NEW SOUTH WALES ABORIGINAL LAND COUNCIL v MINISTER ADMINISTERING THE CROWN LANDS ACT (S168/2016)

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 349

Date of judgment: 16 November 2015

Special leave granted: 17 June 2016

In February 2012 the New South Wales Aboriginal Land Council ("the Appellant") lodged a claim pursuant to s 36 of the *Aboriginal Land Rights Act* 1983 (NSW) ("the Act") in respect of two adjacent parcels of Crown land in Berrima. The land itself comprised the decommissioned Berrima jail, various outbuildings and their surrounds ("the land"). On 20 November 2012 the Respondent rejected the Appellant's claim on the basis that the land was lawfully used and occupied by Corrective Services NSW ("Corrective Services"). The Appellant then appealed that decision to the Land and Environment Court.

On 1 December 2014 Justice Pain rejected the Appellant's appeal, finding that the land was lawfully occupied by Corrective Services, as a manifestation of the Crown in NSW.

On 14 November 2015 the New South Wales Court of Appeal (Beazley P, Macfarlan & Leeming JJA) unanimously dismissed the Appellant's subsequent appeal. Their Honours rejected the Appellant's submission that Justice Pain had erred in finding that the land was occupied as at the date of the claim. Their Honours found that Justice Pain's analysis amounted to a qualitative evaluation of the acts, facts, matters and circumstances pertaining to the whole and each part of the claimed land. The presence of 24/7 security and regular visits by offenders serving Community Service Orders to perform work in the grounds, for instance, were sufficient to base a finding of occupation. It was not the case that the land had ceased to be used for the purposes of punishment of offenders, nor had the land been "mothballed" pending a decision as to its future use.

The New South Wales Court of Appeal also noted that Justice Pain's reasoning reflected the limited nature of the alternative submissions made at trial. Their Honours found that any failure by her Honour to address issues not raised at trial (such as the failure to consider buildings individually) did not therefore amount to an error of law. They further found that Section 2 of the *New South Wales Constitution Act* 1855 (Imp) did not produce the result that statutory authorisation was required in order for any occupation of Crown land to be lawful. In relation to the question of whether Corrective Services (which is not a legal person) could lawfully occupy the land, their Honours held that the land was lawfully occupied by the Crown in right of New South Wales, which includes the Government of New South Wales.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in deciding that the Executive could authorise the management or control of land dedicated for a public purpose without statutory authorisation.

- The New South Wales Court of Appeal erred in deciding that there was an implied statutory authority under the *Crown Lands Act* 1989 (NSW) ("the Crown Lands Act") to maintain and secure the land for the time reasonably needed to perform the obligations imposed by that Act exercisable by any persons other than the Minister Administering the Crown Lands Act.

On 28 June 2016 the Appellant filed a Notice of Constitutional Matter. The Attorneys-General for Victoria, Western Australia and Tasmania have filed Notices of Intervention.