- firstly, an inducement of breach of contract requires that active steps be taken by the alleged wrongdoer, and in this case anything that the directors of the holding companies did was inaction rather than action; and
- secondly, it was very difficult to determine which company within the Baulderstone group was the wrongdoer.

Although Hodgson JA (with whom Meagher JA agreed) did not refer to the comments of either Barrett J or Young CJ, it appears that he agreed with Barrett J. Hodgson JA stated that "the directors of DSC and SOL are not liable as such for inducing breach of contract" and then referred to the same case authority that Barrett J relied upon for the established principle concerning inducement of contract. Hodgson JA went on to say that in any event, it was not proven that the directors of BH and BHI knew the relevant facts of the breach.

Conclusion

This decision is significant for two reasons.

1. It is a reminder that, when drafting agreements, it is important to always consider the context. Words which appear to have a generally understood meaning may be ambiguous in certain contexts. Where possible, such words should be clearly defined in the relevant agreement.
2. It raises the issue of whether a holding company can be held liable for inducing a breach of contract by a subsidiary company in circumstances where the holding company and the subsidiary have common directors. As the Court did not express a firm view on the issue, there is uncertainty as to the current state of the law.

JUST AND EQUITABLE COMPENSATION – WEDNESBURY UNREASONABLENESS*

The Nardell Colliery Pty Ltd v NSW Coal Compensation Review Tribunal and NSW Coal Compensation Board (NSW Supreme Court, Sperling J, 29 May 2003)

Coal Acquisition Act 1981 – Coal Acquisition (Re-Acquisition Arrangements) Order 1997 – Just and equitable compensation – Wednesbury unreasonableness

Facts and Nature of Action

This case concerned a judicial review of the determination of factor "r" made by the Coal Compensation Review Tribunal on 17 April 2002. The decision of the Tribunal was reported in (2002) 21 AMPLJ at pp 114 to 118.

Factor "r" was part of a formula set out in Schedule 1 of the 1997 Order which provided for the determination of compensation on the basis of a discounted cash flow. Factor "r" was part of the cash flow calculation. It was the revenue received or expected to be received in respect of the coal which would be applied against the reasonably expected tonnage of saleable coal to determine the cash flow prior to it being discounted.

The Tribunal determined that factor "r" should be based on a value of 7/8 of $1.70 per tonne royalty rate for coal adjusted according to the applicable corporate tax rate and no findings were made in respect of front end payments and super royalty. A front-end payment, prescribed base

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royalty of $1.70 per tonne and super royalty of 50 cents per tonne were payable under the coal lease granted in respect of Nardell's coal.

Nardell sought orders quashing these decisions and orders that the Tribunal re-determine these matters according to law. Nardell claimed that: (1) factor "r" should include its share of the super royalty which was payable under the coal lease, (2) the front-end payment payable under the coal lease should be included in the compensation calculation and (3) as the discount rate calculation included a dividend imputation factor of 0.5 then the cash flow and in particular factor "r" should also include the same dividend imputation factor and the omission of that factor constituted Wednesbury unreasonableness.

Decision

The Court ordered that the Tribunal's determinations on factor "r" and the determination that no front-end payments or super royalty be included in the compensation calculation be quashed and that the Tribunal re-determine factor "r" according to law on the basis that the super royalty and a dividend imputation factor of 0.5 should be included and that the front-end payment should be included in the compensation calculation as a just and equitable adjustment. The effect of this decision is that, for the Nardell claim, factor "r" would change from $1.04 per tonne under the Tribunal's determination to $1.64 per tonne.

Submissions

Nardell argued that it was appropriate to include the front-end payment and super royalty in the compensation calculation because both were included in the coal lease granted over the coal and were received by the Crown and were pecuniary losses of Nardell attributable to the *Coal Acquisition Act.*

The Coal Compensation Board argued that it was necessary to assess the loss having regard to what would have been Nardell's entitlements under the *Mining Act* 1992 in the event that the coal had been restored to it and in that situation super royalty was not payable after 1992 and front-end payments were not payable. There was also an argument based on parity with compensation entitlements for other claimants, who it was claimed, would not be entitled to any super royalty or front-end payments.

Nardell argued that the expert evidence established that where a dividend imputation factor is used in the WACC formula which was part of the discount rate methodology used by the Board then the cash flow also had to include that factor. The Board argued that the Tribunal did not adopt the WACC formula or, if it did, the mistake made was insignificant and relief should be denied on the discretionary ground because of this point.

Compensation concept

The Court considered the compensation scheme contemplated by the 1997 Order and concluded that:

1. the compensation to be assessed is the sum of money which will put the party to be compensated in the same position as he would have been if his coal had not been acquired by the *Coal Acquisition Act*;

2. the compensation assessment involves a comparison between an actual and a hypothetical state of affairs – the actual state of affairs is the situation as it has been and will be following the *Coal Acquisition Act*; the hypothetical state of affairs is the situation as it would have been if the *Coal Acquisition Act* had not occurred;

3. in determining what situation would have been but for the *Coal Acquisition Act*, events occurring to the date of the compensation assessment are to be taken as certain except events should be excluded where it is judged that they are unlikely to have occurred in the absence of the *Coal Acquisition Act* and associated legislation.

Reasons

The Court first considered the three reasons put forward by the Tribunal for excluding super royalty and rejected them. The first reason was that the figure of 90 cents was said to indicate an intention to limit the compensation for royalty to loss of the prescribed royalty of $1.70. This argument was dismissed on the basis that factor "r" was defined as 90 cents or other amount that is just and equitable and the figure of 90 cents was to be substituted, if necessary, with whatever "other amount" would produce a just and equitable assessment of the applicant's loss for the year.

The second reason was that the entitlement to a share of super royalty was removed by the *Coal Mining (Amendment) Act* 1981 and never re-instated. The Court indicated that this was the basis of Nardell's claim and was not a reason for rejecting it.

The third reason given was an asserted disclosure of parliamentary intention from the Minister's speech in Parliament. The Court thought that the Tribunal had misread the speech but in any case the requirement for just and equitable compensation could not be overridden by the intentions of the Government as conveyed by a speech in Parliament.

The Court then considered the Board's arguments at the hearing and rejected them. The Board's arguments included that the loss of a share of super royalty was a contingency as at 1982 and not a certainty because at 1982 the lease was a contingency and not a certainty. The Court rejected this argument having regard to the concept of compensation mentioned above. The Court concluded that if the *Coal Acquisition Act* and associated legislation had not been passed then the royalty provisions in the *Mining Act* 1992 (which provided for no super royalty on privately owned coal) would not have been in the same form because it was most unlikely that the Government would have been prepared to give its up $1/8^{th}$ share of the super royalty if the coal remained privately owned. On that basis, the *Mining Act* 1992 could not be considered to be a known event for the compensation calculation and should not be taken into account as a relevant event.

Nardell was also entitled to its share of the front-end payment for reasons similar to those for the super royalty.

The other issue concerned the mismatching of cash flows and discount rate methodology as it related to taking into account dividend imputation. The Court accepted that the expert evidence clearly established that the matching of the cash flows and the WACC formula in the discount rate methodology was appropriate to produce a just and equitable result and that the Tribunal had made a mistake (by oversight) in not recognising this concept, that such mistake was not insignificant and that such a mistake involved Wednesbury unreasonableness and should be corrected.

Likely Appeal

It is expected that the Coal Compensation Board will appeal this decision to the New South Wales Court of Appeal.