Negotiation in good faith—prior dealings

Cameron/Hoolihan/Queensland [2005] NNTTA 84

Sosso M, 16 November 2005

Issues

Among other things, this Tribunal determination dealt with:

- where certain agreements were made prior to a s. 35 application being lodged under the Native Title Act 1993 (NTA), did s. 37 prohibit the making of a future act determination by the Tribunal;
- whether past conduct of the grantee party was a relevant consideration in determining whether there had been negotiation in good faith as required by s. 31(1)(b) prior to the s. 35 application being made?

Background

The grantee party, Robert Cameron, had applied for the grant of a mining lease (ML10290). This was the proposed future act relevant to the Tribunal's inquiry. The native title party was the applicant in a claimant application brought on behalf of the Gugu Badhun People.

In 2000-2002, Mr Cameron had acted on behalf of Ebony Ridge Marble Pty Ltd in negotiations with the Gugu Badhun People in relation to the proposed grant of a different mining lease over the same area of land (the previous negotiations). These negotiations were ultimately unsuccessful and the application for that lease was abandoned. In this matter, the native title party alleged that the Gugu Badhun People had provided financial support to Mr Cameron during the previous negotiations and that money was still owed to them as a result. The Tribunal noted the previous negotiations were seen by the native title party as a key issue in the determination of whether the grantee party had negotiated in good faith in relation to ML10290—at [17].

Charles Reinalda, the representative for, and financial backer of, Mr Cameron's current venture, entered into negotiations about ML10290 with the Gugu Badhun People. Due to the prior relationship between Mr Cameron and the native title party, Mr Reinalda was the main point of contact for negotiations over the ML10290 and undertook to pay the money allegedly owed to the Gugu Badhun People from the previous negotiations.

A s. 31(1)(b) state deed and an ancillary agreement/indigenous land use agreement had been signed by the native title party, Mr Cameron and Mr Reinalda by 9 June 2005. The state deed had been lodged by that date but had not yet been executed by the State of Queensland. On or around 14 June 2005, Mr Cameron's and Mr Reinalda's business relationship was terminated, at which point Mr Reinalda contacted the native title party's legal representative and indicated he would no longer be funding the terms of the agreement reached between the parties.

On 20 June 2005, the native title party's legal representative informed Mr Cameron by email that there would be no further progress toward an agreement until Mr Cameron gave a guarantee of payment of certain costs incurred to date and a statement of his capacity to 'meet the upfront payments under the agreement'. Less than an hour after sending that email, the native title party's legal representative contacted the state and confirmed that the ancillary agreement was 'withdrawn' because it was entered into with 'a partnership' that was now in dispute and 'therefore the parties are no longer in agreement'. The Tribunal took this to be repudiation or the unilateral termination of the agreement by the native title party—at [30] and [42].

Twelve days later an amended s. 31(1)(b) agreement, which was the same as the earlier agreement except that references to Mr Reinalda had been removed, was forwarded to Mr Cameron by the native title party's legal representative but it was not accepted.

On the material before the Tribunal, it was concluded that, although Mr Cameron was the grantee, both the negotiations engaged in and the expectations of the native title party were reliant upon Mr Cameron and Mr Reinalda acting in concert—at [24].

Did agreement mean Tribunal could not make a determination?
Paragraph 37(a) of the NTA provides that the arbitral body (in this case, the Tribunal) must not make a determination if 'an agreement of the kind mentioned in paragraph 31(1)(b) has been made'. As noted earlier, in this case, both a s. 31(1)(b) state deed and an ancillary agreement/indigenous land use agreement had been signed by the native title party and Mr Cameron and Mr Reinalda. The question was whether either or both of them operated to prohibit the Tribunal from making a future act determination in this case. As both agreements provided for consent to the doing of the future act in question, the Tribunal found that both were potentially within the scope of s. 31(1)(b)—at [23].

However, the state deed had not been executed by the government party and so was not relevant. As to the ancillary agreement, it had been 'executed by the relevant negotiation parties' but 'abandoned by the native title party' before the application for the s. 35 application was made to the Tribunal—at [23].

It was determined that:

> If there is no section 31 agreement in force at the time the section 35 application is made, the Tribunal has jurisdiction to make a section 38 determination. However, if at any time after the section 35 application is made, agreement is reached, the jurisdiction of the Tribunal lapses. The fact that an agreement was reached but then terminated prior to the section 35 application being made, does not prevent the Tribunal reaching a determination. The focus of section 37 is on the existence of an extant agreement, not on a state of affairs which no longer exists - at [23].

Good faith negotiations

The Tribunal made the following observations on good faith negotiations:

- the NTA obliges the parties to good faith negotiations to consider a range of matters but, if they wish to reach a more comprehensive and enduring agreement, that is for them to determine;
- the type of matters that may be addressed are indicated by the criteria set out in s. 39 and issues identified in s. 33;
- the obligation is to negotiate in good faith - there is no obligation to reach an agreement;
- a party making a s. 35 application is not acting in bad faith, referring to *Strickland v Minister for Lands* (WA) (1998) 85 FCR 303 at 322;
- there is an obligation on the negotiation parties to enter into discussions with an open mind and an honest desire to reach a reasonable accord;
- a party alleging dishonesty or deceit (as the native title party did in this case) has an evidentiary burden, on the balance of probabilities, of substantiating the allegation, referring to Strategic Minerals Corporation/ Kynuna/Queensland [2003] NNTTA 83, DP Sumner at [40];
- there is no obligation to negotiate after a s. 35 request has been made;
- while it may or may not be that a party's conduct after a s. 35 determination application has been made is relevant to whether a party negotiated in good faith before it was made (referring to South Blackwater Coal Ltd v Queensland (2001) 165 FLR 232 at 237 to 240), there is no mandate in the NTA for receiving evidence of that conduct—at [37] to [38].

The native title party contended the grantee party had failed to meet good faith negotiation criteria in that he had shifted position, refused to sign a written agreement, undertaken unilateral conduct harming the negotiation process and failed to do what a reasonable person would have done in the circumstances—at [29].

The grantee party refuted these contentions on the basis that he was not required to negotiate about events unrelated to the future act in question in these proceedings, had never repudiated the agreements while the native title repudiated both, did negotiate in good faith and was free to severe or create business relationships as he saw fit. On the latter point, the Tribunal noted that:

> Mr Cameron could do as he saw fit in the running of his business affairs, but if his conduct in making or breaking commercial relations with others has or had an impact on agreements negotiated with other negotiation parties, then it is unsustainable to contend that the Tribunal must ignore such matters—at [50].

The government party contended that, in assessing whether the grantee party negotiated in good faith, the Tribunal should not and could not have regard to conduct of the grantee party prior to the date on which the obligation to negotiate in good faith arose.

Past conduct may be considered

The Tribunal noted that:

> There is no restriction on the Tribunal to receive into evidence past conduct of a negotiation party, if it is relevant to the issue of good faith. It would be wholly artificial to limit material to conduct arising after the commencement of good faith negotiations. Clearly parties engaged in such negotiations are influenced by a range of factors, and past negotiations and conduct may well be relevant not only to assessing the negotiations but also the overall tenor of the proceedings ... . The Tribunal and Federal Court have recognized that relationships do change once negotiations start, and if a party was so influenced by past negotiations that they did not approach the new negotiations with an open mind and a preparedness to reach a reasonable accord, they would be the party failing to negotiate in good faith—at [47].

In this matter, the previous negotiations involving Mr Cameron as representative of Ebony Ridge Marble and the Gugu Badhun People were taken into account but the weight placed on that evidence was tempered by the fact that (among other things):

- they occurred some years previously;
- the negotiations related to a different mining lease;
- while they involved Mr Cameron, they also involved other persons connected with Ebony Ridge Marble—at [48].

Decision of question of good faith

The Tribunal noted (among other things) that:

- both agreements stated that good faith negotiations had taken place;
- the parties, both of which had experienced and competent legal representatives, freely and with full knowledge executed agreements after what was clearly a series of fruitful negotiation meetings which met the criteria of good faith negotiations;
- it was the native title party that terminated the agreements without any discussions with Mr Cameron as to possible alternative arrangements;
- this course of action was not adequately explained even if previous conduct was considered—at [41] to [42] and [49].

Therefore, the Tribunal found that the government and grantee parties did negotiate in good faith and, therefore, that it could conduct a further inquiry and make a determination on the s. 35 application. It was noted that:

- the native title party did not discharge the evidentiary burden to justify its allegations of bad faith;
- the logically relevant evidence before the inquiry supported a conclusion of good faith as required by s. 31(1)(b)—at [52] to [53].