High Court review of property law cases

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This article considers the recent High Court developments in various different property law areas. The High Court has made some substantial contributions to property law in the past year as the following notes indicate. Of particular interest is the significant development of the native title issue in the decision of *Coe v. Commonwealth of Australia.*[1] Important contributions have also been made in other areas as diverse as planning legislation, partition, compensation under the guarantee fund in the Torrens system and the boundaries of land ownership as conceived under the New South Wales *Encroachment of Buildings Act 1922.* The purpose of this article is to provide a brief outline of these developments and an indication of the direction the High Court is moving in various different property law fields.

Native title

1 Introduction

The High Court in *Mabo and Others v. State of Queensland (No. 2)*[2] recognised that land which is in the possession of indigenous people is capable of creating a proprietary interest even though the aboriginal culture would prevent any alienation or exclusive individual use of the land. The special proprietary interest which may be created is known as 'native title'. Native title in this context refers to the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws and acknowledged by the traditional customs observed by the indigenous inhabitants. Native title can only be assumed by the indigenous inhabitants of a territory and their descendants. Native title is recognised by the common law however, it is not a part of the common law and it is not alienable by the common law.

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1 (1993) 118 ALR 193.

2 (1992) 107 ALR 1.

The decision in *Mabo (No. 2)* and the introduction of the native title legislation[3] has brought the whole issue of native title rights to the forefront. One of the most interesting concerns in this regard is the exact scope future courts will give to a native title interest. Following the Mabo decision, the courts are only prepared to protect the native title interests of members of an indigenous clan or group when those interests remain in conformity with the traditional laws and customs of the people. Native title will be extinguished where the traditional title holders lose their connection with the land; this loss of connection must, however, be substantial. Native title will not be extinguished simply by a modified lifestyle and some changes in customs; it must be shown that there has been a fundamental change in the particular lifestyle of the indigenous group.

Any claim to native title must clearly delineate the area of land involved and the basis of the claim. Apart from the possibility that a group has lost connection with the land, it is also feasible for a native title claim to be extinguished. Extinguishment may occur if another interest has been granted over the particular land involved. The recent native title legislation categorises the types of acts which may be validated resulting in the extinguishment of native title; these acts include the granting of a freehold, commercial, agricultural or residential lease and the grant of a licence or of a permit. If a validation results in extinguishment of native title, native title holders will be entitled to just compensation. Compensation is to be awarded according to the same terms as exist as common law.

The native title legislation has clarified some of the significant issues in terms of the inter-relationship between existing property interests and native title claims. It has also gone much further than *Mabo (No. 2)* by providing native title holders with the ability to seek just and fair compensation for extinguishment of title. Just prior to the introduction of the federal native title legislation the High Court in *Coe (on behalf of the Wiradjuri tribe) v. Commonwealth of Australia and Another*[4] was asked to consider a native title claim over wide tracts of land claimed within central New South Wales. The importance of the decision lies not so much in its overall conclusion, but rather in its development and elucidation of the grounds for and qualifications to the

3 *Native Title Act 1993* (Cwlth).

4 See above n.1

native title concept as enunciated in *Mabo (No. 2)*. It must of course be remembered that the decision in *Coe* was issued prior to the enactment of the federal native title legislation which has added substantially to this area of law.

2 The decision of *Coe v. Commonwealth of Australia*

The decision in *Coe* is a single judgement by Mason CJ in the High Court. The case initially arose from proceedings initiated by the plaintiff, on behalf of the Wiradjuri tribe, which sought various different declarations to the effect that the Wiradjuri tribe held native title over a large part of southern and central New South Wales. The first defendant, the Commonwealth of Australia, sought an order striking out certain paragraphs of the plaintiff's statement of claim. The second defendant, the State of New South Wales, sought an order that the plaintiff's action be dismissed or, alternatively, stayed, or that the statement of claim be entirely struck out. Before examining the decision of Mason CJ, the basis of the statement of claim needs to be considered.

3 Inaccurate description of land

The plaintiff sued the Commonwealth as 'the successor in title to the Colony of New South Wales, Victoria Regina William IV, George IV and George III and as an international Sovereign. The plaintiff sued the State of New South Wales as the purported owner and occupier of Crown lands within the area of the Wiradjuri nation.

The description of the lands within the statement of claim was held to be inadequate. The statement of claim in the *Coe* decision refers specifically to lands which:

> ...extend from the upper reaches of the Wambool (Macquarie) River in its northern border, the Murray River in its southern border, and the Great Dividing Range and the Murrumbidjeri (Murrumbidgee) River in its eastern border and the flood plains of the Kalar (Lachlan) River in its western border and comprises approximately 80,000 square kilometres...

According to Mason CJ, from the description pleaded, it was not possible to identify precisely all boundaries of the lands claimed. One of the qualifications to a native title claim is that the land claimed be clearly and accurately identified; if this cannot be established it is quite obviously impossible to issue any sort of judgement concerning the validity or otherwise of a native title claim.

4 The native title claim

The plaintiff claimed, inter alia, that the Wiradjuri people were entitled as against the whole world to possession, occupation, use and enjoyment of those Wiradjuri lands where native title has not been extinguished. Compensation for any loss or abrogation of their rights in these lands was claimed. The primary basis for the native title claim was on sovereignty grounds. The statement of claim alleges that the Commonwealth and the State of New South Wales wrongfully and unlawfully attempted by force to settle the Wiradjuri lands and that they should not benefit through such an unlawful seizure. Furthermore, by seizing the land, the Commonwealth had breached its sovereign duty to protect the rights of the Wiradjuri nation. On this basis, the plaintiff furthermore claimed that the defendants owed a fiduciary duty to the Wiradjuri people and, by failing to perform their proper sovereign duties, were in breach of that duty.

The sovereignty argument in *Coe* is clearly different to that raised in *Mabo (No. 2)*. In *Coe* the statement of claim asserted indigenous sovereignty over the entire nation and denied the legitimacy of the sovereignty of the Australian state. No such argument was raised in *Mabo (No. 2)*. The members of the High Court took the opportunity to reiterate the fact that the continuance of British sovereignty did not prevent the assertion of native title however the existence of native title did not carry with it any basis for a challenge to that sovereignty.[5]

In considering the issues set out in the statement of claim, Mason CJ points out that *Coe* must be read subject to the decision of *Mabo (No. 2)*. After considering the decision in *Mabo (No. 2)* his Honour denied that the Crown's acquisition of sovereignty over Australia could be challenged. According to Mason CJ, *Mabo (No. 2)* simply recognised that land in the Murray Islands existed by means of native title and that this title was held under the paramount sovereignty of the crown. The whole idea that the plaintiffs held a sovereignty which was adverse to that of the Crown's was rejected by his Honour. Mason CJ limited the effect of *Mabo (No. 2)* to the creation and recognition of a separate form of proprietary interest, namely native title; his Honour

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5 Above n.2 at 20 and 51, Brennan J; at 59 and 71, Deane and Gaudron JJ; at 92, Dawson J. See also *Essays on the Mabo Decision, 1993,* Law Book Co.; Chapter 8 "The Consent of the Natives: Mabo and Indigenous Political Rights" by Garth Nettheim esp at 108-109.

felt that the decision in *Mabo (No. 2)* in no way impinged upon the sovereign status of the crown.

The argument put forward by the plaintiff that the acts of the defendant constituted a breach of sovereign and fiduciary duty were also rejected. Making reference to the conclusion of Toohey J in *Mabo (No. 2)* on the matter, Mason CJ felt that the essence of what his Honour referred to was that the enactment of dispossessing legislation authorising alienation from land can constitute a breach of fiduciary duty. This was not, however, what the plaintiffs claimed. The mere existence of a fiduciary duty in itself cannot render the legislation inoperative; it is only possible to generate a right to equitable compensation if it can be shown that the legislation actually constituted a breach of that duty. The plaintiffs had not made such a claim.

5 Necessary qualifications to a native title claim

His Honour then went on to consider the validity of the native title claim itself. Apart from the need to accurately and concisely define the native title claim, a further qualification is that the court will only determine a question of title to land in proceedings in which all those persons who have a possible interest in opposing the declaration of title sought by the plaintiff are joined as defendants. Obviously, considering the breadth of the claim made by the defendant, proceedings would become extremely unwieldy if *all* interested parties were joined. According to Mason CJ it was more appropriate to bring test cases over smaller, clearly defined areas rather than broad undefined areas.

Finally, with respect to the native title claim, his Honour concluded that the onus of proof necessary to establish the fact that the native title claim has not been extinguished lies with the plaintiff. In asserting the native title claim, the plaintiff must establish the conditions according to which native title subsists. Those conditions include proving that the title has not been extinguished by an inconsistent Crown grant or by aboriginal occupiers ceasing to have the requisite physical connection with the land in question.

6 Improper purpose

The final issue in the case involved improper purpose. The State of New South Wales claimed that the proceedings were improper because the primary purpose was to serve as an aid to a political process or campaign directed at a political settlement of the claims made.

According to the second defendant, the inference of this purpose could be drawn from the fact that the core of the statement of claim was based upon the sovereignty issue notwithstanding the untenable nature of the native title claim. This, combined with the inadequate description of the lands claimed and the failure to join interested parties, all pointed towards an ulterior purpose.

His Honour felt that even though an improper purpose to the proceedings could be made out, he would not stay the action permanently. One of the reasons for this was based upon the fact that the federal native title legislation had, at that stage, not been issued and it was felt that if the plaintiff was compelled to commence a fresh action, it might adversely affect their position. The following orders were made:

(1) The Statement of Claim was struck out,
(2) The Plaintiff was granted leave to file an amended statement of claim, and
(3) The Plaintiff was to pay the defendant's costs.

7 Conclusion

The importance of cases dealing with the whole native title issue cannot be underestimated. The significance of the decision in *Coe* lies primarily in the fact that it develops and expands upon the principles enunciated in *Mabo (No. 2)* and it does this, primarily, in two ways. In the first place it examines and qualifies the necessary criterion for a native title claim. It clearly points out the need for the plaintiff to accurately describe the land being claimed, join all parties to the process and establish the necessary relationship with the land *including* establishing that there have been no extinguishing acts.

In the second place, the decision clearly rejects the idea that *Mabo (No. 2)* in any way diminished the sovereign capacity of the Crown. According to Mason CJ, the whole basis for the Mabo decision was native title. His Honour was quite specific in stating that *Mabo (No. 2)* denied any challenge to the Crown's acquisition of sovereignty over Australia. Native title exists within the Crown's sovereignty and it does not create its own independent form of sovereignty.

As noted, the *Coe* decision was issued prior to the introduction of the Commonwealth native title legislation. Whilst this does not detract from the basis of the decision, it is important to note that the legislation

has now established a more informal and easier method of assessment for uncontested native title and compensation claims with the introduction of the National Native Title Tribunal. The *Coe* decision must necessarily be read in light of the introduction of this legislation.

Co-ownership and partition

The basic premise of a co-ownership relationship is that two or more persons are entitled to the simultaneous enjoyment of land. If two or more persons are simultaneously entitled to property and the relationship does not constitute a joint tenancy, they will hold the land as tenants in common. A tenant in common holds a distinct yet undivided share in the property whereas a joint tenant is seised of the whole but no individual or distinct part of the land. There are a number of different ways in which a co-ownership relationship, whether it be a joint tenancy or a tenancy in common, might be brought to an end. If a joint tenancy is severed it may create a tenancy in common; in order to extinguish a tenancy in common it must be proven that there is no longer any co-existing ownership of property. One of the most obvious ways of establishing this is by way of partition. Most of the states have legislative provisions authorising the court to issue a partition of the land in a situation where interested parties who either individually or collectively hold a half share or upwards in the property, request the court to divide the land between them.

If a division of the land is inappropriate the court may direct a sale of the land and a distribution of the proceeds. Obviously, for many parties, a sale is easier and more efficient than an actual distribution of the land and is commonly requested.

The power to order partition or sale remains at the true discretion of the court. An interesting issue relates to the type of considerations which the court will be affected by in exercising this discretion. This was one of the basic concerns the High Court was considering in *Nullagine Investments Pty Ltd v. The Western Australian Club Incorporated.*[6]

The facts of the case involved a tenancy in common. The Western Australian Club, owned a ten storey building and a multi-storey car park in Perth. They entered into three agreements, as tenants in common, with Nullagine Investments Pty Ltd. The first agreement was

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6 (1993) 177 CLR 635.

a sale to Nullagine of an undivided half-share in the land. The second was an agreement by which the parties leased the car park to the Club for a term. The third was an 'occupation deed' under which the Club was granted sole and exclusive use and occupation of the eighth, ninth and part of the tenth floors of the building for ten years along with access from the foyer and lifts. The occupation deed contained a clause by which the parties agreed that neither would sell, transfer, assign or otherwise dispose of its share or interest in the land unless 'as a condition precedent thereto' it first offered its share and interest to the other at a price to be mutually agreed upon.

At the end of the ten year period the parties were unable to agree to the basis upon which they would continue to use and occupy the premises. Nullagine wanted to sell its interest, and the Club wanted to buy it but they had not reached a price. Nullagine then brought an action in the Supreme Court of Western Australia for an order directing a sale of the land and a distribution of the net proceeds of the sale in equal shares. The club counterclaimed for a declaration that the club could only dispose of its interest in accordance with the clause in the occupation deed. The Full Court of the Supreme Court allowed the appeal and ordered that a sale could only be effected in accordance with the clause in the occupation deed. Nullagine appealed to the High Court.

The High Court (Deane, Dawson and Gaudron JJ, Brennan and Toohey JJ dissenting) held in favour of the plaintiff, Nullagine Investments Pty Ltd. The approach and reasoning of the court may be summarised as follows:

(1) It was held that the clause in the occupation deed applied only to a disposition by one of the parties of its interest and not to a disposition of the complete freehold of the land. Accordingly, this meant that the clause in the deed did not prevent one of the parties from seeking an order for partition or sale of the land. Deane, Dawson and Gaudron JJ were careful to point out that the freehold estate is to be treated as the land itself whilst an interest or share in the land is something different. An interest in land refers to a portion of the land; it cannot, by its very definition, confer an absolute freehold estate.

(2) Apart from the above distinction, the court in their discretion felt that it was not possible to imply a term restricting the ability of one of the parties to seek an order for partition or sale in a situation where the agreement had terminated. Any such term, even if it could be established, could only exist *during* the period of the agreement and not after its expiration.

(3) In dissent, Brennan J felt that the clause in the occupation deed would have the effect of precluding either party from disposing of its interest in the land unless that interest had first been offered to the other party according to the terms of the deed. His Honour drew a distinction between invalid restraints upon alienation and conditions annexed to an estate in land. A restraint upon alienation would be invalid upon the basis of the doctrine of repugnancy which sets out that the fundamental right of a property holder to alienate should not be restricted. A conditional interest can only be invalidated if the condition is contrary to public policy. Brennan J concluded that when a term, bargaining away the statutory right to apply for an order for partition or sale is a part of an agreement which itself provides for the termination of the tenancy in common, the bargain is consistent with the whole policy underlying the introduction of the first *Partition Act 1868 (UK)* and every subsequent Partition Act.

The decision reveals the breadth of the courts discretion in this area. Quite clearly any contractual term purporting to oust the courts jurisdiction will be treated sceptically. The decision of the majority provides clear evidence of the strictness with which such clauses are approached. Brennan J provides a strong dissent on the matter as well as an interesting survey of the history and policies underlying the partition and sale provisions.

Statutory compensation within the Torrens system

One of the pivotal features of the Torrens system of land registration is the ability of a person suffering loss as a result of registration to seek compensation from a guarantee fund. A state guaranteed fund for compensation is vital in a system centred around indefeasibility of title upon registration. The legislative provisions for the funds in all states are designed to ensure that persons who suffered loss as a result of

indefeasibility or an error or misfeasance on the part of the Registrar or an officer of the Registrar can acquire just compensation. If the funds are to achieve these aims the legislative provisions setting out the terms for the award to compensation must be approached flexibly.

One of the most significant compensatory provisions is that which deals with compensation for the deprivation of an interest or estate in land as a result of fraud. In all states except Victoria, a person who has been deprived of an estate or interest in land in consequence of fraud may make a claim for compensation. The phrase 'as a consequence of fraud' is given a natural meaning so that any person who loses an interest in land because of the fraud of another who takes a registered interest will be entitled to compensation.

In the recent decision by the High Court in *Saade v. Registrar-General*[7] s. 126 of the New South Wales *Real Property Act 1900* (the 'RPA') which provides for compensation in circumstances where an individual has been deprived of an estate or interest in land as a result of fraud, was given a broad application. The facts of the case involved a fraud in the transfer of land. Mrs Saade was the registered proprietor as a joint tenant with her husband over land in New South Wales. In 1976, Mr Saade forged his wife's signature to a memorandum of transfer of the property over to Mr Khoury who was also a party to the forgery.

Mr Saade then left for Lebanon and could not be located at the time proceedings were commenced. He was named as a defendant but was not served with any process. Mrs Saade became aware of Mr Saade's return from Lebanon the second day of the hearing and subpoenaed him to appear as a witness. Mrs Saade then joined the Registrar-General in the action. The trial judge dismissed the claim against Mr Saade and Mr Khoury and entered judgement against the Registrar-General for the sum of $53,000, assessed as the loss Mrs Saade suffered through the deprivation of her interest in the property as a result of the forgery.

The Court of Appeal of New South Wales upheld an appeal by the Registrar-General. Mrs Saade then appealed to the High Court. It was held per curiam by the High Court (Deane, Dawson, Toohey, Gaudron and McHugh JJ) that compensation was available under s. 126(2)(b) of the RPA on the basis of an erroneous registration. The court made the following determinations:

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7 (1993) 118 ALR 219

(1) It was found that Mrs Saade was clearly a person deprived of an interest in land 'in consequence of fraud'. She was also held to be a person deprived of such an interest 'by the registration of any other person as proprietor of such.....interest'. This clearly creates a cause of action for Mrs Saade under s. 126(1) of the RPA.

(2) Mrs Saade must also identify a person against whom damages might be brought in s. 126(2) so that the Registrar-General becomes the nominal defendant. In order for the Registrar-General to be liable to pay compensation from the fund it must then be shown that the person established under s. 126(2) is not capable of paying those damages. Section 126(5)(b) sets out that this will occur where the person liable for damages is dead, bankrupt, insolvent or cannot be found within the jurisdiction.

(3) The Court ultimately held that it was Mr Saade rather than Mr Khoury who was the person capable of being identified in s. 126(2) of the RPA. It was held that Mr Saade came within s. 126(2) of the RPA as a person 'upon whose application the erroneous registration was made.' The court felt that upon a true construction of this provision it was of no relevance to identify the person upon whose application the transfer was registered. It was held to be the intention of the act to allow the transferor as the identifiable person in order to widen the category of persons against whom the statutory cause of action will lie.

(4) Due to the conclusion that Mr Saade was the identifiable person in s. 126(2) of the RPA it was then open to the court to conclude that Mr Saade was not within the jurisdiction pursuant to s. 126(5) and consequently the Registrar-General would be liable for damages.

This decision undoubtedly extends the application of the New South Wales assurance fund. In doing so it sets an important benchmark for other states in the interpretation of such provisions. The wide interpretation given to s. 126 of the RPA makes it clear that the Court is not prepared to impose technical limitations upon a guarantee fund set up for the primary purpose of enabling persons who suffer loss through the Torrens system to obtain fair and just compensation.

Boundaries and the encroachment of buildings

Ownership of land means, literally, owning everything up the sky and down to the centre of the earth. A permanent trespass can therefore occur in any situation where a structure encroaches upon neighbouring land. Strictly speaking, in such situations, the owner can demand the demolition of the building. Naturally this would cause inevitable difficulties. The problem, however, is now dealt with in New South Wales by the *Encroachment of Buildings Act 1922*. This act empowers either the adjacent or encroaching owner to approach the court in a situation where there has been an encroachment by a substantial building of a permanent character.

Encroachment is defined in s. 2 of the legislation to mean encroachment by a building and this includes encroachment by the overhang of any part, as well as encroachment by intrusion of any part in or upon the soil. Either the adjacent owner or an encroaching owner may approach the court for relief under this Act in respect of any such encroachment. Upon such an application the court has a discretion to grant such relief as it deems necessary including the payment of compensation, the conveyance or lease of the land to the encroaching owner or the removal of the encroachment. In considering whether or not to grant relief the court must take into account, inter alia, considerations such as the situations and value of the subject land and the nature and extent of the encroachment, the character of the encroaching building and its purpose and the loss and damage which either has been or will be incurred by the adjacent owner.

Whether or not an encroachment has occurred will depend upon the particular circumstances. One thing which is clear is that the legislation will not apply where a building is erected entirely on the wrong land. In *Ramsden v. Dyson*[8] Lord Cranworth stated that :

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own....but if a stranger builds on my land knowing it to be mine, there is no principle of equity which would

8 (1886) LR 1 HL 129.

> prevent my claiming the land with the benefit of all the expenditure made on it.[9]

This issue has been explored further by the High Court in *Amatek Ltd v. Googoorewon Pty Ltd*[10]. On the facts of the case, Googoorewon Pty Ltd purchased Lot 18 from a subdivision which was then owned by Compton Park Pty Ltd. The lot was purchased with the intention of establishing a nursery for the commercial raising of trees. No survey was taken concerning the boundary between Lot 18 and the neighbouring Lots 16 and 17. Googoorewon Pty Ltd, after locating a suitable area, erected a timber building as an office and amenities building. A water tank and pipes were connected to a dam which was some distance away.

Compton Park later sold Lot 17 to Amatek Ltd and it was subsequently discovered that the improvements erected by Googoorewon actually stood on Lot 17. Googoorewon applied to the New South Wales Supreme Court for an order that Amatek transfer the land upon which the improvements stood over to it. The trial judge held that the court did not have jurisdiction. The New South Wales Court of Appeal subsequently held that relief might be given under the Act in circumstances where a person has erected a free-standing building on a neighbour's land. Amatek then appealed to the High Court (Mason CJ, Brennan, Dawson, Gaudron and McHugh JJ) who unanimously reversed the decision. The court made the following conclusions on the matter.

(1) The encroachment to which the Act is directed is the encroachment by a building and not a person. The purpose of the Act is to make provision for the adjustment of boundaries where *buildings* encroach on adjoining land and to facilitate the determination of boundaries.

(2) The encroachment by a building, of which the Act is speaking, is a horizontal encroachment 'beyond the boundary' between the land of the encroaching owner and the land of the adjoining owner. Hence, an encroachment under the Act is an encroachment by a

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9 Id at 140-141.

10 (1993) 176 CLR 471

building that traverses the boundary between the contiguous parcels of land.

(3) As a result of this determination it follows that the Act has no jurisdiction in the circumstances; there were no buildings encroaching across the boundary between Lot 17 and 18.

The significance of this decision lies in its limitation of the application of the encroachment legislation to situations where the building itself actually extends across two separate boundaries. The Act has no jurisdiction in a situation where the alleged encroachment does not actually extend across this boundary. According to the High Court, such an encroachment is not that of a building but rather, of a person. Undoubtedly the above comments of Lord Cranworth are directly relevant in this context so that the appropriate remedy for such an incursion does not lie in any statutory provision but rather in the equitable jurisdiction.

Planning and subdivision

There are many examples of situations in which an attempt has been made to dispose of land which has not been formally subdivided according the appropriate planning legislation. Most planning legislation will render invalid any transaction which attempts to subdivide land without going through the mechanics of the legislation. Generally, what this requires is that there be a plan of authorised survey which is deposited with the office of the Surveyor-General. A transaction which comes within the ambit of the legislation is one which emphasises the purpose or intent of actually carrying out the act of a subdivision. Any agreement with the basic intention of separating out land into different parts for separate use or occupation would fit within this description.

One of the interesting areas of dispute concerns the issue of whether transactions purporting to sell unsubdivided land rather than actually subdivide the land would be rendered void by planning legislation. In considering this issue it is important to examine the exact character of the transaction by considering its natural meaning and effect: see *Braham v. Walker*[11].

11 (1961) 104 CLR 366.

The High Court in *Gaye (No 1) Pty Ltd v. Allan Rowlands Holdings Pty Ltd*[12] further examined this whole area. The facts of the case involved a portion of land in the Northern Territory. The appellants purchased about 300 acres from a block of 3933 hectares. The recitals to the transactions contemplated that the 300 acres would become freehold land and that the purchasers would take the relevant steps to arrange for the subdivision. The respondents then claimed that the transaction was illegal because it did not comply with the *Northern Territory Planning Act 1979*. The illegality issue was not raised until the trial judge in the Supreme Court of the Northern Territory determined damages and as a result, even though Kearney J felt that the transaction was on its face illegal, he would refuse this issue as a matter of discretion.

The respondent appealed to the Court of Appeal who allowed the appeal. Gaye (No 1) Pty Ltd then appealed to the High Court. The High Court (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) per curiam, allowed the appeal. The following comments were made:

(1) Section 83 of the Northern Territory *Planning Act 1979* does not by its terms, render contracts or offers for the sale of land in unsubdivided form illegal. The section renders void only a transaction purporting to subdivide land, that is, to render separate parts of the land available for separate occupation or use. The agreement in issue does not attempt to render such a separation. The primary intention of the transaction was to sell the land and this is strengthened by the fact that one of the actual clauses in the agreement contemplated the consequences of a subdivision not being possible.

(2) As a result of this reading of the character of the transaction it was held that the agreement was neither a transaction subdividing land nor one purporting to do so. It was simply a transaction which called for a transfer of land in a subdivided form in accordance with the Act. Consequently the legislation was not applicable and the appeal was allowed.

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12 (1993) 114 ALR 349.

The decision raises important questions concerning the boundaries of subdivision legislation. It is vital that the exact character of the transaction be identified before it is alleged that a failure to comply with statutory procedures renders it invalid. The whole purpose of planning legislation is to ensure that subdivisions are dealt with according to the established statutory processes. If the transaction itself *deals* with a subdivision rather than actually performs it then it cannot truly be said that it offends the subdivision provisions. In *Gaye*, the High Court have provided a clear endorsement of this principle.