Future act – declaration where no native title determination

Edwards v Santos Limited [2009] FCA 1532

Logan J, 18 December 2009

Issue

Relief was sought in relation to the grant of petroleum leases under the *Petroleum Act 1923* (Qld) because a dispute had arisen between the parties as to whether this would be a pre-existing rights based act (PERBA). If it was, then the right to negotiate provisions of the *Native Title Act 1993* (Cwlth) (NTA) would not apply. The application was dismissed because it had no reasonable prospects of success in relation to the Federal law question and, given there was no 'matter' in the requisite sense before the court, because the applicants lacked standing and the court lacked jurisdiction on the State law question (i.e. the validity of an act done under State law).

Background

The applicants in these proceedings are the 'registered native title claimant' for a claimant application brought on behalf of the Wongkumara People. As noted, there was a disagreement about whether the grant of a petroleum lease would be a PERBA for the purpose of Pt 2, Div 3, Subdiv I of the NTA. In an attempt to resolve the dispute, the applicants applied for:

- a declaration that the grant of any such lease to Santos Limited (Santos) or Delhi Petroleum Pty Ltd (Dehli) in respect of any land covered by an authority to prospect (ATP 259) held by Santos would not be a PERBA under the NTA;
- a declaration that the grant of a petroleum lease to Santos in respect of any land covered by the ATP 259 would not be valid pursuant to s. 24ID unless the requirements of Pt 2, Div 3, Subdiv P the NTA (the right to negotiate provisions) had been satisfied; and
- an order restraining the State of Queensland from granting a petroleum lease under the *Petroleum Act 1923* (Qld) to Santos in respect of any land covered by ATP 259.

The applicants relied upon their status as the 'registered native title claimant' for the claimant application but the application for relief dealt with in this case was brought as a separate proceeding (i.e. it was not brought 'in the context of' the Wongkumara People's claimant application). It raised both a Federal law question (i.e. a matter arising under the future act provisions of the NTA) and a State law question (i.e. the validity of an act done under State law)—at [49] to [50].

Santos and Delhi sought dismissal of the proceeding because:

- the court had no jurisdiction to entertain the application;

- even if the court had jurisdiction, the application had no reasonable prospects of success, relying on s. 31A of the *Federal Court of Australia Act 1976* (Cwlth) (FCA), which provides that the court may 'give judgment for one party against another' if (among other things) it is satisfied the other party has no reasonable prospect of success.

Santos and Delhi also sought strike-out of the statement of claim pursuant to O 11 r 16 of the Federal Court Rules because:

- it failed to disclose a reasonable cause of action; and
- it was embarrassing in that, if it was to have any prospect of success, it would 'necessitate' a determination of native title in respect of the claimed land, a question 'already at large' in the claimant application and so there was the 'potential for inconsistent findings'—at [10].

Santos and Delhi also raised the question of standing. The state sought summary dismissal on the basis that the application had no reasonable prospects of success. It did not concede jurisdiction, submitting it was unnecessary to decide the question.

Reasonable prospects of success – FCA s. 31A

Justice Logan noted that, while s. 31A of the FCA softened the tests previously applied to applications for summary judgment and summary dismissal, a generally cautious approach should still be adopted because s. 31A was concerned with substance, not just form—at [13] to [14].

The submission that the application had no reasonable prospects of success was, in essence, that:

- the applicants did not seek a determination recognising the existence of native title in these proceedings;
- a 'future act', as defined in s. 233(1), is an act that 'apart from' the NTA, either validly 'affects' (as defined in s. 227) native title or would do so if valid;
- to secure final relief of the kind sought in this case, it was not sufficient to establish that an act might affect native title if native title were found to exist;
- as a corollary, mere status as a registered native title claimant could never supply the requisite element in the definition of future act, which is also an element of any entitlement to the relief sought in these proceedings—at [16], relying upon *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 414 (*Lardil*).

The applicants:

- sought to distinguish *Lardil* on the basis that it related to procedural rights conferred by Subdiv H or Subdiv N of the NTA and not the right to negotiate found in Subdiv P;
- argued that, in any event, a declaration that the grant of a petroleum lease is not a PERBA did not require them to establish they had native title because, if there was no valid ATP259, there could be no valid grant of a petroleum lease.

The second submission was considered in conjunction with the jurisdictional challenge. As to the first, his Honour found that, rather than being distinguishable,

Lardil confirmed 'in a binding way' that a future act is one which 'affects' native title, not an act which, if native title existed, 'might' affect it—at [19].

As in *Lardil*, the applicants in this case sought final relief but did not advance a claim to native title in these proceedings. Rather, they relied on their status as 'registered native title claimant'.

Therefore, the court held that the applicants had no reasonable prospect of securing any of the relief sought insofar as they relied upon anything other than the State law question because:

> [T]he advancing and successful vindication of a native title claim, not status as the "registered native title claimant", is, given the definition of "future act", just as central to the application of provisions upon which the Applicants rely as it was to those under consideration in *Lardil*. To seek to distinguish *Lardil* on the basis that the rights within Div 3 of Pt 2 with which that case was concerned were "procedural rights" ignores this centrality—at [30] to [31].

Jurisdiction – what is the 'matter'?

On the State law question, the applicants relied upon s. 213(2) of the NTA, s. 39B(1A)(c) of the *Judiciary Act 1903* (Cwlth) (Judiciary Act) and s. 21 of the FCA as a source of jurisdiction for the court. The reference to s. 21 of the FCA was found to be misconceived because that section did not, of itself, confer jurisdiction—at [33].

Paragraph s. 39B(1A)(c) of the Judiciary Act provides that:

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction **in any matter** ... arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter (emphasis added).

Subsection 213(2) of the NTA provides that: 'Subject to this Act, the Federal Court has jurisdiction **in relation to matters** arising under this Act' (emphasis added).

The court noted (among other things) that:

- the word 'matter' as used in both provisions means the subject matter for determination in a legal proceeding;
- accordingly, there can be no 'matter' before the court unless there is some immediate right, duty or liability to be established by the determination of the court;
- as 'the giving of an advisory opinion is antithetical to an exercise of Federal jurisdiction', a distinction must be drawn between 'a permissible invocation of judicial power and the impermissible posing of an academic or hypothetical question';
- it is permissible to seek a declaration 'based on a concrete situation' but not one that is 'divorced from the facts' and that will not 'quell any existing controversy'—at [34] to [35], [38] to [39] and [41], referring to the relevant case law.

Impermissibly seeking advice

His Honour found that this case offered 'a paradigm example of an impermissible attempt to secure an advisory opinion' because:

> What is revealed is nothing more than a difference in contractual negotiating positions between the Applicants, who claim in other proceedings, but have not yet been determined to hold, native title in respect of the claimed land and Santos and Delhi Petroleum who may one day seek to obtain from the State a petroleum lease in respect over part of the claimed land on the strength of ATP259P. It is not pleaded that any such lease has been granted or is even imminently to be granted—at [43].

The claim for injunctive relief was 'bedevilled by like problems', i.e. no imminent or even threatened grant of any lease by the state was pleaded—at [46].

Therefore, putting the question of standing to one side, in the absence of a 'matter' the court lacked jurisdiction in relation to the State law question. His Honour also pointed out that, even if the declarations sought were made, this would not have the effect that the NTA obliged Santos, Delhi or the state to negotiate with the applicants. Instead, if the existence of native title was later recognised, a failure to comply with the right to negotiate provisions in the NTA would mean that an otherwise valid future act would (via s. 28) be attended with invalidity to the extent to which it affected that native title—at [45].

No 'matter' as applicants lack standing

As was noted, 'standing is an inherent aspect' of whether the court is 'seized with a "matter"'. In this case, there was no provision giving the applicants standing to seek any of the relief they claimed. Further, the applicants were found to be strangers to any dealings between the state and Santos and Delhi Petroleum with respect to the granting of a particular petroleum lease. Logan J acknowledged that 'the position would be different' if the Wongkumara People had already been recognised as holding native title or the relief had been sought 'in the context of' the Wongkumara People's claimant application—at [49].

No link between Federal and State law questions

A majority in *Lardil* decided the court had jurisdiction to decide the question of the validity of an act done under State law (the State law question) in circumstances where deciding that question was 'an essential step' in any determination of whether there was a 'future act' (the Federal question)—at [50].

However, merely asserting a cause of action under the NTA is not enough to bring the State law causes of action within the court's accrued jurisdiction under s. 23 of the FCA if the NTA claim is 'colourable' and 'not genuine'. Claims that are 'obviously doomed to fail' are 'colourable' and 'not genuine'. As the present case was not materially distinguishable from *Lardil*, it was 'doomed to fail' and so the Federal law aspect was 'colourable'. Therefore, the court had no jurisdiction to entertain the State law aspect of the claim, even if the applicants had standing (which they did not)—at [52] to [54].

Exercise of discretion inappropriate if seeking a staging post

If the foregoing conclusions were wrong, Logan J would not have granted declaratory relief founded on the State law question because 'the true way of conceiving the declarations sought' was as 'staging posts to the end of an assertion in the future of a right to negotiate' and the use of declaratory relief in this way not desirable—at [55] to [57].

Decision

The court made orders dismissing the application. His Honour was not inclined to (instead) strike out the statement of claim because:

> The only way to address the fundamental jurisdictional difficulty ... would be to plead a claim for native title. That would be pregnant with a potential for embarrassment ... given that the Applicants already claim a native title determination in respect of the claim land in other proceedings in the Court—at [58].

Costs & leave to appeal

The parties were given the opportunity to make submissions as to costs, including 'whether s. 85A of the NTA operates so as to require each party to bear their own costs'—at [59]. See *Edwards v Santos Limited (No 2)* [2010] FCA 238, summarised in *Native Title Hot Spots* Issue 32.

An application for leave to appeal, referred to the Full Court, was dismissed—see *Edwards v Santos Limited* [2010] FCA 34 and *Edwards v Santos Limited* [2010] FCAFC 64 summarised in *Native Title Hot Spots* Issue 32.