Future act agreement terminated following Wongatha decision

Jabiru Metals Pty Ltd v Lynch [2009] WASC 238

Hasluck J, 2 September 2009

Issue

Jabiru Metals Pty Ltd (the plaintiff) sought a declaration that commercial agreements between the plaintiff and those named as the applicants in the Wongatha, Wutha and Koara native title determination applications (the defendants) were terminated as at, and from, 5 February 2007. The termination date is the date the native title applications were dismissed, in whole or in part by the judgment given in by the Federal Court in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*).

Background

In 2004, the plaintiff entered into an agreement with each of the Wongatha and Wutha claim groups as represented by the registered native title claimant as entered on the Register of Native Title Claims. The Koara application was not registered at the time of execution of the agreement. The purpose of the agreements was to provide (among other things) for payments from the plaintiff to the defendants to progress reaching certain milestones in relation to the plaintiff's mining project (Jaguar developments) and an annual $10,000 payment. Pursuant to the agreements, if there had not been a final determination of native title in respect of the mining area, the payments should be paid into trust accounts established by any native title claim group in equal proportions of the total amount. The $10,000 annual payment was to be paid to an educational trust fund nominated in writing by the native title parties established for the benefit of the Wongi people.

On 5 February 2007, the Federal Court dismissed the Wongatha native title determination application in its entirety and those parts of the Wutha and Koara applications which overlapped the Wongatha application. The remainder of the Wutha application is pending and the remainder of the Koara application has been dismissed. The result is that there are no registered native title claimants in relation to the area subject of the agreements. On 27 May 2007, the plaintiff commenced producing ore and its obligations to make milestone payments and annual payments took effect. However, there were no final determinations of native title, nor any registered native title claim groups to whom payments could be made. No trust fund had been nominated. No payments had been made.

Termination of the agreements

On or about 23 October 2007, the plaintiff gave notice to the defendants terminating the agreements pursuant to a provision that provided for termination if the relevant native title claim was withdrawn or ceased to affect a mining area. The plaintiff wrote to each of the defendants' representatives proposing to seek declaratory relief to confirm that each of the agreements had been terminated by frustration as a result of the dismissal of the native title applications affecting the plaintiff's mining area in the *Wongatha* decision. Following the making of declaratory orders, it was proposed that voluntary payments would be made to the defendants. None of the defendants opposed the plaintiff's originating summons.

The plaintiff's submissions were that:

- the agreements were lawfully terminated by the legal principles of frustration.
- the plaintiff undertook to make voluntary payments to the defendants but, as a listed company, was unable to make voluntary payments if there was risk of claims under a contract pursuant to s. 11(2) of the *Property Law Act 1969* (WA);
- the discretion to give declaratory relief should be exercised because the payments are to be made to persons with an interest in the agreements.

Justice Hasluck referred to *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, the leading case on the doctrine of frustration. The cases relevant to the exercise of declaratory relief under s. 25(6) of the *Supreme Court Act 1935* (WA) and Order 18 rule 16 of the *Rules of the Supreme Court 1971* (WA) were *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421and *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286—at [35] to [43].

The court identified the critical issue as being whether the situation that has arisen was fundamentally different from the situation contemplated at the time of making of the contracts. It was clear that, at the time of making each of the agreements, the parties contemplated there would be either a registered native title claim or a final determination of native title. The parties did not contemplate a situation where there would be no native title claims in relation to the area of the mining agreements. Hasluck J noted that performance of the contract was not possible because there were no relevant persons under the agreements and it was not possible to identify anyone to whom payments could be made to discharge the plaintiff's obligations under the agreements. Further, the issues raised were not hypothetical or theoretical:

> The evidentiary materials point to an underlying reality that the processing of ore in the manner contemplated by the agreements has commenced and the mining company recognises that in the modern era negotiations with native title claimants are necessary, notwithstanding differences of opinion as to the merits of a particular plea—at [46].

It was found that:

- the proposed payments reflected the question of possible accrued entitlements prior to the termination of the agreements;
- the commitment by the plaintiff to fulfil its obligations weighed strongly in favour of the exercise of the court's discretion;

- no defendant opposed the orders sought.

Decision
Orders were made terminating each agreement as at 5 February 2009. There was no order as to costs—at [51].