Major disturbance—expedited procedure appeal

Little v Oriole Resources Pty Ltd [2005] FCAFC 243

French, Stone and Siopis JJ, 5 December 2005

Issue

This appeal to the Full Court of the Federal Court related to a determination of an expedited procedure objection application by the National Native Title Tribunal. The question raised was whether the grant of a miscellaneous licence under the *Mining Act 1978* (WA) was an act attracting the expedited procedure under the *Native Title Act 1993* (Cwlth) (NTA) and, therefore, not subject to the right to negotiate. In particular, the appeal deals with the proper interpretation and application of s. 237(c) of the NTA.

Background

The licence, for mining camp infrastructure and associated facilities, was to be granted to Oriole Resources Pty Ltd (Oriole) over an area of 120 hectares. Oriole's stated intention was to rely upon pre-existing mining camp accommodation at the site and to use the licence for the purpose of a possible power line easement, access tracks and rubbish disposal.

The State of Western Australia asserted in its notice under s. 29 of the NTA that the proposed grant was an act attracting the expedited procedure. The registered native title claimant representing the Badimia People lodged an objection to the application of the expedited procedure which was dismissed by the Tribunal. An 'appeal' under s. 169 to the Federal Court (the 169 appeal) on questions of law was dismissed: *Little v Oriole Resources Pty Ltd* [2005] FCA 506 per Nicholson J, summarised in *Native Title Hot Spots* Issue 16. The grounds of the s. 169 appeal were directed to the Tribunal's approach to the construction of s. 237(c). The registered native title claimant appealed from aspects of that judgment. This is the decision in relation to that appeal.

Section 237

Section 237 provides that a future act is an act attracting the expedited procedure if:

- the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
- the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and

- the act is not likely to involve major disturbance to any land or waters concerned [first limb] or create rights whose exercise is likely to involve major disturbance to any land or waters concerned [second limb].

Construction of s. 237

Their Honours observed that s. 237 had been amended by the *Native Title Amendment Act 1998* (Cwlth) by the insertion of the phrase 'is not likely to' so as to override the construction of that section in *Dann v Western Australia* (1997) 74 FCR 391, which the court said was essentially the same as that argued by the appellant. One the proper construction of s. 237(c), the court noted that:

- the class of 'rights' created by the future act referred to in the second limb could logically be defined as, alternatively, rights comprised in, and coming into existence upon, the doing of the future act or rights that may, or may not, come into existence after the doing of the future act;
- a future act will often, if not always, be an act creating rights, e.g. the grant of the licence would confer a right upon the holder to do the things authorised it, namely to construct mining infrastructure and associated facilities;
- if the creation of these rights is the future act, the second limb of s. 237(c) appears to be otiose (or superfluous) and the likelihood of major disturbance is a matter to be assessed in light of the act, i.e. there is no occasion for a two-step analysis by reference to rights created by the act;
- in these cases, this construction renders s. 237(c) consistent in terms of policy and structure with ss. 237(a) and (b)—at [42] to [43].

In relation to the second limb, it was said that:

- a construction that may give it some work to do would apply it to cases where rights are created not by the future act itself but as a consequence of things done under that act;
- for example, a particular legislative or executive act may empower a person to make decisions or elections or to do things upon which certain rights subsequently come into existence;
- the second limb is best construed as requiring the same kind of predictive assessment as the first limb and as the other paragraphs i.e. there appeared to be no rational basis for a distinction to be drawn under which the second limb would be construed according to the pre-amendment position—at [44].

After consideration of the relevant cases and materials, it was found that there was nothing in the legislative history or prior judicial interpretation of s. 237 that operated against such a construction to the second limb of s. 237(c)—at [45] to [50].

However, in this case:

- there was no suggestion that there were any relevant grants, other than those comprised in the grant of the licence, that may come into existence upon some post-grant contingency; and, therefore
- the only question before the Tribunal was whether 'the act is not likely to involve major disturbance to any land or waters' i.e. only the first limb was relevant – at [44].

The court was critical of the approach taken by the Tribunal because it:

- did not cite the authorities relevant to the construction of s. 237(c) in its amended form;
- assessed the likelihood of 'major disturbance' by reference to what could be done under the licence rather than what was likely to be done;
- it embarked upon its task on an assumption that was unduly favourable to the claimants, based upon its misconstruction of s. 273(c);
- acting on that false assumption, found the hypothetical possible effect of the grant not to constitute a major disturbance—at [34] and [51].

Therefore, the court was of the view that:

- if the Tribunal applied a wrong legal test for 'major disturbance', the requisite predictive assessment would have to be undertaken on a basis less favourable to the claimants;
- this required consideration of whether the Tribunal did err in its approach to its assessment of 'major disturbance' —at [51] .

Major disturbance

Their Honours observed that the words of s. 237(c) were not affected by the 1998 amendments. The court noted (among other things) that:

- while t he word 'major' is an adjective of degree, and necessarily involves an element of subjective assessment as to the degree of disturbance, that assessment is not entirely subjective;
- the Tribunal accepted that the grant of the licence would create rights whose exercise 'may involve major disturbance' i.e. the Tribunal was referring to the range of things that could be done under the rights conferred notwithstanding that the Oriole did not intend to go beyond using the additional land subject to the licence for a power line easement, access tracks and rubbish disposal—at [55].

Tribunal erred in law

It was held that:

> The substantive reasoning of the Tribunal on this point turned critically upon the absence of any concerns expressed or evidence given on behalf of the claimants or other Aboriginal people who might have an interest in the area. However, while the concept of 'major disturbance' involves judgments of degree these are not entirely subjective. Just because a view may be imputed to the 'Australian community' that the establishment of a significant mining camp and accommodation facilities in an area already the subject of extensive mining activity is not a 'major disturbance' ... that does not answer the question whether it is or not. On the hypothesis on which the Tribunal proceeded which allowed for the possibility of the extensive exercise of rights under the Miscellaneous Licence ... it is hard to see how the potential disturbance could be described as other than a 'major disturbance'. Whilst it is difficult to identify any expressed error in the reasoning in this respect, it is sufficient to say that the conclusion is sufficiently unreasonable to demonstrate underlying error—at [56].

Decision

While the court did find there was an error of law on the Tribunal's part, this did not mean that the appellants won the case because their Honours went on to find that:

- had the Tribunal undertaken a predictive assessment as required, it could not have come to any conclusion on the evidence other than that the proposed works would be limited in the way asserted by the Oriole;
- in particular, it could not have come to the conclusion that the Oriole would be likely, for some 'idiosyncratic reason contrary to its stated intention', to duplicate existing mining camp accommodation facilities;
- On that basis, the Tribunal would undoubtedly have found the act to be one which was not likely to involve any major disturbance to the land—at [57].

Therefore, the appeal was dismissed.