Warden Sharratt SM accepted that it must be a rare event that such a long extension of time be granted but concluded that there was reasonable cause in the circumstances.

INTERPRETING STATE AGREEMENTS: THIRD PARTY ACCESS TO EXISTING RAILWAY*

Hancock Prospecting Pty Ltd & Ors v BHP Minerals Pty Ltd & Ors ([2003] WASCA 259)

Contracts and agreements – State agreements – Interpretation of terms in state agreements – Use of definitions – Third party right of access to railway system – Rights conferred on third parties

On 6 November 2003 the Full Court of the Supreme Court of Western Australia allowed an appeal that compelled BHP Minerals Pty Ltd and their Mount Newman joint venture participants (defendants/respondents) (the Mount Newman Participants) to negotiate and enter a contract with Hope Downs (plaintiffs/appellants) to carry iron ore products produced by the appellants operating a mine.

Background

Hope Downs sought a declaration before the Supreme Court of Western Australia concerning the proper construction of the Mount Newman State Agreement as ratified by the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (the Mount Newman Agreement) and varied by Rail Transport Agreement dated 27 January 1987 between the Mount Newman Participants and the State of Western Australia (the RTA).[1]

Hope Downs had also entered into a state agreement with the State and ratified by the *Iron Ore (Hope Downs) Agreement Act 1992* (WA) to develop the Hope Downs iron ore project. Whilst Hope Downs had expended considerable money and time in progressing the Hope Downs mine, it had not commenced production at the time of the hearing.

Prior to seeking the declaration, the parties were engaged in negotiations whereby Hope Downs was attempting to secure access to the Mount Newman Participants' railway when it began operating its mine. Those negotiations failed which led to Hope Downs seeking to clarify the terms of the Mount Newman Agreement and the RTA in regard to accessing the Mount Newman Participants' railway.

Just prior to the trial commencing, the Mount Newman Participants conceded that the RTA created "rights for third parties which are enforceable at law".[2]

The Original Decision

In McKechnie J's view, the essential question was whether the Mount Newman Participants were required to enter negotiations concerning access to its railway with Hope Downs either:

(a) prior to the time that Hope Downs requires iron ore to be carried; or
(b) following the commencement of mining by Hope Downs.

Hope Downs submitted that the Mount Newman Agreement and, particularly, the RTA compelled the Mount Newman Participants to enter negotiations regarding access to its railway with Hope

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* Simon Eley and Paul Fitzpatrick, Solicitor and Partner, Clayton Utz, Perth. Clayton Utz acted for the appellants in the original decision and on appeal.

1 *Hancock Prospecting Pty Ltd & Ors v BHP Minerals Pty Ltd & Ors* [2002] WASC 224.

2 Ibid [28].

Downs prior to Hope Downs actually requiring iron ore to be transported. In support of this submission, Hope Downs argued that it was in the public's interest to promote the development and exploitation of iron ore resources by allowing the joint use of an existing railway. Hope Downs submitted that it would be contrary to the intention, and frustrate the purpose, of the RTA if the Mount Newman Participants were not obliged to enter negotiations for access to its railway prior to the time that it required transport of its iron ore.

The Mount Newman Participants submitted that there was not sufficient evidence to support a finding that the purpose of the RTA would be frustrated if Hope Downs were not able to negotiate access to the railway prior to commencement of mining operations. The Mount Newman Participants also argued that, as the definition of "third party" in the RTA was clear, it was not necessary to have regard to intention and purpose of the RTA.

The State of Western Australia, the second defendant and party to the Mount Newman Agreement and the RTA, did not make any submissions to the Court in regard to the proper construction of the RTA.

In deciding whether to award declaratory relief to the plaintiffs, McKechnie J acknowledged the parties agreement that third parties had legally enforceable rights under the RTA and focused on the definition of "third party" in the RTA, namely, "a person *operating* a mine producing iron ore products..."[3] to determine when the right to negotiate arose. McKechnie J agreed with the submissions of the Mount Newman Participants and held that where the definition in the RTA of "third party" is clear, there is no need to resort to discerning the purpose and intention of the RTA.[4] Accordingly, in McKechnie J's view, in order to be considered a "third party" under the RTA, Hope Downs must actually be operating a mine before it has a right to enter negotiations with the Mount Newman Participants for access to the railway.[5] In these circumstances, McKechnie J declined to grant the declarations sought by Hope Downs.

The Appeal

Hope Downs appealed the decision of McKechnie J before the Full Court of the Supreme Court of Western Australia, Justices Murray, Templeman and Hasluck presiding.[6]

Hope Downs' submissions

Hope Downs submitted that the purpose of the RTA was intended to encourage the development of iron ore resources in Western Australia by ensuring the efficient use of existing infrastructure on Crown land and facilitating competition in the Pilbara mining region.

Hope Downs argued that given that mining occurs in remote locations, it is necessary that the terms of transport must be agreed, or determined by an expert, prior to commencement of production of iron ore by Hope Downs or, indeed, other minerals produced by third parties.

Hope Downs considered that McKechnie J failed to acknowledge the intention expressed in the substantive provisions of the RTA read as a whole and, instead, concentrated on the meaning of "third party" as defined in the RTA. Hope Downs submitted that this resulted in construing the RTA contrary to its intention in that, on McKechnie J's interpretation, it operated to impede

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3 Ibid [22] and [26] to [33].
4 Ibid [64] and [67].
5 Ibid [68].
6 *Hancock Prospecting Pty Ltd & Ors v BHP Minerals Pty Ltd & Ors* [2003] WASCA 259.

mineral development, efficient use of existing infrastructure and competition in the Pilbara mining industry.

Hope Downs submitted the construction of any definition is to be determined upon the proper construction of the instrument as a whole, so as to give effect to its manifest purpose: *Australian Broadcasting Commission v Australian Performing Rights Association Ltd*.[7] Furthermore, Hope Downs argued that the purpose in an agreement made by the State, and ratified by Parliament, is of fundamental importance. Hope Downs considered that the real issue of construction was not the meaning of "third party" as defined in the RTA but the intention expressed in the provisions of the RTA read as a whole.

Hope Downs suggested that the purpose of the RTA was to regulate the carriage of other parties' iron ore products over the Mount Newman Participant's railway. Hope Downs argued that the purpose of the RTA would be undermined if the definition of "third party" was considered without reference to the RTA as a whole. Hope Downs submitted that the RTA, read as a whole, places an obliges the Mount Newman Participants to enter negotiations, and, ultimately an agreement, with Hope Downs for the carriage of iron ore over the railway thereby facilitating third party access to the railway.

The State's Submissions [8]

The State continued the practical approach adopted by Hope Downs and submitted that, on the interpretation of the Mount Newman Participants, Hope Downs would be required to be producing iron before it could engage in negotiations for access to the railway and argued that such a result was commercially unrealistic and frustrated the purpose of the RTA.

The State also submitted that, notwithstanding express provisions, it was an implied term of the RTA that there was an obligation on the Mount Newman Participants to negotiate access to the railway by a third party for the transport of iron ore.

The State, in arguing to allow the appeal, otherwise agreed with the submissions put by Hope Downs.

The Mount Newman Participants' submissions

On appeal, the Mount Newman Participants submitted that the central issue was whether Hope Downs fell within the definition of "third party" in the RTA. The Mount Newman Participants argued that the meaning of "third party" was clear and unambiguous and, in these circumstances, there was no need to resort to extrinsic evidence to aid construction of the RTA.

The Mount Newman Participants supported their argument by reference to the proposition in *Metcalf v Permanent Building Society*[9] that:

> "... to admit extrinsic evidence, particularly as to the commercial purpose of the contract ... would be in truth to create ambiguity and then seek to resolve it rather than to aid the construction of what I think to be the clear language of the contract."

The Mount Newman Participants argued that uncertainties within the RTA are avoided if its provisions are given their natural and ordinary meaning.

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7 (1973) 129 CLR 99.

8 As noted above, the State of Western Australia did not make submissions before McKechnie J but elected to do so at the appeal. The State supported the contentions of Hope Downs and argued that the appeal ought be allowed (ibid [38]).

9 (1993) 10 WAR 145.

The Mount Newman Participants suggested that, if Hope Downs' interpretation of the RTA were accepted, then they would be compelled to enter lengthy and costly negotiations with any third party seeking access to the railway irrespective of whether that third party satisfied the definition of third party under the RTA at some time in the future. It was argued that the uncertainty arising from such an interpretation would be avoided if the definition of "third party" was given its natural and ordinary meaning.

The Mount Newman Participants submitted that the terms of the RTA are clear; it ensures a prospective third party access to carriage when the third party begins "operating a mine producing iron ore".

The Decision on Appeal

On appeal, the court allowed the appeal and unanimously ordered that the Mount Newman Participants must, under and in accordance with the Mount Newman Agreement as varied by the RTA, negotiate and enter into a contract with Hope Downs, to carry the iron ore products produced by Hope Downs operating the mine. Murray J agreed with the judgments of Hasluck and Templeman JJ.

Templeman J acknowledged the relevant provisions of the Mount Newman Agreement that provided third parties access to the Mount Newman Participants' railway[10] and the initial stages of the Hope Downs project.[11]

After considering the terms of the Mount Newman Agreement and the RTA, Templeman J did not accept that the Mount Newman Participants' obligation to enter negotiations with third parties was restricted by the definition in the RTA to third parties actually "operating a mine producing iron ore". He considered that the Mount Newman Participants construction of the RTA was "untenable".[12] Similarly, Templeman J disagreed with the submission that the terms of the RTA only apply to existing producers because such an interpretation defeated the purpose of the RTA, namely, the facilitation of the iron ore industry in the Pilbara.[13] Templeman J accepted Hope Downs' submission that:

> "it makes no commercial sense to require a prospective mine operator to undertake the huge expense of establishing a mining operation without having the slightest idea how much he will have to pay to transport his iron ore to the port."[14]

Templeman J considered the costs of entering such negotiations as a burden incident to the Mount Newman Participants' privileged position under the Mount Newman Agreement[15] and considered that a third party could not enter the detailed contractual negotiations contemplated by the RTA unless its plans for mining were well advanced.[16] In Templeman J's view, Hope Downs' plans were well advanced. Accordingly, there was no legal impediment to the parties entering negotiations for access to the railway.

As preliminary issue, Hasluck J considered whether the principles of statutory interpretation apply to the provisions of the RTA. In his view, the RTA should not be regarded as a statutory enactment

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10 Ibid [8].
11 Ibid [12].
12 Ibid [31].
13 Ibid [31].
14 Ibid [31].
15 Ibid [32].
16 Ibid [33].

or as a "written law" within the meaning of the *Interpretation Act 1984* (WA) and, accordingly, should not be construed as if it were a statute.[17] It is suggested by Hasluck J that provisions of state agreements, and amendments to state agreements, simply:

> "... displace the effect of statutory provisions such as planning controls or otherwise in order to confer certain immunities upon [parties to state agreements] in the manner allowed for by s 3 of the Government Agreements Act 1979."[18]

This appears to be the basis of Templeman J's assertion that the Mount Newman Participants enjoy a privileged position under the Mount Newman Agreement.[19]

Hasluck J approached the task of interpreting the Mount Newman Agreement and the RTA as essentially an agreement between two parties[20] and, in doing so, to discover the intention of the parties to the agreements.[21] He considered that the authorities made it clear that:

> "... an instrument should be construed practically so as to give effect to its prescribed commercial purpose as the law seeks to uphold commercial contractual obligations and the expectations that derive from them."[22]

He also accepted the submission of Hope Downs that: "[t]he whole of the instrument has to be considered and the words of every clause must if possible by [sic] construed so as to render them all harmonious"[23] and suggested that McKechnie J failed to construe the RTA and the Mount Newman Agreement as a whole and gave too much weight to the definition of "third party" in the RTA.

In Hasluck J's view the Mount Newman Agreement and the RTA establish a right of access to the railway to third parties subject to, according to the terms of the RTA, detailed contractual arrangements to be negotiated.[24] In addition, the terms of the RTA should not be construed to restrict the right of access of a third party to the railway but as facilitating the negotiations necessary to ensure the third party's access to the railway while balancing competing interests.[25]

Hasluck J did not accept the Mount Newman Participants' reference to the definition of "third party" as limiting access to the railway by third parties. Such a limitation would only exist where clear language stipulated an eligibility requirement for access.[26] Hasluck J also considered that, in construing the RTA as a whole, the railway was never intended for the exclusive use of the Mount Newman Participants.

In Hasluck J's opinion, the time when the right to negotiate the detailed contractual arrangements for access to the railway arises, is determined by practical commercial considerations. According to Hasluck J, the terms of carriage must be finalised prior to commencement of production of iron ore so, logically, negotiations concerning access must also be initiated prior to commencement of

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17 Ibid [65] and [66].
18 Ibid [66]
19 Ibid [32].
20 Ibid [67].
21 Ibid [72].
22 Ibid [72]: *Pan Foods Co Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 170 ALR 579.
23 Ibid [72]: *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99.
24 Ibid [74].
25 Ibid [75].
26 Ibid [76].

production. To determine otherwise, would place third parties in the untenable position of not knowing the terms on which they could transport their products to port.[27]

Order
The court ordered that, pursuant to the Mount Newman Agreement and the RTA, the Mount Newman Participants were obliged to negotiate, and enter a contract, with Hope Downs to carry the iron ore produced by Hope Downs.

NEW ZEALAND

FIRST RIGHT OF REFUSAL*

McLachlan & Ors v Mercury Geotherm Ltd & Ors (Court of Appeal, New Zealand, unreported, 28 August 2003 CA 142/02)

Joint venture – First right of refusal – Requirements – Wish to sell and also the terms upon which to sell – Issuing an Information Memorandum not enough

Background

A joint venture had been established between the various parties in order to facilitate development and construction of a power station.

Facts
As part of the joint venture agreement it included a first right of refusal. A material part of the agreement is as follows:

> "In consideration of the mutual promises contained in this Lease and in the Joint Venture Agreement, the Lessors grant the Lessee or its nominee a right of refusal in respect of the Land or any part thereof, should the Lessors wish to sell or dispose of those parcels of land (together, the "Relevant Land") as are comprised in the Land, or in the property the subject of the Landcorp Property Agreement (as that term is defined in the Joint Venture Agreement) or in any other parcels of land which the Lessors may acquire after the date of this Lease."

The power station project ran into financial trouble, a receiver for the joint venture was appointed and the receivers circulated a "confidential information memorandum" to selected potential purchasers including the McLachlans.

The McLachlans allege that the first right of refusal had been trigged and their rights not honoured.

Judgment

The Court of Appeal, upholding the High Court decision, found that the first right of refusal had not been triggered by the issue of the Information Memorandum.

The Court of Appeal held that in order to trigger the right, the vendor must "overtly manifest" a wish to sell, and also the terms upon which to sell. The Court of Appeal found that the absence of terms in which the receivers could be said to have indicated a wish to sell the leased land was fatal to that argument on appeal.

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27 Ibid [81].

* David Quigg LLB(Hons), LLM and Matt Yates LLB BA, Quigg Partners, Wellington, New Zealand