MINISTER ADMINISTERING THE CROWN LANDS ACT V NSW ABORIGINAL LAND COUNCIL

High Court of Australia (Kirby, Hayne, Heydon, Crennan and Kiefel JJ)
2 October 2008
[2008] HCA 48

Land rights – *Aboriginal Land Rights Act 1983* (NSW), s 36(1)(b) – claimable Crown land – whether land 'lawfully used or occupied' – whether acts preparatory to sale constitute use of land

Statutory interpretation – interpretation of 'lawfully used or occupied' – beneficial and remedial interpretation

Facts:

On 23 May 2005, the New South Wales Aboriginal Land Council made a claim to land in Wagga Wagga under *Aboriginal Land Rights Act 1983* (NSW) ('ALRA'). The land was used as a motor registry and storage facility prior to 1998. However, at the time of the claim, the land was vacant and in a state of disrepair and due to be sold. The Department of Lands had appointed a real estate agent and fixed an auction date. Section 36(1)(b) ALRA states claimable Crown lands must 'not be lawfully used or occupied'. The Minister for Lands refused the land claim, construing the acts preparatory to sale as rendering the lands in use and thus not claimable Crown land within the ALRA.

The Court of Appeal held that the land was claimable and the Department of Lands' actions did not constitute 'use' of the land. The key issue on appeal to the High Court was the same: whether the land in question was claimable under the ALRA, which depended on whether the land was 'not lawfully used or occupied'.

Held, dismissing the appeal, per Hayne, Heydon, Crennan and Kiefel JJ:

1. The ALRA has underlying beneficial and remedial purposes, as evident from the preamble and extrinsic materials. It is not necessary to invoke any principle of 'beneficial construction' in this case, as there is no choice to be made between competing constructions of s 36(1)(b) of the ALRA: [44]–[48].

2. There is no exhaustive definition of 'not lawfully used or occupied'. 'Use' is a protean word. In general, use of land is shown by physical acts on the land, while occupation is shown by a combination of actual and legal possession and a degree of permanence and continuity: [69]; *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWCA 281 considered, *Newcastle City Council v Royal Newcastle Hospital* [1957] HCA 15 considered.

3. Regardless of the question of whether the expression 'lawfully used or occupied' has only a single meaning or is better understood by a separate consideration of the words 'used' and 'occupied', the expression is one that encompasses utilisation, exploitation and employment of land: [73].

4. Sale of land amounts to exploitation of land but does not automatically show use or occupation. A person who uses land derives an advantage but deriving an advantage from ownership of land does not necessarily constitute use of the land: [74]–[75]; *Newcastle City Council v Royal Newcastle Hospital* [1957] HCA 15 considered.

5. In the present case, the preparatory acts to sale were predominantly not physical acts done on the premises but occurred at other places. Mere transitory visits by surveyors and real estate agents do not constitute use of land. The

steps towards selling the land were steps directed to deriving the advantages of disposing of the asset and receiving the proceeds of sale, but they did not amount to a lawful use of the land. The land was therefore claimable: [76]

Held, dismissing the appeal, per Kirby J:

6. While the starting point in statutory interpretation must always be the text in question, the process should not be purely literal or grammatical but guided by context and purpose, even when the text does not appear ambiguous: [2]; *Re Bolton; Ex parte Beane* [1987] HCA 12 considered, *Trust Company of Australia Ltd v Commissioner of State Revenue* [2003] HCA 23 considered, *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 considered, *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5 considered.

7. The ALRA has beneficial and remedial objects, and exceptions to the right to claim land under the Act should be interpreted narrowly: [11], [17]–[19], [28]; *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 considered, *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council* (No 2) [2001] NSWCA 28 considered.

8. 'Use' is protean and inherently unclear, and the resulting statutory phrase as a whole is therefore potentially ambiguous. As such, the statutory words require interpretation according to the ALRA's beneficial and remedial objects: [8], [23].

9. To be 'lawfully used or occupied', land must be used physically and in actuality. Purely notional, potential, contingent, contemplated or future use is not sufficient. This is supported by the fact that, while the Crown is said to be 'universal occupant' of land over which sovereignty is asserted, such a notional interpretation of 'occupation' could not be accepted as applicable to s 36(1) without effectively excluding all lands from 'claimable Crown lands': [28]–[32]; *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWCA 281 considered, *Attorney-General v Brown* (1847) 1 Legge 312 considered, *Mabo v Queensland* (No 2) [1992] HCA 23 considered, *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 considered.

10. Without adopting a narrow construction, the preparatory acts to sale arguably constituted use of land. However, under the beneficial and remedial interpretation, there was no continuing, separate, actual use of the land before the subject claim was made: [24]–[25], [35].