NSW ABORIGINAL LAND COUNCIL V MINISTER ADMINISTERING THE CROWN LANDS ACT

New South Wales Court of Appeal (Mason P, Giles JA, Tobias JA)
12 October 2007
[2007] NSWCA 281

Land rights – legislation – claim to Crown land – land used for preparation of sale – land otherwise vacant – whether land in 'use' – s 36(1)(b), *Aboriginal Land Rights Act 1983* (NSW)

Statutory interpretation – specific interpretation of 'use' – inconsistency between *Crown Lands Act 1989* (NSW) and *Aboriginal Land Rights Act 1983* (NSW) – no inconsistency

Facts:

On 25 May 2005 the appellant lodged a claim pursuant to the *Aboriginal Land Rights Act 1983* (NSW) ('ALRA') on behalf of the Wagga Wagga Local Aboriginal Land Council. The claim concerned a parcel of urban land in Wagga Wagga. The premises had been used as a motor registry until 1985. It was undisputed between the parties that as at 2004 the land was no longer required for State purposes and should be disposed of as soon as practicable. The premises were vacant and had fallen into a state of disrepair. The Department of Lands had taken steps to facilitate the sale of the land, including obtaining valuations and expert opinions, appointing an agent and fixing an auction date. The respondent Minister rejected the appellant's claim on 8 March 2006 on the basis that the land was not 'claimable Crown land' within the meaning of the ALRA as it was being lawfully used and occupied by the Department of Lands in preparing the land for sale. The appellant appealed the respondent's decision to the Land and Environment Court. Biscoe J rejected the appeal on the basis that the decision to sell the land and the preparatory steps taken to achieve the sale constituted lawful use of the land for the purposes of s 36(1)(b) of the ALRA.

Held, allowing the appeal, per Mason P, Tobias JA agreeing:

1. The legal question for consideration not previously addressed is whether 'use' for the purpose of a sale falls within the statutory concept of s 36(1)(b) of the ALRA: [30].

2. When determining the meaning of the word 'use' in the ALRA, the fact that the *Crown Lands Act 1989* (NSW) ('CLA') grants power to sell Crown lands is irrelevant. Section 7 of the CLA specifically preserves the operation of other legislation authorising Crown land to be disposed of or dealt with in any manner inconsistent with the CLA: [22].

3. The ALRA expressly provides for Crown land 'able to be lawfully sold or leased' to be claimed, provided additional conditions are met. A qualifying precondition in one subsection, namely s 36(1)(a), cannot at the same time constitute a disqualifying condition in another subsection, namely s 36(1)(b): [23].

4. For the purposes of s 36(1)(b), 'use' must be more than notional and be present use when the claim is made rather than contemplated or intended use: [32]; *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1997) 42 NSWLR 641 applied.

5. The primary judge erred in finding that the decision to sell the land and the steps taken in order to do so collectively amounted to a use of the land. The statement in *Darkinjung Aboriginal Land Council v Minister Administering Crown Lands Act* (2006) 149 LGERA 162 that 'use' includes a right to use land which arises without any dealing necessarily taking place has no reference to sale of land as a 'dealing'. The primary judge erred in his reliance on previous case law to support these propositions: [8], [43]–[45]; *Darkinjung Aboriginal Land Council v Minister Administering Crown Lands Act* (2006) 149

LGERA 162 distinguished, *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1997) 42 NSWLR 641 distinguished, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (1992) 76 LGRA 192 distinguished.

6. Crown land that has been vacant for years, fallen into a state of disrepair, has been identified as surplus to departmental needs and for which there is no known reason for retention, is not being used in any relevant sense: [24]–[25].

Held per Giles JA:

1. The trial judge did not consider the correct question. The question is not whether sale of land is 'use' of the land for the purposes of s 36(1)(b) of the ALRA, as sale of land, or action to sell, will not usually of themselves constitute 'use' of Crown land. The question is whether at the relevant time the land is being used, and action to sell the land may or may not be part of use found in wider circumstances: [66], [70], [73]; *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 cited, *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1997) 42 NSWLR 641 cited.

2. For almost five years the land in question had been effectively physically unused and had been recognised as surplus to requirements. As such, the better conclusion is that this was unused Crown land which was being sold, and was not a case where action to sell the land constituted part of its use: [77].

Note: the High Court has granted the Minister special leave to appeal. See Transcript of Proceedings, Minister Administering the Crown Lands Act v NSW Aboriginal Land Council *(High Court of Australia, Gummow and Heydon JJ, 16 May 2008).*