HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

NOELENE MARGARET EDWARDS & ORS PLAINTIFFS

AND

SANTOS LIMITED & ORS DEFENDANTS

Edwards v Santos Limited [2011] HCA 8
30 March 2011
S153/2010

ORDER

1. *A writ of certiorari issue directed to the fourth defendant to quash:*

   (a) *the decisions of the Federal Court of Australia made on 18 December 2009 and 17 March 2010 in proceeding QUD 86 of 2009; and*

   (b) *the decision of the Full Court of the Federal Court made on 4 June 2010 in proceeding QUD 28 of 2010.*

2. *Dismiss the application for the issue of a writ of mandamus against the fourth defendant.*

3. *The first, second and third defendants pay the costs of the plaintiffs in:*

   (a) *the Federal Court of and incidental to the first, second and third defendants' motions for summary dismissal;*

   (b) *the Full Court of the Federal Court; and*

   (c) *this Court.*

Representation

J A McCarthy QC with J F Kildea and A L Tokley for the plaintiffs (instructed by Eddy Neumann Lawyers)

B W Walker SC with S B Lloyd SC and S R R Cooper for the first and third defendants (instructed by Blake Dawson Lawyers)

R J Webb QC with H P Bowskill and G J D del Villar for the second defendant (instructed by Crown Solicitor (Qld))

Submitting appearance for the fourth defendant

Intervener

S J Gageler SC, Solicitor-General of the Commonwealth with R G Orr QC and B Lim intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Edwards v Santos Limited

Practice and procedure – Federal Court of Australia – Summary judgment – Applications by defendants to dismiss proceedings summarily under s 31A(2) of *Federal Court of Australia Act* 1976 (Cth) – Plaintiffs "registered native title claimant" under s 253 of *Native Title Act* 1993 (Cth) ("NTA") in respect of certain land – Plaintiffs and first and third defendants negotiating Indigenous Land Use Agreement ("ILUA") under NTA that included land first and third defendants claimed was encumbered by "Authority to Prospect" ("ATP") granted by second defendant under *Petroleum Act* 1923 (Q) – ATP entitled first and third defendants to apply to Minister for grant of lease of encumbered land for purpose of petroleum exploration – Plaintiffs sought declarations that grant of lease to first and third defendants would not be valid and any lease granted would not be a "pre-existing right-based act" within meaning of s 24IB of NTA – Whether plaintiffs have sufficient interest for grant of declaratory and injunctive relief – Whether questions raised by plaintiffs hypothetical – Whether plaintiffs seeking advisory opinion.

Practice and procedure – Federal Court of Australia – Jurisdiction – Section 213(2) of NTA conferred jurisdiction on Federal Court with respect to "matters arising under" NTA – Where determination of whether lease would be valid and whether lease would be a pre-existing right-based act may affect ILUA negotiations – Whether negotiation of ILUA a matter arising under NTA.

Practice and procedure – High Court – Original jurisdiction – Costs – Application pursuant to s 75(v) of Constitution for writs directed to Federal Court to quash orders of that Court – Section 26 of *Judiciary Act* 1903 (Cth) empowers High Court to award costs in "all matters brought before the Court" – Section 32 empowers High Court in exercise of original jurisdiction to grant all such remedies as parties are entitled to "so that as far as possible all matters in controversy between the parties" may be "completely and finally determined" – Where High Court quashes orders of Federal Court – Whether High Court may make costs order in place of orders quashed.

Words and phrases – "advisory opinion", "certiorari", "completely and finally", "hypothetical", "matter", "reasonable prospects of success", "standing", "sufficient interest".

Federal Court of Australia Act 1976 (Cth), ss 31A(2), 33(4B)(a).
Judiciary Act 1903 (Cth), ss 26, 32.
Native Title Act 1993 (Cth), s 213.

1 FRENCH CJ, GUMMOW, CRENNAN, KIEFEL AND BELL JJ. We agree with Heydon J and for the reasons he gives that the plaintiffs should have the substantive relief of certiorari and an order for costs in this Court against the first, second and third defendants.

2 That leaves the question of costs of the Federal Court proceedings.

3 The application to this Court was made necessary by the success of the first, second and third defendants upon their applications to the Federal Court under s 31A(2) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") and the refusal by the Full Court of leave to appeal, and by the exception to the appellate jurisdiction of the High Court (otherwise conferred by s 73(ii) of the Constitution) created by s 33(4B)(a) of the Federal Court Act.

4 In the exercise of its original jurisdiction in the present proceeding this Court is required by s 32 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") to grant remedies apt to "completely and finally" determine, so far as possible, all matters in controversy between the parties regarding the errors by the primary judge upon the s 31A(2) applications and by the Full Court in refusing leave to appeal. The orders quashed upon the grant of certiorari include the costs orders against the plaintiffs obtained by the first and third defendants. The second defendant did not seek costs of the proceedings in the Federal Court, including before Logan J and the Full Court.

5 The orders now to be made by this Court will not effect the complete relief to the plaintiffs mandated by s 32 of the Judiciary Act unless the plaintiffs not only are relieved from the burden of the costs of the first and third defendants erroneously imposed upon them in the Federal Court but also are placed in the favourable position with respect to costs they themselves would have enjoyed had the Federal Court litigation not been determined in the fashion which has attracted certiorari from this Court. The plaintiffs correctly submit that had the s 31A(2) applications been dismissed and, failing that, had an appeal by them to the Full Court been successful, there is no reason why costs should not have followed the event. The relief granted in this Court should include an order that the first, second and third defendants pay the costs of the plaintiffs of the Federal Court proceedings, including the Full Court proceedings.

6 HAYNE J. I agree that the plaintiffs are entitled to certiorari to quash the orders made at first instance in the Federal Court of Australia (by Logan J) and the orders made on application for leave to appeal to the Full Court of that Court. The costs of the proceedings in this Court should follow the event. I do not agree that this Court can make any order in substitution for the costs orders that were made in the Federal Court at first instance and on the application for leave to appeal.

7 In *Kirk v Industrial Court (NSW)*, six members of this Court held[1] that the Court of Appeal of the Supreme Court of New South Wales, exercising the original jurisdiction of that Court, had power to quash orders of the Industrial Court of New South Wales but did not have power to make any order in place of the orders that had been quashed. For the reasons which led to the majority's conclusion in *Kirk* about the powers of the Court of Appeal, the same conclusion must be reached about the powers of this Court.

8 Because no appeal lies to this Court against the refusal of the Full Court of the Federal Court to grant leave to appeal against the orders of Logan J[2], the plaintiffs brought the present proceedings in the original jurisdiction of this Court. The plaintiffs sought certiorari to quash the orders made in the Federal Court, and mandamus directing the Federal Court to hear and determine the proceedings the plaintiffs had instituted in that Court. Because the plaintiffs claimed mandamus against officers of the Commonwealth, the action in this Court was within its original jurisdiction under s 75(v) of the Constitution.

9 The importance of the distinction between this Court's appellate and original jurisdiction has been repeatedly emphasised in cases concerning the powers of the Court on appeal. In particular, the distinction between appellate and original jurisdiction is central to the reasoning which underpins the established doctrine of the Court that further evidence will not be received on appeal[3]. The distinction between appellate and original jurisdiction is no less important when considering what orders this Court can make in a matter where the Court's jurisdiction is conferred by s 75(v).

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1 (2010) 239 CLR 531 at 584 [110]-[111]; [2010] HCA 1.

2 *Federal Court of Australia Act* 1976 (Cth), s 33(4B)(a).

3 See, for example, *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1931] HCA 34; *Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35; *Eastman v The Queen* (2000) 203 CLR 1; [2000] HCA 29.

10 The plaintiffs submitted that this Court's power to order the first, second and third defendants to pay the plaintiffs' costs of the proceedings in the Federal Court, at first instance and on application for leave to appeal to the Full Court, came from either s 26 or s 32 of the *Judiciary Act* 1903 (Cth) or some combination of the operation of those provisions. It is convenient to deal first with s 26.

11 Section 26 of the *Judiciary Act* gives this Court "jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of jurisdiction". No doubt, the enactment of s 26 recognised that, in England, "[c]osts in Courts of Common Law were not by Common Law at all, they were entirely and absolutely creatures of statute"[4]. Be this as it may, s 26 of the *Judiciary Act*, in its terms, is directed to the awarding of costs in the particular matter that is "brought before the Court"; it is not concerned with the costs of matters other than the matter in this Court.

12 It is to be accepted, as noted in *De L v Director-General, NSW Department of Community Services [No 2]*[5], that the power given by s 26 should not be narrowed. But in considering how s 26 is engaged in the present matter, it is also necessary to recognise that the matter in this Court centred upon the claim by the plaintiffs that the Federal Court had, because of jurisdictional error, neglected to exercise jurisdiction conferred on it and that the plaintiffs were thus entitled to relief under s 75(v) of the Constitution, and associated relief.

13 The matter in this Court arose out of, but was distinct from, the controversy or matter that was before the Federal Court. The justiciable controversy in the Federal Court was whether the plaintiffs were entitled, as against the defendants in that Court, to any of the declaratory or injunctive relief claimed in that Court. In this Court, the justiciable controversy was whether the Federal Court's orders disposing finally of the proceedings in that Court were infirm on account of jurisdictional error. Unlike the case of committal for trial followed by trial, in which a single matter proceeds through more than one court[6], and unlike the case in which this Court's appellate jurisdiction is engaged, the "matter brought before the Court" here is distinct from the matter that was

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4 *Garnett v Bradley* (1878) 3 App Cas 944 at 962 per Lord Blackburn; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 182; [1992] HCA 28.

5 (1997) 190 CLR 207 at 212 per Brennan CJ and Dawson J, 221 per Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 14.

6 *R v Murphy* (1985) 158 CLR 596 at 614, 617-618; [1985] HCA 50. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585-586 [138]-[140]; [1999] HCA 27.

brought before the Federal Court. The distinction between the matters is emphasised by the difference in parties to the two proceedings. In this Court, the relevant officers of the Commonwealth (here the Federal Court) are necessary parties. It is the combination of the identity of those parties as officers of the Commonwealth and the relief which is sought which founds this Court's jurisdiction. In the Federal Court, the parties to the controversy were the plaintiffs and those parties who are the first three defendants in this Court.

14 The power given to this Court by s 26 of the *Judiciary Act* is power to award costs in the matter before this Court, not the matter that was before the Federal Court. Section 26 does not authorise the making of an order providing for the costs incurred in the matter in the Federal Court.

15 Section 32 of the *Judiciary Act* gives the High Court power to grant complete relief in the exercise of its original jurisdiction and in any cause or matter pending before the Court, whether originating in the Court or removed into it from another court. Section 32 provides:

> "The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided."

16 The certiorari to which the plaintiffs are entitled is granted in the exercise of the powers given by s 32 of the *Judiciary Act*. This is not a case in which the constitutional writ of mandamus should be ordered. Complete relief is granted to the plaintiffs by an order for certiorari (relief not mentioned in s 75(v)) without going on, pursuant to s 33(1)(a) or (e) of the *Judiciary Act*, to order the constitutional writ of mandamus to hear and determine the claim which the plaintiffs had made in the Federal Court.

17 The certiorari to which the plaintiffs in this matter are entitled is certiorari to quash the orders made at first instance and in the Full Court of the Federal Court. Reference is made in *Re McBain; Ex parte Australian Catholic Bishops Conference*[7] to some aspects of the history of the development in England of

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7 (2002) 209 CLR 372 at 463-465 [255]-[260]; [2002] HCA 16.

certiorari to quash and the relationship between the development of certiorari to quash and the writ of error. But as was pointed out in *McBain*[8], the place which is now occupied by certiorari alongside the constitutional writs of prohibition and mandamus must be determined having close regard to the Australian constitutional context. In particular, in a matter of the present kind, where certiorari is directed to a superior court of record for jurisdictional error, it is not to be expected that immediate assistance will be gained by consideration of 19th century English practice in relation to certiorari.

18 Recognising the force of that caveat, it is nonetheless relevant to notice that no English case was drawn to this Court's attention in which any order for costs beyond the costs of the proceeding for certiorari had been ordered in a case where certiorari to quash had issued. And orders for the costs of proceedings in the court to which certiorari was directed were refused in the King's Bench, for want of power, in *R v Passman*[9] and *R v Higgins*[10]. Such later dicta as might be thought to touch upon the question[11] would also suggest that no order for costs wider than an order disposing of the costs of the proceedings in this Court should be made. Nothing in the leading English practice works of the late 19th and early 20th centuries[12] suggests to the contrary. Rather, as was said in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[13]:

> "It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error

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8 (2002) 209 CLR 372 at 465-467 [261]-[266].

9 (1834) 1 Ad & E 603 [110 ER 1338].

10 (1836) 5 Ad & E 554 [111 ER 1275].

11 See, for example, *Kydd v Liverpool Watch Committee* [1907] 2 KB 591 at 603 per Fletcher Moulton LJ; *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 at 356-357 per Morris LJ.

12 See, for example, Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 7th ed (1912), vol 1 at 803-807; Short and Mellor, *The Practice on the Crown Side of the King's Bench Division of His Majesty's High Court of Justice*, 2nd ed (1908) at 63-83; Chitty, *Chitty's Archbold's Practice of the Queen's Bench Division of the High Court of Justice, and on appeal therefrom to the Court of Appeal and House of Lords, in Civil Proceedings*, 14th ed (1885), vol 2 at 1555-1574; Grady and Scotland, *The Law and Practice in Proceedings on the Crown Side of the Court of Queen's Bench*, (1844) at 186-194.

13 [1952] 1 KB 338 at 357.

> of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it."

Or, as the same point was put in *Craig v South Australia*[14], certiorari "is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal *or a substitution of the order or decision which the superior court thinks should have been made*" (emphasis added).

19 Section 32 of the *Judiciary Act* does not give power to this Court to exercise the powers that were exercisable by an officer of the Commonwealth whose decision is subject to the grant of constitutional writs under s 75(v) (or associated forms of relief like certiorari). That the relief in this case is to be directed to a court neither permits nor requires some different conclusion.

20 By contrast, power to exercise those powers that were available to another court is given to the Court, in the exercise of its appellate jurisdiction, by s 37 of the *Judiciary Act*. That section provides:

> "The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance, and if the cause is not pending in the High Court may in its discretion award execution from the High Court or remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment."

It is under this section that the Court acts, in its appellate jurisdiction, when it modifies an order for costs made in an intermediate appeal court or gives that judgment for costs that ought to have been given in the first instance. And it is then the duty of those other courts to execute the High Court's judgment in the same manner as if it were a judgment of the intermediate or trial court concerned. The procedures and mechanisms of those other courts (for example, for taxing or fixing the amount to be allowed for costs) are thus engaged. No provision is made, whether in the *Judiciary Act* or otherwise, which enables this Court, on granting relief under s 75(v) or associated relief, to make such order for costs as should have been made by Logan J at first instance or by the Full Court of the Federal Court. No provision is made, whether in the *Judiciary Act* or otherwise, which would engage the procedures and mechanisms of the Federal Court for fixing, pursuant to the order of this Court, the amount to be allowed for the costs of proceedings in the Federal Court.

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14 (1995) 184 CLR 163 at 175; [1995] HCA 58.

21 HEYDON J. This is an application in the original jurisdiction of this Court for the issue of writs pursuant to s 75(v) of the Constitution in relation to decisions of the Federal Court of Australia at first instance (Logan J) and the Full Court of that Court (Stone, Greenwood and Jagot JJ). The plaintiffs were driven to this course because s 33(4B)(a) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") operates to preclude them from seeking special leave to appeal to this Court against the Full Court's decision. The substance of the relief sought should be granted for the following reasons.

The background

22 The plaintiffs, on behalf of the Wongkumara People, have for some time been pursuing but have not yet succeeded in a native title claim in respect of certain land in south-west Queensland and north-west New South Wales ("the Claimed Land"). The plaintiffs are the "registered native title claimant" within the meaning of s 253 of the *Native Title Act* 1993 (Cth) ("the NTA"). The first defendant is Santos Limited, and the third defendant is Delhi Petroleum Pty Limited ("the petroleum defendants"). The petroleum defendants are the holders of Authority to Prospect 259P ("the ATP") in respect of land in south-west Queensland which falls within the boundaries of the Claimed Land. The ATP was granted by the second defendant, the State of Queensland, on 31 January 1979 under the *Petroleum Act* 1923 (Q) ("the Petroleum Act"). It was purportedly varied, extended or renewed thereafter – most recently, on 3 January 2008 for a term of four years commencing on 1 January 2007. Under s 40(1) of the Petroleum Act, the holder of an authority to prospect in respect of a particular area may apply to the Minister for a grant of a petroleum lease covering that area. The holder becomes entitled to the grant upon satisfaction of certain conditions contained in s 40(2). The petroleum defendants did not raise any shadow of a doubt about either their willingness to apply or their capacity to satisfy the conditions.

23 On 16 January 2001 six representatives of the Wongkumara People (four of whom are among the plaintiffs) and the petroleum defendants (amongst others) entered an Indigenous Land Use Agreement ("the ILUA") under the NTA. The ILUA was not registered. It was to expire on 16 January 2006.

24 The function of the ILUA was to deal with problems arising from the fact that native title can be difficult to prove, and the processing of native title claims can take a long time. To use the words of the Explanatory Memorandum to the Native Title Amendment Bill 1997[15]:

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15 At par 7.2.

> "over most of mainland Australia, governments and others seeking to use land do not know if native title exists, and if it does, who holds it. It is difficult in such circumstances to have agreements which provide the necessary level of legal certainty. These provisions [including what is now Pt 2 Div 3 subdiv C of the NTA] are designed to give security for agreements with native title holders, whether there has been an approved determination of native title or not, provided certain requirements are met."

Not only did the ILUA give security to the petroleum defendants in dealing with native title claimants who may become native title holders, but it gave the plaintiffs, as native title claimants, the opportunity to obtain immediate advantages which would otherwise be postponed until a perhaps distant day when their native title claim succeeds. Thus the recitals to the ILUA included the following account of the ILUA:

> "The Joint Venture Parties [who included the petroleum defendants] receive certainty in [their] dealings with respect to native title and cultural heritage. The Native Title Parties [who included some of the plaintiffs] receive certainty in the involvement in cultural heritage management in the Joint Venture Parties [sic] dealings with the Project Area as well as compensation, employment and other benefits."

25 The plaintiffs allege that from late 2005 onwards, representatives of the Wongkumara People and the petroleum defendants have negotiated with a view to entering a further Indigenous Land Use Agreement (the "new ILUA") under the NTA in relation to proposed "future acts" within the meaning of the NTA. Those negotiations are in fulfilment of an obligation created by cl 2.4(a) of the ILUA by which the parties agreed to "negotiate the terms of a new ILUA".

26 On 4 November 2005, Mr Paul Woodland, Adviser, Government & Indigenous Affairs, wrote a letter on behalf of the first defendant to the six representatives of the Wongkumara People who had entered the ILUA. The principal parts of the letter to which the parties referred are as follows. It commenced:

> "This letter is to summarise the proposal Santos put to you on Sunday 11 September (and other meetings) in Charleville for the ILUA … we wish to reach with you in relation to our petroleum operations within the area of your Native Title Claim …, which documentation will supersede the ILUA and associated documentation executed on 16 January 2001."

After discussing various points, the letter then said:

> "Over the term of the current ILUA the [Wongkumara] have made a series of requests for additional benefits. It has been Santos' view that these

requests constituted [a] re-opening of negotiations in order to obtain greater benefits for the [Wongkumara]. To date we have viewed this as inappropriate.

As we are now negotiating a superseding ILUA …, we consider that it is now appropriate to address these requests.

1. Gift of the Santos Pastoral Leases

The [Wongkumara] have requested that Santos gift to them the two Pastoral Leases over Nappa Merri and Kihee. Santos has considered this request and advises that it will not gift these Pastoral Leases.

The reasons for this decision are:

(a) the request seeks a very significant benefit for the [Wongkumara] as the properties have an estimated value in excess of $20m. As Santos has previously explained, Santos' existing Authorities to Prospect pre-date the [NTA]. Accordingly, as a result of the 'automatic' production licence grant provisions of the [Petroleum Act], the grant of production licences which emanate from those Authorities to Prospect are [sic], in our view, 'pre-existing rights based acts' under the NTA (PERBAs) and, as such, are not subject to the right to negotiate provisions of the NTA. They are therefore similar to other titles granted prior to the NTA."

The letter then gave three other reasons for the first defendant's decision. The reference to "pre-existing rights based acts" was a reference to s 24IB of the NTA. The reference to "production licences" was a reference to what s 40 of the Petroleum Act calls "leases".

27 The plaintiffs took issue with the contention that the "production licences", ie leases, would be pre-existing rights based acts. They instituted proceedings in the Federal Court of Australia. Paragraphs 5 and 6 of their amended statement of claim referred to the claim made in the Santos letter. Paragraphs 9 to 11 of the amended statement of claim denied that the ATP could be validly varied so as to extend the term for the four years commencing on 1 January 1983 or for the term for four years commencing on 1 January 1987, and alleged that all renewals were void. The plaintiffs further alleged that the petroleum defendants were not entitled to apply under s 40 of the Petroleum Act for the grant of a lease over the Claimed Land. The original Application claimed two declarations corresponding with those allegations:

"3. A declaration that [the ATP] expired on 31 December 1982 and is no longer operative.

4. A declaration that acts of ministers or officers of the second [defendant] purporting to vary, extend or renew the term of [the ATP] beyond 31 December 1982 were and are invalid and of no force and effect."

The claim for those orders, and a claim for a particular injunction, have been abandoned. The orders sought in the Amended Application are:

"1. A declaration that the grant of a petroleum lease to the first and/or third defendants under s 40 of the [Petroleum Act] in respect of any of the [Claimed Land] and covered by [the ATP] would not be a pre-existing rights based act within the meaning of Subdivision I of Division 3 of Part 2 of the [NTA].

2. A declaration that the grant of a petroleum lease to the first and/or third defendants under s 40 of the [Petroleum Act] in respect of any of the Claimed Land and covered by [the ATP] would not be valid pursuant to s 24ID of the [NTA] unless the requirements of Subdivision P of Division 3 of Part 2 of that Act had been satisfied.

…

6. An order restraining the second [defendant] from granting a petroleum lease to the first and/or third [defendants] under s 40 of the [Petroleum Act] in respect of any of the Claimed Land covered by [the ATP]."

The trial judge and the Full Court

28 The petroleum defendants and the State of Queensland sought summary dismissal of the plaintiffs' claim under s 31A(2) of the Federal Court Act on the ground that the application had no reasonable prospects of success[16]. The petroleum defendants also submitted that the Federal Court had no jurisdiction to entertain the application.

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16 Section 31A(2) provides:

"The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding."

29 On 18 December 2009 the primary judge acceded to the applications of the petroleum defendants and the State of Queensland[17]. On 17 March 2010 he made a costs order against the plaintiffs[18]. The plaintiffs sought leave to appeal against the primary judge's orders. Not content with simply permitting the plaintiffs' leave application to proceed to hearing, on 25 January 2010, the petroleum defendants revealed a certain excess of zeal – and, perhaps, a reluctance, manifested in other ways as well, to have the validity of the ATP examined by a court despite their professed confidence in its validity – by filing a notice of motion seeking summary dismissal of the plaintiffs' application for leave to appeal under s 31A(2) of the Federal Court Act.

30 The Full Court did not deal separately with that notice of motion, but did refuse leave to appeal from the orders of the primary judge[19].

The reasoning of the primary judge and the Full Court

31 It is not necessary to set out every aspect of the primary judge's reasoning. That is partly because he concentrated on what he perceived to be deficiencies in the argument advanced by the plaintiffs in support of the second declaration they sought. But the order dismissing the whole of the proceedings summarily was not justifiable if there were reasonable prospects of success in relation to the first declaration. The primary judge held that the Federal Court did not have jurisdiction to hear and determine the plaintiffs' application because it was "a paradigm example of an impermissible attempt to secure an advisory opinion."[20] He continued:

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

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17 *Edwards v Santos Ltd* (2009) 263 ALR 473.

18 *Edwards v Santos Ltd (No 2)* [2010] FCA 238.

19 *Edwards v Santos Ltd* (2010) 185 FCR 280.

20 *Edwards v Santos Ltd* (2009) 263 ALR 473 at 483 [43].

The primary judge also said of the plaintiffs[21]:

> "Their mere status as a registered native title claimant does not … give them standing to claim any of the relief sought, including any part which relies only on state law."

The primary judge saw the claims under the NTA as "obviously doomed to fail", and hence as "colourable" and "not genuine"[22].

32 The Full Court considered that the primary judge's decision was not attended with sufficient doubt to warrant granting leave to appeal.

Two approaches to the controversy

33 The conclusion reached by the primary judge, not disturbed by the Full Court, was incorrect for the following reasons.

34 The plaintiffs could have established standing and other necessary conditions in one of two ways. The first way was to vindicate an enforceable right of their own. The second was to attack the claim by the petroleum defendants of a right which interfered with the plaintiffs' interests. The primary judge (and, probably, the parties too) concentrated on the first question – whether the plaintiffs had an enforceable right. The primary judge noted the absence of any established native title in the plaintiffs and said that the plaintiffs did not have any right that the petroleum defendants negotiate with them. But the primary judge did not consider whether the plaintiffs had reasonable prospects of establishing that the claim of the petroleum defendants that the grants of "production licences", ie leases, emanating from the ATP were "pre-existing rights based acts" was erroneous on the ground that the ATP was void.

The factual circumstances

35 When the plaintiffs requested a gift of the two Pastoral Leases, they were doing so pursuant to negotiations which representatives of the Wongkumara People and the petroleum defendants were contractually obliged to conduct by reason of cl 2.4(a) of the ILUA. They were also negotiations regulated in certain respects by the NTA. The first defendant refused the request for the gift of the two Pastoral Leases. It did so because it said that the Pastoral Leases were worth in excess of $20m on the ground that the ATP pre-dated the NTA, that the extensions of the ATP were valid, and that the grant of "production licences",

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21 *Edwards v Santos Ltd* (2009) 263 ALR 473 at 485 [49].

22 *Edwards v Santos Ltd* (2009) 263 ALR 473 at 485 [53].

ie leases, would be automatic. That valuation of over $20m might collapse if the extensions of the ATP were not valid. And if the valuation collapsed, the plaintiffs' prospects of obtaining a gift of the Pastoral Leases would improve. Contrary to what the primary judge said in a different context, the claim of the plaintiffs to challenge the ATP extensions did not depend on the plaintiffs actually having native title[23]. The new ILUA could be concluded and have the statutory effect given it by the NTA irrespective of whether the plaintiffs had obtained or would obtain a determination that native title exists.

Standing, hypothetical questions, advisory opinions, jurisdiction

36 The circumstances just summarised raise the following questions, which cannot be wholly disentangled. Does the Federal Court have jurisdiction to grant declaratory relief? Do the plaintiffs have standing, or a "sufficient interest" or a "real interest"? Is the question which the plaintiffs are raising merely hypothetical? Are the plaintiffs seeking an advisory opinion? Another, more distinct, question is whether the plaintiffs are invoking *federal* jurisdiction.

37 The jurisdiction to grant a declaration "includes the power to declare that conduct which has not yet taken place will not be in breach of … a law."[24] The jurisdiction also includes the power to declare that conduct which has not yet taken place will be a nullity in law. The plaintiffs are claiming that the petroleum defendants had no right to apply to the Minister under s 40 of the Petroleum Act because the ATP had ceased to be valid. The plaintiffs are claiming that there is no power in the Minister to grant a "production licence", ie lease, under s 40, and that any attempt to grant it can be restrained by injunction. These claims are not outside the Federal Court's jurisdiction to grant declaratory and injunctive relief. The plaintiffs have a sufficient interest to make those claims, because success in those claims would advance their interests in the negotiations which the parties were contractually obliged to conduct. The plaintiffs have standing because they have an interest in the question whether the ATP is valid which is greater than that of other members of the public[25]. The questions which the plaintiffs wished to agitate were not hypothetical. The first defendant's letter of 4 November 2005 had sufficiently indicated the intention of the petroleum defendants to make an application to the Minister under s 40 of the Petroleum Act and it had predicted

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23 *Edwards v Santos Ltd* (2009) 263 ALR 473 at 483 [44].

24 *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305 per Barwick CJ; [1972] HCA 19. On the breadth of the jurisdiction to grant declarations, see also *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438; [1972] HCA 61.

25 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; [1981] HCA 50.

that success would be "automatic". If so, the plaintiffs would be seriously disadvantaged because their negotiating position would be gravely weakened; if not, the plaintiffs would be correspondingly better off. If the plaintiffs obtained the first declaration sought, it would produce foreseeable consequences for the plaintiffs and the petroleum defendants by allowing them to continue the process of negotiating the new ILUA armed with knowledge of the correct legal position in relation to the ATP.

38 An example of how a person can have standing to obtain a declaration and how a court can have jurisdiction to grant a declaration is afforded by *Aussie Airlines Pty Ltd v Australian Airlines Ltd*[26]. Head leases of airport facilities compelled the head lessee to grant a sublease to any "new entrant to the domestic aviation industry". An applicant claiming to be a "new entrant" was held to have standing to obtain a declaration that it was a "new entrant" even though it was not found to have rights under the head leases enforceable against the head lessee. Lockhart J (Spender and Cooper JJ concurring) said that the question was not "hypothetical", it was of "real practical importance" to the applicant, the applicant had a "real commercial interest" in the relief, the head lessee was "plainly a contradictor", and there was "obviously a real controversy"[27]. So here, whether or not the plaintiffs have rights enforceable against the petroleum defendants, the 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.

39 Hence the first declaration which the plaintiffs seek about the petroleum defendants' rights is one which a court of equity has jurisdiction to grant; the plaintiffs have standing to seek it; the question they raise is not hypothetical, but concrete and real; and the opinion they seek is not merely advisory.

Federal jurisdiction

40 The interest which the plaintiffs are protecting arises out of a federal statute, the NTA. Their activity is designed to ensure that if their native title claim succeeds, they will have received present advantages (in the first instance, the Pastoral Leases) which compensate them for any future subjection of their native title to the interests of the petroleum defendants.

41 The plaintiffs' involvement in the negotiations for the new ILUA led to them becoming involved in a dispute about what its terms might be. That dispute

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26 (1996) 68 FCR 406.

27 (1996) 68 FCR 406 at 415.

turned on whether the petroleum defendants had the "immediate right"[28] which they claimed. On the existence of that "immediate right" turned the validity of a future act. That "immediate right" was integrally connected with the NTA. Hence there existed a "matter" in federal jurisdiction – a matter "arising under this Act" within the meaning of s 213(2) of the NTA[29], 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) ("the Judiciary Act")[30]. The NTA is linked with the process of negotiating the new ILUA because the NTA contains many provisions in Pt 2 Div 3 subdiv C about the process of negotiation before it is finalised, for example, the obtaining of government assistance (s 24CF), and the making of 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 (ss 24CD(7), 24CG(3)(b)(ii) and 24CL(3)). The significance of the issue of what advantages the representatives of the Wongkumara People who were negotiating the new ILUA with the petroleum defendants can obtain stems from, for example, s 24DJ(1) of the NTA. It provides:

> "Any person claiming to hold native title in relation to any of the land or waters in the area covered by the agreement may make an application to the Registrar objecting against registration of the agreement on the ground that it would not be fair and reasonable to register the agreement."

Hence if the representatives of the Wongkumara People succeed in negotiating the new ILUA, other persons claiming to hold native title in the area covered by the new ILUA can object to its registration on the ground that it is not fair and reasonable because it failed to obtain the most favourable terms from the petroleum defendants. And if the new ILUA is not registered, many of its advantages under the NTA do not arise.

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28 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; [1921] HCA 20.

29 Section 213(2) provides:

> "Subject to this Act, the Federal Court has jurisdiction in relation to matters arising under this Act."

30 Section 39B(1A) relevantly provides:

> "The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> …
>
> (c) arising under any laws made by the Parliament …"

42 At one point the Solicitor-General of the Commonwealth submitted that the only reason why there was no matter arising under the NTA was that there was insufficient concreteness in relation to the possible grant of a "production licence", ie lease, under s 40 of the Petroleum Act.

> "[H]ad the petroleum lease been sufficiently concrete – because it had been granted, was imminently to be granted or, perhaps, was the subject of a valid application – the Commonwealth submits that there *would* have been a matter arising under the [NTA] and that there *would* have been accrued jurisdiction to determine the state law claim." (emphasis in original)

The letter of 4 November 2005 from the first defendant gave the petroleum lease question concreteness: the letter represented its grant as being "automatic", and the petroleum defendants maintained that position in oral argument.

43 At another point the Solicitor-General of the Commonwealth correctly accepted general propositions from which the conclusion flows that there is federal jurisdiction because the controversy arising from the assertion by the petroleum defendants that the ATP would automatically lead to "production licences", ie leases, which were pre-existing rights based acts within the meaning of s 24IB of the NTA, and the denial of that assertion by the plaintiffs on the ground that the ATP is void, is a controversy that arises under the Act.

44 Counsel for the petroleum defendants also accepted that while the first and second declarations sought by the plaintiffs had flaws supporting the orders of the Federal Court for other reasons, the question whether they should be granted was within the jurisdiction of the Federal Court.

45 These concessions by the petroleum defendants and the Solicitor-General were correct. While a claim to damages for breach of contract is a claim for relief under State law, if the contract is in respect of a right which is a creature of federal law, the claim arises under the federal law[31]. That is true whether the State law is common law, like the law of contract, or statute law, like the position of the ATP in relation to the "production licences", ie leases, under s 40 of the Petroleum Act. And there is also 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[32]. Here the petroleum

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31 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; [1983] HCA 31.

32 *Felton v Mulligan* (1971) 124 CLR 367 at 408; [1971] HCA 39; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262 [29]; [2005] HCA 38.

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.

Conclusion

46 The opinion of the primary judge, not disturbed by the Full Court, was erroneous in concluding that there was no matter, that the plaintiffs had no standing, that the plaintiffs' application was merely for an advisory opinion, and that the Federal Court had no jurisdiction. Mistakenly to deny jurisdiction is a jurisdictional error attracting a writ of certiorari.

Some arguments of the defendants

47 In view of the conclusion just arrived at, many of the arguments advanced by the parties are immaterial. But it is necessary to note a few arguments put by the petroleum defendants and the State of Queensland, even though they are immaterial.

48 The petroleum defendants argued that the proceedings were hypothetical for the following reason. They contended that the plaintiffs were arguing that if the ATP were invalid, the grant of "production licences", ie leases, could be a proper subject for the new ILUA. They continued:

> "If the plaintiffs' argument that the ATP is invalid were correct …, there is nothing that an ILUA could do to remedy that defect. What follows is that, if the ATP is valid then the grant of a petroleum lease would be valid as a PERBA …; in such a case there is no need to include reference to it in any ILUA. Conversely, if the ATP were to be found to be invalid, then the petroleum defendants would have no capacity under State law to obtain petroleum leases pursuant to that ATP and therefore there would be no need to address that issue in any ILUA either. That is, whatever view were to be taken of the validity of [the ATP], there is no cause for it ever to be the subject of an ILUA, showing again the hypothetical nature of the present proceeding."

This submission does 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. The same proposition answers another argument of the petroleum defendants: that the plaintiffs identified as a "matter" the question of what can lawfully be the subject of the new ILUA, but that had not been pleaded.

49 The petroleum defendants also submitted that the orders made in the Federal Court should be upheld because an agreement providing for consents to

the construction of pipelines had been made between the parties in October 2006. They argued that this revealed the amended statement of claim to be defective because the allegation that negotiations had been on foot from about late 2005 was factually incorrect. The October 2006 agreement was not relied on before the primary judge. It was relied on for the first time in this Court. The parties, including the petroleum defendants, invited the primary judge to assume the factual correctness of the plaintiffs' case as alleged in the amended statement of claim[33]. To invite this Court to take the October 2006 agreement into account is to depart from that agreed position without warrant. If the petroleum defendants thought that the October 2006 agreement were fatal to the plaintiffs' case as presented, the appropriate course would have been to plead the October 2006 agreement in their defence – a document which they never filed – and debate its significance either on a summary judgment application or, more satisfactorily, at a trial. In the end the petroleum defendants did not press the argument and conceded that the negotiations for a new ILUA were not completed.

50 Another argument advanced by the petroleum defendants was that the plaintiffs' litigation was pointless because the petroleum defendants "will not choose to enter into an ILUA" which deals with the "production licences", ie leases. The proposition that the petroleum defendants would not enter an ILUA dealing with that matter was not advanced in the 4 November 2005 letter from the first defendant, or at any time until the hearing in this Court. The submission encounters numerous difficulties pointed out in argument, but it is not necessary to deal with them, because eventually the petroleum defendants abandoned the argument.

51 The State of Queensland repeatedly submitted that the validity of the ATP was not challenged by the plaintiffs. Both the State of Queensland and the petroleum defendants drew attention to the removal of the third declaration, which appeared in the original Application, from the Amended Application. The amended statement of claim certainly challenges the validity of the ATP. And its invalidity is an essential step in the reasoning justifying the making of the first declaration. The removal of the third declaration was not an abandonment by the plaintiffs of their contention: that contention remains fundamental to the proceedings.

52 The petroleum defendants and the State of Queensland also made numerous criticisms of the amended statement of claim, the relief sought in the Amended Application, and supposed disparities between them. These complaints were not of sufficient significance in this case to justify summary dismissal. They were matters which could have been attended to either before trial or in the process of working out what relief was appropriate at the end of the

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33 *Edwards v Santos Ltd* (2009) 263 ALR 473 at 477 [15].

trial. This was illustrative of the way in which the present case was an inappropriate use of s 31A proceedings. The function of that provision is not to substitute for the resolution of real controversies at a trial a premature termination of them by summary means.

Orders

53 *Substantive relief.* The plaintiffs apply to this Court for an order that a writ of certiorari issue to quash the decision of the primary judge and of the Full Court. That application should be granted. The writ of certiorari is not mentioned in s 75(v) of the Constitution, but it may issue in the exercise of an implied ancillary or incidental authority to the effective exercise of s 75(v) jurisdiction[34]. The plaintiffs also apply for mandamus against the fourth defendant (the Federal Court and its judges). That application should be rejected on the ground that that type of relief is not necessary in this case.

54 *Plaintiffs' costs in High Court: petroleum defendants.* The petroleum defendants submitted that the costs of the proceedings in this Court should follow the event, save that their costs in this Court should be paid by the plaintiffs (or, alternatively, that no order should be made as to costs) to the extent that amendments to the plaintiffs' Amended Application and amended statement of claim were necessary elements in the plaintiffs' success in this Court. The plaintiffs' success in this Court does not depend on the necessary elements postulated by the petroleum defendants. Hence the application of the petroleum defendants for a special costs order must be rejected.

55 *Plaintiffs' costs in High Court: State of Queensland.* The State of Queensland accepted that it could not argue against an order that costs follow the event in this Court unless one of two submissions succeeded. The first submission was that no order should be made as to costs in this Court if the plaintiffs succeeded on a basis not previously argued by them, but first identified by this Court, namely the proper construction of s 31A of the Federal Court Act or the correctness of *Lardil Peoples v Queensland*[35]. The second submission was that no order should be made as to costs in this Court if the plaintiffs succeeded on a basis raised by the plaintiffs for the first time in this Court, namely reliance upon the *Petroleum and Gas (Production and Safety) Act* 2004 (Q) as the source of power to grant any "production licence", ie lease. The success of the plaintiffs in this Court does not rest on either of the bases described. Hence the application

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34 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14]; [2000] HCA 57, approved in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 673 [63]; [2007] HCA 14.

35 (2001) 108 FCR 453.

of the State of Queensland that there be no order as to costs in this Court must be rejected.

56 *Plaintiffs' costs in Federal Court.* The plaintiffs submitted that the petroleum defendants and the State of Queensland should pay the plaintiffs' costs of and incidental to the motions for summary dismissal heard and determined by Logan J in the Federal Court and the application for leave to appeal to the Full Court of the Federal Court against Logan J's decisions of 18 December 2009 and 17 March 2010. They relied on s 26 of the Judiciary Act. They also relied on the power granted by s 32 of the Judiciary Act to this Court in the exercise of its original jurisdiction to grant remedies "so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided."

57 The petroleum defendants submitted that they should not have to pay the plaintiffs' costs in the Federal Court and the Full Court of the Federal Court. They submitted that the proceedings there related to one matter, that the proceedings in this Court related to a distinct matter, and that hence s 26 of the Judiciary Act did not apply. They submitted that s 37 of that Act did not apply either. They did not deal with the plaintiffs' s 32 submission. They repeated their submissions in support of their contention that the plaintiffs should pay their costs in this Court.

58 The submissions of the State of Queensland concentrated on s 32 of the Judiciary Act. The State drew a parallel between the supervisory jurisdiction of this Court under s 75(v) of the Constitution and its appellate role in relation to the supervisory jurisdiction of the Supreme Court of New South Wales considered in *Kirk v Industrial Court (NSW)*[36]. The State advanced an argument from anomaly. It submitted that "it would be anomalous to interpret s 32 … as enabling the … Court to do in its original jurisdiction what it could not do in the exercise of its appellate jurisdiction in *Kirk* (under s 37 of the [Judiciary Act])".

59 The plaintiffs' application to this Court arose from the interaction of three factors. One was the success of the petroleum defendants and the State of Queensland on their applications to the Federal Court under s 31A(2) of the Federal Court Act. The second was the refusal by the Full Court of leave to appeal. The third was the bar to an appeal to this Court created by s 33(4B)(a) of the Federal Court Act.

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36 (2010) 239 CLR 531 at 584 [110]-[111]; [2010] HCA 1.

60 If these arguments of the petroleum defendants and the State of Queensland succeeded, they would work an injustice and set a precedent open to abuse in future. Both the injustice and the unsatisfactory precedent flow from the correct submission of the plaintiffs that "had the summary judgment application been dismissed there would have been no reason why costs should not have followed the event [and] had the plaintiffs been successful in the Full Court there would have been no reason why costs should not have followed the event".

61 The injustice which would be created if the petroleum defendants and the State of Queensland were correct arises thus. The plaintiffs have demonstrated substantive error on the part of the Federal Court and the Full Court of the Federal Court. Had s 33(4B)(a) of the Federal Court Act not deprived the plaintiffs of a capacity to seek special leave to appeal to this Court, this Court would have had power to set aside the costs orders in dealing with any appeal. But since the plaintiffs cannot seek special leave to appeal to this Court, they will suffer financial loss if the Federal Court costs orders cannot be set aside in these proceedings. It would be unjust if the plaintiffs cannot obtain compensation for that financial loss by a costs order in this Court.

62 The unsatisfactoriness of the precedent which would be created if the arguments of the petroleum defendants and the State of Queensland were accepted flows partly from the equivalent injustice that would arise in future cases. But it also flows from the temptation which it would create for a certain category of litigant. That category comprises wealthy litigants – it is not suggested that the tactics of the petroleum defendants and the State of Queensland in these proceedings, or anything else, indicate that they fall into it – who seek to render fruitless litigation which has been commenced against them by less wealthy litigants, not by achieving success on the merits at a trial, but by other means. One technique is to seek to administer knockout blows before trial by means of strike out applications or summary dismissal applications or stay applications. Another technique is to engage in extensive softening up by making as many interlocutory applications as they choose, and resisting à outrance those of the other side. The goal of the second technique is to cause the claimants to become incapable of providing security for costs and funding the litigation, or at least to conclude that they cannot afford the litigation, and thus to cause them to abandon the litigation before trial. Successes obtained by tactics of the former kind are more likely to come under challenge in this Court than those obtained by tactics of the latter kind. But the propensity of those litigants to engage in tactics of either kind would be intensified by the knowledge that if their resort to these tactics succeeds in the first instance and can only be corrected in s 75(v) proceedings in this Court, they will be immune from compensating those who made claims against them for the costs which the claimants were ordered to pay under costs orders which events in this Court reveal ought not to have been made. The temptation to engage in oppressive proceedings, and the likelihood of its being yielded to, would be increased if those who are in a position to engage in oppressive proceedings think that they will enjoy immunity

from costs orders in the Federal Court, even if s 75(v) applications in this Court establish that those oppressive proceedings were not soundly based.

63 Do the injustice and the precedent for abuse which acceptance of the arguments advanced by the petroleum defendants and the State of Queensland would create have to be endured? Or do those arguments rest on a fallacy? There is a fallacy in the State of Queensland's argument. It lies in its argument from anomaly. The majority reasoning in *Kirk's* case rests on the proposition that there was no legislative provision giving the Court of Appeal of the Supreme Court of New South Wales jurisdiction to make a costs order in place of the orders made in the Industrial Court of New South Wales which were quashed[37]. But it is fallacious for the State of Queensland to conclude that there is no legislative provision giving this Court jurisdiction to make a costs order in relation to the proceedings in the Federal Court. Section 32 is a legislative provision of that kind. The majority reasoning in *Kirk's* case is thus distinguishable.

64 As the plaintiffs submitted, s 32 of the Judiciary Act requires this Court to grant remedies which will determine "completely and finally", so far as possible, "all matters in controversy between the parties regarding the cause of action" on which the plaintiffs' application for certiorari relied. A step in that direction is the grant of certiorari itself, for the orders quashed include the costs orders against the plaintiffs in each court in favour of the petroleum defendants.

65 However, by itself that step is incomplete. A grant of the complete relief to the plaintiffs referred to in s 32 of the Judiciary Act requires as well that the plaintiffs be indemnified in relation to their own costs of the Federal Court proceedings which had the flaws leading to certiorari in this Court.

66 The State of Queensland argued in its written submissions that when the matter returns to the Federal Court, that Court can make "appropriate costs orders

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37 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 584 [110]. The correctness of that assumption might depend on the true construction of a provision to which this Court in *Kirk's* case was not referred, namely the *Civil Procedure Act* 2005 (NSW), s 98(6)(c), considered against the background of *R v Passman* (1834) 1 Ad & E 603 [110 ER 1338]; *R v Higgins* (1836) 5 Ad & E 554 [111 ER 1275]; *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440; Supreme Court Costs Rules 1915 (NSW), r 4; Rules of the Supreme Court (Revised) 1965 (UK) (SI 1965/1776), O 53, r 6 and O 62, r 4; *Supreme Court Act* 1970 (NSW), s 76(2)(c); Supreme Court Rules 1970 (NSW), Pt 52, r 7; and New South Wales Law Reform Commission, *Report of the Law Reform Commission on Supreme Court Procedure*, Report No 7, (1969) at 17 [42], 106 (marginal note to cl 76(2)), 419 (marginal note to Pt 52, r 7).

… in place of any costs orders that may be quashed." The difficulty is that for this Court to put the plaintiffs to the necessity of re-agitating somewhat ancient controversies in making the necessary applications would mean that this Court had not completely and finally determined either those controversies or the wider controversy of which they form part. It would mean that this Court had failed to avoid a multiplicity of legal proceedings. The "matters in controversy" referred to in the concluding words of s 32 are not limited to the "cause or matter" referred to in the opening words: they extend to matters in controversy "arising out of or connected with the cause of action". The controversy about whether the petroleum defendants and the State of Queensland should pay the costs of the plaintiffs in the Federal Court and the Full Court is "connected with the cause of action", and the disposition of it in the Federal Court and the Full Court, in relation to which the plaintiffs applied for certiorari in this Court.

67 Hence, the petroleum defendants and the State of Queensland should pay the costs of the plaintiffs of the proceedings in the Federal Court and the Full Court.

68 *Conclusion on costs.* In summary, then, the petroleum defendants and the State of Queensland must pay the costs of the plaintiffs in the Federal Court of Australia occasioned by the applications of the petroleum defendants and the State of Queensland for summary dismissal, the plaintiffs' costs of the application for leave to appeal to the Full Court against the orders of the Federal Court of Australia made on 18 December 2009 and 17 March 2010, and the plaintiffs' costs in this Court. The effect of the grant of certiorari will be to quash the costs orders against the plaintiffs in favour of the petroleum defendants made by the Federal Court and the Full Court.

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