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Details of Filing

Document Lodged:	Submissions
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File Title:	DELIA KEMPPI & ORS v ADANI MINING PTY LTD (ACN 145 455 205) & ORS
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Important Information

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Form 122
Rules 36.01(1)(b); 36.01(1)(c)

No. QUD48 of 2018

Federal Court of Australia

District Registry: Queensland

Division: General

On appeal from the Federal Court

DELIA KEMPPI and others

Applicants

ADANI MINING PTY. LTD. (ACN 145 455 205) and others

Respondents

Submissions of the Applicants for Leave to Appeal

Material Relied Upon

1. The Applicants read and rely upon:
    a. Documents relied upon in the application before Reeves J. in the application for an interlocutory injunction the subject of the application for leave to appeal which are set out in an annexure to these submissions;
    b. Judgment of Reeves J. dated 2 February 2018 dismissing the application for an interlocutory injunction;
    c. Reasons for judgment of Reeves J. dated 2 February 2018;
    d. Order of Reeves J. dated 5 February 2018 ordering costs on the dismissed application for an interlocutory injunction;
    e. Application for leave to appeal filed 5 February 2018;
    f. Affidavit of Colin Stanley Hardie filed 5 February 2018;
    g. Affidavit of Adrian Burragubba filed 5 February 2018;
    h. Affidavit of Delia Kemppi (misspelled "Kempii" in the affidavit) filed 5 February 2018;
    i. Affidavit of Lester Lorraine Barnard filed 6 February 2018;
    j. Affidavit of Linda Bobongie filed 5 February 2018; and
    k. Affidavit of Lyndell Turbane filed 5 February 2018.

Application for Leave to Appeal

Legislative Provisions and Case Law

2. The Court has appellate jurisdiction to hear and determine appeals from judgments of the Court constituted by a single judge exercising the original jurisdiction of the Court.[1]

3. An appeal shall not be brought from such a judgment, if it is an interlocutory judgment,[2] unless the Court or a Judge gives leave.[3]

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[1] Federal Court Act 1976 ("FC Act"), s. 24(1)(a)
[2] It is clear that an application refusing an interlocutory injunction (pending the determination of the substantive application) is an interlocutory judgment.
[3] FC Act, s. 24(1A): the exception in s. 24(1C) is not applicable.

4. Applications for leave to appeal to the Court must be heard and determined by a single judge[4] unless a judge directs that the application must be heard and determined by Full Court[5] or the proceeding has already been assigned to a Full Court.[6]

5. The Rules provide that a party may apply orally for leave to appeal from an interlocutory judgment or order of the Court to the Judge who pronounced the judgment at the time of the pronouncement of the judgment.[7] Although an application for leave to appeal was foreshadowed at the time of the pronouncement of the judgment, no oral application was made at the time. Accordingly, the written application for leave to appeal was permitted by the Rules.[8]

6. Leave to appeal is less likely to be granted if the appeal lies from the exercise of discretion in a matter of practice and procedure as opposed to a discretion which is determinative of substantive legal rights.[9]

7. An interlocutory order for an injunction is regarded as a matter of practice and procedure.[10] However, it is also the case that the question of injustice flowing from an order appealed against will be a necessary and relevant consideration.[11]

8. If an order, while interlocutory in effect, has the practical operation of finally determining a substantive right, leave will be more readily given.[12] The High Court has held that, an interlocutory order affecting only the course of proceedings in a suit is unlikely to qualify for leave while the grant of an interlocutory injunction may affect rights of a necessary value to justify the grant of leave.[13]

9. The two tests applicable to a grant of leave are that the decision at first instance should be attended with sufficient doubt to warrant its reconsideration on appeal and that substantial injustice would result if leave were refused.[14]

Substantial Injustice

10. The learned primary judge found that whatever native title exists in the area concerned will be extinguished permanently by the approval of a surrender under cl. 9(b) of the Project Agreement.[15]

11. The six areas shown in the map annexed to the affidavit of Mr. Manzi and the railway corridor shown on the same map comprise the areas subject to extinguishment.[16]

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[4] *Federal Court Act 1976* ("FC Act"), s. 25(2)(a)
[5] FC Act, s. 25(e)
[6] FC Act, s. 25(2)(f)
[7] *Federal Court Rules 2011* ("Rules"), r. 35.01
[8] Rules, r. 35.11: the two conditions, namely, a right to appeal under the FC Act subject to gaining leave and no oral application for leave are fulfilled.
[9] *Thompson v Thompson* (1942) 59 WN (NSW) 219, 220: *Thompson* was not a case of leave to appeal but the distinction between matters of substantive rights and matters of practice and procedure is made clearly.
[10] *Adam P Male Fashions v Phillip Morris* (1981) 148 CLR 170, 177
[11] *Adam P Male Fashions v Phillip Morris* (1981) 148 CLR 170, 177
[12] *Décor Corporation Pty. Ltd. v Dart Industries Inc* (1991) 33 FCR 397, 400
[13] *Ex parte Bucknell* (1936) 56 CLR 221, 225
[14] *Johnson Tiles Pty. Ltd. v Esso Australia Pty. Ltd.* (2000) 104 FCR 564, 584 [44]
[15] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [15]
[16] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [19]-[24]

12. The Applicants submit that, while it argues for a different construction, there is a possibility that, even if the decision to register the Project Agreement on the Register of Indigenous Land Use Agreements is found to be invalid on the trial of the principal proceeding, any extinguishment of native title which occurs, in the meantime, in reliance upon the Project Agreement will be held to be valid.[17]

13. The Applicants submit that this possibility that the native title rights of the Applicants, along with other Wangan & Jagalingou people, may be extinguished permanently prior to the determination of the trial and notwithstanding an order on the trial that the registration of the Project Agreement was, itself, void is a matter of substantial injustice and a factor that argues in favour of the grant of leave to appeal.

14. The learned primary judge also, correctly, found that the Applicants would suffer prejudice by possible reduced access to sites and features of importance to the Applicants and the Wangan & Jagalingou People through extinguishment of native titles in the areas identified above.[18] That is a further matter giving rise to substantial injustice and militating in favour of the grant of leave to appeal.

Attended with Sufficient Doubt to Warrant Reconsideration on Appeal

15. Grounds 1-3 of the proposed grounds set out in the draft notice of appeal[19] dispute findings of the learned primary judge concerning the possible extinguishment of native title and its impact on the Applicants.

16. The learned primary judge found that, if the Applicants were correct in their arguments,[20] the registration of the Project Agreement would be void and no land and waters would be extinguished and that, if the Applicants were wrong, the injunction would have been wrongly granted because the Applicants would fail at trial.[21]

17. These findings appear to be significantly contributory to the learned primary judge's conclusion that the Applicants did not have a strong probability of success in any of the four claims pleaded in their statement of claim.[22]

18. As discussed above,[23] the Applicants argue for a construction that the invalidity of the decision to register the Project Agreement by the Fourth Respondent would result in invalidity of any steps taken in reliance upon that registration and result in extinguishment of native title. However, a contrary argument which cannot be discounted at this stage of the proceedings is that the proper construction of s. 24EB NTA is that actions taken in reliance on the registration of the Project Agreement (and the resulting extinguishment of native title) would remain valid notwithstanding the

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[17] Applicants' Submissions filed 19 January 2018, paragraphs 15-17. The argument to this effect was advanced by the Third Respondent in submissions dated 24 January 2018 and filed pursuant to leave granted at the hearing on 30 January 2018.
[18] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, paragraph 55
[19] Annexure CSH1 to the affidavit of Colin Stanley Hardie filed 5 February 2018 (page 5 of the bundle)
[20] The particular example was the argument that the Fourth Respondent had no jurisdiction to make a decision to register the Project Agreement by placing it on the Register of Indigenous Land Use Agreements because the application therefor was not accompanied by a complete description of the surrender area as required by regulations 5 and 7(2) of the *Native Title (Indigenous Land Use Agreements) Regulations 1999*. See *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [31]-[33].
[21] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [33]
[22] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [36]
[23] Paragraphs 12-13 of these submissions

finding of invalidity of the registration decision and the subsequent removal of the Project Agreement from the register.[24]

19. The Applicants submit that the learned primary judge's dichotomy of alternatives in the concluding paragraph of [33] is incomplete with the result that it understates both the strength of the Applicants' case[25] and the possible detrimental impact on the Applicants if the interlocutory injunction sought was not granted.

20. The learned primary judge sets out the circumstance that the Wangan & Jagalingou people had authorised the making of the Project Agreement at an authorisation meeting.[26] It is the certification of the events at this authorisation meeting[27] and the construction of the resolutions at this authorisation meeting as unconditional[28] that are the subject of three of the four grounds pleaded in the substantive proceedings. The fourth ground (the incomplete description point)[29] also goes to the question of effective authorisation in that what is said to be incomplete description arises because it reflects the lack of precision in description in the Project Agreement.[30]

21. The learned primary judge went on to conclude that the Applicants could not validly assert that they are protecting the native title rights of the Wangan & Jagalingou People because those People have authorised the making of the Project Agreement and the resulting extinguishment of the native title rights and interests in question.[31] The learned primary judge concludes, as a result, that it necessarily follows that the Applicants can suffer no prejudice in terms of native title rights and interests if the injunction were not granted.[32]

22. The Applicants submit that two errors are present in this reasoning. First, the grounds pleaded question the effectiveness of the authorisation meeting resolutions to authorise the making of the Project Agreement. It is to prejudge the results of those arguments to assume and act on the legal effectiveness and validity of the authorisation meeting.

23. Second, although the Applicants hold their native title rights as members of the Wangan & Jagalingou People, they suffer prejudice as individuals if the native title rights of the Wangan & Jagalingou People are extinguished. The NTA intends that such rights may only be extinguished by prescribed processes taken in accordance with the NTA. The Applicants are entitled to insist that the legal requirements of the NTA are complied with, strictly, and they do suffer prejudice if those rights and interests are extinguished by a registration process that is held to be invalid.

24. The learned primary judge held[33] that the circumstances of this case were not exceptional or special in the context of a failure by the Applicants to provide an

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[24] The Applicants argument is found in the Applicants' Submissions filed 19 January 2018, paragraphs 15-17. The argument to this effect was advanced by the Third Respondent in submissions dated 24 January 2018 and filed pursuant to leave granted at the hearing on 30 January 2018.
[25] As set out in *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [36]
[26] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [41]
[27] Amended statement of claim filed 18 December 2017, paragraphs 32-36
[28] Amended statement of claim filed 18 December 2017, paragraphs 43-45
[29] Amended statement of claim filed 18 December 2017, paragraphs 37-42
[30] Amended statement of claim filed 18 December 2017, particulars to paragraph 41
[31] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [42]
[32] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [42]
[33] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [65]

undertaking as to damages.[34] The learned primary judge concluded that *Weribone* was distinguishable.[35]

25. The Applicants do not submit that the circumstances in the present case and those in *Weribone* are directly equivalent. Nonetheless, the Applicants contend that the circumstances in the present case are special or exceptional in the way those terms are used in the authorities. The Applicants do rely, by analogy, on the statement that the exercise of the Court's jurisdiction to make a determination of native title under the NTA affects the public generally.[36] The Applicants submit that the prospect of native title rights and interests being permanently extinguished by a process that is subsequently found to have been void for lack of jurisdiction is also a matter that affects the public generally.

26. It is also submitted that the learned primary judge's conclusion that the Applicants were incapable of suffering prejudice by the loss of native title rights, per se, discussed above, [37] impacted on His Honour's assessment of the weight to be placed on the absence of an undertaking as to damages and his conclusion that the circumstances of this proceeding were neither special nor exceptional.

27. It is submitted that, for the reasons discussed, the decision at first instance, is attended with sufficient doubt to justify the grant of leave to appeal.

Interim Injunction Pending Determination of the Appeal

28. A single judge may make an interlocutory order pending the determination of an appeal to the Court.[38] The reference pending the appeal to the court includes an order pending the determination of an application for leave to appeal.[39]

29. The Applicants have now offered to the Court undertakings as to damages in respect of the interim injunction now sought[40] but acknowledge the limited effectiveness of the undertaking because of their own lack of means. The effectiveness of the injunction may be a relevant factor.[41]

30. The Applicants rely on the submissions made above that the potential extinguishment of native title rights and interests discussed above raises matters of public interest.[42]

31. In cases seeking to enforce duties arising under planning and environmental legislation, the absence of an undertaking as to damages is a matter to consider on

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[34] *Weribone on behalf of the Mandandanji People v The State of Queensland* [2013] FCA 255, [81]-[83], citing *Attorney-General v Albany Hotel Company* [1896] 2 Ch 699, 700; *Air Express Limited v Ansett Transport Industries (Operations) Proprietary Limited* (1981) 146 CLR 249, 269 and 311-312 and *Graham v Campbell* (1878) 7 Ch D 490, 494

[35] *Kemppi v Adani Mining Pty. Ltd. (No 3)* [2018] FCA 40, [64]-[68]

[36] *Weribone on behalf of the Mandandanji People v The State of Queensland* [2013] FCA 255, [87]: the statement was made in support of the conclusion by Rares J. that the remarks in *Commercial Bank of Australia Ltd. v Insurance Brokers of Australia* (1977) 16 ALR 161, 169, namely, that in the case of an application for an interlocutory injunction pursuant to s. 80 of the *Trade Practices Act 1974* (Cth), the court would take the presence or absence of an injunction into account on the balance of convenience as one of the factors to be considered, were apposite to the circumstances in *Weribone*.

[37] Paragraphs 20-23 of these submissions

[38] FC Act, s. 25(2B)(ab)

[39] FC Act, s.25(2BA) combined with s. 25(2)(a)

[40] Affidavits of each of the Applicants filed 5 February 2018

[41] *Starkey on behalf of the Kolkatha People v State of Australia* [2016] FCA 1577, [29]

[42] Paragraphs 25-26 of the submissions

the balance of convenience but does not preclude the grant of an interlocutory damages.[43]

32. Lack of means on the part of an applicant for interlocutory injunctive relief who provides an undertaking as to damages is not a matter that would prevent the grant of an interlocutory injunction.[44]

33. Apart from the failure of the Applicants to provide an undertaking as to damages, the learned primary judge found the factors before him to be evenly balanced. The circumstances have been changed by the preparedness of the Applicants to place their limited assets at risk of being forfeited if they are unsuccessful in the action.

34. It is submitted that the existing restraining order should be continued pending the determination of the application for leave to appeal and, if leave is granted, pending the hearing and determination of that appeal.

Stephen Keim SC
John Waters
7 February 2018

[43] See the line of cases discussed in *Negra (NSW) Pty. Limited v Gundagai Shire Council* [2007] NSWLEC 806, [28] – [33]

[44] *Dein v Bealey* (1960) 78 WN (NSW) 56 and *Szentessey v Woo Ran* (1985) 64 ACTR 98: see also *Goater v Commonwealth Bank of Australia* [2014] NSWCA 265, [88]-[97]; *Allen v Jambo Holdings Ltd.* [1980] 2 All ER 502; *National Trust of Australia (NT) v Minister for Lands, Planning and Environment* (1997) 7 NTLR 20; *Ward v State of Western Australia*, Nicholson J., unreported, 21 December 1995, [18]; and *Bradstreet v Merrin Developments Pty. Ltd.* [2017] NSWSC 1559