Costs - native title party to pay

Edwards v Santos Limited (No 2) [2010] FCA 238

Logan J, 17 March 2010

Issue

The issue in this case was whether the applicants for declaratory and injunctive relief (who were also the 'registered native title claimant' for a claimant application) should be ordered to pay costs following the dismissal of their application.

Background

The applicants constituted the 'registered native title claimant' in the Wongkumara People's claimant application. They made a separate application seeking declaratory orders and an injunction in relation to the proposed grant of a petroleum lease under the *Petroleum Act 1923* (Qld) to Santos Limited or Delhi Petroleum Pty Ltd (the companies). Justice Logan dismissed the application (see *Edwards v Santos Limited* [2009] FCA 1532, summarised in *Native Title Hot Spots* Issue 32) and directed the parties to make written submissions on the issue of costs.

The 'spirit' of s. 85A

It was common ground, and his Honour agreed, that s. 85A of the *Native Title Act 1993* (Cwlth) (NTA), which provides that (unless the court orders otherwise) each party to a proceeding must bear his or her own costs, was not directly relevant to these proceedings. Therefore, the question was dealt with in accordance with s. 43 of the *Federal Court of Australia Act* 1976 (Cwlth), taking into account the 'spirit' of s. 85A. The matters relevant to the exercise of the discretion as to costs were:

- the reasonableness of the conduct of the applicants in bringing their application;
- whether it involved the construction of important NTA provisions;
- whether it raised novel issues of public importance;
- whether there was a disparity of resources available as between the parties;
- whether the applicants prosecuted their application with due diligence;
- whether the application was advanced on grounds other than native title—at [4] to [5].

Disparity of resources, notice of challenge

While the applicants could not 'command anywhere near the resources' of the respondents, they had notice 'at an early stage that a challenge to jurisdiction was to be made ... on the basis of intermediate appellate authority' (i.e. the decision in *Lardil, Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414) and, while they prosecuted their case with due diligence, they did so 'in the face of' such notice—at [6].

Other aspects of prosecution of the application

While it was true that the applicants were motivated to bring the proceedings to resolve a dispute the negotiations for an indigenous land use agreement and that s. 24CD of the NTA made them a proper party to such an agreement without a need to

establish native title, it did not follow from this that 'they had any standing to bring their application' for declaratory and injunctive relief or that the court 'had any jurisdiction to entertain it'. The applicants might have joined an application for the relief sought in this case to their claimant application but they did not 'as a matter of deliberate forensic choice' and in the face of *Lardil*. As they were legally advised, this choice must have been made with 'an appreciation that the Full Court had ordered costs' in *Lardil*—at [7] to [8].

Public interest

While there was a 'public importance' about questions such as the delineation of whether persons in the applicants' position have standing and whether the court may entertain such an application, it was not 'self evidently greater' than that of the companies being able to 'conduct their business affairs without the burden both as to costs and otherwise of unnecessary litigation', particularly when *Lardil* provided an earlier intermediate appellate authority on the subject—at [9].

Decision

Logan J decided to exercise his discretion as to costs in the usual way (i.e. with costs following the event) for the reasons noted. Therefore, the applicant was ordered to pay the companies' costs—at [10].