Edwards v Santos Limited [2011] HCA 8

French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 30 March 2011

Issue

The question in this case was whether a writ of certiorari should issue to quash Federal Court orders summarily dismissing an application for a declaration that renewals of an authority to prospect (ATP) were not valid. The High Court unanimously decided it should. This case may be limited to its facts. However, the decision does imply that, at least where parties are contractually bound to negotiate an indigenous land use agreement (ILUA) pursuant to an earlier 'agreement to agree' and a dispute arises as to certain terms of the ILUA, that dispute may be a 'matter' within Federal Court's jurisdiction under s. 213(b) of the *Native Title Act 1993* (Cwlth) (NTA) even where (as in this case) the dispute concerns a question of State law.

Background

Those seeking the writ (the native title party) constitute the 'registered native title claimant' (RNTC) for an application made on behalf of the Wongkumara People under ss. 13 and 61 of the NTA. Santos Limited and Delhi Petroleum Pty Ltd (the petroleum companies) hold the relevant ATP, which has purportedly been 'varied, extended or renewed' several times since it was first granted in 1979. If the ATP is valid and certain conditions are met, the petroleum companies have a right to the grant of a petroleum lease pursuant to s. 40 of the *Petroleum Act 1923* (Qld) (Petroleum Act). The petroleum parties 'did not raise any shadow of a doubt about … their capacity to satisfy' those conditions—at [22], Heydon J.

In 2001, representatives of the Wongkumara People made an agreement, referred to as an ILUA, with the petroleum companies. It was not registered on the Register of Indigenous Land Use Agreements and was to expire in 2006 (the unregistered ILUA). From 2005, the parties to the unregistered ILUA negotiated about making a new ILUA to deal with, among other things, the doing of future acts as defined in the NTA (the new ILUA). It was the negotiations for the new ILUA that gave rise to these proceedings. Heydon J characterised the negotiations for the new ILUA as being 'in fulfilment of an obligation created by' a clause in the unregistered ILUA in which the parties 'agreed to negotiate the terms of a new ILUA'—at [25].

In 2009, during the negotiations for the new ILUA, a dispute arose that led to the native title party applying to the Federal Court for, among other things, declarations that:

- the grant of a petroleum lease to the petroleum companies under s. 40 of the Petroleum Act *would not* be a pre-existing rights based act within the meaning of Pt 2, Div 3, Subdiv I of the *Native Title Act 1993* (Cwlth) (NTA);
- the grant of such a lease *would not* be valid under s. 24ID of the NTA *unless* the requirements of Subdiv P of Div 3 of Pt 2 (the right to negotiate provisions) of the NTA were satisfied.

An order restraining the State of Queensland from granting such a lease was also sought.

This was the relief sought in their amended pleadings before the Federal Court. Originally, a declaration was sought that a grant of a petroleum lease under s. 40 of the Petroleum Act would not be a pre-existing rights based act because the ATP was invalid for non-compliance with the

Petroleum Act (the State law question). The native title party was alleged that purported renewals of the ATP in 1983 and 1987 were of no effect because, at that time, there was no power in the Petroleum Act to extend the term of an ATP and, therefore, all subsequent purported renewals of the ATP were void and of no effect: see *Edwards v Santos Limited* [2009] FCA 1532 at [6].

The primary judge dismissed the proceedings summarily pursuant to s. 31A(2) of the *Federal Court Act 1976* (Cwlth) (FCA) on the ground that the application had no reasonable prospects of success because:

- the court had no jurisdiction to give an advisory opinion on a hypothetical question; and
- 'mere status as a registered native title claimant' did not give the native title party 'standing to claim any of the relief sought, including any part which relies only on State law'—*Edwards v Santos* [2009] FCA 1532 at [35], [44] and [49].

Costs were ordered against the native title party. The Full Court refused leave to appeal from the orders of the primary judge: see *Edwards v Santos* [2010] FCA 34. The Federal Court decisions are summarised in *Native Title Hot Spots* Issue 32.

Certiorari

Heydon J noted that:

- the native title party sought a writ of certiorari in the High Court's original jurisdiction pursuant to s. 75(v) of the Constitution because s. 33(4B)(a) of the FCA precluded an application for special leave to appeal;
- while the writ of certiorari is not mentioned in s 75(v), 'it may issue in the exercise of an implied ancillary or incidental authority to the effective exercise of s 75(v) jurisdiction'—at [21] and [53].

The court was unanimous in finding that a writ in certiorari should issue for the reasons given by Heydon J—at [1], [6] and [53]. All paragraph references in this summary are references to Heydon J's reasons for judgment. Where his Honour is quoted, all footnotes have been omitted.

Two approaches available – wrong one taken

The primary judge found the Federal Court had no jurisdiction because there was no 'matter' involved, the native title party had no standing and the application was 'merely for an advisory opinion'. It was found the primary judge's reasoning, which was not disturbed by the Full Court, was 'incorrect'. The native title party 'could have established standing and other necessary conditions in one of two ways':

- 'vindicate an enforceable right' of its own; or
- 'attack' the petroleum companies' claim of a right 'which interfered with' the native title party's interests—at [33] to [34].

According to Heydon J, the primary judge's mistake was to concentrate 'on the first question – whether the ... [the native title party] had an enforceable right'. In his Honour's view, what the primary judge should have considered was:

> [W]hether the plaintiffs had reasonable prospects of establishing that the claim of the petroleum [companies] … that the grants of … leases, emanating from the ATP were "pre-existing rights based acts" was erroneous on the ground that the ATP was void—at [34].

Relevant facts

As part of the negotiations for the new ILUA, the native title party asked the petroleum companies to 'gift' two pastoral leases to the native title claim group. According to his Honour:

- this request was made 'pursuant to negotiations' that the parties to the unregistered ILUA were 'contractually obliged' to conduct;
- they were also 'negotiations regulated in certain respects by the NTA';
- the request was refused because the pastoral leases were said to be 'worth in excess of $20m', apparently on the ground that the ATP pre-dated the NTA, the extensions of the ATP were valid and that the grant of leases under s. 40 of the Petroleum Act 'would be automatic'—at [35].

However, if the native title party was successful in challenging the validity of the extensions of the ATP, this valuation 'might collapse', which would improve the prospects of the native title party obtaining the leases as a 'gift' to the Wongkumara People. Therefore, the native title party's claim 'to challenge the [validity of the] ATP extensions' did not depend on them actually having native title. This was because:

> The new ILUA could be concluded and have the statutory effect given it by the NTA [assuming it got registered] irrespective of whether the plaintiffs had obtained or would obtain a determination that native title exists—at [34].

Standing, hypothetical questions, advisory opinions, jurisdiction

At [36], Heydon J noted that this case raised a number of questions that could not be 'wholly disentangled', namely:

- did the Federal Court have jurisdiction to grant declaratory relief?
- did the native title party have standing, or a 'sufficient interest' or a 'real interest'?
- was the question raised hypothetical?
- was the native title party seeking an advisory opinion?

For the reasons noted below, Heydon J was satisfied that the first declaration sought by the native title party about the petroleum companies' rights:

> [I]s one which a court of equity has jurisdiction to grant; the plaintiffs have standing to seek … ; the question … is not hypothetical, but concrete and real; and the opinion they seek is not merely advisory—at [39].

The native title party's claim that the petroleum companies had no right to apply to under s. 40 of the Petroleum Act because the ATP had 'ceased to be valid' and the claim that the Minister could be restrained were within Federal Court's jurisdiction 'to grant declaratory and injunctive relief'. The native title party had a sufficient interest because 'success in those claims would advance their interests in the negotiations *which the parties were contractually obliged to conduct*' The native title party had standing because of 'an interest in the question whether the ATP is valid which is greater than that of other members of the public'—at [37], emphasis added.

The questions asked by the native title party 'were not hypothetical' because Santos Limited had written in November 2005 indicating that the petroleum companies intended to apply to the Minister under s. 40 of the Petroleum Act and 'predicted that success would be "automatic"'. The native title party 'would be seriously disadvantaged' if that happened 'because their negotiating position would be gravely weakened'. On the other hand, if the native title party 'obtained the … declaration' sought that the grant of the lease under s. 40 would not be a pre-existing rights based act, the native title party 'would be correspondingly better off'. The declaration would 'produce foreseeable consequences' by allowing negotiations for the new ILUA to continue with the negotiating parties 'armed with knowledge of the correct legal position in relation to the ATP'—at [37].

In this case, regardless of whether or not the native title party had enforceable rights against the petroleum companies:

> [T]he question whether the ATP is valid is not hypothetical, it is of real practical importance to the plaintiffs, they have a real commercial interest in the relief, the petroleum defendants (and Queensland) are plainly contradictors, and there is obviously a real controversy—at [38].

Heydon J emphasised the native title party's bargaining position as a relevant factor later in his reasons. A submission was made that, if the ATP is valid, then the grant of a petroleum lease under s. 40 of the Petroleum Act would also be valid as a 'pre-existing rights based act' under Pt 2, Div 3, Subdiv I of the NTA, in which case it would not need to be included in the new ILUA. The same was true if the ATP is invalid because the petroleum companies would have no right under state law to obtain petroleum leases and so there would be no need to address that issue in any ILUA. According to Heydon J:

> This … [did] not undercut the proposition that the bargaining position of the plaintiffs could be much improved if they could demonstrate the invalidity of the ATP, because it would negate one of the reasons why the petroleum defendants refused to make a gift of the Pastoral Leases—at [48].

Federal jurisdiction – matter arising under the NTA

There was another 'more distinct' question: Was the native title party invoking federal jurisdiction? Heydon J found this was the case for (among others) the following reasons:

- the interest the native title party was protecting arose out of a federal statute, i.e. the NTA;
- their 'activity is designed to ensure that, if their native title claim succeeds, they will have received present advantages' (i.e. the pastoral leases) in compensation for 'any future subjection' of their native title to the petroleum companies' interests;
- their involvement in the new ILUA negotiations led to a dispute about its terms which 'turned on whether the petroleum defendants had the "immediate right" [under s. 40 of the Petroleum Act] which they claimed';
- the validity of a future act turned on the existence of that 'immediate right' and so that 'immediate right' was 'integrally connected with the NTA';
- therefore, a 'matter' existed 'in federal jurisdiction', i.e. 'a matter arising under' the NTA within the meaning of s. 213(2) and a matter arising 'under a law of the Federal Parliament within the meaning of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth)' (Judiciary Act);
- the NTA is 'linked with the process of negotiating the new ILUA because the NTA contains many provisions ... about the process of negotiation before it is finalised', including obtaining assistance from the National Native Title Tribunal (s 24CF) and 'making ... all reasonable

> efforts to ensure that all persons who hold or may hold native title in the relevant area are identified and authorise the new ILUA'—at [41], referring to ss. 24CD(7), 24CG(3)(b)(ii) and 24CL(3).

It was noted (among other things) that:

> [T]here is … a matter arising under a federal law if the source of a defence which asserts that the defendant is immune from a liability or obligation of that defendant is a law of the Commonwealth. Here the petroleum defendants are alleging that they are immune from the "right to negotiate provisions of the NTA" because of the pre-existing rights based acts provisions of the NTA. Hence there is a matter arising under a federal law—at [45].

Conclusion

It was found that the primary judge mistakenly found the Federal Court had no jurisdiction because the primary judge concluded there was no 'matter', the native title party had no standing and the application was 'merely for an advisory opinion'. The Full Court did not disturb these findings. Heydon J found that: 'Mistakenly to deny jurisdiction is a jurisdictional error attracting a writ of certiorari'—at [46].

Comment – reliance on s. 24DJ

At [41], Heydon J gave s. 24DJ(1) as an example of the 'significance of the issue of what advantages the representatives of the Wongkumara People … negotiating the new ILUA … can obtain'. According to his Honour, it demonstrated that, if the Wongkumara People's representatives negotiated the new ILUA, other persons claiming to hold native title in the new ILUA could object to its registration on the ground that it was not fair and reasonable to register it because those representatives 'failed to obtain the most favourable terms' from the petroleum companies. With respect, this ground of objection to registration is only available if the ILUA is an alternative procedure agreement: see Pt 2, Div 3, Subdiv D of the NTA. In the case before the court, it seems the proposal is to negotiate an area agreement: see Pt 2, Div 3, Subdiv D of the NTA.

Decision

The court issued a writ of certiorari quashing the orders of the Federal Court and the Full Court. The matter was referred back to the Federal Court with the native title party's costs at first instance, on appeal to the Full Court and in the High Court to be paid by the other parties.