

CITATION: *Rirratjingu Parties v Galpu Parties & Anor* [2019] NTSC 77

PARTIES: RIRRATJINGU ABORIGINAL CORPORATION AS REPRESENTATIVE OF THE RIRRATJINGU PARTIES

v

DJALU GURRUWIWI AS REPRESENTATIVE OF THE GALPU PARTIES

and

GUMATJ CORPORATION LIMITED AS REPRESENTATIVE OF THE GUMATJ PARTIES

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 100 of 2019 (21934059)

DELIVERED ON: 25 September 2019

HEARING DATE: 25 September 2019

JUDGMENT OF: Grant CJ

## **CATCHWORDS:**

COMMERCIAL ARBITRATION – Composition of arbitral tribunal – Appointment of arbitrators – Consequences of failure of agreement on procedure for appointment of arbitrator

Agreements provided for the appointment of a retired superior court judge to arbitrate claims – No agreement between the parties on a procedure for appointing an arbitrator – Order made appointing an arbitrator.

*Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 7, s 11

## **REPRESENTATION:**

### *Counsel:*

Plaintiff:	S Pringle
First Defendant:	No appearance
Second Defendant:	S Bowden

### *Solicitors:*

Plaintiff:	MinterEllison
First Defendant:	No appearance
Second Defendant:	Bowden McCormack

Judgment category classification:	B
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Rirratjingu Parties v Galpu Parties & Anor* [2019] NTSC 77  
100 of 2019 (21934059)

BETWEEN:

**RIRRATJINGU ABORIGINAL  
CORPORATION as representative of  
the Rirratjingu Parties**

Plaintiff

AND:

**DJALU GURRUWIWI as  
representative of the Galpu Parties**

First Defendant

AND:

**GUMATJ CORPORATION LIMITED  
as representative of the Gumatj Parties**

Second Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* on 25 September 2019)

- [1] This is an application made by the plaintiff by Originating Motion dated 11 September 2019 seeking an order pursuant to s 11(4) of the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) appointing the Honourable Robert French AC as arbitrator on the terms set out in an arbitration agreement received into evidence during the course of the proceedings.

- [2] The factual context and circumstances in which that order is sought may be summarised as follows.
- [3] The representatives of the plaintiff and the defendants are parties to an agreement known as the Gove Agreement relating to mining operations on the Gove Peninsula conducted under leases held by Rio Tinto Alcan Inc. The land covered by those leases is “Aboriginal land” within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.
- [4] The representatives of the plaintiff and the defendants were parties to proceedings in the Federal Court of Australia which involved a dispute concerning the apportionment of royalty payments received by the Northern Land Council in respect of the land covered by the leases.
- [5] On 11 October 2018, in the context of a court-annexed mediation, the representatives of the plaintiff and the defendants in this proceeding agreed to compromise the Federal Court proceedings on terms recorded in an agreement styled “Terms of Settlement – RTA Leases Land”. Further, the representatives of the plaintiff and the defendants agreed to take steps to resolve another dispute concerning the township of Yirrkala on terms recorded in an agreement styled “Terms of Settlement – Yirrkala”. Both agreements provided for the appointment of a retired superior court judge to arbitrate their respective claims to be traditional owners of the land in Yirrkala. Under the agreements, the arbitration was to be conducted in accordance with the *Commercial Arbitration (National Uniform Legislation) Act*.

- [6] After that time, the parties' legal representatives agreed to approach Mr French to determine his availability to accept appointment as an arbitrator, and Mr French confirmed that availability. The parties' legal representatives also exchanged correspondence in relation to the listing of the arbitration for a directions hearing and the terms of the arbitration agreement.
- [7] On 29 March 2019, the first defendant's legal representative advised that he did not have instructions to sign the draft arbitration agreement.
- [8] On 1 April 2019, the first defendant's legal representative attended a teleconference conducted by Mr French and attended by the legal representatives for the other parties. During the course of that teleconference, the first defendant's legal representative advised that he was attending as an observer only, and was not retained as a legal representative for the first defendant.
- [9] On 2 April 2019, the first defendant's former legal representative sought written support from the plaintiff and the second defendant for the first defendant's application for funding assistance for legal representation in the arbitration.
- [10] In June 2019, the arbitration agreement was signed by the representatives of the plaintiff and the second defendant. Mr French had been consulted in relation to the terms of the arbitration agreement before that was done.
- [11] On 29 June 2019, the first defendant's former legal representative advised the legal representatives for the other parties that they should communicate directly with Djalu Gurruwiwi on behalf of the Galpu parties.

[12] On 1 July 2019, a solicitor acting for the plaintiff attended personally on Mr Gurruwiwi and provided him with a copy of the arbitration agreement which had been signed by the other parties. No substantive discussion concerning the content of the agreement took place at that time. To this date, neither Mr Gurruwiwi nor any other person acting on behalf of the Galpu parties has provided an executed copy of the arbitration agreement.

[13] On 9 September 2019, the first defendant's former legal representative advised the solicitor acting for the plaintiff that he was not acting for the Galpu parties because they did not have funding, that the Northern Land Council had made a recommendation to the Commonwealth for funding for the Galpu parties, and that he would advise if funding was provided. The solicitor acting for the plaintiff advised the first defendant's former legal representative that the plaintiff would be making an application to this Court for orders confirming the arbitration agreement and appointing Mr French as the arbitrator.

[14] On 11 September 2019, Mr Gurruwiwi was served with a copy of the Originating Motion, the Summons on Originating Motion and the affidavit material which had been filed. Neither Mr Gurruwiwi nor any other person acting on behalf of the Galpu parties has filed an appearance in these proceedings.

[15] There is a preliminary issue concerning the status of the parties named to this proceeding. As presently named, the parties do not have legal personality. It is no doubt for this reason that the parties to the agreements reached in the course

of the mediation were the Rirratjingu Aboriginal Corporation as representative of the local descent group of that name, Mr Gurruwiwi as representative of the local descent group of Aborigines known as the Galpu, and the Gumatj Corporation Limited as representative of the local descent group of that name.

[16] While it is understandable that not all members of the three descent groups have been named as parties to the proceedings, the primary practical difficulty with the conduct of proceedings by parties with no legal personality relates to the enforcement of orders made. In recognition of that potential difficulty, the solicitors acting for the presently named plaintiff and second defendant consent to the substitution of those respective corporations as plaintiff and second defendant. While Mr Gurruwiwi has not appeared in this proceeding, he has been served with the originating process and affidavit material and his joinder is necessary as representative of the Galpu parties. Accordingly, I will be making orders in those terms to regularise the proceedings.

[17] I turn then to consider the principal relief sought. Section 11(3) of the *Commercial Arbitration (National Uniform Legislation) Act* provides relevantly that failing an agreement between the parties on a procedure for appointing an arbitrator, an arbitrator is to be appointed by the Court.

[18] Section 11(4) of the Act relevantly provides that where under an appointment procedure agreed on by the parties a party fails to act as required under the procedure, or the parties are unable to reach an agreement expected of them under the procedure, any party may request the Court to take the necessary

measure unless the agreement on the appointment procedure provides other means for securing the appointment.

[19] I note in that respect that the agreements to compromise provide that if the parties to the arbitration are unable to agree on the appointment of an arbitrator the parties shall ask the President of the Law Council of Australia to nominate an arbitrator. Two observations may be made concerning that provision – one practical and one technical.

[20] The practical consideration is that the President of the Law Council of Australia is briefed to appear on behalf of the second defendant both in this proceeding and in the proposed arbitration. While that difficulty is not insurmountable, in that it might be implied that the President may deputise another member of the Council to nominate an arbitrator, the technical consideration makes that unnecessary.

[21] That is, while the agreement permits the parties to ask the President of the Law Council to nominate an arbitrator in the absence of agreement, it does not in its terms provide any means for making the appointment. For that reason, the exception under s 11(4) has no application in the circumstances. Moreover, as the parties have not agreed on a procedure for appointing the arbitrator, the relief sought by the appointment of an arbitrator is properly considered to be a matter arising under s 11(3)(b) of the Act.

[22] In this case I am satisfied that the agreements reached by the parties during the course of the mediation are “arbitration agreements” within the meaning of s 7 of



the *Commercial Arbitration (National Uniform Legislation) Act*. The agreements expressly provide so. By those agreements, the parties have agreed to submit to arbitration on certain disputes which have arisen between them in respect of a defined legal relationship. The content of those agreements are recorded in writing. I am further satisfied that the parties have failed to agree on the appointment of an arbitrator. That failure is not due to a lack of concurrence concerning the arbitrator proposed, but due to the fact that the procedure has been stultified by the withdrawal of the first defendant's legal representative due to an absence of funding. That situation should not be permitted to delay the appointment of an arbitrator in accordance with the agreements reached at the court-annexed mediation. Thereafter, the question of how to proceed will be a matter for the arbitrator.

[23] Accordingly, I make the following orders:

1. Pursuant to rule 9.06 of the *Supreme Court Rules 1987* (NT) the "Riratjingu Aboriginal Corporation as representative of the Riratjingu Parties" is substituted as plaintiff.
2. Pursuant to rule 9.06 of the *Supreme Court Rules 1987* (NT) "Djalu Gurruwiwi as representative of the Galpu Parties" is substituted as first defendant.
3. Pursuant to rule 9.06 of the *Supreme Court Rules 1987* (NT) the "Gumatj Corporation Limited as representative of the Gumatj Parties" is substituted as second defendant.

4. Pursuant to s 11(3) of the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), the Honourable Robert French AC is appointed as arbitrator for the purpose and on the terms set out in the arbitration agreement annexed to the affidavit of Sarah Grace Pringle sworn on 11 September 2019 and marked “SGP-C1”.
  
5. I make no order as to costs.

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