

WILLIAMS v. WRECK BAY ABORIGINAL COMMUNITY COUNCIL & ANOR (C5/2018)

Court appealed from: Court of Appeal of the Supreme Court of the Australian Capital Territory [2017] ACTCA 46

Date of judgment: 23 October 2017

Special leave granted: 21 March 2018

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) (the “*Land Grant Act*”) is Commonwealth legislation applicable to a community of Aboriginal persons living on a tract of land in the Jervis Bay area. Under the *Land Grant Act*, a body corporate known as the Wreck Bay Aboriginal Community Council (“the Council”) was established and granted ownership of the land occupied by the community. The members of the Council consist of those Aboriginal persons who resided on the land as at 24 May 1986 together with persons who have since been accepted as members of the community at a general meeting of the Council.

Under s 6 of the *Land Grant Act* the Council has certain functions including “[...]taking] action for the benefit of the Community in relation to the housing, social welfare, education, training or health needs of the members of the Community.”

The *Residential Tenancies Act 1997* (ACT) (“the *RT Act*”) is ACT legislation which governs the relationship between landlords and tenants and seeks to balance their respective rights.

The *Jervis Bay Territory Acceptance Act 1915* (Cth) was amended in 1988 to include, inter alia, s 4A which provides that “Subject to this Act, the laws ... in force from time to time in the Australian Capital Territory are, so far as they are applicable ... to the [Jervis Bay] Territory (“JBT”) and are not inconsistent with an Ordinance, in force in the JBT as if the JBT formed part of the Australian Capital Territory.”

S 46 of the *Land Grant Act* provides that: “This Act does not affect the application to Aboriginal Land of a law in force in the Territory to the extent that that law is capable of operating concurrently with this Act.”

The issue in this appeal is the extent to which the *RT Act*, as a law in force in the JBT, applies to Aboriginal Land under the *Land Grant Act* over which the first respondent, the Council, granted a lease.

The appellant is a registered member of the Council and has been the tenant of premises in the Wreck Bay village, in the JBT, leased to him by the Council pursuant to a residential tenancy agreement since 1989. The premises are located on

Aboriginal Land: that is, land which has been granted to the Council pursuant to s 8 of the *Land Grant Act*.

In April 2015 the appellant commenced proceedings in the ACT Civil and Administrative Tribunal (“ACAT”) against the Council seeking compensation of \$25,000 under s 83(d) of the *RT Act* and an order that repairs be carried out on the premises. The Council applied to strike out the application on the basis that ACAT had no jurisdiction to hear the dispute because there was not a residential tenancy agreement between the parties. ACAT decided in December 2015 that the appellant had been occupying the premises under a residential tenancy agreement within the meaning of s 6A of the *RT Act* and therefore ACAT did have jurisdiction. The proceedings were subsequently removed to the ACT Supreme Court by consent. This was done by the Council filing an application in June 2017 in the ACT Supreme Court, by way of a Special Case, in relation to whether the *RT Act* applied to Aboriginal Land. The Attorney-General for the Australian Capital Territory (the second respondent) intervened in those proceedings. On 25 August 2016 Elkaim J held that the *RT Act* did so apply. The Council appealed to the Court of Appeal which allowed the appeal, finding that the *RT Act* was incapable of operating concurrently with the *Land Grant Act* and accordingly, that Sections 8 and 9 of the *RT Act* did not apply to Aboriginal Land.

In this Court the appellant submits that the provisions of the *RT Act* relevant to his claim are capable of operating concurrently with the provisions of the *Land Grant Act* relating to leases. Thus the relevant provisions of the *RT Act* are not prevented from applying to the residential tenancy agreement.

The first and second respondents submit that the Court of Appeal was correct in its determination that the *RT Act* and *Land Grant Act* were incapable of concurrent operation, and as such, the provisions of the *RT Act* are not applicable to the residential tenancy agreement.

A Section 78B Notice was filed by the Council in May 2018. There has been no intervention by any State or other Territory Attorney-General in response.

The appellant’s grounds of appeal to the High Court are:

- That the Court of Appeal erred in law in holding that Sections 8 and 9 of the *RT Act* as applied in force in the Jervis Bay Territory by Section 4A of the *Jervis Bay Territory Acceptance Act 1915 (Cth)* are not capable of operating concurrently with the *Land Grant Act* in accordance with Section 46 of the *Land Grant Act*.
- That the Court of Appeal erred in law in holding that the *RT Act* does not apply to Aboriginal Land for the purposes of Section 46 of the *Land Grant Act* to the extent to which Sections 8 and 9 of the *RT Act* would apply to a lease granted by the Council.