NORTHERN LAND COUNCIL v QUEENSLAND MINES LIMITED

Court of Appeal of the Northern Territory

Nader, Martin JJ and Gray A/J

11, 12 March 1991.

ABORIGINALS - Aboriginal Land Rights (N.T.) Act 1976 (Cth) - s.46 - whether s.46 can apply to land other than land the subject of an application for the grant of a mining interest.

CROWN - Crown grants - validity of - general rule of law - unimpeachable in the absence of the Crown as a party to an action - Rule 9.05 of no effect - Supreme Court Rules - Rule 9.05 and 9.06.

DECLARATIONS - declaratory relief - in respect of future possibilities - matter for exercise of court's discretion - factors considered in exercise of discretion - utility - practicality.

LICENCES - Crown licences - assumption of validity of - indefeasible unless Crown a party to proceedings challenging validity.

MINES - Mining Act 1939 (NT) - special mineral leases - continuation under Mining Act 1980 (NT) - coexistence of special mineral leases with exploration licences - s.22(2) and (3) Mining Act 1980.

MINES - Mining Act 1980 (NT) - exploration licences - grant only to extent of application - licence granted over greater area than application - licence still valid - only impeachable in proceedings properly instituted against Crown.

PRACTICE AND PROCEDURE - joinder of parties - Rule 9.05 and 9.06 - Supreme Court Rules.

STATUTORY INTERPRETATION - Aboriginal Land Rights (NT) Act 1976 (Cth) - s.46 - meaning and effect of provisions - "mining works to be conducted on the land"

STATUTORY INTERPRETATION - Mining Act 1980 s.22, s.23, s.24

STATUTORY INTERPRETATION - Supreme Court Act 1988 - s.19 - remedies granted only when claim brought before court in properly instituted proceedings.

Cases referred to:

Assets Co Ltd v Mere Roihi (1906) AC 176

Falkingham v Harbison (1899) 24 VLR 764

Gould and Birbeck and Bacon v Mt Oxide Mines Ltd (1916) 22 CLR 490

Performing Right Society Ltd v London Theatre of Varieties Ltd [1924] AC 1

Sinclair v Murphyores Inc Pty Ltd (1978) Qd.R 239

Wingadee Shire Council v Willis (1910) 11 CLR 23.

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP7 of 1990

BETWEEN:

NORTHERN LAND COUNCIL
Appellant

and

QUEENSLAND MINES LIMITED
Respondent

CORAM: NADER, MARTIN & GRAY JJ.

REASONS FOR JUDGMENT

(Delivered 27 March, 1991)

This appeal is against certain orders of Angel J made on 27 June 1990. The orders included declarations concerning the contractual and statutory rights and obligations of the parties in relation to future mining operations contemplated by the respondent.

In stating the background to this litigation, we have borrowed heavily from the learned trial judge's reasons for judgment. For convenience, we will hereafter refer to the appellant and respondent as the defendant and plaintiff respectively.

The plaintiff, a public mining company, is the registered holder of Special Mineral Lease 94 ("SML94") granted under the Mining Act 1939 (NT) and Exploration Licence 2508 ("EL2508") granted under the Mining Act 1980 (NT). Situate within SML94 is a uranium ore processing plant, (which we shall call the 'Nabarlek Plant') which in the past has been used for milling and processing uranium ore found within the area of SML94. SML94 is an area of land lying within the boundaries of EL2508. The land embraced by the boundaries of EL2508 and SML94 is "Aboriginal land" as defined by the Aboriginal Land Rights (NT) Act 1976 (Cth). If the plaintiff finds uranium ore within EL2508, it wishes to secure the right to mine it, and having done so, thereafter process it at the Nabarlek Plant.

In order to mine EL2508, it being Aboriginal land for the purposes of the Aboriginal Land Rights (NT) Act 1976 (Cth), the plaintiff would first need to obtain the grant of a "mining interest" under the Aboriginal Land Rights (NT) Act 1976 (Cth). A "mining interest" is defined in the Act (see Aboriginal Land Rights (NT) Amendment Act 2/90), inter alia, as:

> "'mining interest' means:
> (a) any lease or other interest in, or right in respect of, land granted under a law of the Northern Territory relating to mining for minerals (other than a lease or other interest in land, or a right, relating to the mining or development of extractive mineral deposits);

... but does not include, when the expression is used in Part IV, any such lease, licence, interest or right that is an exploration licence or exploration retention lease;"

Where an "intending miner" seeks the grant of a mining interest the terms of s.46 of the Aboriginal Land Rights (NT) Act 1976 (Cth) apply. An "intending miner" is defined in the Act, inter alia, as follows:

"'intending miner', in respect of Aboriginal land, means:

(a) a person who makes application, under a law of the Northern Territory relating to mining for minerals, for the grant of a mining interest in respect of that land, while the person:

(i) holds an exploration licence under that law in respect of that land; or

(ii) being a person who has held an exploration licence in respect of that land, holds under that law an exploration retention lease or exploration retention licence, or has made an application for the grant of such a lease or licence, in respect of that land or a part of that land; or ..."

Section 46(1)(a) of the Act provides:

"Terms and conditions to which grant of mining interest subject

46. (1) An intending miner who seeks the grant of a mining interest in respect of Aboriginal land in respect of which that intending miner holds or held an exploration licence or an exploration retention lease (whether that licence or lease was granted before or after the land became Aboriginal land) shall submit to the relevant Land Council a statement, in writing, setting out:

(a) a comprehensive proposal in relation to the mining works that the intending miner proposes to conduct on the land which includes, but is not limited to, the following particulars: ...

(xii) infrastructure requirements."

Once a statement is submitted to the relevant Land Council, the intending miner and the Council shall "agree upon the terms and conditions to which the grant of the mining interest will be subject" (s.46(3)). If the two parties do not agree upon terms and conditions, then s.46(7) makes provision for the terms and conditions to be settled by conciliation, and failing that, arbitration.

At issue in these proceedings is whether the processing of ore mined from EL2508 at the Nabarlek Plant on SML94 is matter which can be included in a s.46(1)(a) statement, and as such be subject to the terms and conditions of a grant of a mining interest over EL2508, such terms and conditions to be settled by conciliation and arbitration should the parties fail to agree.

The plaintiff seeks declaratory relief to the effect that in the event it finds uranium ore within EL2508 and obtains a mining interest therein, it can use the Nabarlek Plant to process such ore once mined, and that if necessary it can enjoin the defendant to conciliation or arbitration in respect of such a proposal.

At the trial, the plaintiff's case was that the title to EL2508 extends to the SML94 area, thus bringing proposals for the use of the Nabarlek Mill within s.46.

The defendant disputed the validity of EL2508 insofar as it extended to the SML94 area. The plaintiff's alternative case was put upon the assumption that EL2508 did not extend to SML94. Upon that assumption, it was said that a proposal for the use of the mill comes within the category of an infrastructure requirement within s.46(1)(a)(xii). In relation to the plaintiff's alternative case, the defendant's answer was that the operation of s.46, insofar as it provides for the submission of a mining proposal, is confined to a proposal concerning the land in respect of which the mining interest is sought. These rival submissions were fully developed by counsel during the appeal.

It was not disputed in the Court below that EL2508, in its terms, included the area encompassed by SML94. The learned trial judge was pressed by counsel for the defendant to conclude that EL2508 was ineffective, at least to the extent that it included SML94. It was said that the Minister had no power to grant EL2508 over the SML94 land. Two reasons were advanced for this proposition. First, it was said that under s.22(1) of the Mining Act 1980, the Minister's power to grant an exploration licence was limited to the land in respect of which the application was made. Reliance was placed upon the language of the plaintiff's written application for EL2508, which appears to exclude the SML94 land.

Secondly, it was said that the consent of the defendant to the grant of EL2508 did not extend to the SML94 land and that, accordingly, the grant of a licence including the SML94 land was in breach of s.40 of the Aboriginal Land Rights (NT) Act 1976.

The learned judge concluded, correctly in our view, that he was not entitled to look behind the licence "to scrutinise its integrity". He further concluded that, because of the terms of the licence, if the plaintiff hereafter makes an application for a "mining interest" in respect of EL2508 it will become "an intending miner" in respect of the SML94 area. This conclusion, if justified, provides an adequate foundation for the declarations made by his Honour, subject to discretionary considerations.

The issue of the scope of EL2508 came before the learned trial judge in a curious way. In its original statement of claim the plaintiff did not allege that EL2508 included the SML94 land. This is not surprising because it has been candidly conceded by counsel for the plaintiff that, at the outset, it was mistakenly believed that EL2508 excluded the SML94 area.

This belief was engendered by the fact that the plaintiff's written application for EL2508, which was dated 27 February 1980, expressly excluded the SML94 area from the description of the land over which the licence was sought.

The plaintiff's application was made under the Mining Act 1939 which was in operation at the relevant time. When the application was granted, the Mining Act 1980 was in force, and the grant was made pursuant to its provisions. The licence as granted excluded "all land that is subject to a mining tenement".

The plaintiff's advisers believed that SML94 was a mining tenement and thus excluded. It was not until the evening of the first day of the trial that it was appreciated that the definition of "mining tenement" in the Mining Act 1980 did not extend to a special mineral lease. This meant that, on its face, EL2508 extended to and included the SML94 area.

On 13 February 1990, the second day of the hearing, an application was made to make substantial amendments to the plaintiff's statement of claim. This application was granted but, upon the defendant's application, the proceedings were adjourned until 14 May 1990.

When the plaintiff made amendments to its statement of claim pursuant to leave given, the amendments did not include an express allegation that EL2508 extended to the SML area. Paragraph 18 of the amended statement of claim is in the following terms:

> "EL2508 was formally granted by the Northern Territory Department of Mines and Energy on 29 June 1988 to the Plaintiff. The area the subject of EL2508 was expressed to be exclusive of "all land that is the subject of a mining tenement or an application for a mining tenement made before the application for the grant of this licence ...". The area the subject of EL2508 exclusive of the SML Area is hereafter referred to as the "EL2508 Area."."

It is apparent that at the time the statement of claim was amended the extended scope of EL2508 had been appreciated. It remains unexplained why paragraph 18 of the statement of claim was expressed as it was.

The fact is that there was no application to further amend the statement of claim to allege the fact that EL2508 extends to the SML94 area. Nor was there any attempt to amend the defence to allege that EL2508 was ultra vires, at least in part, or to join the Minister as a party.

When the proceedings resumed on 14 May 1990, despite the state of the pleadings, the plaintiff's counsel was allowed to argue for the extended scope and indefeasibility of the EL2508. The defendant's counsel sought to meet these arguments by contending that EL2508 was ultra vires.

We have closely read the transcript of the proceedings below and it is apparent that at no time did the defendant's counsel object to the issue of the scope of

EL2508 being raised. No reference was made to the state of the pleadings.

On at least two occasions, counsel for the defendant conceded that, if EL2508 embraced the SML94 area, the defendant's "intending miner" point ceased to be available. The learned trial judge raised the question of whether the Minister should be joined. In reply, counsel for the defendant said he did not "wish to say that the suit is bad for want of parties". His Honour told counsel that as the issue had been raised he had to deal with it. He said that if he reserved judgment and then found against the defendant on the point "I don't want you crying foul". He invited the defendant's counsel to say all he wished to say about the matter. All that counsel did was to repeat his submission that the licence, so far as it extended to SML94, was ultra vires for the two reasons to which we have already referred.

Counsel for the plaintiff repeatedly stated that he relied upon the express terms of EL2508 and submitted that it was indefeasible, except in proceedings to which the Minister was a party.

In the result, we are satisfied that the plaintiff's reliance on the express terms of EL2508 was a matter upon which the learned trial judge was obliged to rule.

In Gould and Birbeck and Bacon v Mt Oxide Mines Limited (1916) 22 CLR 490, Isaacs and Rich JJ said, at page 517:

> "Pleadings are only a means to an end, and if the parties in fighting their legal battle choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of the contest."

Before this Court, the defendant's counsel placed some reliance upon the state of the pleadings but did not seriously contend that it was not open to the learned trial judge to give the ruling that he did in relation to EL2508. Nor is there any ground of appeal which challenges the right of the primary judge to consider the issue raised by the plaintiff's reliance upon the express terms of EL2508. Upon the contrary, the defendant's contention was that the learned trial judge was in error in not looking behind EL2508 to determine whether its grant was within the Minister's power. See grounds 2, 4 and 5 of the notice of appeal.

In our view, his Honour was correct in deciding that he could not look behind EL2508." It is a general rule that the validity of a Crown grant cannot be impeached except at the instance of the Crown, or at any rate in a suit to which the Crown is a party."

Wingadee Shire Council v Willis (1910) 11 CLR 123 at p.129-30 per Griffiths CJ. See also Assets Company Limited v Mere Roihi (1905) AC 176 at p.202-3; Sinclair v Murphyores Inc Proprietary Limited (1978) Qd.R 239 at p.249.

This case, in our view, falls squarely within the general rule. The grant of an exploration licence confers wide powers over Crown land the subject of the grant. The licensee is authorised "to enter and re-enter the licence area with such agents, employees, vehicles, vessels, machinery and equipment as may be necessary or expedient for the purpose of exploring for minerals in, or under the licence area". The licensee may dig pits, sink bores and make tunnels. He may extract and remove ore from the land for sampling and testing. He may sink wells and take or divert water from a lake or stream on the land. All this and more is provided for in s.23 of the Mining Act. Furthermore, the right of the licensee to explore for minerals is exclusive of other miners; s.11(1)(b)(i).

The licensee has a number of obligations. He must expend a minimum sum, in this case $200,000, in carrying out exploration during the first year of the licence period. He must report the discovery of minerals of economic interest. These and other duties are prescribed in s.24 of the Act.

An exploration licence may be sold, transferred or encumbered. Upon the death of a licensee, the licence devolves upon his personal representative. In the case of a judgment against the licensee, the licence may be taken in execution and sold by an officer of the Court. These matters are dealt with in s.173 of the Act.

The exploitation of mineral wealth is notoriously a matter affecting the public interest, including interests entrenched by statute. In the scheme of things the Minister is the person primarily concerned with such matters. Even if there were no authority at all on the point, the Court would be strongly disinclined to declare such a licence issued by a Minister of the Crown to be wholly or partly void in proceedings to which the Minister is not a party; proceedings in which he would have no opportunity to be heard, and by which he would not be bound.

In the Court below, the defendant did not take up the learned trial judge's suggestion that the Minister be joined. When the notice of appeal was given, the Minister was joined as the second respondent. Ground 5 of the notice of appeal alleges that the learned trial judge "was in error in failing to find that it was not within the power of the second respondent to grant EL2508 in respect of all the land described therein." However, it appears that second thoughts prevailed because the proceedings against

the Minister were discontinued before the appeal came on for hearing.

The continued non-joinder of the Minister did not deter counsel for the defendant from inviting this Court to look behind EL2508 and rule upon its invalidity.

It was first said that there is no rule of law to the effect that the validity of a licence cannot be challenged in proceedings to which the Crown is not a party. In our view the binding authorities to which we have referred establish such a rule of law, at least in respect of a Crown grant such as the present. Alternatively, it was contended that Rule 9.05 of the Supreme Court Rules dispensed with the need to join the Minister.

Rule 9.05 provides that a proceeding shall not be defeated by reason of the misjoinder or non-joinder of a party. Its origin is Rule 11 of Order XVI of the English High Court Rules which were introduced following the passing of the Judicature Act 1873. One purpose of Rule 11 was to abolish the old plea of abatement by which an action could be finally defeated for want of a party:- In Performing Right Society Ltd v London Theatre of Varieties Ltd 1924 AC 1, Viscount Cave L.C. said, at p.14, "Further, under Order XVI Rule 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does

not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case." See also Falkingham v Harbison (1899) 24 VLR 764.

Next, it was said that the learned trial judge had determined the validity of EL2508 without requiring the joinder of the Crown but reached the wrong conclusion. However, it must be borne in mind that his Honour did not make any finding as to the validity of the licence. He simply refused to investigate the question of its validity.

It was then suggested that the learned trial judge should have adjourned the proceedings pursuant to s.79 of the Supreme Court Act to enable the Attorney-General to be given notice, required joinder of the Crown under Rule 9.06 of the Supreme Court Rules, or refused to make any declarations until the validity of the licence had been properly determined.

His Honour was not invited to take any of these courses, nor do we think that he should have taken any such step of his own motion. His Honour had before him one party relying upon an apparently valid licence and another party asserting its invalidity. His Honour, having suggested that the latter contention could only be pursued in proceedings against the Crown, was not required to do

more. We repeat, that the plaintiff's case did not require his Honour to rule upon the validity of its licence and he did not do so. Nor does this Court.

Next, it was put that as s.19 of the Supreme Court Act requires the Court to grant all remedies to which the parties appear to be entitled, the learned trial judge was required to deal with and rule upon the defendant's claim of invalidity of the licence. But the requirements of s.19 only operate in relation to a "claim properly brought forward by him in the proceeding". The defendant's claim was not, in our view, such a claim.

Next, it was submitted that it would be "unjust and illogical" to implicitly declare that the licence was valid, when there was evidence to the contrary. It was said that this would amount to the Court holding that black was white "merely because of some view that the Minister should have been a party". Finally, it was argued that to uphold the learned trial judge's order would be likely to lead to further proceedings and would otherwise be inconvenient.

It is sufficient to say that none of the considerations put forward make any headway against the fundamental grounds which, in our opinion, support the learned trial judge's ruling that he was bound by and could not go behind the terms of EL2508.

It follows in our opinion that if the plaintiff makes an application for a "mining interest" in respect of the land the subject of EL2508, it will become an "intending miner" in respect of that land, which land includes the SML area. It further follows that a proposal concerning the use of the Nabarlek plant to process minerals found on the EL2508 land is a proposal "in relation to the mining works that the intending miner proposes to conduct on the land".

In the Court below and, less strenuously, before this Court it was urged that declaratory relief should be refused on the grounds that the issues raised by the plaintiff are academic, hypothetical and premature. It was pointed out that it is problematical whether the plaintiff will ever discover workable mineral deposits which would justify an application for a mining interest.

We entirely agree with the learned trial judge's opinion that there is a very marked degree of utility and practicality surrounding the issues raised. His Honour, after discussing the relevant authorities, made the following observations:

> "It seems to me the issues in this case are not merely abstract or hypothetical and that a declaration would have utility. The elements of utility and reality are present here; the plaintiff does intend to conduct its future activities in a particular way. Whether s.46 will apply to the plaintiff's proposed conduct affects its present and immediately proposed activities. The plaintiff has formulated a definite course of action for the future, that is to retain and maintain the

> Nabarlek Plant, explore EL2508, if economically feasible to mine any discovery, and process such discovery at the Nabarlek Plant. The legal position apropos any future processing at the Nabarlek Plant practically affects both its future operations on EL2508 (in particular its proposed exploration expenditure thereon) and the retention and future use of the Nabarlek Plant and the SML94 area. If the defendant is correct, in the absence of its agreement, the plaintiff shall have to dismantle the Nabarlek Plant and reinstate the SML94 area and thereafter apply for an exploration licence of the SML94 area and ultimately reestablish the Nabarlek Plant or some substitute. Such a drastic consequence calls for an early determination as to whether the defendant can be required to 'agree' via arbitration. In our opinion the present case does call for appropriate declaratory relief sufficient to clarify the parties' rights and obligations with respect to conciliation and arbitration in the absence of reaching agreement as to the future use of the Nabarlek Plant."

We respectfully adopt the view expressed by his Honour. In our opinion, this is an eminently appropriate case for the exercise of the Court's discretion in the plaintiff's favour and the making of the declaration expressed in the orders under appeal.

We have given some consideration to the question whether the interests of the parties might be served by an expression of the Court's opinion upon the plaintiff's alternative case. But further reflection has persuaded us that no good purpose would be served.

Any such opinion, being obiter, would have no binding effect. It would be based upon a hypothesis that

does not presently prevail. The questions involved are difficult and any opinion proffered would necessarily be tentative. If in the future there is a properly mounted challenge to the validity of EL2508, the plaintiff will be able to seek a declaration upon his alternative case by way of counterclaim or otherwise.

As things stand at present we consider that EL2508 is indefeasible and takes effect according to its terms. The appeal will be dismissed.