Coe v Commonwealth [1993] HCA 42; (1993) 68 ALJR 110; (1993) 118 ALR 193 (17 August 1993)

HIGH COURT OF AUSTRALIA

ISABEL COE ON BEHALF OF THE WIRADJURI TRIBE v. THE COMMONWEALTH OF AUSTRALIA and STATE OF NEW SOUTH WALES
S. 93/017
Number of pages - 18
[1993] HCA 42; (1993) 68 ALJR 110, (1993) 118 ALR 193

HIGH COURT OF AUSTRALIA
MASON CJ

CATCHWORDS

HEARING

SYDNEY, 17 August 1993
23:12:1993

ORDER

1. Statement of claim struck out.

2. Grant leave to the plaintiff, if so advised, to file and serve an amended statement of claim on or before 17 February 1994.

3. The plaintiff to pay the defendants' costs of these applications.

DECISION

MASON CJ There are two applications before me by way of summons, one application being presented by each defendant. The first defendant is the Commonwealth of Australia, which seeks an order pursuant to O.20 r.29 or O.26 r.18 striking out certain paragraphs of the plaintiff's statement of claim. The second defendant is the State of New South Wales, which seeks an order that the plaintiff's action be dismissed or, alternatively, stayed, or that the statement of claim be entirely struck out.

2. The plaintiff claims to sue on behalf of the Wiradjuri tribe, being Aboriginal people ((1) statement of claim, par.2.), and seeks declarations of various kinds and consequential relief. They include declarations to the effect that the Wiradjuri are the owners of lands constituting a very large part of southern and central New South Wales. In her statement of claim, the plaintiff puts the claim to relief on a variety of grounds. Description of lands claimed

3. The lands which are the subject of the action are described in pars 2 and 3 of the statement of claim. They are expressed in these terms:

"2. Since time immemorial, since 1788, since 1813, since 1901 and since within living memory (hereinafter collectively referred to as 'since time immemorial') the Wiradjuri people, who are known as Wiradjuri Kooris and who are included in that group of people known as Aboriginal people, are a nation of persons who have continuously lived on and occupied that land now known as central New South Wales, in whole or in part, according to Wiradjuri laws, customs, traditions and practices, with their own language.

3. The Wiradjuri nation have rights to all (land bounded by the common borders it shares with its neighbours ... and extends 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 (Murrimbidgee) 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) and have continued to have rights to the said land by reason of their traditional connection to the said land, notwithstanding any wrongful or unlawful extinguishment, forced dispossession, or forced abandonment of the said land pleaded herein."

subsequent paragraphs ((2) pars 5, 7, 8, 9, 10, 11, 12, 15, 17, 18, 19, 20, 22, 23, 24 and 25.), is inadequate. From the description and particulars pleaded, it is not possible to identify precisely all boundaries of the lands which the plaintiff claims. Although the plaintiff's solicitor has endeavoured to provide a more precise description of the relevant lands, I am not persuaded that the lands are yet identified adequately. If the action is to proceed, the plaintiff should be required to amend her statement of claim so as to identify correctly the lands claimed.

Parties, form and purpose of proceedings

4. It is also clear that, within the lands claimed, there are countless areas of land and allotments in private ownership, the owners not having been joined as defendants in the proceedings. Without these owners being joined, this Court could not make binding declarations adverse to their interests.

5. Furthermore, within the lands claimed there are many areas of land which have been dealt with by statutes and are the subject of freehold and other grants of title. Hence, the plaintiff is asserting a claim to many parcels of land in New South Wales which are the subject of grants of freehold and other title. That is a matter of particular relevance to the plaintiff's assertion of native title in accordance with the decision in Mabo v. Queensland (No.2) ((3) [1992] HCA 23; (1992) 175 CLR 1.), another ground of relief relied upon by

the plaintiff to which I shall refer later. It is evident that, if all interested parties are joined as defendants and the plaintiff persists in maintaining all the claims presently pleaded, the proceedings will become unwieldy in the extreme to the point of becoming unmanageable.

6. Apart from general deficiencies in the statement of claim which I shall identify, the second defendant contends that the plaintiff has commenced the proceedings for an improper purpose, amounting to an abuse of process, and that the action should be dismissed or stayed on that score. As will appear later, I consider that the second defendant's contention is correct and that the statement of claim should be struck out on this ground. But it will be convenient first to examine the case which is pleaded and secondly to deal with the objections to the case as pleaded.

The case pleaded in the statement of claim
7. The plaintiff sues the first defendant, 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 International Sovereign" ((4) par.4.). The plaintiff sues the second defendant, the State of New South Wales, in that it ((5) par.5.):

"is the purported owner and occupier of Crown lands within the area of the Wiradjuri nation and purportedly holds the radical title and reversionary title to land within the tribal area of the Wiradjuri excepting that land purportedly owned and occupied by the Commonwealth".

8. The first ground, described as "the sovereignty claim", is pleaded in pars 2-10 (inclusive), 12 and 19. Paragraphs 6-8 are as follows:

"6. The Wiradjuri are a sovereign nation of people.
7. In the alternative to paragraph 6 herein, the Wiradjuri are a domestic dependent nation, entitled to self government and full rights over their traditional lands, save only the right to alienate them to whoever they please.
8. In the further alternative to paragraphs 6 and 7 herein, the Wiradjuri are a free and independent people entitled to the possession of those rights and interests (including rights and interests in land) which as such are valuable to them."

9. Paragraphs 9 and 10, though relevant to the sovereignty claim, constitute a separate allegation of genocide and of the commission of other crimes against humanity. The paragraphs are in these terms:

"9. The second named Defendant - and George III, George IV, William IV, Victoria Regina and the Colony of New South

Wales, being predecessors of the second named Defendant - and their servants and agents (hereinafter collectively referred to as "the second named Defendant"), by unprovoked and unjustified aggression including murder, acts of genocide and other crimes against humanity, and contrary to international customary law, wrongfully and unlawfully attempted by force to settle, the whole or part of the tribal lands of the Wiradjuri, and partially excluded the Wiradjuri people and the Plaintiff's forebears from the Wiradjuri land.

10. The first and second named Defendants have, by way of crimes including particularly genocide and other crimes against humanity, wrongfully benefited through their wrongful and unlawful seizure of Wiradjuri land, and their wrongful and unlawful claims to proprietary interests in Wiradjuri land."

10. Paragraph 11 is an allegation that the first defendant "wrongfully and unlawfully acquired Wiradjuri land". In this instance the allegation is alleged to be in the exercise of powers conferred upon that defendant by the Commonwealth Constitution.

11. Paragraph 12, pleaded additionally and as an alternative to pars 6-11, is in these terms:

"George III, George IV, William IV and Victoria Regina had the sole power as International Sovereign to impair the personal, proprietary and usufructuary rights of the Plaintiff".

The paragraph is an element in the sovereignty claim and makes the further assertion that the defendants lack legislative competence to impair Wiradjuri rights.

12. Paragraph 13, which also seems to be linked to the sovereignty claim, taken together with par.14, sets up a claim that the defendants are under a fiduciary duty to the Wiradjuri nation. The paragraphs are as follows:

"13. The first and second named Defendants have represented by their conduct and otherwise to the Wiradjuri nation that they recognised and continue to recognise:

(a) Wiradjuri title;

(b) the personal and usufructuary rights of the Wiradjuri; and

(c) Wiradjuri laws, customs and practices.

14. Further by reason of the matters raised in paragraph 13 herein, the first and second named Defendants were and are under a fiduciary duty owed to the Wiradjuri nation."

13. Paragraph 15, which alleges breach of fiduciary duty, also sets up a claim that the defendants were trustees of a trust on behalf of the Wiradjuri nation and breached that trust obligation. The alleged breach of the duty and the obligation consisted in dispossessing the Wiradjuri from their land and alienating Wiradjuri land.

14. Paragraphs 16 and 17 allege that King George III and his successors "had a Sovereign duty to protect the rights of the Wiradjuri nation and failed to do so". The two paragraphs are pleaded in these terms:

"16. In the alternative to paragraphs 6, 7 and 8 herein, if the Wiradjuri were subjects of George III and his successors from 7 February 1788, then George III and his successors had a Sovereign duty to protect the rights of the Wiradjuri nation and failed to do so.
17. Further to paragraph 16 herein, the predecessors of the first and second named Defendants wrongfully and unlawfully purported to extinguish the native title rights of the Plaintiff's predecessors in title and the Wiradjuri nation."

15. Paragraph 18 is in these terms:

"18. In the further alternative to paragraphs 6, 7 and 8 herein, if the Plaintiff, the Plaintiff's predecessors in title, and the Wiradjuri people became subjects of George III on 7 February 1788, and they enjoyed, and continued to enjoy, the right to possession to their said Wiradjuri lands" (sic).

If it were not for the presence of par.23, this paragraph would be capable of being read as asserting a Mabo (No.2) type claim to native or possessory title. As par.23 clearly maintains a claim of that kind, I am left in doubt as to the purport of this paragraph. But for it being expressed as an alternative to pars 6, 7 and 8, I would have been inclined to regard this paragraph as an aspect of the sovereignty claim.

16. Paragraph 19 alleges that the defendants wrongfully and unlawfully purported to issue freehold title to third parties over portions of Wiradjuri land. This paragraph presumably is to be read as an allegation that the issue of freehold titles was unlawful, either because the Wiradjuri had sovereignty or because the issue was in breach of the duties of the defendants as trustees or fiduciaries.

17. Paragraph 20 asserts an entitlement to relief by way of (a) compensation for dispossession; (b) damages for trespass by the defendants and third parties; (c) damages for unlawful alienation by the second defendants (sic) to third parties; and (d) damages for the loss of possessory rights of the Wiradjuri as a result of the adverse possession by third parties. Paragraph 21 asserts an entitlement to compensation for breach of the

fiduciary and trust obligations, while par.22 asserts that the defendants have a duty to preserve all vacant Crown land within Wiradjuri territory for the benefit of that nation.

18. Paragraph 23 does assert a Mabo (No.2) type claim. It alleges:

"23. Further and in the alternative to paragraphs 6-22 herein, the Wiradjuri have maintained their traditional connection to Wiradjuri land described ... herein and - to the extent that native title has not been extinguished - have native title to those lands."

19. Paragraph 24 is a distinct claim that the first defendant has sought to extinguish the plaintiff's title to Wiradjuri land by acts and legislation inconsistent with s.51(xxxi) of the Constitution. Paragraph 25 is another distinct claim that the second defendant has unlawfully sought to extinguish Wiradjuri title by the Aboriginal Land Rights Act 1983 (N.S.W.) and the Crown Lands (Validation of Revocations) Act 1983 (N.S.W.) by reason of the inconsistency of those Acts with the Racial Discrimination Act 1975 (Cth), ss.10 and 11.

20. The plaintiff's claim for relief is by way of the following declarations:

"A: the Wiradjuri are a sovereign nation of people;
B: the Wiradjuri are a domestic dependent nation, entitled to self government and full rights over their traditional lands, save only the right to alienate them to whoever they please;
C: the Wiradjuri are a free and independent people entitled to the possession of those rights and interests (including rights and interests in land) which as such are valuable to them;
D: the Wiradjuri people are entitled as against the whole world to possession, occupation, use and enjoyment of Wiradjuri lands;
E: the Wiradjuri people are entitled as against the whole world to possession, occupation, use and enjoyment of those Wiradjuri lands where native title has not been extinguished;
F: the Plaintiff and the Wiradjuri nation and people are entitled to compensation for any loss or abrogation of their rights in their lands;
G: the Plaintiff and the Wiradjuri nation and people are entitled to damages for any loss or abrogation of the rights of the Plaintiff and the Wiradjuri nation and people with respect to their lands;
H: the Plaintiff and the Wiradjuri nation and people are entitled to exemplary damages for any loss or

abrogation of the rights of the Plaintiff and the Wiradjuri nation and people with respect to their lands;
I: the Plaintiff and the Wiradjuri nation and people are entitled to reparations for the acts of genocide and other crimes against humanity inflicted upon the Plaintiff and the Wiradjuri nation and people;
...
M: the Aboriginal Lands Rights Act (1983) N.S.W. as amended is invalid, insofar as it derogates from and infringes upon Wiradjuri native title rights;
N: the Crown Lands (Validation of Revocations) Act 1983 (N.S.W.) is invalid".
The plaintiff also seeks orders for inquiries into compensation and reparations.

21. At the hearing Mr Searle for the respondent conceded that, as against the first defendant, he was pressing only pars 1-3 (inclusive), 5-8 (inclusive) and 23.

The sovereignty claim

22. Mr Searle sought to derive some support from the judgments of Murphy and Jacobs JJ in Coe v. Commonwealth ((6) [1978] HCA 41; (1979) 53 ALJR 403; 24 ALR 118.). In that case, on an appeal from an order which I made refusing leave to amend the plaintiff's statement of claim, the Court divided equally on the question whether the statement of claim should be amended ((7) Gibbs and Aickin JJ considered that the appeal should be dismissed; Jacobs and Murphy JJ considered that leave to amend should be granted.). Consequently, pursuant to s.23(2)(b) of the Judiciary Act 1903 (Cth), my decision was affirmed. The principal points of departure between the four Justices who sat on the appeal were that Gibbs and Aickin JJ considered (a) that it was settled law that the Australian colonies were acquired by Great Britain by settlement and not by conquest, that view having been expressed by the Privy Council in Cooper v. Stuart ((8) (1889) 14 App Cas 286, at p 291.); and (b) that the amended statement of claim did not plead sufficiently or appropriately a claim that the Aboriginal people had rights and interests in land which were recognized by the common law and were still subsisting. Jacobs and Murphy JJ, on the other hand, thought that the view taken in Cooper v. Stuart was open to challenge and that the claim to proprietary and possessory rights to land recognized by the common law was sufficiently pleaded.

23. It is worth noting that Gibbs J (with whom Aickin J agreed) acknowledged that the claim to such rights was arguable, if properly pleaded. This is what his Honour said ((9) (1979) 53 ALJR, at p.408; pp.129-130 of ALR):

"The allegations summarized in pars.(c) and (f) above may have been intended to raise a claim that the aboriginal people had rights and interests in land which were recognized by the common law and are still subsisting. In other words it may have been desired to attack the

correctness of the decision of Blackburn J in Milirrpum v. Nabalco Pty. Ltd. ((10) (1971) 17 FLR 141; (1972-73) ALR 65.). That would be an arguable question if properly raised."

In Mabo (No.2), the Court declined to accept the view of the Crown's acquisition of the Australian colonies expressed in Cooper v. Stuart and went on to hold that the Aboriginal inhabitants of Australia had rights in land which were recognized at common law. To that extent, what was said in Coe must be read subject to Mabo (No.2).

24. But Coe lends no support whatsoever to a subsisting Aboriginal claim to sovereignty. That claim was rejected by all four Justices. Gibbs J stated that the annexation of the east coast of Australia by Captain Cook and the subsequent acts by which the whole of the Australian continent became part of the Dominions of the Crown were acts of state whose validity could not be challenged. His Honour continued ((11) (1979) 53 ALJR, at p.408; pp.128-129 of ALR):

"If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported. In fact, we were told in argument, it is intended to claim that there is an aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the aboriginal people of Australia as a domestic dependent nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians: Cherokee Nation v. State of Georgia ((12) (1831) 5 Pet 1, at p 17.).

However, the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ ((13) ibid., at p.16.) of the Cherokee Nation, that the aboriginal people of Australia are organized as a 'distinct political society separated from others', or that they have been uniformly treated as a state. ... The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising

sovereignty, even of a limited kind, is quite impossible in law to maintain."

25. Jacobs J described the first part of the proposed amended statement of claim as being ((14) (1979) 53 ALJR, at pp.409-410; p.132 of ALR):

"apparently intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia in the face of sovereignty alleged to be possessed by the Aboriginal nation".

Jacobs J refused to allow the first part of the proposed statement of claim "because generally it is formulated as a claim based on a sovereignty adverse to the Crown" ((15) ibid., at p.410; p.133 of ALR). His Honour said of pars 2A and 3A, which disputed the validity of the Crown's claim of sovereignty and sovereign possession, that they were "not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged" ((16) ibid., at p.410; p.132 of ALR).

26. Although Murphy J did not deal specifically with the sovereignty claim, his Honour agreed generally with Jacobs J and with the order proposed by him ((17) ibid., at p.412; p.138 of ALR). Murphy J was of opinion that the plaintiff was entitled to argue that the sovereignty acquired by the British Crown did not extinguish "ownership rights" in the Aborigines. But his Honour agreed with the order refusing leave to amend in the form of the first part of the proposed amended statement of claim.

27. Mabo (No.2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law. Mabo (No.2) denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country ((18) (1992) 175 CLR, at pp.15, 31-32, 69, 78-79, 122, 179-180.). Mabo (No.2) recognized that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown. The principles of law which led to that result apply to the Australian mainland as the judgments make clear. The consequence is that pars 6, 7 and 8 which are the core of the plaintiff's claim do not disclose a reasonable ground for relief.

28. The allegation in par.7 that the Wiradjuri are a dependent domestic nation, entitled to self-government and full rights over their tribal lands, is but another way of putting the sovereignty claim. The allegation has no basis in domestic law. Likewise, the claim in par.8 that the Wiradjuri are a free and independent people is but another aspect of the sovereignty claim, having no independent legal significance.

The genocide claim

29. The plaintiff contends that the acts referred to in pars 9 and 10 constitute acts of genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide or were otherwise acts contrary to international customary law. An international convention to which Australia is a party does not give rise to rights under Australian municipal law in the absence of legislation carrying the convention into effect ((19) Simsek v. Macphee [1982] HCA 7; (1982) 148 CLR 636.). No such legislation has been enacted and, in any event, the Convention post-dates most of the acts complained of. Many of them took place in the late eighteenth and early nineteenth centuries when New South Wales was a British colony. However, the plaintiff submits that municipal courts could have jurisdiction to try crimes against international law on the footing that the common law recognizes international law as part of the common law ((20) cf. Polyukhovich v. The Commonwealth [1991] HCA 32; (1991) 172 CLR 501, at pp 566-567.). But, even if one accepts the propositions for which the plaintiff contends, the problem which confronts the plaintiff is to show how the acts pleaded in pars 9 and 10 generate an entitlement to damages or compensation in the plaintiff against the second defendant which was not a party to many of the alleged acts which occurred in the late eighteenth and early nineteenth centuries when the principles of customary international law differed from the principles accepted today. The plaintiff's entitlement as a representative of the Wiradjuri people to recover damages or compensation from the second defendant for these alleged wrongs is by no means evident. If the acts complained of gave rise to an entitlement to compensation at common law, that entitlement naturally would vest in the person or persons suffering loss or damage in consequence of those acts.

30. I am inclined to the view that, if it be assumed that the Wiradjuri have a claim against the second defendant for reparations cognizable in Australian municipal courts for wrongs done to them in breach of customary international law, that claim does not extend to wrongs done to which the second defendant was not a party. However, in the absence of more comprehensive argument than was advanced before me, it would be wrong to act on that view in an application to strike out. At the same time, the pleading of the claim based on acts of genocide and breaches of customary international law in pars 9 and 10 is deficient in that it fails to identify what are the provisions or principles of law applicable when the acts alleged were committed and how it is that the second defendant is liable for acts committed before it came into existence. On this footing, pars 9 and 10 do not adequately plead the alleged ground for relief and they should be struck out on the basis that they may tend to prejudice, embarrass or delay the fair trial of the action.

Paragraph 11

31. This paragraph is not pressed and must be struck out.

The claim that defendants lack legislative competence (par.12)

32. This paragraph is only pressed against the second defendant. It is an element in the sovereignty claim and on that score cannot be maintained. It also constitutes an allegation that the second defendant lacked legislative competence to impair the rights of the plaintiff, presumably meaning thereby the rights of the members of the Wiradjuri nation. That allegation is plainly untenable. The fiduciary and trust claim (pars 13-15, 21-22)

33. This claim, based on representations of recognition of Wiradjuri title, personal and usufructuary rights and Wiradjuri laws, customs and practices, is pressed now against the second defendant only. The claim is for compensation for breach of the trust obligation and the fiduciary duty; it is not a claim to equitable ownership of the lands. There is no prayer for relief by way of declaration that the second defendant holds the Wiradjuri lands in trust for the Wiradjuri or the plaintiff.

34. Mr Searle for the plaintiff submits that the fiduciary duty pleaded in par.14 arises from the representation pleaded in par.13, namely, that the second defendant represented by its conduct and otherwise to the Wiradjuri nation that it recognized and continued to recognize Wiradjuri title, rights, laws, customs and practices. Although Mr Searle relied upon Guerin v. The Queen ((21) (1984) 13 DLR (4th) 321.) and the observations of Toohey J in Mabo (No.2) ((22) (1992) 175 CLR, at pp.20l-203.) to support the fiduciary claim, I doubt that the judgments in the two cases sustain the way in which the statement of claim presented the claim, that is, a fiduciary duty arising from a representation. In Guerin, the fiduciary relationship arose from the concept of native title and the inalienability in the circumstances of that case of the Indian interest in the land except upon surrender to the Crown ((23) (1984) 13 DLR (4th), at p.334.). Toohey J saw the fiduciary relationship arising ((24) (1992) 175 CLR, at p.203.):

"out of the power of the Crown to extinguish traditional
title by alienating the land or otherwise".
However, I accept that in some circumstances a fiduciary relationship may arise out of a representation, just as it may arise out of an undertaking. And, as I understand the Solicitor-General for New South Wales, he accepts that the facts pleaded could, if the observations of Toohey J be correct, establish that some fiduciary obligation arose in the past. Nonetheless, the Solicitor contends that the fiduciary/trust claim is either untenable or inadequately pleaded.

35. His first point is that the plaintiff cannot sue in a representative capacity to recover equitable compensation for breaches of fiduciary duty to the Wiradjuri nation arising from acts done in the distant past. The acts alleged to have been done are the acts of which particulars were given in the claim in respect of genocide and other crimes against humanity pleaded in par.9. Those acts seemingly took place in the late eighteenth and early nineteenth centuries, before the State of New South Wales was established by the Constitution. The acts also included failure to advise the Wiradjuri of relevant rights and the wrongful purported exercise of rights over Wiradjuri land, including the right of alienation. The Solicitor concedes that, in Mabo (No.2), the entitlement of the Meriam people to possession under a native title was protected or enforced in a representative action. But he argues that the court will not permit a representative action to be brought in a case in which equitable compensation is sought for breach of fiduciary duty with respect to native title to traditional lands. Although this argument has some force, it is not an argument that I should accept on an application to strike out a pleading.

36. However, the Solicitor takes issue with the way in which the plaintiff's claim has been pleaded and here he is on stronger ground. First, neither in the relevant paragraphs nor in

the prayers for relief does the plaintiff define or describe the fiduciary duty which is said to have arisen. Presumably it was a duty to maintain, preserve or deal with Wiradjuri title and rights in land for the benefit of the Wiradjuri nation and not otherwise. Contrast the express allegation in par.22 that the defendants "have a duty to preserve all vacant Crown land within Wiradjuri territory for the benefit of the Wiradjuri nation". The plaintiff does not plead that the second defendant was under a like duty in the past. Whether the plaintiff seeks to assert a more wide-ranging fiduciary duty to care for and promote and protect the welfare of the Wiradjuri people is by no means clear - the particulars given in par.9 suggest that the plaintiff may intend to make such a claim, notwithstanding that the representation pleaded in par.13 and the particulars given under that paragraph do not mention or suggest such a claim.

37. Secondly, a number of the particulars given under par.9 which are relied upon as breaches of the fiduciary duty pleaded and trust obligation pleaded in par.15 are not attributed to the second defendant. Indeed, I do not read sub-par.(c) of the particulars given under par.9 as asserting that the "criminal acts" to which reference is there made as having been perpetrated by the second defendant or with its authority, except for sub-par.(c)(ix) ((25) Sub-paragraph (c)(ix) contains the following particulars:

"Wiradjuri land, occupied by pastoralists and other settlers
outside the limits of location, with the consent of the
second named Defendant, was torn from the Wiradjuri nation
by criminal acts including:
...
(ix) armed bodies of men (including Mounted, Border and
other Police) , church organisations and an Aborigines
Protection Board forcibly dispersed Wiradjuri people from,
throughout and to, certain parts of Wiradjuri land.").

38. As noted earlier, many of the particulars given in par.9 relate to incidents which took place when New South Wales was a British colony.

39. Thirdly, it is by no means clear to me how the plaintiff seeks to make out that the fiduciary duty has been infringed, more particularly in relation to alienation of the Wiradjuri lands. Mr Searle argues that the enactment of a statutory power of alienation constituted a breach of the fiduciary duty. He seeks to support the claim to equitable compensation by reference to the observations of Toohey J in Mabo (No.2) ((26) (1992) 175 CLR, at p.205.):

"A fiduciary obligation on the Crown does not limit the
legislative power of the Queensland Parliament, but
legislation will be a breach of that obligation if its
effect is adverse to the interests of the titleholders, or
if the process it establishes does not take account of those
interests."

The Solicitor disputes the correctness of the second of the two propositions stated by his Honour. The question was not discussed by the other Justices in Mabo (No.2), though Dawson J pointed out ((27) ibid., at pp.166-167.) that the fiduciary obligation recognized in Guerin v. The Queen is dependent upon some sort of aboriginal interest existing in or over land. On an application to strike out it would not be appropriate for me to decide whether the statement made by Toohey J correctly reflects the law or whether Dawson J is right in suggesting that the subsistence of an aboriginal interest in land is essential to the creation of a fiduciary relationship of the kind which the plaintiff seeks to set up. Nor, as I understand him, does the Solicitor-General ask me to do so.

40. However, as I read pars 13-15, they do not assert that the enactment of legislation dispossessing the Wiradjuri and authorizing alienation of their land constitutes a breach of trust or fiduciary duty yet, in the context of breach of fiduciary duty, that is the essence of what Toohey J was saying in the passage which I have quoted. The existence of a fiduciary duty cannot render the legislation inoperative, though, according to Toohey J, it could generate a right to equitable compensation if the legislation constituted a breach of duty. My reading of the pleading gains support from sub-par.(c) of the particulars given of par.15. Indeed, that paragraph refers to the Wiradjuri's rights to their land "pursuant to the law of the purported Sovereign" (emphasis added). It then goes on to assert that the second defendant:

"wrongfully and unlawfully asserted and purported to
exercise certain rights over the said land including the
right to alienate land to third parties" (emphasis added).

That assertion seems to echo the earlier sovereignty claim and to challenge the validity of any alienation to third parties. The particular also raises a question as to what title and rights the plaintiff is referring to in pars 13-15. Are the references to native title as recognized in Mabo (No.2) or to a larger form of title associated with Wiradjuri sovereignty?

41. The uncertainties and inadequacies of the claims pleaded in pars 13-15 are such that neither these paragraphs in their present form, nor pars 21 and 22, which are dependent upon them, should be permitted to stand.

The claim that the second defendant had a sovereign duty to protect the Wiradjuri nation (pars 16 and 17)

42. The claim made in these paragraphs is that the second defendant and its predecessors had a sovereign duty to protect the Wiradjuri yet those predecessors "unlawfully purported to extinguish the native title rights" of the Wiradjuri. This claim echoes particulars (a)(iii) and (b)(iii) of par.1 of the statement of claim. Paragraph (a)(iii) states:

"the Commonwealth has a constitutional duty to protect the
personal and proprietary interests of the Aboriginal people
of Australia".

Paragraph (b)(iii) refers to "the implied duties within the Constitution to protect the interests of the Aboriginal people". The argument before me did not reveal the basis of a

constitutional implied duty owed by the second defendant to the Wiradjuri to preserve their native title rights or the basis on which breach of such a duty could generate an action for damages or compensation at the suit of the plaintiff. The claim made in these paragraphs is, accordingly, untenable.

43. Mr Searle for the plaintiff ultimately stated in argument that the plaintiff did not press the claim of "wrongful extinguishment" of Wiradjuri title pleaded in these paragraphs. Indeed, he said that the paragraphs were intended to do no more than to plead a breach of fiduciary duty. On this footing the paragraphs are incorrectly expressed, and may tend to prejudice, embarrass or delay the fair trial of the action.

The claim that the second defendant unlawfully purported to issue freehold titles (pars 18 and 19)

44. The claim here appears to be a repetition of the claim based on implied duty pleaded in pars 16 and 17, with an assertion that the issue of freehold titles was a breach of that duty. Again, Mr Searle stated in argument that these paragraphs were intended to achieve no more than to plead a breach of fiduciary duty. On that footing, they suffer from the defects of pars 16 and 17.

Compensation and damages for breach of duty (par.20)

45. In this paragraph, the plaintiff seeks compensation for dispossession of land, damages for trespass, damages for unlawful alienation of Wiradjuri lands to third parties and damages for loss of Wiradjuri possessory rights as a result of adverse possession by third parties. The claim for compensation for dispossession is evidently not related to the claim for equitable compensation associated with the breach of trust/fiduciary duty because that claim for compensation is pleaded in par.21. The par.20 claim for compensation is apparently related to the claims pleaded in pars 9 and 10.

46. The claim for damages for trespass is not without its difficulties. The preceding paragraphs do not distinctly plead trespass. However, in par.9, the plaintiff alleges that the second defendant "wrongfully and unlawfully attempted by force to settle" the Wiradjuri lands "and partially excluded" the Wiradjuri from those lands. That could be understood as asserting a trespass but, if so, its true character is disguised because it appears in the context of a claim in respect of genocide.

47. The claim for unlawful alienation is apparently based on some tortious wrong but the precise nature of the tort is not identified. Likewise, the legal basis for the claim for damages for loss of possessory rights as a result of adverse possession by third parties seems to be based on an unidentified tortious wrong.

48. The claim for relief in this paragraph is inadequately pleaded. The claim that native title has not been extinguished (par.23)

49. This is a Mabo (No.2) style native title claim to the Wiradjuri lands to the extent that such a title has not been extinguished. The qualification to which I have given emphasis means that the actual lands which are the subject of the claim remain unidentified by the

plaintiff except to the extent that they are lands which fall within the lands described in the particulars. The particulars given of this claim identify (a) native title rights to land leased by the Crown pursuant to the Western Lands Act 1901 (N.S.W.) and (b) native title rights to all Crown lands. Subject to four qualifications which I shall mention, this is a tenable claim. The first qualification is that not only should the Wiradjuri lands be described precisely but also that the lands which are the subject of the Mabo (No.2) style claim to native title should be described precisely so that it is possible to identify the lands which are the subject of that claim. The second 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. As I remarked earlier, having regard to the many parcels of land which appear to be affected by the declarations of title sought by the plaintiff, proceedings will become unwieldy if steps are taken to join all interested parties. Judicious selection of test cases would be a more appropriate procedure.

50. The third qualification is that, as Brennan J pointed out in Mabo (No.2) ((28) (1992) 175 CLR, at p.68.):

"(i)f a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium".

The plaintiff's claim to the land mentioned in (a) therefore meets a formidable obstacle.

51. The fourth qualification is that the plaintiff is evidently proceeding on the footing that it is for the second defendant to prove extinguishment, that is, that the defendant bears the onus of proving that matter. Although the Solicitor-General for New South Wales was inclined to concede that the onus is on the defendant, a matter which the Solicitor-General for the Commonwealth did not accept, I do not consider that the defendant bears the onus. It seems to me that, if the plaintiff asserts native title to land, then the plaintiff must establish the conditions according to which native title subsists. Those conditions include (a) that the title has not been extinguished by inconsistent Crown grant ((29) ibid) and (b) that it has not been extinguished by the Aboriginal occupiers ceasing to have a requisite physical connection with the land in question ((30) ibid., at p.70.). In Mabo (No.2), Brennan J said ((31) ibid):

"Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connexion with the land or on the death of the last of the members of the group or clan."

Acquisition of property on unjust terms (par.24)
52. In argument the plaintiff's counsel stated that this paragraph was not pressed.

Revocation of native title inconsistent with the Racial Discrimination Act (par.25)
53. This paragraph was not challenged by the second defendant except to the extent that the lands in question have not been precisely described. In this instance, the particulars given may overcome that objection.

Improper purpose
54. The second defendant contends that the predominant purpose of bringing the proceedings is not to litigate them to a successful conclusion but rather that they should serve as an aid to a political process or campaign foreign to the litigation, namely, to contribute to a political settlement of claims made by the Aboriginal people of Australia or by the Wiradjuri who constitute part of that people. The second defendant submits that the inference that the proceedings have been brought for this ulterior and illegitimate purpose should be drawn from the fact that the core of the plaintiff's case is the sovereignty claim, notwithstanding that it is an untenable claim. Certainly the sovereignty claim is the central element in the case pleaded in the statement of claim. Furthermore, the genocide claim features prominently in the statement of claim, despite the difficulties associated with it. In addition, there are technical shortcomings: the inadequate description of the lands claimed and the failure to join interested parties. Indeed, the unwieldy nature of the proceedings arising from the joinder of so many grounds for relief in relation to such a large area of land claimed instead of presenting manageable claims to defined parcels of land for resolution points to the purpose of using the proceedings for political purposes.

55. The affidavit of Mr John McDonnell who deposes to the making of various statements by Mr Paul Coe, the brother of the plaintiff and the Chairman of the Aboriginal Legal Service which acts for the plaintiff in these proceedings, supports the existence of this purpose. These statements indicate that the principal purpose of the proceedings is to pursue the sovereignty claim in order to play a part in creating the impression that the Aboriginal people have rationally based legal claims to much of New South Wales with the consequence that the farming community should start negotiating with the Wiradjuri with respect to the payment of royalties for occupation of traditional Wiradjuri lands. In addition, the statements indicate that the opposition of the States to the Federal Mabo legislation left Aboriginal people with no alternative but to bring land claims, such as that involved here, in the eastern States. The plaintiff has not contested the making of these statements.

56. In Williams v. Spautz ((32) [1992] HCA 34; (1992) 174 CLR 509.), this Court by majority held that proceedings are brought for an improper purpose and constitute an abuse of process where the purpose of bringing them is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers. It would ordinarily follow that, in view of the conclusions I have reached, this action should be stayed permanently. Such a stay would not preclude the plaintiff from bringing a fresh action to

tenable claims pleaded in proper form, so long as the action was not designed to achieve a purpose foreign to the litigation. However, in the present case, in the light of the possibility that federal legislation will come into operation and might adversely affect the plaintiff's position if the plaintiff were compelled to commence a fresh action, I consider that I should do no more than strike out the entire statement of claim, leaving the plaintiff, if she be so advised, to file an amended statement of claim confined to tenable claims pleaded in proper form.

57. In the result I make the following orders.

1. Strike out the plaintiff's statement of claim.
2. Grant leave to the plaintiff, if so advised, to file and serve an amended statement of claim on or before 17 February 1994.
3. The plaintiff to pay the defendants' costs of these applications.