

McArthur River Mining Pty Ltd v Lansen & Ors [2007] NTCA 5

PARTIES:

McARTHUR RIVER MINING PTY
LTD ACN 008 167 815

v

HARRY LANSEN & ORS obo THE
KURDANJI PEOPLE

and

LES HOGAN obo THE GARAWA AND
GURDANJI PEOPLE

and

ANNIE ISAAC & DINAH NORMAN
obo THE RRUMBURRIYA PEOPLE

and

WENDY ROPER & ORS obo THE
RRUMBURRIYA PEOPLE

and

ANNIE ISAAC obo THE
RRUMBURRIYA PEOPLE

and

LEONARD NORMAN & ORS obo THE
ANTHAWIRRIYARRA PEOPLE

and

BILLY COOLIBAH & ORS obo THE
GURDANJI AND GARAWA PEOPLE

and

NT MINISTER FOR MINES AND
ENERGY

and

NORTHERN TERRITORY OF
AUSTRALIA

TITLE OF COURT:

COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION:

APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO:

AP 8 of 2007 (20632687)

DELIVERED: 18 July 2007

HEARING DATE: 18 July 2007

JUDGMENT OF: MARTIN (BR) CJ, RILEY and
SOUTHWOOD JJ

APPEAL FROM: Supreme Court SC 157 of 2007 decision
by Angel J

CATCHWORDS:

APPEAL – GENERAL PRINCIPLES

Appeal against decision declaring authorisation allowing conversion of mine invalid – legislation changed retrospectively and prospectively to validate authorisation – appeal by way of re-hearing - Court empowered to substitute decision based on law and facts at time of re-hearing – appeal allowed.

*McArthur River Project Agreement Ratification Act 1992 (NT);
McArthur River Project Amendment (Ratification of Mining Authorities)
Act 2007 (NT), s 4AB*

REPRESENTATION:

Counsel:

Appellant: G Gibson QC and K Barlow
1st to 7th Respondents: N Williams SC and S Glacken
8th to 9th Respondents: T Pauling QC and S Brownhill

Solicitors:

Appellant: Cridlands
1st to 7th Respondents: Northern Land Council
8th to 9th Respondents: Solicitor-General for the Northern
Territory

Judgment category classification: B
Judgment ID Number: Mar0709
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McArthur River Mining Pty Ltd v Lansen & Ors [2007] NTCA 5
No AP 8 of 2007 (20632687)

BETWEEN:

McARTHUR RIVER MINING PTY LTD
ACN 008 167 815
Appellant

AND:

HARRY LANSEN & ORS obo THE
KURDANJI PEOPLE
First Respondents

LES HOGAN obo THE GARAWA AND
GURDANJI PEOPLE
Second Respondent

ANNIE ISAAC & DINAH NORMAN obo
THE RRUMBURRIYA PEOPLE
Third Respondents

WENDY ROPER & ORS obo THE
RRUMBURRIYA PEOPLE
Fourth Respondents

ANNIE ISAAC obo THE
RRUMBURRIYA PEOPLE
Fifth Respondent

LEONARD NORMAN & ORS obo THE
ANTHAWIRRIYARRA PEOPLE
Sixth Respondents

BILLY COOLIBAH & ORS obo THE
GURDANJI AND GARAWA PEOPLE
Seventh Respondents

**NT MINISTER FOR MINES AND
ENERGY**

Eighth Respondent

**NORTHERN TERRITORY OF
AUSTRALIA**

Ninth Respondent

CORAM: MARTIN (BR) CJ, RILEY and SOUTHWOOD JJ

**EX TEMPORE
REASONS FOR JUDGMENT**

(Delivered 18 July 2007)

MARTIN CJ:

- [1] This is an appeal against a decision of a Judge declaring decisions of the Minister for Mines and Energy invalid and quashing actions by the Minister which had the effect of precluding the appellant from converting its mining operation at McArthur River to open cut.
- [2] The appellant operates a project known as the McArthur River project. In 2002 the appellant applied for an authorisation to conduct mining activities on the site. The application specified the mining activities to be ‘underground lead/zinc/silver mine, processing plant and Bing Bong port facilities’. Authorisation 0059-01 was granted on 21 January 2003.
- [3] Following a proposal by the appellant to convert the mining activities from underground to open cut, and after various procedures had been undertaken and an Environmental Assessment Report produced, on 13 October 2006 the

Minister accepted an amended Mining Management Plan providing for the change from underground to open cut operation and granted authorisation 0059-02.

- [4] The first to seventh respondents are registered Native Title Claimants to lands and waters affected by the McArthur River project. They challenge the validity of the Minister's decisions.
- [5] On 30 April 2007, the learned trial Judge delivered reasons for finding that authorisation 0059-01 did not authorise the proposed open cut mining operation and that the proposed operation was, therefore, statutorily prohibited. His Honour determined that the Minister's acceptance of the amended Mining Management Plan was of no effect because the Plan was not in respect of mining activities to which authorisation 0059-01 related.
- [6] On 3 May 2007 the Judge declared that the decisions of the Minister made on 13 October 2006 to accept the amended Mining Management Plan and to grant authorisation 0059-02 were invalid and of no effect and quashed those actions.
- [7] On 4 May 2007 the McArthur River Project Agreement Ratification Act 1992 was amended by the McArthur River Project Amendment (Ratification of Mining Authorities) Act 2007. Section 4AB was inserted which operates both retrospectively and prospectively.

- [8] In substance, s 4AB provided that authorisations 0059-01 and 0059-02 are valid and effective and authorise mining activity of any kind including the conversion of the relevant mine from underground to open cut. Section 4AB also provides that the amended Mining Management Plan is valid and effective and was validly approved by the Minister on 13 October 2006.
- [9] This appeal is by way of re-hearing. The Court is empowered to substitute its own decision based on the facts before the Court and the law as it exists at the time the Court makes its decision.
- [10] While the substantive statutory provisions governing the conduct of the Minister when dealing with a proposal to convert a mining operation from underground to open cut have not been changed, the law governing the issue presented to the trial Judge has been altered with retrospective and prospective effect. The issue before the Judge was the validity of the particular actions by the Minister. The law governing that issue has changed and this Court must apply the law given to it by Parliament as it stands today. Applying today's law, the actions of the Minister were valid.
- [11] Plainly the amending legislation was enacted in response to the decision of the trial Judge. The terms of the amending legislation are unambiguous as is the intent of the legislature. It has dealt retrospectively with the specific issues before the Judge. In particular, the legislature has specifically addressed the scope of both authorisations by declaring that the authorisations are valid and authorise mining activity of any kind, including

conversion from underground to open cut. It follows that at the relevant time authorisation 0059-01 related to an open cut mining operation. Further, the legislature has declared that the amended Mining Management Plan was validly approved by the Minister on 13 October 2006.

- [12] In my view the legislature has plainly evinced an intention to set aside the result of the litigation and to alter the rights of the parties to the benefit of the appellant and to the detriment of the first to seventh respondents. This Court must determine the rights of the parties in accordance with the facts before this Court and in accordance with the law today as it governs those rights.
- [13] It necessarily follows, therefore, that the appeal must be allowed and the declarations and orders of the trial Judge set aside. In lieu of those orders, this Court should order that the originating motion filed 21 December 2006 be dismissed.
- [14] The appellant's substantive appeal complains that the trial Judge erred in his application of the law as it existed at the time of his Honour's decision. The appellants seek a judgment of the Court on the issues raised in that substantive appeal. However, in view of the change in the law and the confined issue before the Judge, in my view it is unnecessary and inappropriate to determine those issues. It would be tantamount to giving an advisory opinion.
- [15] The orders are:

- (1) Appeal allowed.
- (2) Declarations and orders of Angel J made 3 May 2007 are set aside.
- (3) Originating motion filed 21 December 2006 is dismissed.

[16] The Court is of the view that the costs of the hearing at first instance should not be disturbed. The appeal was allowed on the basis of the amending legislation and not on a basis related to any error by the trial Judge. In these particular circumstances the Court will not disturb the order made by the learned trial Judge on 25 May 2007 as to the costs of the hearing at first instance.

[17] As to the costs of the appeal, the order of the Court is that each party bear their own costs.

RILEY J:

[18] I agree. I have nothing to add.

SOUTHWOOD J:

[19] I, too, agree with his Honour, the Chief Justice's reasons for decision and for the orders proposed in lieu of the orders of the Supreme Court.
