SUPREME COURT OF QUEENSLAND

CITATION:	*Eckford & Ors v Stanbroke Pastoral Co Pty Ltd & Anor* [2012] QSC 48
PARTIES:	**JAMES RONALD ECKFORD and** **LEANNE ECKFORD** (First plaintiffs) and **ECKFORD HOLDINGS PTY LTD** **ACN 097 124 037** (Second plaintiff) v **STANBROKE PASTORAL COMPANY PTY LTD** **ACN 008 442 939** (First defendant) and **STATE OF QUEENSLAND** (Second defendant)
FILE NO/S:	S 12014 of 2009
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2011
JUDGE:	Dalton J
ORDER:	**Application for summary judgment dismissed.** **Leave to amend claim and statement of claim.**
CATCHWORDS:	Adverse possession; Leases; Pastoral leases; Limitation of Actions Act; Action to recover land; Ejectment; Rights of Pastoral lessee to exclude occupier who is neighbouring Pastoral lessee; Nature of reversion at end of Pastoral lease; Adverse possession against lessor; Adverse possession against Crown. *Common Law Procedure Act* 1852 (UK) *Judicature Act* 1873 (UK) *Land Act* 1897 (Qld) *Land Act* 1910 (Qld) *Land Act* 1962 (Qld) *Land Act* 1994 (Qld) *Limitation Act* 1960 (Qld)

Limitation of Actions Act 1974 (Qld)
Property Law Act 1974 (Qld)

E A Francis, *The Law and Practice Relating to Torrens Title in Australasia* (1972) vol 1, Butterworths, Sydney
Megarry and Wade, *The Law of Real Property* (2nd ed, 1959) London

H W R Wade, "Landlord, Tenant and Squatter" (1962) 78 LQR, 541

Chung Ping Kwan v Lam Island Development Co Ltd [1997] AC 38
Fairweather v St Marylebone Property Co Ltd [1963] AC 510
Gledhill v Hunter (1880) 14 Ch D 492
McGavin v McMaster (1869) 2 QSCR 23
The Commonwealth v Anderson (1960) 105 CLR 303
Wik Peoples v Queensland (1996) 187 CLR 1
Wood v Browne [1984] 2 Qd R 593

COUNSEL: J Bell QC and M Hoch for the applicant/first defendant
R M Derrington SC and D Williams for the respondent/plaintiffs
D Keane for the respondent/second defendant

SOLICITORS: Thynne & Macartney for the applicant/first defendant
McInnes Wilson for the respondent/plaintiffs
Crown Law for the respondent/second defendant

[1] **DALTON J:** This matter came on in the applications list as an application for summary judgment on the basis that, even assuming the facts pleaded by the plaintiffs are correct, the plaintiffs' claim founded on adverse possession is not maintainable as a matter of law. I determine the summary judgment application on that basis, i.e., I do not find facts, but assume that the plaintiffs will establish the facts they plead. The plaintiffs cross-apply for leave to amend the claim and statement of claim to add claims based on estoppel and pursuant to s 197 of the *Property Law Act* 1974 (Qld). There is no opposition to this and I grant leave to amend.

[2] The applicant/first defendant holds a grazing property in Cape York, Kamilaroi, as a pastoral lease. The plaintiffs hold an adjoining grazing property, Morella, as a pastoral lease. The properties are both huge. The plaintiffs acquired the lease of Morella in 2000. There is no point taken, by the applicant or the Crown, as to the fact that some, or all, of the possession alleged to be adverse was possession by the plaintiffs' predecessors in title. At some unknown time, prior to 1967, a fence was built between the two properties, not on the true boundary, but so that about 23,000 acres of Kamilaroi is wrongly on the Morella side of the fence (the disputed land). At least from 1973 onward the plaintiffs (and their predecessors) have been in undisturbed possession of the disputed land. They have used the disputed land in conjunction with the rest of Morella, as a single grazing property, in that they have:
(a) run cattle in the paddocks which include the disputed land;

(b) applied for and been issued water licences with respect to bores situated on and serving the disputed land;
(c) used and maintained those bores to water stock on the disputed land, and
(d) participated in the maintenance of the wrongly sited fence.

[3] There are various lots comprised in the stations Kamilaroi and Morella. The wrongly sited fence is on Lot 100 of Crown Plan PH1945. That lot was granted to Kamilaroi Pastoral Pty Ltd as a pastoral lease on 5 July 1956. It was transferred to an intermediate owner on 17 November 1980 and to the first defendant on 13 February 1986. There is no point taken, by the applicant or the Crown, based on the fact that the lease has been so transferred. The lease was originally for 30 years and has been extended on three occasions so that it will now expire in 2018. There is no point taken based on the fact that the terms have been so extended.

Adverse Possession

[4] The basis for a claim of adverse possession has always been the claimant's possession of land together with the provisions of the statutes of limitations. In Queensland, s 13 of the *Limitation of Actions Act* 1974 provides:

> "An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person."[1]

[5] Section 14(1) of the same Act provides that the right of action in a person dispossessed accrues on the date of dispossession.[2]

[6] Section 24(1) of the *Limitation of Actions Act* provides:

> "… where the period of limitation prescribed by this Act within which a person may bring an action to recover land (including a redemption action) has expired, the title of that person to the land shall be extinguished."[3]

[7] The nature of adverse possession at common law is described in the second edition of Megarry and Wade as follows:

> "Limitation is wholly statutory, and is concerned with the title to the land itself. It simply extinguishes a former owner's right to recover possession of the land, leaving some other person with a title based on adverse possession. … limitation operates negatively, by eliminating the claim of a person having a superior title.
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> …
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> … If S (squatter) wrongfully takes possession of land belonging to O (owner), O immediately acquires a right of action against S for recovery of the land. If O takes no action, in 12 years (normally) his right of action becomes barred and his title extinguished by limitation. S can no longer be disturbed by O, and as against the rest of the world S is protected by the fact of his possession. Possession by itself gives a good title against all the world, except someone having a better legal right to possession.

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1 Section 11 of the *Limitation of Actions Act* 1960 (Qld) began with the words, "No action shall be brought by any person to recover any land after …" but was otherwise identical.
2 Section 12(1) of the 1960 Act was to like effect.
3 Section 22 of the 1960 Act was to like effect.

> This last proposition is fundamental to our concept of title to land. If the occupier's possession is disturbed, for example by trespass or nuisance, he can sue on the strength of his possession and does not have to prove his title. It follows that the person disturbing the occupier's possession cannot attack his title, if he admits his possession; in the language of pleading, a defendant sued for trespass in such a case cannot plead *jus tertii* (that the land belongs to some third party, not to the plaintiff)."[4]

[8] The authors conclude:

> "Adverse possession and limitation together are therefore the foundations of a good title; if this is understood, the nature of a title acquired by limitation becomes plain. There is no 'parliamentary conveyance' from the one party to the other; one title is extinguished altogether and a new one arises. The new title is, however, subject to the rights of third parties, whether legal or equitable, unless they too have been barred by limitation."[5]

[9] *Fairweather v St Marylebone Property Co Ltd*[6] makes it clear that someone taking by adverse possession is not a successor to the title of the person dispossessed. The squatter's title is based on possession which in due course becomes, "incapable of disturbance … his title, therefore, is never derived through but always arises in spite of the dispossessed owner."

Applicant's Contention

[10] The argument raised by the applicant as fatal to the plaintiffs' claim is that the applicant, as a pastoral lessee, has never had an "action to recover land" within the meaning of ss 13 and 24(1) of the *Limitation of Actions Act.* The applicant accepts that a lessee at common law who is put out of possession has an action to recover land within the meaning of ss 13 and 24 of the *Limitation of Actions Act*, but says that a lessee of a pastoral holding under the Land Acts (whether 1910, 1962 or 1994) does not have such an action. Reliance is placed upon the fact that the Land Acts give statutory rights to a Crown lessee to bring an action against a person in unlawful occupation of the land, as well as statements of principle from *Wik Peoples v Queensland*[7] to the effect that a pastoral lease is a creature of statute and not the common law.

An Action to Recover Land

[11] The *Limitation of Actions Act* defines "action" as including "any proceeding in a court of law".[8] It defines "land" as including:

> "… corporeal hereditaments, rentcharges and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale but, save as is provided in this definition, does not include an incorporeal hereditament."[9]

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4 *The Law of Real Property* (2nd ed, 1959) London, p 954-5.

5 Above, p 960.

6 [1963] AC 510, 535 and 536 per Radcliffe LJ; see also H W R Wade, "Landlord, Tenant and Squatter" (1962) 78 LQR 541, 543-544.

7 (1996) 187 CLR 1.

8 The definition in the *Limitation of Actions Act* 1960 (Qld) was identical.

9 The definition in the *Limitation of Actions Act* 1960 (Qld) was identical.

[12] Section 5(5) of the *Limitation of Actions Act* provides:

> "A reference in this Act to a right of action to recover land includes a reference to a right to enter into possession of the land or, in the case of a rentcharge, to distrain for arrears of rent and a reference to the bringing of such an action includes a reference to the making of such an entry or distress."[10]

[13] The applicant says that the phrase, "an action to recover land" can be traced through English cognates back to the *Common Law Procedure Act* of 1852. That Act abolished the action of ejectment which rested on complex fictions and, "[t]hereafter a plaintiff merely had to institute his action for the recovery of land by pleading his claim to it in ordinary language. But this did not bring about any change in the substantive law …"[11] The *Judicature Act* of 1873 introduced new court rules (1875) which used the phrase "an action for the recovery of land". This action was regarded as no different to the old action of ejectment which was an action for the recovery of possession of land.[12] The action of ejectment was originally an action of trespass. The history is given by Windeyer J in *The Commonwealth v Anderson.*[13] He says there:

> "… it is important to remember that ejectment is not so called because it is a process whereby a plaintiff seeks to have the defendant ejected from his land. It got its name because it was an action in which the plaintiff complained that he had been wrongfully ejected by the defendant from land of which he was rightfully possessed."

The Land Acts

[14] From the statement of claim in this matter, the plaintiffs' case is founded on adverse possession from at least 1973 onwards. From 1910 until 1962 the *Land Act* 1910 governed the grant of pastoral leases in this State and the initial lease of Lot 100 was pursuant to that Act. After 28 December 1962 that lease was deemed to have been granted under the 1962 Act – see s 4(2) of the *Land Act* 1962. Provisions in that Act remained in force until the *Land Act* 1994 came into force. By 1994 there had been, on the plaintiffs' case, more than 12 years' adverse possession if the starting date is taken to be 1973. Therefore, I cannot see that the provisions of the 1994 Act are relevant to a determination of the applicant's contention. If the plaintiff had rights by adverse possession, they were gained before 1994. Perhaps, having regard to the fencing at some time before 1967, the relevant 12 year period may start earlier than 1973. Even if the *Land Act* 1910 applied during some of this time, its provisions are very similar to those in the 1962 Act, and the discussion in *Wik* related to leases under both the 1910 and 1962 Acts.

[15] Prior to 1975, the *Limitation Act* 1960 (Qld) applied. As between the plaintiffs and the first defendant, the material provisions of that Act were the same as the 1974 Act (see the footnoted references above). The *Limitation Act* 1960 did differ so far as adverse possession against the Crown is concerned, that is discussed below.

[16] The 1910 and 1962 Land Acts defined Crown land as all land in Queensland except for land which:

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10 The definition in the *Limitation of Actions Act* 1960 (Qld) was identical.

11 Megarry and Wade, above, p 1074.

12 *Gledhill v Hunter* (1880) 14 Ch D 492, particularly at 500.

13 (1960) 105 CLR 303, 320-321.

"is, for the time being –

(a) lawfully granted or contracted to be granted in fee simple by the Crown; or

(b) reserved for or dedicated to public purposes; or

(c) subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land."

[17] Section 372 of the *Land Act* 1962 provided:

"(1) Any person, not lawfully claiming under a subsisting lease or license, or otherwise under this Act or any other Act, or under prior authority in writing of the Minister or Commission, who occupies any Crown land or any reserve, whether or not the reserve is under the control of trustees, or who resides or erects any structure, or erects, constructs, places or maintains any other improvement or thing whatsoever, or depastures stock, on any Crown land or any reserve, or who clears (which term includes destruction of trees), digs up, encloses or cultivates any Crown land or any reserve or any part thereof, shall be guilty of an offence against this Act …

…

(3) Upon convicting any person for an offence under this section, whether or not a penalty as aforesaid is imposed, the justices in their discretion may, upon the application of the complainant, issue a warrant in terms of subsection (1) of section 373 of this Act to remove such person from the land or reserve in respect whereof the offence was committed …

(4) For the purposes of this section the term 'Crown land' includes any road."[14]

[18] This section did not apply at any time to the plaintiffs' occupation of the disputed land. The disputed land was not at any relevant time Crown land within the meaning of this section, and the statutory definition, because it was at all relevant times subject to the pastoral lease granted to the first defendant – see (c) of the statutory definition.

[19] The *Land Act* 1962 provided at s 373(1):

"Any Commissioner or officer authorised in that behalf by the Minister who has reason to believe that any person is in unlawful occupation of any Crown land or any reserve (whether or not the reserve is under the control of trustees) or is in possession of any Crown land under colour of any purchase, lease or license that has been terminated by forfeiture, cancellation or otherwise, may make complaint before justices, who shall hear and determine the matter in a summary way, and, on being satisfied of the truth of the complaint, shall issue their warrant, addressed to the Commissioner or to such authorised officer or to any member of the Police Force, requiring him forthwith to remove such person from such land, and to take possession of the same on behalf of the Crown; and the person to

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14 A similar provision was found at s 203 of the 1910 Act.

whom the warrant is addressed shall forthwith carry the same into execution.

A lessee or his manager or a licensee of any land held from the Crown or a person who is purchasing any land from the Crown, may in like manner make a complaint against any person in unlawful occupation of any part of the land comprised in the lease or license or being purchased and the like proceedings shall thereupon be had."[15]

[20] Section 373 of the 1962 Act was amended in 1985.[16] Following amendment the section provided:

"(1) Any Commissioner or officer authorized in that behalf in writing by the Minister who believes on reasonable grounds that a person –

(a) is in unlawful occupation of Crown land or a road or a reserve, whether or not under the control of trustees;

(b) is in possession of Crown land under colour of a purchase, lease, licence or other authority under this Act or any other Act or the authority in writing of the Minister or Commission or other person or body having power to grant such authority that has been terminated by forfeiture, cancellation or otherwise

may make a complaint before a justice of the peace in that respect.

(2) The matter of complaint may be heard and determined in a summary way under the *Justices Act 1886-1982* and, upon the Magistrates Court being satisfied of the truth thereof, it may issue its warrant requiring the member of the police force executing it forthwith to remove from the Crown land, road or reserve in question the person named in the warrant and all persons claiming under or through him together with his and their goods and effects and to give possession of the Crown land, road or reserve to the Crown or a duly authorized agent of the Crown.

(3) Any of them a lessee or his manager or a licensee or permittee of land held from the Crown under this Act or any other Act or under the authority in writing of the Minister or Commission or other person or body having power to grant such authority or a person who is purchasing any land from the Crown who believes on reasonable grounds that any person is in unlawful occupation of the land so held or being purchased or any part thereof may make a complaint before a justice of the peace in that respect.

(4) The matter of complaint may be heard and determined in a summary way under the *Justices Act 1886-1982* and, upon the Magistrates Court being satisfied of the truth thereof, it may issue its warrant requiring the member of the police force

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15 A similar provision was found at s 204 of the 1910 Act.

16 Number 6 of 1985, s 63.

> executing it forthwith to remove from the land in question held or being purchased from the Crown the person named in the warrant and all persons claiming under or through him together with his and their goods and effects and to give possession of such land to the complainant or his duly authorized agent.
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> …"

Wik Peoples v Queensland

[21] In *Wik,* all members of the majority decided that rights and obligations under a pastoral lease held under the 1910 or 1962 Acts derive their content from the statute under which they were granted and the terms of the grant itself, rather than because they are capable of being regarded as, or equivalent to, common law leasehold interests.[17] Further, all members of the majority were of the view that there was no reversion expectant on the expiry of the term of a pastoral lease, as there is when a common law lease is created, because the Crown, at the time of the grant of a pastoral lease, holds radical, not feudal title.[18] Members of the majority were of the view that at the expiry or determination of a pastoral lease the Crown might deal with the land as authorised by statute, as Crown land (as defined) under the Land Acts.[19]

[22] The majority in *Wik* found that the grant of a pastoral lease was not inconsistent with the continuing existence of native title rights, and to that extent, the decision is authority for the proposition that a pastoral lessee does not have exclusive possession. But the decision in that case is no authority for the proposition that such a lessee does not have a good right against persons who wrongly occupy land the subject of the grant in circumstances where that wrongful occupation is inconsistent with the pastoral lessee's rights. This is particularly clear in the judgments of Gummow and Kirby JJ in the High Court decision, but I think it is also readily discernible in the judgments of Toohey and Gaudron JJ.

[23] In the course of his analysis as to whether the grant of a pastoral lease was inconsistent with the existence of continuing native title rights, Gummow J discussed s 204 of the 1910 Act, the equivalent to s 373(1) of the 1962 Act, set out above. He found the term, "unlawful occupation" was not apt to describe occupation by persons exercising rights of native title.[20] The basis of his decision was that by reason of the nature of the pastoral leases in question, and the nature of the native title rights in question, the two were not mutually inconsistent. He said:

> "The ordinary meaning of the phrase 'for the purpose of pasture' is the feeding of cattle or other livestock upon the land in question. The phrase 'for pastoral purposes' would include the feeding of cattle or other livestock upon the land but it may well be broader, and encompass activities pursued in the occupation of cattle or other livestock farming. Even upon this broader interpretation, it cannot be said that there have been clearly, plainly and distinctly authorised activities and other enjoyment of the land necessarily inconsistent with the continued existence of any of the incidents of native title

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17 Above, Toohey J p 116; Gaudron J pp 149-115; Gummow J p 176, and Kirby J at pp 244-5.

18 Above, Toohey J p 128; Gaudron J p 155; Gummow J p 189, and Kirby J pp 244-5.

19 Above, Toohey J pp 128-129; Gaudron J p 156, and Gummow J p 189.

20 Above, pp 193-195.

> which could have been subsisting at the time of these grants of the pastoral leases."[21]

[24] To similar effect is the judgment of Kirby J:

> "Where Parliament had not expressly abolished proprietary rights, the court typically asked itself whether, '[t]he continued use of the land … would render the existence of the powers expressly conferred … impossible'. If such a question is posed in relation to native title rights and the rights conferred on the lessees of pastoral leases under the successive Land Acts of Queensland, the answer must be in the negative. The exercise of the leasehold interests to their full extent would involve the use of the land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for the Aboriginals to continue to utilise the land in accordance with their native title, as they did."[22]

[25] The situation here contrasts. Both the leases Kamilaroi and Morella were leases for pastoral purposes. The use of land by one pastoral lessee was entirely incompatible with the use of the same land by the other pastoral lessee. The grants to each pastoral lessee must necessarily have been of possession to the exclusion of another pastoral lessee. As Toohey J said in *Wik*, "A pastoral lease under the relevant legislation granted to the lessee possession of the land for pastoral purposes. And the grant necessarily gave to the lessee such possession as was required for the occupation of the land for those purposes."[23]

[26] In *Wik*, Gummow J discusses the 1910 equivalents of ss 372 and 373(1) of the 1962 Act, each set out above. He notes that the 1910 provisions were enacted at a time when there was uncertainty as to whether or not the Crown had an action in ejectment at common law.[24] Gummow J notes that:

> "… an end sought to be achieved by legislation such as s 203 and s 204 of the 1910 Act was the imposition of legal order upon the confusion which developed with the expansion of European settlement. In particular, the second paragraph of s 204 [s 373(1) equivalent] conferred some security of tenure against third parties, including settlers with competing claims."[25]

[27] Of the nature of the action created in the pastoral lessee by the equivalent to the second paragraph of s 373(1), Gummow J said:

> "The second paragraph of s 204, which must be read with the first, authorises a lessee and licensee of any land from the Crown to take proceedings in the same manner as a Commissioner or officer authorised by the Minister. If successful this will lead to the issue of a warrant for the removal of the unlawful occupiers and thereafter to what is identified as the taking of 'possession' of the subject land 'on behalf of' the lessee or licensee. The section treats indifferently the nature of the enjoyment of such a lessee or licensee by use of the same term, 'possession' to identify it."[26]

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21 Above, p 201.
22 Above, p 249.
23 Above, p 122.
24 Above, p 191. This matter was resolved by *The Commonwealth v Anderson*, above, in favour of the Crown's right to an action in ejectment at common law.
25 Above, pp 192-3.
26 Above, p 194.

[28] Clearly enough, Gummow J was describing the effect of the provision as a statutory proceeding to be put into possession of land. He says further, "As has been indicated, by s 204 the 1910 Act created its own remedy in the nature of ejectment and made it available not only to lessees but also to licensees of any land from the Crown."[27]

Resolution of Applicant's Contention

[29] I reject the applicant's contention. In my view on the facts as pleaded, the first defendant (or its predecessors) had a right to bring an action to recover the disputed land within the meaning of s 13 of the *Limitation of Actions Act*, and lost it in accordance with s 24 of that Act. The terms of s 373(1) of the 1962 Act make it abundantly clear that the proceeding it describes is one to be put into possession of land. The complaint is made against an unlawful occupier. The remedy is, in respect of Crown land, for possession to be taken on behalf of the Crown. If the land is not Crown land, as defined, because it is subject to a pastoral lease, the second paragraph of s 373(1) applies, and the sensible construction is, as recognised in the parts of Gummow J's judgment extracted above, that possession is taken on behalf of the pastoral lessee. As a matter of construction this right described by s 373(1) is "an action to recover land" within the meaning of ss 13 and 24 of the *Limitation of Actions Act*, particularly having regard to the history of the action of ejectment and the subsequent use of the phrase after the *Common Law Procedure Act*. Possession was always the gist of the action of ejectment. It was an action brought by someone wrongfully ejected from land to remove the trespasser and be restored to possession.

[30] It seems to me that the interest of a pastoral lessee is an estate or interest in land within the meaning of the definition of land in the *Limitation of Actions Act*. That the nature and incidents of that estate or interest are defined by statute rather than the common law does not affect this conclusion. The inclusory definition at s 5(5) of the *Limitation of Actions Act* is consistent with, and supportive of, this position. The amendments to s 373 which operated from 1985 onwards are probably irrelevant, given the dates involved in this matter. However, the amended s 373 plainly describes a proceeding to restore possession, i.e., an action to recover land within the meaning of ss 13 and 24 of the *Limitation of Actions Act.*

[31] Further, it is not anywhere provided in the 1910 or 1962 Act that the statutory procedure to remove someone in unlawful occupation is an exclusive remedy. The terms of the sections are permissory rather than mandatory. In *Wik* Brennan CJ expressed the view that, "Absent this statutory procedure [s 373(1) equivalent], a pastoral lessee could secure the ejectment of a person having no right to be or to remain on the land only by bringing civil proceedings in the Supreme Court."[28] He notes that civil proceedings were brought in the old case of *McGavin v McMaster*[29] and that a provision corresponding with the second paragraph of s 204 of the 1910 Act was introduced the year after the decision in *McGavin v McMaster*, "perhaps to avoid the necessity for litigation between adjoining landholders in the Supreme Court …"[30]

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27 Above, p 195.
28 Above, pp 72-3.
29 (1869) 2 QSCR 23.
30 Above, p 73.

[32] It may be as Gummow J suggests in *Wik* that the sections creating a statutory procedure to remove trespassers had their origins in doubt as to whether or not the Crown had an action for ejectment. Perhaps the origin lay in a desire to provide a cheap and effective way to determine disputes between settlers as suggested by both Brennan CJ and Gummow J. My view is that the statutory rights are additional to, and not in derogation of, rights at common law. I cannot see, for example, that a pastoral lessee would not have rights to seek declaratory and injunctive relief in this Court against someone in unlawful occupation of the land granted to the pastoral lessee, where that occupation was incompatible with the enjoyment of the pastoral lessee's rights. There is nothing in *Wik* which points to a contrary conclusion. Such an action would be an action to recover land within the meaning of ss 13 and 24 of the *Limitation of Actions Act.*

Adverse Possession against the Crown

[33] The second defendant was not originally sued, but intervened in the proceeding because it is concerned that its interests might be affected. It supported the applicant's position on the summary judgment application and made independent submissions as to why the plaintiffs' claim was not maintainable at law.

[34] Counsel for the plaintiffs made it clear on this application that the plaintiffs do not assert any rights to adverse possession of the disputed land as against the Crown. My view is that this position is the only one available to the plaintiffs as a matter of law. The common law never regarded adverse possession against a lessee during the term of a lease as adverse possession against the landlord.[31] Until the lease came to an end, possession by a squatter was not adverse to the landlord's interest in the reversion, for that interest was not in possession, but delayed upon the term of the tenant. The landlord's right against a squatter did not accrue until the lease came to an end.[32]

[35] As noted above, it is wrong to regard the Crown as having a reversionary interest in land which is the subject of a Crown lease. Rather, at the determination of a Crown lease, the land is once again Crown land, as defined, to which the Crown has radical title. Notwithstanding this is a very fundamental difference between a lease at common law and a Crown lease, I do not think it has a practical effect on rights and obligations between the Crown and the plaintiffs in this case. There is no sense in which the plaintiffs' possession of the disputed land has been adverse to the Crown's interests in, or title to, that land. Putting to one side any rights acquired by the plaintiff, the only persons entitled to be in possession of the disputed land since the grant of the pastoral lease in 1956 have been the first defendant and its predecessors. The plaintiffs' possession has been adverse to the rights of those lessees, not the Crown. Presently, the Crown is not entitled to possession of the disputed land. When the lease of Lot 100 comes to an end, the disputed land will once again be Crown land, as defined, and the Crown will have rights to remove the plaintiffs if they remain in occupation of that land.

[36] In any event, s 6(4) of the *Limitation of Actions Act* 1974 provides that:

> "Notwithstanding any law or enactment now or heretofore in force in the State, the right, title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any way

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31 *St Marylebone Property Co Ltd*, above, 536.

32 *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38, 46.

> affected by reason of any possession of such land adverse to the Crown for any period whatever."

[37] There does not seem to have been an equivalent to this provision in the *Limitation Act* 1960. There was no rule at common law. From 1943 s 203A of the *Land Act* 1910 (see below) applied to prevent adverse possession against the Crown in respect of Crown land, as defined. This did not apply to the disputed land, which was not Crown land because it was subject to a pastoral lease. However, even if the plaintiffs' claim is taken to date from 1967, not 1973 as pleaded, no rights could have accrued to the plaintiffs, against the Crown, before s 6(4) of the *Limitation of Actions Act* was enacted in 1974.

Provisions as to Registration of Dealings

[38] Section 227 of the 1962 Act provided for a register of the particulars of, "all leases, and licenses, under this Act, and of all transfers, mortgages and subleases thereof and other dealings therewith under this Act." The *Land Act* 1994 contains many more provisions to the effect that dealings with land under that Act may only occur with the Minister's approval and that various dealings in land create no interest until they are registered – see e.g. ss 322 and 323. Section 301 of the *Land Act* 1994 provides, "A document does not transfer a lease … or create a legal interest in a lease until it is registered." The submission on the part of the Crown was that as a result of such provisions, there could not be an interest created by adverse possession of land subject to the *Land Act* 1994 without the Minister's consent, or registration. In my opinion these arguments mistake the nature of a claim based on adverse possession. There is no dealing between the plaintiffs and the first defendant relied upon. The plaintiffs do not claim to have taken any transfer from the first defendant. The plaintiffs' claim is for an interest in land which has arisen in spite of the first defendant. In any event, if an interest was acquired by adverse possession, that occurred before 1994.

[39] If the plaintiffs are found to have acquired an interest by reason of adverse possession, the relief necessary, and available, to support that interest will need to be considered. I note that there are provisions such as ss 380(3) and 389 of the *Land Act* 1994 which may be relevant to that. There are less formal solutions available, such as that adopted by the Court in *Wood v Browne*.[33] What remedy is fashioned to support the plaintiffs' right (if it is established) is not something which can be sensibly considered now. Similar considerations will arise if the plaintiffs succeed in their proprietary estoppel and s 197 *Property Law Act* claims, in relation to which the first and second defendants make no summary judgment application. That the plaintiffs do not at this stage articulate definitively how the rights they assert are to be given effect in the terms of an order is not a reason to grant summary judgment.

Adverse Possession of Land under the Land Acts

[40] The Crown made this written submission, "Where to be successful any claim for adverse possession would require the consent of the Minister, it may be concluded that the Land Act in failing to set out a process for claims of adverse possession does not contemplate that such claims can be made." As discussed above, under the *Land Act* 1994, dealings require the consent of the Minister, but a claim for adverse possession is not based on a dealing. The submission that the *Land Act* (by which

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33 [1984] 2 Qd R 593.

was meant the *Land Act* 1994) "does not contemplate" claims based on adverse possession was not developed. If rights were acquired by adverse possession, that occurred before 1994. There are early cases in several Australian States as to whether or not there could be claims for adverse possession in Torrens land schemes. There are conflicting decisions in Queensland which are summarised in *Torrens Title in Australasia*.[34] The Crown submission referred to none of this case law, and I do not interpret the one sentence submission extracted above as mounting an argument that rights of adverse possession are inconsistent with the scheme for registration established by the Land Acts of 1910, and 1962. I would certainly not determine such a point without it being distinctly raised and without hearing full argument on it.

[41] I do note, however, that the provisions about registration under the *Land Act* 1962 are unsophisticated and quite different from a Torrens scheme of title by registration. Further, I note that s 374 of the *Land Act* 1962 contemplated that there might be a claim for adverse possession of land under that Act. It provided as follows:

> "No title to any land which has been either before, on or after the commencement of this Act –
>
> (a) dedicated, opened, declared or otherwise notified as a road for public use under any Act or in connection with the alienation of any Crown land; or
>
> (b) left between Crown grants as a road or driftway; or
>
> (c) reserved or dedicated under this Act or any other Act for or to any public purpose; or
>
> (d) reserved in any Crown grant,
>
> or to any Crown land shall by reason of adverse possession be allowed to be asserted or established as against –
>
> (i) the Crown; or
>
> (ii) persons holding such land in trust for any public purpose.
>
> Nothing in this Act shall affect the operation of any provision of 'The Real Property Acts 1861 to 1960,' or the title to any land which has in any proceedings, other than summary proceedings, to which the Crown has been a party been adjudged not to be Crown land."[35]

[42] That section did not apply to land subject to a pastoral lease.

Disposition

[43] I dismiss the application for summary judgment. As a matter of law I think the contention put forward by the applicant is wrong. I am certainly not satisfied that the plaintiffs have no real prospect of succeeding on their adverse possession claim as required by r 293(2)(a). Nor was I persuaded to this standard by the submissions made on behalf of the Crown. I will hear the parties as to costs.

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34 E A Francis, *The Law and Practice Relating to Torrens Title in Australasia* (1972) vol 1, Butterworths, Sydney, p 621-2. See also the case law referred to in Bradbrook, McCallum and Moore, *Australian Real Property Law*, (4th ed, 2007) Lawbook Co, Sydney, p 677. There is also a considerable body of English case law.

35 A similar provision was found at s 203A of the 1910 Act (inserted by No 16 of 1943).