Pegasus Gold v Metso Minerals [2003] NTCA 03

PARTIES:	PEGASUS GOLD AUSTRALIA LTD
	v
	METSO MINERALS (AUSTRALIA) LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 11 of 2001 (9800344)
DELIVERED:	19 February 2003
HEARING DATES:	4 & 5 December 2002
JUDGMENT OF:	Martin CJ, Mildren & Thomas JJ

CATCHWORDS:

Statues:

Mining Act ss 60,185
Supreme Court Act s 54
Supreme Court Rules r 84.08
Workmen's Lien Act ss 2.5
Workmen's Lien Act 1896 ss 1, 2

Cases

Eon Metals NL v Commissioner of State Taxation (WA) 91 ATC 4841, followed
Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 2) (1987) 162 CLR 153 at 162-3, referred to
National Australia Bank v Blacker & Anor (2000) 104 FCR 288 at 292-296, followed
Warren v Coombes (1979) 142 CLR 531 at 537, referred to

Workmen's Lien – Whether lien enforceable – Appellant under administration pursuant to Corporations Law – Whether equipment a fixture

REPRESENTATION:

Counsel:

Appellant:	T Young
Respondent:	R Ross-Smith

Solicitors:

Appellant:	Ward Keller
Respondent:	Purcell Lancione Cureton

Judgment category classification:	B
Judgment ID Number:	mil02281
Number of Pages:	15

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Pegasus Gold and Metso Minerals [2003] NTCA 03
No. AP 11 of 2001 (9800344)

BETWEEN:

PEGASUS GOLD AUSTRALIA LTD (ACN 009 628 924)
Appellant

AND:

METSO MINERALS (AUSTRALIA) LTD (ACN 000 197 428)
Respondent

CORAM: Martin CJ, Mildren and Thomas JJ

REASONS FOR JUDGMENT

(Delivered 19 February 2003)

Martin CJ:

[1] I have had the benefit of reading a draft prepared by Mildren J. I agree.

Mildren J:

[2] The respondent had manufactured and supplied to the appellant certain spare parts for use in the repair and maintenance of mineral processing and other associated equipment located on the appellant's mineral lease in 1997. The respondent sent invoices to the appellant in respect of those spare parts in sums totalling $264,042.36 which remain unpaid. On 24 December 1997 the respondent lodged a notice of lien with the Registrar General of the

Northern Territory against the appellant's estate and interest in the mineral lease in respect of the unpaid monies. The learned trial judge found that the spare parts became integral parts of the crushers and other processing equipment and that such equipment were fixtures, albeit removable fixtures and therefore the respondent was entitled to a lien over the appellant's interest in the mineral lease pursuant to s 5 of the Workmen's Liens Act.

[3] There was no dispute that the appellant was indebted to the respondent in the amount of $264,042.36. The issue between the parties was whether or not the respondent was entitled to an order for the enforcement of the lien under the Act. The importance of that question, was that on 12 December 1997 the appellant was placed under administration pursuant to Part 5.3A, Division 2 of the Corporations Law, and the effect of a valid lien is to place the respondent in the position of a secured creditor.

[4] Before dealing with the substantive grounds of the appeal, it is necessary to refer briefly to one matter raised by counsel for the respondent in argument who suggested that an appeal to this Court is an appeal *stricto sensu* and therefore it was necessary for the appellant, in order to succeed, to show an error of law on the part of the learned trial judge. There are a number of answers to this submission. First, an appeal *stricto sensu* is not an appeal limited to questions of law. Secondly, an appeal to this Court is not an appeal restricted to questions of law. Section 54 of the Supreme Court Act provides:

> The Court of Appeal shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which may be taken on affidavit, by oral examination before the Court of Appeal or a Judge or otherwise as the Court of Appeal directs.

Such an appeal, the High Court said in *Warren v Coombes* (1979) 142 CLR 531 at 537:

> …although by way of rehearing, is conducted on the transcript of the evidence taken at the trial, and the witnesses are not called to give their evidence afresh, but the appeal is a general appeal and is not limited, for example, to questions of law.

Subsequently, their Honours observed at p 551:

> Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.

[5] Their Honours went on to say at p 552:

> Again with the greatest respect, we can see no justification for holding that an appellate court, which, after having carefully considered the judgment of the trial judge, has decided that he was wrong in drawing inferences from established facts, should nevertheless uphold his erroneous decision. To perpetuate error which has been demonstrated would seem to us a complete denial of the purpose of the appellate process. The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognise the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full

> weight to his decision, they consider that it was wrong, they must discharge their duty and give affect to their own judgment.

The facts

[6] The facts as found by the learned trial judge involving this dispute are fully set out in his Honour's reasons for judgment which are now reported in sub nominee *Svedala Australia Ltd v Pegasus Gold Australia Ltd* (2001) 165 FLR 59 at pps 60-65, and it is not necessary to repeat those findings in detail. It is necessary however, to make the following brief observations. The original equipment supplied by the respondent during the period 1993 to 1997 included Barmac crushers, secondary cone crushers, secondary carbon recovery and trash screens and pumps. The equipment was used during the process of crushing, screening, feeding, milling and extracting gold from the ore which had been mined from the pit on the appellant's mining lease. Most of the equipment was very large indeed. A Barmac, for example, when new and unused, weighed approximately 123 tonnes with its stand fitted. There were nineteen such Barmacs bolted to a frame and mounted into a support stand on anti-vibration mounts. Each frame and stand was constructed from fabricated steel approximately 2.5 metres wide, 2.5 metres long and 1.5 metres high. Each frame and support stand were in turn attached to a larger support structure and housing which respectively supported and encased the Barmac, the feeder and the feed bin structure. The Barmacs support frame was directly bolted onto the supporting

structural steel work of the tertiary crushing station, the footing of which was embedded into the ground with concrete.

[7] As to the three secondary crushers supplied, these weighed approximately 84 tonnes when empty and were built into a steel structure approximately 25 metres high. There is a substantial concrete component to the structure and the entire secondary crusher section would weigh thousands of tonnes. The secondary crushers were bolted directly to the steel structure of a secondary crushing station. That structure was designed to accommodate the vibration and out of balance dynamic forces encountered in the operation of the cone crushers. Although removable, the size and the nature of the operation of the secondary crushers in the circuit meant that once installed they were not readily removable.

[8] As to the screens, these were located above the crushers. They were bolted on to the secondary station framework. They were not easily removable once installed because they were bolted down and other equipment required removal before they could be removed.

[9] The pumps were an integral part of the extraction and recovery process, bolted down to fabricated steel bases and entombed concrete foundations. They were attached to pipes to permit liquids to flow through them.

[10] The learned trial judge found that all the items of equipment in question were plainly intended to form part of the gold mine plant for the indefinite life of the mine and were installed in situ for that purpose. The plain object

and purpose for which the items in question were installed were their use for such times they were needed. None of the equipment was removed from the site at any time that the appellant operated the mine. The mining plant and equipment in question was sold by the appellant with the mineral lease as a going concern. The mineral lease in its terms required mining plant and equipment to be removed at the expiry of the lease. The lease was for a term of fifty years. The mining operation commenced in 1993 and was expected to continue until about 2004. In fact it ceased late in 1997.

[11] His Honour observed that s 185 of the Mining Act 1980 requires removal of all plant, machinery, engines and other equipment from the tenement at the end of the lease.

[12] His Honour found that the Barmac crushers and other equipment, were large and heavy although nevertheless removable from the plant by crane, and transportable once detached from the remainder, and that it was and remains an economic proposition to sell and relocate that equipment as was, and as is, mining industry practice. Moreover, removal of the equipment would not damage it.

The Law

[13] Section 5 of the Workmen's Liens Act provided at the relevant time:

> A contractor or sub-contractor shall have a lien for the contract price, so far as accrued due, on the estate or interest in land of any owner or occupier in each of the following cases -

(a) where the work is done, with the assent, express or implied, of the owner or occupier to the land or to any fixture thereon;

[14] Section 1 of the Workmen's Lien Act 1896, provided:

> Liens shall be had under "The Workmen's Liens Act, 1893" for materials furnished, although such materials may not be furnished in connection with work; and "The Workmen's Liens Act, 1893," shall be amended and read and construed accordingly.

[15] Section 2, provided in part:

> ... in this Act, where not inconsistent with the context, the following terms have the following meanings: -
>
> "Fixture" means such a fixture upon land as, having been attached to such land by the vendor, would pass to the purchaser upon the sale of the fee simple of the land;

[16] The learned trial judge, in the course of his reasons, said:

> To the present case, one approach is to say, as is the fact, that the chattels whilst attached to the plant superstructure were from the first intended to be accessory to the mining operation (or perhaps more specifically the ore processing operation) conducted on the land rather than accessory to the soil itself and that never having been intended to be part of the soil, at law they remain chattels.

Counsel for the appellants submitted that that finding of fact precluded a finding that the plant was a fixture.

[17] Subsequently, his Honour said:

> In the present case the items in question, in situ, form integral parts of the mineral processing plant as a whole ... whilst the relevant items could be individually detached and removed without destruction or damage to the items themselves or associated items or super-structure, such removal, absent replacement, rendered the plant

> as a whole significantly diminished or inoperative. In my opinion the mineral processing plant as a whole constituted buildings and the individual items of plant, in situ, constituted parts of the buildings which were integral to the overall purpose and use and enjoyment of the buildings. The individual items of plant could not operate alone or other than in conjunction with other plant items. Incorporated as they were into the overall mineral processing plant and their placement and function being integral and vital to the overall operation, in my view, notwithstanding that they were detachable and replaceable, in situ, they lacked individual identity as personalty. In the present case, I think, with respect, that the respective positions of the plaintiff and defendant are to be emphasised, and I have steadily borne them in mind in reaching my conclusion. As between the defendant lessee and the Crown, for instance, I should regard the mine plant items as lacking the character of land.

[18] Counsel for the appellant submitted that the finding in the last sentence also precluded a finding that the relevant plant had become fixtures.

[19] I should note at this stage that there is no evidence as to who owned the fee simple of the land. There is no evidence that the Crown had granted an estate in fee simple over the land to anyone; there is no evidence that it had not.

[20] We were referred by both counsel to a large number of authorities. I do not think it is necessary to discuss them in detail. They have been comprehensively reviewed by Ipp J in *Eon Metals NL v Commissioner of State Taxation (WA)* 91 ATC 4841, and by Conti J in *National Australia Bank Ltd v Blacker & Anor* (2000) 104 FCR 288 at 292-296. In my opinion, the principles derived from the cases by Ipp and Conti JJ have been accurately stated by them, and I am content to adopt their Honours' analysis of them.

Conclusions

[21] From the facts of this case, it is clear that the equipment was annexed to the land in such a way as to give rise to a presumption that the property in question had become a fixture and that the burden of proving otherwise rested upon the appellant. Secondly, although sometimes it is appropriate to take into account the subjective intention of a party fixing a chattel to land, usually the relevant test is to be determined objectively from such facts and circumstances that are apparent for all to see. I accept that as between, for example, a landlord and tenant, the actual intentions of the parties may well be critical if there was a common intention. But in this case, there are no findings as to what were the actual intentions of either party and therefore, the appropriate test as to the intention is to be ascertained to the objective facts and circumstances. The degree of annexation of a chattel to the land is of course relevant to the ascertainment of that intention. In this case, all of the mineral processing plant could be removed without causing any damage to the land. I also think it is significant that it was an economic proposition to sell and relocate that equipment, as was and is common mining industry practice, and that removal of the equipment would not damage it. It is also significant that there was a requirement, both under the terms of the lease and under the provisions of s 185 of the Mining Act 1980, that all the equipment be removed at the end of the lease.

[22] In my opinion, the purpose or object of the annexation was not for the better enjoyment of the mineral lease. The ore, once removed from the ground, in

law became a chattel. The purpose of the equipment as a whole was to treat the ore in such a way as to separate the gold from it. Moreover, the equipment was extremely large and on the findings of the learned trial judge, would move and vibrate and therefore had to be fixed in such a way as to prevent that vibration. There is force in the argument that the individual chattels became part of a much larger piece of equipment, as the learned trial judge found, but this did not necessarily mean that the whole structure became a fixture. As was pointed out by counsel for the appellant, it was not vital that this equipment remained on the mineral lease. It could have been effectively located anywhere, although it was more economic to locate it as near as possible to the mine site in order to reduce the cost of transporting the ore.

[23] In my opinion, the function to be served by annexing the plant to the soil was to stabilise it so that the equipment could be used as a piece of equipment.

[24] Counsel for the respondent submitted that the purpose of the annexation was for the better enjoyment of the land. In one sense, equipment had nothing to do with the land as the ore, once extracted from the soil, was no longer part of the land. In another sense, "land" means the interest in land which the appellant had under the mineral lease. That interest is described in s 60 of the Mining Act as being, inter alia, for:

> the mining of the mineral or minerals specified in the lease document, including the removal from the lease area and the

> treatment of tailings or other mining material the property of the Crown on the lease area.

and for

> the erection and use of machinery, conveyor, apparatus, plant, buildings or other structures for or in connection with the mining; transporting; treatment, processing or refining; impounding and retaining of waste resulting from the mining, stacking or storage, of specified minerals or a mineral or substance containing those minerals or that mineral.

[25] Therefore, in another sense it may be said that the equipment was there for the better enjoyment of the lease, the purposes of which included the mining of the minerals in the soil and the erection and use of machinery in connection with mining, treatment, processing and refining, etc.

[26] Nevertheless, it is difficult to see how it was ever the objective intention of the appellant to affix the equipment to the soil in such a manner that the equipment became part of the soil and thereby a fixture, given that both the terms of the lease and the Mining Act require the appellant to remove the equipment eventually, that it was economic to do so, and that it could be done without damage either to the soil or to the equipment.

[27] Counsel for the respondent contended that the position was similar to that which pertains between landlord and tenant where a right of severance arises. However, a right of severance is one thing, but a requirement by law to remove the object in question is another.

[28] In my opinion the correct conclusion to be drawn from the findings of the learned trial judge is that the equipment was not and had never become, a fixture.

[29] The respondent sought to support the findings of the learned trial judge via two matters raised in his notice of contention. The first is that the definition of "fixture" in s 2 of the Workmen's Liens Act operates as a legal fiction, and that the property in question fell within that definition. The learned trial judge found that there was no reason to suppose that the definition excluded from its contemplation the general law relating to fixtures. There are no decisions which either counsel has been able to find which have discussed the definition of fixture as it appears in s 2 of the Act. I consider that the conclusion which his Honour arrived at was correct. The word "land" in the definition of "fixture" (except where it appears last occurring) plainly does not mean an interest in land but means the soil itself: see *Jennings Construction Limited v Burgundy Royale Investments Pty Ltd (No 2)* (1987) 162 CLR 153 at 162-3. The respondent's argument would require a construction of the definition in such a way as to require the Court to make an assumption that the respondent was the owner of the fee simple at the time when the equipment had been attached to the soil. In that event, it might be difficult to decide what objectively was the respondent's intention if it meant that the Court would be required to ignore entirely the existence of the mineral lease. However, in the light of the fact that ownership of the fee simple does not carry with it ownership of the minerals

and that the right to mine in the Northern Territory is governed by the Mining Act, whichever way one looks at it, even if "land" means the physical entity as opposed to the estate or interest, the same criterion as to whether or not the property had become a fixture must be considered. I therefore reject the argument that the respondent is entitled to succeed because of the peculiar nature of the definition of "fixture".

[30] The second matter raised in the respondent's notice of contention is an argument that the gold mining process as a whole was work done to the land for the purposes of s 5 of the Workmen's Liens Act. I am unable to accept that submission. The definition of "work" in s 2 of the Act is that "'work' means every description of manual work or personal service". I do not see how a large mechanised mining operation can possibly fall within the definition of "work".

[31] I would therefore allow the appeal. I would set aside orders 1 and 3(c) of the formal orders of the Court given by his Honour on 18 October 2001.

[32] In lieu thereof, I would declare that the respondent is not entitled to a contractor's lien pursuant to s 5 of the Workmen's Liens Act. I would order the respondent to pay to the appellant the sums paid out of Court to the respondent pursuant to the orders of the learned trial judge made on 28 September 2001 and 18 October 2001 and I would further order that the respondent pay the appellant's costs of the appeal and of the action, except those costs attributable to the issue of whether or not the appellant was

indebted to the respondent and the costs ordered to be paid by the appellant pursuant to orders 3(a) and (b) of Angel J given on 18 October 2001.

[33] I would further order that the appellant not recover any of the costs for the preparation of the appeal books in this case. The appellant prepared four volumes of appeal books which contained an enormous amount of irrelevant material. This appeal could have been easily decided without reference to more than the judgment appealed from, the notice of appeal and the notice of contention. We were told that the solicitors for the appellant believed that because Order 84.10 set out the order in which the documents are to be included in the appeal book by reference to specific documents, that it was necessary in each case to include all of those documents, whether they were required on the hearing of the appeal or not. Under the provisions of r 84.08 the Registrar is required to decide what documents and matters shall be included in the appeal papers. However, it is up to the parties to make appropriate submissions to the Registrar and if, as a result, the Registrar is wrongly persuaded to include documents which are not required, the party concerned must bear the consequences. In this case, the solicitors for the respondent contended before the Registrar that most of the material in the appeal book was not required, but the Registrar was persuaded otherwise by the submissions of the solicitors for the appellant. In those circumstances, the appellant should not have the costs of the preparation of the appeal books.

Thomas J

[34] I have read the draft judgment prepared by Mildren J. I agree with his Honour's reasons and with his conclusion. I join in the proposed orders.
