FMG PILBARA PTY LTD V COX

Full Court of the Federal Court of Australia (Spender, Sundberg and McKerracher JJ)
30 April 2009
[2009] FCAFC 49

Native title – future act – obligation to negotiate in good faith – whether FMG fulfilled obligation to negotiate in good faith – relevance of good faith for stage of negotiations – relevance of good faith for the making of an application for a determination by the National Native Title Tribunal under the *Native Title Act 1993* (Cth), s 35 – National Native Title Tribunal's power to make a determination under the *Native Title Act 1993* (Cth), s 38 – FMG negotiating on a 'whole of claim' basis – whether negotiations must be specifically directed to particular future act under the *Native Title Act 1993* (Cth), s 31(1)(b)

Facts:

This appeal from a decision of the National Native Title Tribunal ('Tribunal') concerned land in the Pilbara region of Western Australia, to which the first respondent, the Puutu Kunti Kurrama Pinikura people ('PKKP'), and the second respondent, the Wintawari Guruma Aboriginal Corporation ('WGAC'), both had native title claims. FMG sought a future act determination in relation to the land. The relevant future act was the proposed grant of a mining tenement lease to FMG.

The *Native Title Act 1993* (Cth) ('*NTA*') sets out a procedure for negotiating with native title claimants in relation to future acts. It commences with the issuing of notice under s 29 of an intention to do a future act. Under s 31(1)(b), the parties are then obliged to negotiate in good faith. By virtue of s 35(1), if no agreement is reached and it is at least six months past the notification day then any party to the negotiations may apply to the Tribunal for a determination under s 38. The Tribunal may not make a determination, however, if it is satisfied by a negotiation party that any other negotiation party did not negotiate in good faith (s 36(2)).

FMG was in the process of negotiating two draft Land Access Agreements ('LAA') – one with each PKKP and WGAC. The draft LAA between FMG and PKKP was negotiated from February 2007, and it was intended that the LAA would become an Indigenous Land Use Agreement ('ILUA') if agreed to. Negotiations over the draft LAA between FMG and WGAC commenced in March 2006 and resulted in the conclusion of a negotiation protocol in November 2006. In the case of both draft LAAs, the negotiations occurred on a 'whole of claim' basis, though the proposed mining tenement formed a part of the draft LAAs. Each of the draft LAAs was similar in its terms, making provision for compensation from FMG in exchange for agreement as to the conducting of future acts by FMG in relation to the mining tenement. Those acts could not be specifically identified in advance.

In the absence of an agreement being reached between FMG and the first and second respondents for LAAs within six months from notification, FMG sought a determination from the Tribunal under s 35 in relation to the proposed tenement.

The first issue for the Full Court of the Federal Court to decide was whether, on the proper construction of s 35 of the *NTA*, when read with s 31(1)(b), the Tribunal has the power to make a determination under s 38 of the *NTA* regardless of the stage reached in the negotiations, provided that the six-month period has expired and the negotiation party has negotiated in good faith. The second issue on appeal was whether a negotiation party can satisfy the requirement in s 31(1)(b) (ie, that it negotiate about a future act) by negotiating on a 'whole of claim' basis (as FMG had done), or whether the negotiation party must conduct negotiations specifically directed to the future act in question.

Held, per curiam, allowing the appeal and setting aside the decision of the Tribunal:

1. The expression 'negotiate in good faith' is to be construed in its natural and ordinary meaning and in the context of the *NTA* as a whole. The requirement of good faith is directed to a party's conduct and state of mind during the course of negotiations. While, for good faith negotiations, it is insufficient to merely 'go through the motions' with a rigid or predetermined position, the evidence suggests that FMG had an open mind throughout the course of negotiations. The act of lodging a s 35 application, taken alone, cannot be relied upon in order to establish bad faith: [19]–[20], [24], [27]; *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 followed; *Brownley v Western Australia (No 1)* [1999] FCA 1139 cited.

2. For the purpose of s 31(1)(b), there is no requirement for the negotiations to have reached a certain stage. To suggest that negotiations must have reached a certain stage before a negotiation party can make an application for an arbitral determination under s 35 is to put a gloss on the *NTA*'s provisions: [23].

3. In the present case, there could only be a conclusion of lack of good faith where the fact that the negotiations had not passed the embryonic stage was caused by some breach or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct. It is clear on the facts that there had been conscientious and bona fide negotiation by FMG for a six-month period directed towards the agreement required under s 31(1)(b): [27]–[30].

4. The *NTA* does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. To have to negotiate specifically about a particular future act would impose an additional criterion under s 31(1)(b) of the *NTA* which is not to be found in the section. The requirement under s 31(1)(b) will be satisfied provided that what was discussed and proposed was conducted in good faith and was with a view to obtaining agreement about the doing of the future act. 'Whole of claim' or project negotiations are desirable and it was appropriate for FMG to negotiate on this basis: [37]–[38]; *Thomas* [1998] NNTTA 8, affirmed.

5. To negotiate in good faith for a period in excess of six months in order to reach an ILUA that also includes the future act constitutes conduct within the requirements of s 31(1)(b) of the *NTA*. In the case of FMG and WGAC, FMG's negotiation was directed towards an ILUA that also encompassed attempted agreement about the future act in question (the proposed mining tenement), and this satisfied s 31(1)(b): [42].