetts v McCann (1990) 170 CLR 596
Ansell v Wells (1982) 63 FLR 127
Banks v Transport Regulation Board (Vict.) (1968) 119 CLR 222
Bread Manufacturers of NSW v Evans (1981) 38 ALR 93
Busby v Human Resources Department, Australian Telecommunications Commission (1988) 20 FCR 463
Chamberlain v Banks (1985) 7 FCR 598
Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155
Cudgen Rutile (No.2) Pty Ltd v Chalk (1974) 4 ALR 438
Dai Xing Yao v Minister for Immigration & Ethnic Affairs (1997) 144 ALR 147
Dixon v Commonwealth (1981) 61 ALR 173
FAI Insurance Ltd v Winneke (1981-1982) 151 CLR 342
Fraser v State Services Commission [1984] 1 NZLR 116
Kioa v West (1985) 159 CLR 550
Metropolitan Transit Authority v Waverley Transit (1991) VR 176
Minister for Aboriginal Affairs v Douglas (1996) 66 FCR 40
State of Queensland v Litz (1993) 1 QdR 343

COUNSEL: Hanson QC for the plaintiff/applicant
Griffin QC and D. Morzone for the defendants/respondents

SOLICITORS: Crown Solicitor for plaintiff/applicant
Paul Williams & Associates for defendants/respondents

[1] This is an application by the plaintiff for summary judgment under r. 292 of the Uniform Civil Procedure Rules. In its claim filed on 16 November 2001 it sought -

1. declarations that the first, second and third defendants have no entitlement to occupy, live on or retain possession of land described as Lot 5117 on Crown Plan 857658 containing an area of about 49,800 hectares and land described as Lot 73 on Crown Plan AL343 containing an area of about 67.562 hectares;

2. an order that the relevant defendants deliver up possession of such land and other incidental relief.

Introductory narrative

[2] The land first described was the subject of a pastoral lease granted to the first defendant on or about 12 September 1968 for a term of 30 years commencing on 1 July 1968.

[3] The term of the lease was extended on or about 11 March 1998 by 12 months and, on or about 29 July 1999, there was a further extension to 30 September 1999.

[4] The other parcel of land was the subject of occupation licence 73 granted to the first and second defendants on or about 3 July 1961 for a term expiring on 31 December 1962. It was a term of the licence that it was determinable at any time on 3 months notice in writing.

[5] Both tenures were granted and held pursuant to the provisions of the Land Acts in force from time to time.

[6] Notice in writing cancelling the Occupation licence was given on 17 August 2000 pursuant to the terms of the licence and s 481(1) of the *Land Act* 1994. The notice expired three months after it was given.

[7] The lease was granted to and was held throughout its term by the first defendant. The occupation licence was granted to the first and second defendants and was held by them throughout its term. The third defendant is the son of the first and second defendants.

[8] Prior and subsequent to the three months extension of the term of the lease the plaintiff expressed an interest in acquiring the lease and licence and negotiations took place in that regard between representatives of the Department of Natural Resources and representatives of the defendants.

[9] In that regard, the plaintiff offered to acquire the defendants' interests in the two properties for $450,000. That exceeded the amount of a valuation of the properties obtained by the Department. The offer was not accepted and the lease expired. Prior to its expiration the first defendant made application to renew the lease.

[10] In November 1999 the first defendant made application in the Supreme Court for a judicial review of the Minister's decision not to renew the lease. Those proceedings were dismissed by consent on 23 November 2000.

[11] Notwithstanding the expiration of the lease and the termination of the occupation licence, negotiations continued between the Minister and his representatives on the one hand and the representatives of the defendants on the other. I mention that, for reasons of convenience, I do not propose to differentiate between the respective interests and rights of each of the defendants in the following discussions.

[12] Finally, on 13 September 2002 a departmental officer wrote to the first defendant stating, inter alia, that –

(a) The land had reverted to unallocated State land;
(b) The plaintiff would pay the defendants the value of lawful improvements and these had been assessed at $80,000;
(c) The first defendant was requested to vacate the land.

Notice in writing dated 21 September 2001 was given by the plaintiff to the third defendant requiring him to vacate the land.

[13] The then Minister for Natural Resources and Mines in a letter to the defendants' solicitors dated 1st October 2001 re-affirmed that the lease or licence had expired,

that the defendants had been requested to vacate the land and that there were no current negotiations between the parties.

Grounds relied on by the defendants to resist the summary judgment application

[14] The defendants resist the application and counter-claim for declaratory relief on these grounds:-

(a) (i) The plaintiff in refusing to extend the term of the lease and in purportedly cancelling the occupation licence intended to confer occupation rights on the Wuthati Aboriginal people under the guise of environmental or nature conservation.

(ii)The plaintiff thus purported to cancel the occupation licence for reasons of race and in breach of s 12(e) of the *Racial Discrimination Act* 1975.

(b) Alternatively, if the occupation licence was lawfully determined and if the term of the lease expired it was an implied term of each that the defendants have a reasonable time within which to de-stock the land.

(c) (i)The first and second defendants had a legitimate expectation that the pastoral lease and occupation licence would be renewed for a period equivalent to the original term (or that a similar interest would be granted) or, alternatively, they had a legitimate expectation that the Minister would not do such acts without affording them natural justice.

(ii)The Minister decided not to renew the lease and to terminate the occupation licence before 19 July 1999 for the reasons referred to in paragraph (a) hereof.

(iii)The Minister did not advise the first and second defendants, sufficiently or at all, of the matters relied on by him in forming opinions concerning his intention to transfer occupation rights to the Wuthathi people and had prejudged the issues of renewal, extension or non-cancellation.

(iv)By virtue of the foregoing the first and second defendants were not afforded a reasonable opportunity to put a case to the Minister and were denied natural justice.

(d) (i)Alternatively the decision not to grant the first or second defendants fresh interests was made in November 2000 following an agreement in principle that the plaintiff would grant a long term lease to the first and second defendants over a substantial part of the land after the excision from the land of areas for conservation and tourist purposes.

(ii)No hearing was offered to the first and second defendants in relation to this decision and they were thus denied natural justice;

(iii)They had a legitimate expectation that they would be granted a long term lease based on their long term interests in the land and the course of negotiations.

The defendants' entitlement to natural justice

[15] The principal of "legitimate expectation" alleged by the defendants is that of renewal, grant or continuation of interests in land granted and held under the *Land Act*. It is the existence of that legitimate expectation which is said to give rise to an obligation on the part of the Minister to afford natural justice.

[16] In *Cudgen Rutile (No.2) Pty Ltd v Chalk* (1974) 4 ALR 438 Lord Wilberforce, who delivered the judgment of the Board, noted that it was fully established that, in Queensland, as in other Australian States the Crown cannot contract for the disposal of any interests in Crown lands unless under and in accordance with a power to that effect conferred by Statute.

He then said -

> "It follows as a logical consequence that when a statute regulating the disposal of Crown lands, or of an interest in them, prescribes a mode of exercise of the statutory power, that mode must be followed and observed, and if it contemplates the making of decisions, or the use of discretions, at particular stages of the statutory process, those decisions must be made, and discretions used, at the stages laid down. From this, in turn, it must follow that the freedom of the Minister or Officer of the Crown responsible for implementing the statute to make his decisions, or use his discretions, cannot validly be fettered by anticipatory action; and if the Minister or Officer purports to do this, by contractually fettering himself in advance, his action in doing so exceeds his statutory powers."

[17] In *Cudgen,* the appellant asserted the existence of an agreement with the State of Queensland, arising out of the holding by it of an authority to prospect, the performance of its terms and the recommendation by a mining warden that a mining lease be granted to it. The contention was rejected on the basis that the responsible minister could not fetter, in advance, the exercise of his discretion under the *Mining Act* 1898 in respect of the grant of lease.

[18] The same principles are relevant here. There is difficulty in reconciling an unfettered discretion on the part of the Minister, in relation to renewal of leases and the termination of occupation licences, with a legitimate expectation of the nature asserted by the defendants. In the language of Lord Wilberforce, the creation of such an expectation, arguably, may give rise to "an anticipatory fetter on the future exercise of discretion and public action."

[19] The most desirable use of Crown land in the public interest will change over time having regard to a range of economic and other considerations. Governmental policies in relation to the use and disposition of Crown land will also change. The *Land Act* 1994 and its predecessors accommodated the need for the Crown to be able to make decisions in relation to Crown land in the light of prevailing conditions and policies by making matters such as the renewal of leases and the termination of occupation licences the subject of ministerial discretions.

[20] The defendants, however, gain support for their contentions from the decision of the Court of Appeal in *State of Queensland v Litz* (1993) 1 QdR 343. In *Litz,* the

plaintiff sought summary judgment for possession of land the subject of an expired special lease. The defendant former lessee alleged that he was entitled to an opportunity to be heard by the Minister, but that this had been denied and that he remained in lawful occupation of the land.

[21] McPherson SPJ, with whose reasons Macrossan CJ agreed, concluded, in reliance on *Annetts v McCann*[1]; *FAI Insurance Ltd v Winneke*[2] and *Metropolitan Transit Authority v Waverley Transit Pty Ltd*[3] that the defendant was entitled to natural justice in respect of his application for grant of a new lease, observing at 349:-

> "… it is for present purposes enough to say that the defendant has plausible grounds for arguing that he had a legitimate expectation that he would be able to continue his business after the lease had expired. That being so, the question cannot be fairly disposed of without a trial."

In brief separate reasons Macrossan C.J. suggested the possibility of a slightly different "legitimate expectation" –

> "A case has been made out for the claim that the defendant may have had a legitimate expectation that the application for renewal of his lease would be granted some special consideration."

[22] Mr. Griffin QC, who led Mr. Morzone for the defendants, pointed out that the position of the defendants here was stronger than that of the defendant in *Litz* as there was no provision in the *Land Act* 1962 for the renewal of special leases. There is however, provision for the renewal of pastoral leases.

[23] The defendants point, in particular, to sections 163, 164, 166 and 167 of the *Land Act* 1962, as amended and s 473 of the *Land Act* 1994. The former sections were in force at the time the lease was granted. In broad terms, they provided that on expiration of the term of a pastoral lease the Land Administration Commission was required to carry out an investigation into matters such as the area of the lease which constituted a living area, the public interest, the interests of the lessee and how best the land may be brought into maximum production. The Commission was required to report on such matters to the Minister. If the Minister, after regard to such matters, decided that the whole or part of the land comprised in the expired lease should be made available for leasing, the former lessee was entitled as of right to a new lease.

[24] S 116 relevantly provided:-

> "The lease of every…pastoral lease.. shall be deemed to contain a covenant entitling the late lessee at the expiration of such lease to the right to receive an offer of a new lease as confirmed by this Division."

S 473 of the *Land Act* 1994 provides:-

> "An existing covenant in a pastoral lease, under the repealed Act, Part 6 Division 2, for a new lease at the expiry of the existing lease is

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1 (1990) 170 CLR 596
2 (1982) 151 CLR 342
3 (1992) 1 V.R. 181

> taken to be a covenant to offer a new term lease for pastoral purposes, of a maximum of a living area, on the conditions that could be imposed on a term lease under this Act."

[25] Sections 163, 164, 166 and 167 are contained in Part 6, Division 2, of the 1962 Act. There is, perhaps, some ambiguity about the meaning of s 473 but it is arguable that it requires an investigation by the Chief Executive Officer of the Department responsible for the administration of the *Land Act* of the matters referred to in s163, consideration of those matters by the Minister and if in consequence thereof, the Minister decides that a term lease should be offered to any person, the "late lessee" is entitled to receive the offer of a new lease.

[26] It was submitted on behalf of the defendants that the evidence suggested non-compliance with these statutory obligations. Indeed, one of the pleaded allegations is that there was an obligation on the plaintiff to offer a new lease pursuant to the requirements of s 473. Whether such an obligation arose, one would think, is dependent on formation of an opinion by the Minister, properly advised in respect of the statutory criteria, as to whether land contained in the lease area should be made available for lease. For reasons which will become apparent later it is unnecessary for me to resolve this issue. Nor have I found it necessary to decide whether there is a triable issue in respect of the allegations based on the *Racial Discrimination Act* 1975.

[27] The statutory scheme, whilst not supporting the existence of a "legitimate expectation" for the grant of a new lease or its renewal does lend further support for the existence of a legitimate expectation of the nature discussed in *State of Queensland v Litz*. It is thus plainly arguable that there is an obligation on the part of the Minister to afford natural justice in the circumstances under consideration. Other authorities support this conclusion.[4]

The argument that the defendants were denied natural justice

[28] Mr. Hanson QC submitted that not only had the defendants not been denied an opportunity to be heard but that reference to the evidence disclosed the existence of protracted negotiations involving the making of many submissions by and on behalf of the defendants over a lengthy period. The defendants' response was to allege that the basis of the Minister's decision "was never adequately put" to the defendants and that the defendants thus did not have an opportunity to make meaningful submissions. In particular, it was said that although reference was made by or on behalf of the Minister to "conservation issues" and to "the unresolved matter of native title over the whole area", no particulars were given about the nature and substance of the "conservation issues", the parts of the land affected, whether the conservation issues and native title matters were the only matters under consideration by the Minister, and so forth. Furthermore, it was said that although a document before the Minister revealed an objection to the defendants "on a personal level" that was not a matter raised with them.

The requirements of natural justice

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[4] *Metropolitan Transit Authority v Waverley Transit* (1991) VR 176 at 204 and *Banks v Transport Regulation Board (Vict.)* (1968) 119 CLR 222.

[29] What is necessary to afford "natural justice" or "procedural fairness" in any given case will depend –

> "…on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting…
>
> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly i.e. in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations."[5]

[30] In *FAI Insurance Limited v Winneke* (1981-1982) 151 CLR 342 Gibbs C.J., addressing the question of the nature of the hearing required to be given to an Insurer seeking to renew its licence, said at 350 –

> "No practical difficulty exists in affording a proper hearing to a person who will be affected by the refusal of an application for renewal of an approval under the Act. The nature of the hearing to which a person affected is entitled must always depend on the circumstances of the case, and in a case such as the present fairness requires that the applicant company should be apprised of the allegations against it and should be given a full and fair opportunity to answer those allegations in writing."

[31] The subject application was made in circumstances in which the Crown had expressed doubts about the desirability of renewal and a desire to limit the extent of the leased area should there be a renewal. By analogy with the reasoning in *Winneke*, it is at least arguable that in such circumstances the lessee is entitled to be informed of the substance of the matters which the Minister considers relevant to the determination to be made by him.

[32] Support for this conclusion may be found in the reasons of the Court in *Minister for Aboriginal Affairs v Douglas*[6] (1996) 66 FCR 40 at 54, 55.

[33] There is a related principle which also provides the defendants with some assistance. It is that before a body obliged to afford natural justice may make a determination adverse to a person, it must inform that person of the material before it which is prejudicial to that person's interests as long as it is material and may bear on the outcome of the decision[7] so as to afford that person an opportunity of addressing it.[8] Where the proceedings are non-adversarial, as is the case here, it is

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5 *Kioa v West (1985) 159 CLR 550 at 584-585 per Mason J*

6 (1996) 66 FCR 40 at 54, 55.

7 Compare *Minister for Aboriginal Affairs v Douglas* (supra) at 54.

8 *Bread Manufacturers of NSW v Evans* (1981) 38 ALR 93; *Dixon v Commonwealth* (1981) 61 ALR 173: *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155; *Fraser v State Services Commission* [1984] 1 NZLR 116; *Dai Xing Yao v Minister for Immigration and Ethnic Affairs* (1997) 144 ALR 147 at 154-5; and *Ansell v Wells* (1982) 63 FLR 127.

the substance of the adverse material which needs to be provided rather than its detail.[9]

Overview of the relevant dealings between the plaintiff and the defendants

[34] Before considering the application of these principles to the facts it is instructive to have regard to the manner in which relevant events unfolded.

[35] The first defendant made application for renewal of the lease at a time unknown prior to its initial expiry date of 30 June 1998. A departmental briefing note dated 3 October 1997 identified as "Key Issues" –

(a) Environmental considerations and the desirability of awaiting the conclusion of the Cape York Peninsula Land Use Strategy ("CYPLUS") then being undertaken;
(b) Interest in the area of conservation groups;
(c) Interest in the areas of aboriginal groups;
(d) The existence of mining leases over "the main area of conservation interest"; and
(e) "The lessees have a history of non-cooperation with and vitriolic abuse of any and all government employees and agencies. If the leases are not renewed Mr. Nixon will be difficult to deal with."

[36] It may be inferred that the term of the lease was extended for 12 months so that the CYPLUS report could be obtained and considered.

[37] Paragraph (e) above appeared in another Ministerial briefing paper dated 1 April 1998, again under the heading "Key Issues".

[38] In a letter of 1 July 1998 the Department of Natural Resources further sought the view of the Department of Environment and Heritage concerning the use of the land. One possible land use put forward was a renewal of the lease with a requirement that a conservation agreement be negotiated between the lessee and the Department of Environment and Heritage. There is no direct evidence of the response, if any, to that letter.

[39] On 28 October 1998 an officer of the Department of Environment wrote to the first defendant stating, inter alia –

> "At this stage, I believe the Government is looking at what options may exist for further dealing with your interests at Shelburne Bay. As you are aware, there is considerable Government and community interest in conserving the natural and cultural values associated with lands currently within the Pastoral Holding and the Occupation Licence."

[40] The first defendant applied for an extension of lease on 15 February, 1999.

[41] A briefing paper of May 1999, which bears the Minister's endorsement of 20 May 1999, made reference to the offer of a further area of approximately 20,000 hectares but that part of the document was struck out and initialled. On 10 June 1999 an

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[9] *Chamberlain v Banks* (1985) 7 FCR 598 AND *Busby v Human Resources Department, Australian Telecommunications Commission* (1988) 20 FCR 463 at 467.

officer of the Department of Environment and Heritage wrote to an officer in the Department of Natural Resources in respect of the land canvassing a number of options put forward by the latter in relation to land use. In the letter the officer wrote of: "the superlative conservation values identified for the majority of the property and the incompatibility of their long term conservation with any viable form of grazing enterprise…"; commitment of the government to rationalisation of land use under the auspices of "CYP 2010 and the Cape York National Heritage Trust Plan…"; and of the requirement for protective tenure for the whole of the land in order to meet criteria put forward by a National Forest Policy Statement Implementation sub-committee.

[42] A Ministerial briefing paper dated 24 June 1999 noted under the heading "background" that "officers from both the Department of Natural Resources and the Environmental Protection Agency had been negotiating with the Nixons regarding the voluntary acquisition of the pastoral holding and the occupation licence."

[43] It was noted that the first defendant had made application to renew the lease but the "key issues" section of the briefing paper dealt exclusively with matters of payment and compensation. In a briefing paper, initialled as noted by the Minister on 8 April 1999, it was recommended that the land be valued, there be a three month extension to allow the negotiations to be completed and that in the event of failure of negotiations Ministerial direction be sought as to an offer of a lease of approximately 20,000 ha to the defendants. The Minister endorsed the paper with the comments:-

> "1. 20,000 ha sounds more than necessary.
> 2. Any lease should be based on minimum area "needed" for shortest possible term.
> 3. Outright voluntary acquisition remains the preferred negotiation outcome."

[44] All further correspondence emanating from the Minister or his department appears to contemplate only the non-renewal of the lease, the termination of the occupation licence and the payment of compensation. In a letter of 6 September 1999 to the first defendant, the Minister stated, inter alia, -

> "After consultation with my Departments and weighing up all relevant information, including the potential for mining, I have reached the conclusion that the best interests of all Queenslanders is best served by not renewing the lease and managing the area for conservation purposes."

[45] In a further letter to the first defendant dated 24 September 1999 the Minister, in response to a letter from the first defendant concerning a proposal by her for terms and conditions for a new lease, observed:-

> "It is clear that, due to the outstanding natural heritage values of the bulk of the property and the unresolved matter of Native Title over the whole area, that Occupational Licence 73 and Pastoral Lease 43/5117 have many of the attributes I am required to consider and in that context, I cannot agree to your request."

[46] Mr. Elmes swears that a meeting between the first defendant and second defendant and departmental officers in March 1999, there was discussion about an offer of a new lease to the defendants to contain an area of about half of the existing area of the pastoral lease and of a smaller part of the land contained in the Occupation Licence. As well, he recalls there being discussion of the entering into of a conservation management agreement and that "an agreement in principle" in such regard was entered into. The agreement in principle, according to him, included agreement that the defendants would be left with a viable cattle producing area together with areas suitable for tourism "and that the claimants of native title would be left with suitable area and that the Conservation areas were suitable as well." The first defendant gives a generally similar account of the March 1999 meeting and recounts being told by departmental officers that the defendants would be sent maps on which they should delineate the areas of the existing lease and licence which they wished to retain. She deposes to a meeting with the Minister and departmental officers on 4 June 2000 at which, in effect, the Minister made it plain that no new tenure or tenures would be granted to the defendants.

Is there an arguable case that natural justice has been denied?

[47] It is apparent from the foregoing account that the defendants made submissions to the plaintiff from time to time in relation to the renewal of the lease and the continuation of the occupation licence. The defendants were aware that questions of conservation weighed with the Minister and, it would seem also, that they were aware that the Minister was concerned about the interests of Native Title claimants. That, Mr. Hanson argues, is sufficient to enable the defendants to put their case to the Minister and to thus provide them with an opportunity to be heard.

[48] On the material before me however, which consists essentially of a limited number of selected documents and the uncontradicted evidence of the first defendant and Mr. Elmes, it is arguable that the defendants were not afforded natural justice. The evolution of the decision making process and the reasons for the Minister's final determination do not clearly emerge from the material before me. But it is clear that departmental officers in briefing the Minister had regard to reports and policies which identified particular areas of land as deserving protective tenure. The material does not suggest that all such matters were drawn to the defendants' attention. Nor does the material suggest that "Native Title issues" were or are identified in more than a vague and general way. It is thus arguable that the defendants were not aware of the substance of the case they had to meet, or of those matters which were considered by the Minister to be central to his prospective determination. It is also arguable that they were unaware of the existence of documents and opinions which were material to the Minister's determination and adverse to the interests of the defendants.

[49] In making his determination the Minister was obliged to comply with the Requirements of the *Land Act*. The decision making process involved the assessing and weighing of competing factors, interests and claims. Without a clear understanding of the matters to be taken into account by the Minister any opportunity to be heard was likely to prove illusory.

[50] As the material before me is largely documentary in form supplemented by affidavit evidence, the following observations of McPherson SPJ in *State of Queensland v Litz* are pertinent:-

> "It is, however, one matter to view the sequence of events in purely documentary form, and quite another to have those events elucidated by oral evidence."

There is the additional difficulty, which assists the defendants on a summary judgment application, of identifying the boundaries of the Minister's decision making processes. Any opportunity to be heard after his relevant decision was made may not assist the plaintiff unless the decision was reconsidered and there is some obscurity about when the Minister ceased to entertain, as a practical matter, submissions about the renewal of the lease or the grant of a new lease.

Whether the finding of an arguable case of denial of natural justice entitles the defendants to succeed

[51] Even if it is accepted that there is a triable issue as to whether natural justice was afforded the defendants in relation to the renewal of the lease or the grant of another lease in its place, the reality is that the term of the lease has expired and no new lease has been granted. Prima facie then the plaintiff is entitled to possession of the land, the subject of the expired lease. The defendants' answer to this difficulty is provided by the course taken in the *State of Queensland v Litz* where it was held that until the defendant's right to a proper hearing was vindicated he was entitled to continue to conduct his business and to remain in occupation "…at least until the application is determined at a hearing held in response to the requirement of natural justice." McPherson SPJ continued:-

> "Expressed in another way, the plaintiff cannot stultify the right to a hearing, to which for this purpose it must be assumed the law compels effect to be given, by depriving the defendant of the ultimate benefit which he hopes will accrue to him from that right."

[52] Mr. Hanson sought to distinguish *Litz* in this regard by submitting that *Litz* was decided prior to the coming into force of the *Judicial Review Act* and, that any rights the first defendant had to review a ministerial decision lay under the *Judicial Review Act*. It will be recalled that the applicant had made application for judicial review in 1999 and that the application was dismissed by consent. It followed from those matters, according to the submission, that the defendants' right to have the Minister's decision reviewed would be the subject of an estoppel or that any application for judicial review would not succeed because it was so far out of time and followed an abandonment by the first defendant of her rights. It is sufficient answer to these contentions, for present purposes, to note that it is sworn on behalf of the first defendant that the termination of the judicial review proceedings was accompanied by an express reservation of the first defendant's rights. The plaintiff denies that there was any such reservation but if the first defendant succeeds in having her version of events accepted on trial it would be open to her to make application for judicial review and have that application heard at the same time as the trial of the plaintiff's action. The first defendant swears that he was unable to pursue the judicial review application because of impecuniosity. If that is correct, it would be a relevant consideration on any application for an extension of time within which to seek judicial review.

Conclusion

[53] The submissions on both sides concentrated on the lease and scant reference was made to the termination of the occupation licence. It seemed to be assumed that, generally at least, the same principles applied to the termination of the licence as to the non-renewal of the lease. Certainly the arguments based on a denial of natural justice have general application to the termination of the occupation licence.

[54] As this is a summary judgment application the plaintiff can succeed only if the court is satisfied that –

(a) "The defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and

(b) There is no need for a trial of the claim or the part of the claim."

I am unable to be so satisfied. In my view it cannot be said that the defendants have no real prospect of successfully defending the plaintiff's claims on grounds that they were denied natural justice in respect of their application to renew the lease or to have a new lease granted in its place and in respect of the termination of the occupation licence.

The basis of the arguable denial of natural justice is not that communications and negotiations did not take place. It is that it is arguable that the defendants were not acquainted in more than a vague and general way with the matters and considerations material to the Minister's determination and, further, that the defendants were unaware of the existence of documents and opinions material to the Minister's determination and adverse to the defendants' interests. In those circumstances it is arguable that any opportunity to be heard afforded the defendants was illusory.

[55] I propose to order that the application be dismissed and I will hear submissions on costs.