

14 March 2008

Simon Espie
Land Information New Zealand
PO Box 5501
WELLINGTON

Dear Simon

Pastoral leases - exclusive possession
Our Ref: LIN255/517

Introduction

1. You have sought our advice on whether a pastoral lease grants the holder exclusive possession of the land in the lease. This arises because John Page and Ann Brower in a paper titled "*Property Law in the South Island High Country—Statutory, Not Common Law Leases?*" conclude that a pastoral lease does not grant exclusive possession to the holder. They claim it is not a lease, but a *quasi-usufruct* of statutory origin, and the statute does not grant exclusive possession.
2. For the reasons set out in this opinion, I disagree and consider that a pastoral lease does give exclusive possession. In fact it would be impossible for the holder to undertake the farming operations without exclusive possession of the land. I will set out reasons why I reach this conclusion before commenting on the Page and Brower paper.

Materials considered

3. In researching this matter I have considered two pastoral leases, a Crown renewable lease for farmland and a Glasgow lease which is incomplete (the parties' names have not been inserted) but is a lease of residential property in Wanganui (where one would expect exclusive possession). None of the leases contains an express provision granting exclusive possession or quiet enjoyment of the land.
4. In addition I have considered a number of New Zealand authorities, the Australian High Court decision in *Western Australia v Ward* [2002] HCA28, referred to extensively by Page and Brower and of course considered their paper. I have also considered the South Australian legislation which establishes pastoral leases and web-pages on public access to those leases, but do not propose to discuss these in this opinion as the statutory basis is quite different.

Relevant principles

5. The right to occupy and use land belonging to another is derived through either a lease or a licence. A lease grants an interest in land and a licence is contractual only. The hallmark of a lease is that it grants exclusive possession to the holder. The name

the parties give to the document is not conclusive and it may be termed a licence yet constitutes a lease because it grants exclusive possession.

6. Many leases include an express provision stating that the holder has exclusive possession of the land contained in the lease or that the holder is entitled to quiet enjoyment. Where there is no such provision, recent New Zealand cases emphasise that it is necessary to look to the parties' intention. The cases concerned are *Daalman v Oosterdijk* [1973] 1 NZLR 717 and *Fatac Limited (In Liquidation) v Commissioner of Inland Revenue* [2003] 3 NZLR 648.
7. The following statement by Fisher J in *Fatac* summarises the principle:

“Whether the occupier has the right to exclusive possession turns on the effect of the contract or a grant. The effect of the contract or grant is a matter of interpretation. Interpretation is a search for the intention of the parties. The quarry is an intention as to exclusive possession.”
8. In addition, in a case relating to a pastoral lease, Associate Judge Christiansen accepted that, as a consequence of conditions imposed on the consent to the transfer to the defendant, there was an implied variation of the lease obliging the holder to surrender land from the lease. Accordingly the Court accepted that the lease terms were contained in an amalgam of the statutory and implied terms.

Parties' intentions

9. The provisions of the lease are contained both in the document (registered as a certificate of title or folio of the register) and provisions in the Land Act 1948 and now the Crown Pastoral Lands Act 1998.
10. Referring to the Hunter Valley lease (one of the leases considered) I note that it commences by providing that “the lessor doth, hereby demise and lease unto the lessee etc”. I accept that this is not in itself conclusive. It does however go on to define a term of 33 years, which is consistent with a lease rather than a licence.
11. The document then sets out a number of covenants all of which are consistent with the grant of exclusive possession. They are (paraphrased, and using the numbering in the document):
 2. The lessee is to reside on the land continuously throughout the term.
 3. The lessee will hold and use the land *bona fide* for his own use and benefit and will not transfer, assign or mortgage without approval.
 4. The lessee will farm the land diligently in a husband like manner.
 8. The lessee will maintain the Crown's improvements.
 10. The lessee will not without consent fell or remove any timber, tree, bush etc growing on the land.
11. In the mutual covenants it is agreed the lessee has exclusive right of pasturage over the land but no right to the soil. He may however with prior consent cultivate the land, crop an area sufficient for himself and his family, plough and sow and grass any portion of the land and clear the land by felling and burning bush or scrub and sow

that land in grass. Further provision restricts the numbers of stock which can be depastured on the land.

12. Provisions in the Land Act 1948 are also relevant and support the grant of exclusive possession. Section 26 of the Land Act 1948 provides that, for the purpose of inspecting Crown land held on lease or licence, the Commissioner or anyone authorised by him has free rights of ingress, egress and regress in respect of that land. Those would not be required unless the holder had exclusive possession. Section 62, prior to its amendment, provided that Crown land could be acquired on any of the following tenures:
 - 12.1 Land other than pastoral land can be taken on renewal of a lease or purchase for cash.
 - 12.2 Pastoral land could be acquired by pastoral lease or pastoral occupation licence.
13. In the former, in equating a lease with a purchase (as an alternative) the suggestion is that exclusive possession of the land is granted, either by lease or by sale.
14. Section 66A allows the Commissioner to grant a recreation permit over land on a pastoral lease. But the lessees' consent is required if the permit holder is not the lessee.
15. Section 67A provides for the grant of special leases (which may apply to pastoral land) that specified people could have the right to enter the land or part of it without the consent of the lessee. This section clearly contemplates that the lessee has exclusive occupation and the right to enforce the Trespass Act.
16. Section 68A allows grazing permits to be granted over Crown land. Subsection (3) provides that:

“A grazing permit shall not confer on the holder—

 - (a) The exclusive right to occupy the land to which the permit relates.
 - (b) The status of occupier of the land for the purposes of the law relating to trespass”.
17. The inference is that, there being no similar provisions in the sections authorising the grant of leases, those do grant an exclusive right to occupy.
18. The Crown Pastoral Land Act 1998 has a number of provisions all of which are consistent with the grant of exclusive possession although some require the consent of the Commissioner. These relate to the development of the land and the burning of vegetation.
19. The provisions outlined above are all consistent with an intention to grant exclusive possession of the land. Bearing in mind that the lessee owns both structural improvements such as buildings and fences and improvements to the state of the land, exclusive possession ensures that the lessee will have their sole use. That is confirmed by the terms to the lease which grants the lessee the exclusive right to the

pasturage. The reference to the "pasturage" is a restriction on the use to which the land can be put. But because the land is a pastoral lease granted for pasturage purposes, the use of land for other purposes (by other people) is excluded.

Page and Brower paper

20. This paper rests heavily on the Australian experience and cases such as *Western Australia v Ward*. The issue in that case was whether a pastoral lease extinguished Native title. The Court held that a pastoral lease did not grant exclusive possession but the reasons for this do not apply in New Zealand. There appear to have been two types of lease, one of which was described as a non-exclusive pastoral lease. But all pastoral leases reserved rights to other people for access including access with stock. I assume the reasons for this are geographical and relate to the fact that many Australian stations are extremely large and in areas where there are probably no public roads.
21. More importantly the leases reserved extensive rights to Aboriginal Natives, including the right to erect and live in wurlies and to forage and hunt for food. The Court therefore had no hesitation in finding that given the large number of reservations of access to others, exclusive possession was not granted.
22. The Page and Brower paper does not contain any analysis of the New Zealand legislative provisions or of New Zealand authority. There is a footnote reference to the *Fatac* decision but no apparent analysis of it. While the authors accept that whether an instrument is a lease depends on its substance, not its form, there is no analysis of the substance of a pastoral lease.
23. The paper claims that *Western Australia v Ward* is authority for the proposition that the nomenclature of a lease does not in itself grant exclusive possession. That is not quite what the High Court said; instead it noted that the fact that the lease and the legislation might use language used in relation to a lease between private individuals did not conclusively demonstrate the grant of exclusive possession of the land. I would agree with that and say that the answer (as noted in the New Zealand authorities) is to use that language and the provisions to determine the parties' intentions and whether they indicate a grant of exclusive possession.
24. The paper also notes that a lease must be of fixed duration but then says that a pastoral lease is not for a fixed duration because it is perpetually renewable and so this leads to the conclusion that it is not a lease. A pastoral lease is for a fixed term of 33 years and there are succeeding leases for a similar term if the right of renewal is exercised. If it is not, the lease terminates.
25. For the reasons set out above I do not find the Page and Brower paper convincing and disagree with its conclusions.

Summary

26. Whether or not a pastoral lease grants exclusive possession depends upon whether the instrument can be considered to be a lease rather than something else such as a licence or as Page and Brower suggest, a *quasi-usufruct* of statutory origin. While the lease has a statutory basis (it provides authority to the Commissioner to grant the lease and regulate some of the terms) that ensures that leases of Crown land are

granted on uniform terms and nobody gains a preference or better terms for financial or other reasons.

27. The lease itself brings into play any common law or equitable principles and that includes the provision that it grants exclusive possession. The issue is whether the parties' intention was to grant exclusive possession and the pastoral lease does this.

Yours sincerely



Malcolm Parker
Crown Counsel

Direct Phone: 04-494-5614

Direct Fax: 04-494-5680

Email: parker@crownlaw.govt.nz