Leave to appeal refused

Edwards v Santos Limited [2010] FCAFC 64

Stone, Greenwood and Jagot JJ, 4 June 2010

Issue

Leave to appeal against summary dismissal was sought. The main issue was whether the appeal had reasonable prospects of success, which involved considering whether the primary judge's conclusion that *Lardil Peoples v Queensland* (2001) 108 FCR 453 (*Lardil)* applied, was attended by sufficient doubt as to warrant its reconsideration. The court refused to grant leave.

Background

The applicants sought leave to appeal from orders made by Justice Logan in *Edwards v Santos Limited* [2009] FCA 1532 (summarised in *Native Title Hot Spots* Issue 32). Logan J dismissed the application pursuant to s. 31A of the *Federal Court of Australia Act 1976* (Cwlth). The applicants also appealed from costs orders made against them.

Santos Limited and Delhi Petroleum Ltd (the first and third respondents) hold an authority to prospect (ATP 259) issued under the *Petroleum Act 1923* (Qld) that affects land subject to a registered claimant application made on behalf of the Wongkumara people under the *Native Title Act 1993* (Cwlth) (NTA). A dispute arose between the applicant for that application and the first and third respondents during the negotiations for an Indigenous Land Use Agreement (ILUA). As a result of that dispute, those who were the applicant on the claimant application applied for declarations in the proceedings before Logan J that a petroleum lease granted in relation to ATP259 would not be:

- a pre-existing right-based act within the meaning of Pt 2, Div 3, Subdiv I of the NTA; and
- valid unless the requirements of Pt 2, Div 3, Subdiv P (the 'right to negotiate' provisions) had been satisfied.

They also sought an order restraining the second respondent (the State of Queensland) from granting any such petroleum lease. In concluding that the application should be dismissed, Logan J:

- took the view that the claim for relief was premised on the proposition that the grant of a petroleum lease would be a 'future act' within the meaning of the NTA;
- found that *Lardil* applied so that, in order to secure relief of the kind sought, it was not sufficient for the applicants to establish only that an act *might* affect native title *if* native title were found to exist'.

Application for leave to appeal

Justices Stone, Greenwood and Jagot were of the view that, on the pleadings, the applicants could not 'establish the premise of their application' because:

> A future act, by definition, is one that either validly affects native title, or is invalid because of native title and would affect native title if it were valid: NTA, s. 233. The applicants have not claimed that they hold any native title rights; they rely solely on their status as registered native title claimants. This is precisely the position that pertained in *Lardil*—at [18].

Further, the applicants' submission that *Lardil* was distinguishable because only 'procedural rights' were involved was found to be misconceived: '*Lardil* is authority for a proposition that a future act is one that **affects** native rights not one that **might** affect native title rights'. As Logan J noted, the definition of a 'future act' in the NTA means that the 'successful vindication of a native title claim' was 'just as central to the application of the [right to negotiate] provisions' found in Subdiv P as it was to the procedural rights under consideration in *Lardil*—at [20].

For these reasons, the court was satisfied that the primary judge's decision was not attended with sufficient doubt to warrant granting leave to appeal, which was sufficient to dispose of the application. However, the court went on to comment on other matters in deference to submissions made by the parties.

Advisory opinion

After noting the High Court's view about advisory opinions and declaratory judgments in *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334, the court said that:

- the legal status of a petroleum lease that had not been granted, and may never be granted, was 'an archetypical hypothetical situation';
- an injunction 'must be directed to the protection of an existing legal or equitable right', not a right that may arise in the future, and the right to be protected must be identified;
- in this case, there was no such legal or equitable right to be protected and so the primary judge was correct in refusing the injunction—at [24] to [27], referring to *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199.

Conclusion

Leave to appeal was denied as the case had no prospect of success. Their Honours saw no reason to set aside the orders as to costs made by Logan J in *Edwards v Santos Limited (No 2)* [2010] FCA 238 (summarised in *Native Title Hot Spots* Issue 32).