



[2020] HCATrans 158

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane

No B57 of 2020

Between -

ZEPH INVESTMENTS PTE LTD

Plaintiff

and

STATE OF WESTERN AUSTRALIA

Defendant

Directions hearing

KIEFEL CJ

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON FRIDAY, 9 OCTOBER 2020, AT 2.00 PM

Copyright in the High Court of Australia

MR G.A.F. CONNOLLY: In this matter I appear for the plaintiff, Zeph Investments Pte Ltd. (instructed by Sophocles Lawyers)

5 **MR J.A. THOMSON, SC,** Solicitor-General for the State of Western Australia: May it please the Court, I appear with **MS J.E. SHAW** on behalf of the defendant. (instructed by State Solicitor's Office (WA))

10 **HER HONOUR:** Thank you. Mr Connolly, the plaintiff is not a party to the arbitrations which are the subject of the West Australian Amendment Act, as I understand it.

15 **MR CONNOLLY:** That is correct, your Honour. Zeph Investments is the beneficial owner of – well, Zeph Investments owns Mineralogy which owns International Minerals and so it is a covered investment for the purposes of the Singapore-Australia Free Trade Agreement.

HER HONOUR: But it has quite distinct and separate claims which found these proceedings?

20 **MR CONNOLLY:** We would accept that, but we would accept it is the same defendant and it is the same Act that gives rise to it and some of the relief is similar.

25 **HER HONOUR:** Could you expand a little on the arbitral claims that it is pleaded that the plaintiff has?

30 **MR CONNOLLY:** Your Honour, we claim that under the Singapore-Australia Free Trade Agreement, Zeph being a Singaporean corporation, it owns Mineralogy which owns International Minerals. Those are covered investments for the purposes of the Singapore-Australia Free Trade Agreement in Article 24(3)(a). Those are covered investments that are affected by this Act. This Act purports to bar proceedings in relation to the disputed matters under it. Those include a very broad idea of what is being barred which includes non-Western Australian proceedings, including
35 proceedings that arise under international agreements and treaties such as the Singapore-Australia Free Trade Agreement.

40 **HER HONOUR:** I understand that, but the arbitral claims that are referred to in the pleading are claims against the Commonwealth which have not as yet been brought. Is that right?

45 **MR CONNOLLY:** That is correct, your Honour. We plead they have not been brought because the effect of the Act – its legal and practical effect of the Act is that it impairs our client's ability to proceed with this because of the indemnities that are contained in the Western Australian Act.

HER HONOUR: What would the claims against the Commonwealth be if you were not so impeded?

50 **MR CONNOLLY:** They would be claims for breach of the
Singapore-Australian Free Trade Agreement. If your Honour goes to our
statement of claim, we set these out at sections 73 and 74 of our statement
of claim but for fear of triggering these indemnities, which, your Honour,
55 are extremely broadly worded and that even in our argument go to
indemnities where proceedings are threatened or imagined – sorry, not
threatened – but threatened or purported – these are very broad liabilities
that our client, the Singaporean corporation, cannot avail itself of its
remedies against the Commonwealth without fear of triggering these
indemnities.

60 **HER HONOUR:** I understand that, and I am not suggesting that it is a
precondition - necessary precondition to these proceedings that those claims
be brought, but for present purposes I would just like to have an idea of the
basis for the claims against the Commonwealth.

65 **MR CONNOLLY:** The Commonwealth is the party to the
Singapore-Australia Free Trade Agreement, along with Australia. The
Commonwealth owes obligations to a Singaporean corporation in the
position of Zeph, so if your Honour looks at paragraph 40 of our statement
70 of claim we plead those out. There are obligations on the parties. Those
obligations include protections against expropriation and nationalisation
which include expropriation without compensation. So, those would be
among the arbitral claims that Zeph would be bringing.

75 The problem is, your Honour, from Zeph's perspective, that there is
an indemnity against Zeph in section 15 of the Act in respect of protective
proceedings. We say that Zeph has rights under the Singapore-Australia
Free Trade Agreement which is a non-Western Australian right. There is a
80 broad definition of "proceedings" which is defined by section 7 of the Act
at subsection (c) of the definition of "proceedings" to include "non-WA
proceedings". These are defined to mean proceedings under international
law or a treaty or agreement such as the Singapore-Australia Free Trade
Agreement and they include that Zeph must be prepared to indemnify the
Commonwealth, which would be the respondent party under such an
85 arbitration - Zeph would have to indemnify Western Australia under
sections 16 and 24 of the Act. This includes, your Honour, an indemnity
against a liability which may be actual, contingent or prospective.

90 **HER HONOUR:** Yes, I see. Returning to the issues for directions today,
Mr Solicitor, I take it it is not suggested this is a case appropriate for
remitter?

MR THOMSON: No, your Honour.

95 **HER HONOUR:** I will come to the question about whether this should be
joined with B52 and B54. If we could return then, Mr Connolly, to the
matter of the claims and the plaintiff's pleading? The defendant has said
that as presently pleaded it is hypothetical and that there needs to be at least
100 a statement of belief or some such thing to take it out of that territory. The
defendant has not said, and I will come to it if necessary, what would
happen if the pleading were not amended in those terms. What do you say
to that?

105 **MR CONNOLLY:** We say, your Honour, given the Act – and the Act
captures our client in these indemnities and purports to bar proceedings
such as in section 11(3) of the Act it purports to bar proceedings, including
a non-Western Australian proceeding such as a claim being made under the
Singapore-Australia Free Trade Agreement, there is nothing hypothetical or
110 advisory about this matter. Our client's arbitral claims that are seeking to
be brought – I accept the Commonwealth is the party, but insofar as this Act
includes provision that Zeph is required to indemnify Western Australia,
including against the liability to the Commonwealth, this is a live matter
and it is not a hypothetical one.

115 **HER HONOUR:** I understand that that is the effect you say of the
amending Act. I understand the defendants to say that the hypothetical
aspect of the proceeding is that the arbitral claims are not extant and there
would need at least to be an averment of there being a belief that there are
120 such claims because it is not something upon which this Court can rule.

MR CONNOLLY: Your Honour, we plead our arbitral claims at
sections 73 and 74 and we have to respond by saying Western Australia has
enacted this law. It purports to bind, or it binds our client insofar as the
triggering of the indemnities and provides for an indemnity even in
125 circumstances where Western Australia has not actually expended any
moneys under the Act.

The idea that there is anything hypothetical about this from our
perspective, when we cannot seek relief under the Singapore-Australia Free
130 Trade Agreement for fear of this Act being enforced against our
subsidiaries - so the idea that somehow my client should have to take such a
significant risk in a law that is under challenge here is one that we would
reject.

135 **HER HONOUR:** Mr Solicitor.

MR THOMSON: Yes. There are two difficulties in the hypothetical
nature of what is proposed. The first is in relation to the existence of

140 arbitral claims. That is alleged as a fact. Now, we cannot plead in any way
which admits or establishes those claims because we would not be a party to
those claims. So they would have to be proved if there was to be a proper
basis for that allegation and the relief sought in the case. But there is a
145 separate issue that follows out of it which we mentioned which is the very
general nature of the way in which the arbitral claims have been defined in
paragraph 73. Those arbitral claims do not allow the Court to understand
the particular rights or duties or areas of inconsistency that might possibly
arise.

150 Can I give you, for example, something that my friend has said? He
has referred to section 11(3) as preventing all types of claims. If you look
at section 11(3) of the covering Act, which was inserted by the amending
Act, it actually only says that:

155 On or after commencement, no proceedings can be brought, made or
begun against the State to the extent that the proceedings are or
would be –

and so forth. The similar corresponding provision in relation to protection
160 matters is in section 19(3).

So unless the arbitral claims were intended to be against the State,
then there would be no difficulty about contravening section 11(3) or 19(3).
Yet, if you look at paragraph 81 of the statement of claim, it is alleged that:

165 Subsections 11(3) and 19(3) of the WA Act prevent the
commencement of a proceeding (including an ICSID Convention
arbitration seeking an award unfavourable to the defendant) which is
in any way connected, respectively, with a ‘disputed matter’ or a
‘protected matter’.

170 Now, one answer to that might be well, the proceedings that are
contemplated are not contemplated to be made or begun against the State.
We would not know whether that is the case or not without some
explanation of the nature of the proceedings. If I can carry that thought
175 through, it might well be that the nature of the proceedings as they are
properly defined may not give rise to all of the inconsistencies which are
alleged.

180 So while there is a “covering the field” inconsistency which is
alleged, there is also an inconsistency based upon the alteration, impairment
or detraction from particular rights or duties and without knowing the
particular claims that are contemplated, it would not be possible to know
what particular rights are altered, impaired or detracted from and to the
extent that the claim is made against all of the provisions of the amending

185 Act as being inconsistent, if you get to that point it may be that if the claims
were properly defined you would understand what it is that is said to be
inconsistent but at the moment it is impossible to know that in any detail.

190 Perhaps I can illustrate that in a different way. In relation to the B54
proceedings there is a general claim of inconsistency – sorry, invalidity in
relation to a number of provisions which relate to the commencement of
proceedings in a particular time period and there never have been any and
will not be any proceedings within those areas and therefore the question of
constitutional invalidity will not arise.

195 It is the same sort of question here. What is really sought is a
general ruling from this Court as to the invalidity of the Act without having
defined the particular area of inconsistency in relation to concrete claims.
200 So, as I said at the outset, there are two points. One is that there is a
question about the existence of arbitral claims and then there is a question
about the precise nature of any arbitral claims and both of those matters
feed into the great difficulty that we would have in pleading to this.

205 Now, we have raised that at this point in a directions hearing so that
there might be an opportunity to re-plead if the plaintiff thinks that is
appropriate. If not, then we might need to take other steps to deal with this.
In terms of pleading a defence we should raise the hypothetical nature of
these matters and then seeking a determination of the Court about that, but
it would seem - - -

210 **HER HONOUR:** What would the determination of the Court be? Would
you be applying for a strikeout?

215 **MR THOMSON:** Quite possibly. It depends on the Court's attitude. It
might be that it is raised if there was – in response to the special case that
might be generated out of it. But we would suggest that the Court will have
a problem in determining all of these matters without some knowledge of
there being arbitral claims that Zeph believes it will begin and also knowing
the nature of those claims in order to know the areas of inconsistency that
220 are said to arise.

HER HONOUR: Yes. Mr Connolly, I can see the force of what the
Solicitor-General says in relation to this Court apprehending in a proper
way what the inconsistency and the area of operation of the inconsistency
225 is. Do you wish an opportunity to re-plead or do you wish the matter to
proceed to defence or strikeout?

MR CONNOLLY: Your Honour, we believe the matter is in a shape that
can be responded to by way of defence by Western Australia and if the

230 Solicitor-General in Western Australia wishes to take the separate course,
then it can obviously avail itself of that under an interlocutory proceeding.

HER HONOUR: Mr Solicitor, do you wish me to make directions as to
235 the filing of a defence – do you want to allow for any other steps, including
requests for particulars? I take it that no formal request has been made
because of the nature of what you say is the pleading problem?

MR THOMSON: That is correct. No formal request has been made.
240 Perhaps we should do that and then perhaps plead a defence in response,
having regard to any particulars that might be provided.

HER HONOUR: You do not have any particulars for me to direct the
plaintiff to respond to.

245 **MR THOMSON:** No. Your Honour is right. I suppose we – perhaps I
could take a step back. Perhaps we should just simply plead a defence and
if the plaintiff wishes to provide particulars then it may do so, but the
position is that we have made clear the hypothetical problems that we see in
250 this statement of claim and we propose to raise those and pursue those as
necessary.

HER HONOUR: I can see no problem with my directing that a defence
255 be filed by a particular time and the defendant at the same time, without me
directing it, providing a request for particulars to the plaintiff. That might
facilitate any further argument down the track about the nature of the
pleading. It would also give the plaintiff an opportunity to better
understand your concerns, I suspect.

MR THOMSON: Yes.
260

HER HONOUR: So there would seem to be good reason, perhaps, for
undertaking that dual path.

MR THOMSON: Yes. I gratefully adopt that course, your Honour.
265

HER HONOUR: How long would you take – do you need to file a
270 defence? I should say here, probably before we talk about that, I see that
the date proposed by Mr Connolly attempts to line up with B52 and B54, so
this is probably the time to discuss whether that should be the case. I have
to say, Mr Connolly, I am not - as presently minded, although it might
change in the future – presently minded to load up B52 and B54 with what
are very substantial topics.

275 The way I would envisage this matter proceeding would be for it to
most likely – and I am open to argument about this as we proceed with case

280 management – the most likely course would seem to me to be for this matter to follow as a hearing on B52 and B54 so that the Court would hear B52 and B54 and be familiar then with the amending Act provisions and then it could proceed in a separate hearing following to grapple with the inconsistency questions arising here.

285 **MR CONNOLLY:** Understood, your Honour, and I, to continue the analogy, would not like to see B52 and B54 be delayed in their departure from the runway, to use the military analogy of the planes. But in respect of us, your Honour, I understand my friend might find 19 October a date that is too soon and - - -

290 **HER HONOUR:** Particularly if he is going to be supplying a request for particulars at the same time.

MR CONNOLLY: I understand that, your Honour. We are in your hands, your Honour.

295 **HER HONOUR:** What is a realistic timeframe, Mr Solicitor?

MR THOMSON: If we could have till 26 October, which is just over two weeks from today, that would be helpful, your Honour.

300 **HER HONOUR:** Yes, I see no difficulty with that.

305 **MR THOMSON:** Can I just raise one other matter and that is that your Honour has referred to there being a directions hearing on the 21st for both B52 and B54. The position at the moment, as I understand it, is that technically only B52 is listed for directions on that date. I think that is correct.

310 **HER HONOUR:** Yes, that is right because – I think if I am getting the numbers right, B54 is awaiting the pleadings being put in order in B52, or is it the other way around?

MR THOMSON: So B52 is the proceeding by Mr Palmer personally.

315 **HER HONOUR:** That is where the pleadings need to be regularised before either matter, because they are proceeding in tandem.

MR THOMSON: Yes.

320 **HER HONOUR:** So B54 is waiting for those matters to be resolved before it gets back on track for further case management with B52.

325 **MR THOMSON:** Yes, and we propose to file a defence in B54 today, as ordered. I just thought I would raise that it is only B52 that has formally been listed on the 21st. Of course, I would be in a position to deal with whatever other orders are necessary in B54.

HER HONOUR: No. I think for the moment we just leave B52 resolve its problems.

330 **MR THOMSON:** Yes.

HER HONOUR: I do not think we need to try to line up this matter in terms of case management with the others, although down the track that may well be what we do. I think for the moment we just overcome the difficulties in pleading here and see where we are down the track.

335 **MR THOMSON:** Thank you, your Honour.

340 **HER HONOUR:** I would direct the defendant to file and serve its defence by 26 October and I will allow the parties some time to consider both the defence and what might be a request for particulars. If I put the matter over for further directions to 16 November it will, of course, be, you would appreciate, the intervening - the November sittings when Mr Palmer's section 92 case is being heard. I think unless there is - and I cannot see that there is any urgency and the parties could probably well do with
345 considering their positions - the pleadings if they want this matter to proceed with any kind of pace after that. So I will list the matter for directions on Monday, 16 November at - it would have to be minimum of 12 noon, I suppose, Mr Solicitor, with the time difference now.

350 **MR THOMSON:** Yes, thank you, your Honour.

HER HONOUR: Is 2.00 pm more convenient?

355 **MR THOMSON:** Your Honour, I think it is most likely - anticipating all things being considered - that I will be in self-isolation during that period of time. So I may be - - -

HER HONOUR: Of course, coming back from Canberra.

360 **MR THOMSON:** Yes. I have no difficulty about appearing from self-isolation, but I just mention that so that other people who might also need to be on that appearance call will be in a different location.

365 **HER HONOUR:** If that proves difficult, you would be out of isolation by the following week, the 23rd?

MR THOMSON: That is correct. I will come out on the 20th.

370 **HER HONOUR:** You will not be available – when you say out of it on the 20th, you would not be able to appear on the 20th?

375 **MR THOMSON:** No, that is correct. The first day I would be able to appear would be the 23rd – with everyone else in the same room. I mean, I can appear on the 16th with other people in other rooms. In fact, your Honour would know, I think, that I did that previously.

HER HONOUR: If that causes no difficulty we will stay with the 16th and we will list it for 12 noon.

380 **MR THOMSON:** Thank you, your Honour.

385 **HER HONOUR:** I do not think there are any other directions we can make today. We will review the matter. Hopefully, the parties can have some discussions in the meantime in order to advance the matter at the next directions hearing.

MR THOMSON: Thank you, your Honour.

390 **MR CONNOLLY:** Thank you, your Honour, understood.

HER HONOUR: Thank you, Mr Solicitor and Mr Connolly. The Court will now adjourn.

395

AT 2.25 PM THE MATTER WAS ADJOURNED

AustLII AustLII

AustLII AustLII AustLII

AustLII AustLII AustLII AustLII AustLII

AustLII AustLII AustLII AustLII

AustLII AustLII AustLII AustLII