[2020] HCATrans 196

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane

No B57 of 2020

B e t w e e n -

ZEPH INVESTMENTS PTE LTD

Plaintiff

and

STATE OF WESTERN AUSTRALIA

Defendant

KIEFEL CJ

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE BY VIDEO CONNECTION

ON MONDAY, 16 NOVEMBER 2020, AT 12.06 PM

MR R.G. McHUGH, SC: May it please the Court, I appear with my learned friends, **MR J.S. STELLIOS** and **MR G.A.F. CONNOLLY**, for the plaintiff. (instructed by Sophocles Lawyers)

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

HER HONOUR: I have read the parties' submissions on what further directions seem appropriate. Mr McHugh, I assume consideration has been given to whether to join the Commonwealth as a party, which would seem to overcome some of the problems that I suppose might be allowing it to intervene as necessary?

MR McHUGH: Notices pursuant to section 78B have been served obviously. The view that was taken was that if they were not a necessary party to this proceeding in the form that it is at the moment, it is really a claim only involving the validity of Western Australian legislation. Whether or not the Commonwealth has breached, it is not a necessary part of my claim in the High Court. My claim in the High Court turns on the fact that I have a genuine claim, that is that Zeph, the plaintiff, has a genuine arbitral claim that the Commonwealth is in breach. It is not necessary for this Court to determine whether or not the Commonwealth is in breach. Indeed, it is no part of the case for the Commonwealth to determine that.

Your Honours, one thing I was – I had in mind to do, if it was convenient to the Court, was just to explain what we perceive to be an error that runs through the State's submission.

HER HONOUR: Yes.

MR McHUGH: The argument that - in order for me to advance the arguments that Zeph wishes to advance in your Honour's Court, it is necessary that there be a more precise identification of the particular claims in the SAFTA arbitration. I wanted to show your Honour why that is wrong and why all that is really necessary is for me to show that there is an arguable arbitration that is in some way connected with – because that is the statutory language – what are defined as "disputed matters" or "protected matters". If it is convenient to your Honour for me to do that, I will take your Honour through some of the provisions, if your Honour had the West Australian Act close to hand to show why that is the case.

HER HONOUR: No, I do not actually, but I am sure you can outline it for me.

MR McHUGH: Your Honour, the way it works is this. Under section 7 of the Western Australian Act there is a very broad definition of "connected with". It is an extremely broad provision. There is then a definition of what are called "disputed matters" and that lists off a great number of things that include in paragraph (a) of the definition the Minister's refusal in September 2012 to accept what is described as the first Balmoral South proposal as a valid proposal. That was at the heart of the underlying dispute that was being arbitrated before Mr McHugh. Also among the definition of "disputed matter" in paragraph (f) is:

> to the extent not [otherwise] covered . . . any conduct of the State . . . occurring or arising before commencement and connected with the Balmoral South Iron Ore Project –

So it is an extremely broad definition of "disputed matter". Then there is a definition of something called "protected matters", also in section 7. Your Honour, that defines "protected matters" in paragraph (a) as:

> the consideration of courses of action for resolving, addressing or otherwise dealing with a disputed matter or liabilities or proceedings, or potential liabilities or proceedings, connected with a disputed matter –

Paragraph (e):

> the enactment or coming into operation of the amending Act –

that is relevantly the one that inserted the new Part 3 into the Western Australia legislation that already existed – then paragraph (j) is:

> the operation of this Part –

and then paragraph (l) is:

> any matter or thing connected with a protected matter –

that is referred to. So it is very, very broadly defined. If your Honour then takes up our written submissions, I can do the rest of this from that. At page 5 of the written submissions, paragraph 16, starting at the top of the page, 5, paragraph a - paragraph a summarises the indemnity provisions that operate directly against Mineralogy and International Minerals, which are subsidiaries of my client, and also directly against Mr Palmer, who is a director of my client.

Your Honour sees that there is an obligation to indemnify the defendant against, relevantly, the arbitration or losses connected with the stating of an intention to commence the proceeding or threatening to do so. So that becomes important a little bit further on in the argument, your Honour, because even to state an intention or the desire to commence the arbitration or, for example, to file the notice that has to be provided under the SAFTA regime 90 days before commencing an arbitration stating an intention, all of those things will engage the indemnity.

Then, paragraph b, your Honour sees by section 15 the plaintiff itself has to give an indemnity in respect of the State. Then when your Honour comes to paragraph c, your Honour sees the definitions of "loss" and "liability" include prospective losses and losses, as your Honour sees by…..the words "connected with" that are in anticipation of an actual liability. In paragraph d your Honour sees that the various indemnity provisions provide that:

> the Defendant may enforce the indemnities even if the Defendant has not made any payment –

So that becomes significant for when we get to what is in paragraph e which is the provision relating to the Commonwealth. Your Honour sees the reference in paragraph e to sections 16 and 24 of the WA Act. Section 16 is concerned with claims connected with "disputed matters" as defined and then section 24 is concerned with claims connected with "protected matters" as defined. So those are the definitions that I took your Honour to earlier.

The effect of this regime on its face is that as soon as my client has an arbitration against the Commonwealth in connection with any disputed matter or any protected matter, the indemnity regime kicks in. It already operates against my client at this point. The important point about this – and I will have to read to your Honour from the provisions – I will take section 16 as an example, section 16(2)(b) says that the relevant indemnity section applies if:

> (a) proceedings are brought, made or begun against the Commonwealth or the Commonwealth incurs a liability; and
>
> (b) the proceedings, liability or loss are connected with a disputed matter.

That is the only nexus that is required – some connection with a disputed matter. Under section 24(2)(b), your Honour, the same regime applies but in that case it is "connected with a protected matter", that is including the

enactment of the Act. So that is all that is necessary to engage these indemnities.

If your Honour will come with me into the exhibits to Ms Tan's affidavit – that was filed by the defendant on the directions application. It is conveniently paginated in the bottom right-hand corner and if your Honour turns to what is AT2 starting at page 10, which is the further and better particulars that was provided on about 5 November, I think it was, your Honour – if your Honour comes through to page 12 and to paragraph 2b, the particulars given are that:

> The Plaintiff has genuine claims for breaches of . . . Chapter 8 of SAFTA including those set out in a letter from Volterra Fietta –

I will come to that letter very shortly, but if your Honour comes over to page 14 in the bottom right-hand corner and paragraph e in the middle of the page, your Honour sees that the loss and damage that is the subject of the SAFTA arbitration is the:

> diminution in the economic value of the Plaintiff's investment as a consequence of the WA Act, including but not limited to the value of the lost opportunity to pursue the damages arbitration before the arbitrator.

Now, that damages arbitration…...and all of the disputed matters that I referred to a moment ago that are defined in section 7 of the Act. If your Honour then comes to the letter from Volterra Fietta that starts on page 19, your Honour will see this is addressed to the Minister for Foreign Affairs. This is what commences the consultation regime under the SAFTA arrangements. If your Honour turns to page 20 there is a heading at the top, "Background to the Dispute". The fifth paragraph on that page begins:

> On 4 September 2012, the Government of Western Australia refused to consider –

That is more or less word for word paragraph (a) of the definition of a "disputed matter". I might be overstating in saying it is word for word but it is absolutely the substance of what is the definition in paragraph (a) of "disputed matter". If your Honour comes over to page 22, at the foot of the page under the heading "The Dispute", there is a heading "The 2020 Amendment Act" and the paragraph says:

> Faced with the consequences of its unlawful actions, the Government of Western Australia enacted the 2020 Amendment Act. This was an arbitrary and discriminatory attempt to derail the –

arbitration. Then if your Honour comes to the top of the next page, there is a reference to the drafting of the 2020 Act and then in the middle of the page, before the series of subparagraphs, there is a paragraph that says:

> The 2002 State Agreement Act, as amended by the 2020 Amendment Act, provides *inter alia* that –

That is, it is setting out the operation of the new Act and that is paragraph (j) of the definition of "protected matter". So, your Honour, the point of all of that is one does not need any more particulars of my client's claims under SAFTA for it to be completely clear that the provisions of the Western Australian Act that are relevant to the case in the High Court are engaged by the arbitration that my client is proposing to bring, or wishes to bring, I should say. Sorry, I should withdraw that language and say that it has the right to bring because I do not want to threaten and I do not want to state an intention to bring it at the moment because I do not want any indemnities to be engaged.

Your Honour sees on page 25 of that letter there is, in a summary form, in the middle of the page, a listing of aspects of the SAFTA regime that are said to be infringed. But on any version, one would have to agree that this arbitration would call into question the disputed matters and the protected matters, which is part of the language of section 12 and section 20, I think it is, of the Western Australian Act which is concerned with preventing these things from being commenced in the first place.

The upshot of all of that, your Honour, is that my submission is it is not necessary to go further into the nature of the arbitration and nor is it necessary to join the Commonwealth for these purposes. It is enough that there is a claim that is a genuine one against the Commonwealth, and at that point my submission is the Western Australian regime is engaged and that gives rise to the questions of constitutional invalidity.

HER HONOUR: Is there any fact that you say you need to rely upon as the existence of the dispute?

MR McHUGH: Of genuine claims and they are genuine claims that are connected with disputed matters or protected matters as defined. That would have been insufficient to engage the Act. So, all that being so, my submission is that the parties should get on with preparing the special case.

In B54 I am instructed a draft of the special case was sent to the defendant on about 10 November and I do not understand, at least at the moment – my friend the Solicitor-General may be able to tell me if I am wrong about this – but I do not know that that has yet been responded to. But certainly, much of what is in that draft special case in B54 would have

an overlap with a special case in B57 because of the…..and a lot of the history and so on, and no doubt that can be agreed.

HER HONOUR: Mr McHugh, just speaking about the other two cases, as you have probably been made aware, B52 and B54 are somewhat parked just for the moment whilst Mr Palmer's pleading is more closely looked at. I think that is occurring this afternoon in an application before Justice Nettle. But, sequentially, would it - I take it that it would make sense that this matter would follow on from – if one were talking about a hearing, it would make sense for this matter to follow on from the determination in B52 and B54, that is, you would have a hearing of them and then come to the separate…..for which you contend whilst the earlier, more general questions of invalidity in those two matters were - - -

MR McHUGH: Your Honours, yes, as to sequence, but I just need to be clear about the timing of what I have in mind. I certainly would not accept that it makes sense for us to await the judgment in B52 and B54 before my - - -

HER HONOUR: No, I was thinking that the hearing would simply follow on, that B52 and B54 would be heard and then the Court would proceed to a hearing of this matter so that all issues then could be ventilated. But trying to manage a hearing of all three together, I think, would be problematic.

MR McHUGH: I completely agree with what your Honour suggests. The sensible thing would be for this to commence immediately after the conclusion of the argument in B52 and B54.

HER HONOUR: Yes.

MR McHUGH: While the Court was dealing with all the provisions. But it really is a separate and much more narrow and discrete argument in my case.

HER HONOUR: Yes. But talking about timing, the defendants point out that the plaintiff has started the consultation process with the Commonwealth regarding an arbitration. Does that have any impact upon when this needs to be heard, or should be heard?

MR McHUGH: Only a quite minor impact, for this reason, your Honour. Under Article 24(2) of SAFTA, my client would have to file a written notice of intention to submit a claim for arbitration at least 90 days before it commenced. So my friend in his submissions has rightly calculated that there is six months between the commencement of consultations and the time at which one can actually file the arbitration proper some time in the middle of April. My friend is right about that. But my client at any time,

90 days before then, can file the notice of intention to submit a claim to arbitration.

If one wished to commence an arbitration in April, if that is what my client was minded to do, then it would have to do the notice of intention no later than the middle of January. Now, I am not suggesting that it presently wishes to do that. I am not making that submission. But I just merely make the point that my client is already being impeded even from doing that necessary step and which it needs to do 90 days before it is allowed to commence.

So the position is it is true that no arbitration could be commenced before April in any event and, realistically, it does not seem likely, on any view that I have put – I certainly would not have instructions to suggest that there would be any prospect that an arbitration would be commenced before the determination in the High Court of the claim the subject of B57. So on any version we will be awaiting that.

The upshot of all that, your Honour, is realistically the cases probably should travel together. I accept that it makes sense for B52 and B54 to be heard immediately before my case, but in the meantime, my submission is there is no reason why the parties should not be getting on with preparing a special case so that we will be ready when B52 and B54 are ready to proceed themselves. Justice Nettle, I understand, is hearing the application this afternoon, but for constitutional reasons I take it that will have to be disposed of within a couple of weeks in any event.

HER HONOUR: Yes, that is right.

MR McHUGH: So, your Honour, my submission – I do not suggest this is crushingly urgent, but equally it should not be delayed without good reason. Your Honour, I should also say this. On my reading of the defence, the substance of most of this is unsurprisingly admitted.

HER HONOUR: Yes.

MR McHUGH: From time to time the defence adds the various qualifications or additions which could all be accommodated within a special case. There does not seem to be any real substance to suggest we could not agree a special case and I do not understand my friend to be saying otherwise.

HER HONOUR: I do not understand – I will hear from the Solicitor in a moment – I do not understand him to suggest that steps should not be taken towards agreeing a special case and reserved questions at all. I see that your timetable, though, brings the matter back on for directions just before

Christmas. Is that with a view to lining up hearings at some time – it certainly would not be February, maybe not even March, but to timetabling into next year for hearings?

MR McHUGH: That was what we had in mind. It is possible that that timing is ambitious. It is possible that it is ambitious because we were contemplating agreeing the special case by 11 December. We had had that in there because of the concern about the summer when everything will grind to a halt.

HER HONOUR: The alternative is – well, two alternatives. One would be to leave it open till the end of January before the February sittings start when it could be reviewed, and that would give B52 and B54 time to get back on track, or we could just adjourn it to a date to be fixed as soon as we knew what had happened with the other matters.

MR McHUGH: Your Honour, if it was right at the end of January, in that week that ends – I just have my diary out, your Honour.

HER HONOUR: It ends the 29th. I was thinking of perhaps the 28th.

MR McHUGH: Your Honour, I cannot see why we could not have a directions hearing on either the 28th or the 29th, if that was a sensible time and convenient to the Court and to my friend.

HER HONOUR: That would probably give the other matters time to sort out – as you say, I would expect Justice Nettle to deal with the matter expeditiously in the event, but the position with this is that it might be clarified before year's end.

MR McHUGH: Yes, there is every chance of that.

HER HONOUR: Yes. Mr Solicitor, I did not understand you to suggest that the matter should not proceed to the preparation of a special case with reserved questions. It was really just more a question of timing of further directions.

MR THOMSON: That is correct. Can I ask whether the Court would be assisted in hearing at least some response to the matters that Mr McHugh has outlined.

HER HONOUR: Of course, Mr Solicitor.

MR THOMSON: It has been suggested that there is a thread that – of an error which flows through our position. Can I commence by saying that although my friend has emphasised that there is a genuineness to the claims

that are made, what is pleaded is the existence of arbitral claims and my friend actually stopped himself in the course of his submissions from making the submission that there was an intention to bring an arbitration at this stage. Clearly, that is not pleaded.

The crux of the case depends upon demonstrating that there is some form of inconsistency as between the *International Arbitration Act* or the Commonwealth's prerogative to deal with foreign affairs and the amending Act and that inconsistency, we say, is a matter of understanding how the amending Act might apply in relation to the arbitration, which is not an arbitration to which we are party, but an arbitration between Zeph and the Commonwealth. Quite oddly, Zeph is not the owner of any investments itself but only the economic beneficiary of an investment and the Commonwealth is the party to the arbitration, not us.

So in that respect the amending Act and its operation needs to be assessed by reference to the particular nature of the matters that are to be understood in that context and that is something that appears to be the basis for paragraph 73 which pleads that the arbitral claims are related to four articles of the SAFTA, Articles 4, 5, 6 and 13. It is clear from the letter that has been given by Volterra Fietta that the only ones that are pursued, at least for the purposes of notice, are Articles 4, 5 and 6, and not 13 and, therefore, there is an element of understanding that there are at least three matters in terms of arbitral claims which are to be pursued.

If you look at the letter from Volterra Fietta, which is annexed to the affidavit of Ms Tan, to which your Honour has already been taken, you will see at page 25 of that affidavit the terms of the obligations which are said to have been breached which are in Article 6 "fair and equitable treatment" or "full protection and security"; in Article 4, that an investment is treated in no less favourable manner than the treatment Australia accords to its own investors and investments; and, in Article 5, the "most-favoured nation" clause, all of which relate to the effect of a measure, or the effect of the amending Act.

It is therefore necessary to understand two things: one, how the amending Act has the relevant effects that are stated there and that is impossible to do without understanding the nature of the arbitrary claim and it is also difficult to understand how anything to do with the process of enacting the amending Act, where they have anything to do with the objective effect, that is part of the arbitrary claim.

There is indeed an attempt by Zeph to raise all sorts of matters relating to the process by which the Act was passed as relevant to the arbitral claims and we say all of those things cannot be determined without understanding the particular nature of the arbitral claims.

HER HONOUR: So, as I understand your position then, Mr Solicitor, it would be that if the special case – if there is no difficulty with facts as there does not seem to be, if the matter proceeded by way of the draft reserved questions which the plaintiffs have put in their submissions, something of that order, you would be submitting to the Court in substantive submissions that the questions could not be answered because there is no matter before the Court.

MR THOMSON: That is precisely right. The reason why we have not pursued anything in the nature of a strike-out application is because - - -

HER HONOUR: Or a demurrer.

MR THOMSON: Or a demurrer, or something of that nature is because we anticipate that what would occur is that it would be referred to the Full Court and that the Full Court would determine it one way or the other, somewhat akin to…..but if we happen to be wrong about the hypothetical nature of the matter, and there are obviously other things to be determined as a consequence of that, and we would want to make submissions about that as well, so having regard to the facts that it is most likely that this question about the hypothetical nature or the advisory nature of what is contended will come before the Full Court and, wishing more so to have the ability to make submissions about other matters if we were wrong about that, then we have taken the view that it can be dealt with by way of a special case, but that view does not in any way mean that we do not rely upon the hypothetical or advisory nature of what is sought here.

HER HONOUR: I understand. What do you say to the idea that this matter ought to follow in terms of hearing on the heels of the hearing of B52 and B54? That seems the most sensible course to me.

MR THOMSON: In one respect we can see the force of that, but as we say in our submissions, clearly if – and we do not think it is the case, of course, but if there was a determination that any or all aspects of the amending Act are invalid, then there are no arbitrary claims because whatever be the case, the arbitrary claims are based upon the validity of the amending Act.

So, in that respect, and this might lead into some of the practicalities of it, if the Court perhaps was leaning to the view that some aspect of the amending Act was invalid, but that is the very aspect that would activate the basis for any arbitral claims in relation to the Singapore Australia Free Trade Agreement, then that arbitral claim would in fact not exist.

So for that reason there might be some convenience in determining the validity of the amending Act upon the grounds that are the subject of challenge in relation to B52 and B54 which are subject to one observation I will make. It is now completely distinct from the grounds which are raised in this case. The one observation I will make is that Mr Palmer in B52 has sought to raise, we would say in an abbreviated and incomplete manner, the same issues that are raised in B57, but with that – those six validations are the subject of the strike-out application this afternoon before his Honour Justice Nettle.

So, leaving that aside, the crossover between the grounds of invalidity in B57 and B54 are completely separate and there is that one attempt to try by way of a compendious pleading on behalf of Mr Palmer to incorporate what is effectively the whole of B57 into his pleading in B52.

HER HONOUR: Mr Solicitor, in relation to this matter, you would perhaps wish to argue at the next directions hearing, which might be taking steps towards hearings, and particularly if this can be lined up with B52 and B54 at that point, you might wish to argue that B52 and B54 ought to be not only heard, but determined before this matter proceeds?

MR THOMSON: That is correct.

HER HONOUR: All right. That could be left for hopefully a directions hearing which involves the other two matters as well. We could set a date for further directions towards the end of January in the hope that that fits in with where those matters will be proceeding when the pleadings are sorted out. If we need to alter that date, we could do so. I take it that you have no objection otherwise to the – well, perhaps only with – let us check the dates. If we were looking at a directions date in late January, what do the parties say about the time that they would wish to allow themselves to agree a special case for filing? You would still wish to do it before the year's end, I would think - - -

MR McHUGH: Your Honour, speaking for my part, certainly we will endeavour to do that. The one reason why I am hesitating is because of what I was mentioning earlier, that in relation to B54 I understand there is already a lot of work that has been done towards at least what would be the first half of a special case to be common to my matter. For that reason, although I would hope to get it done by 11 December, if we were not coming back to Court until the end of January, it may be better not to put a hard date on it so that no one ends up being in breach of it, but if the parties work together once the Court has made an order that the plaintiff prepare a special case pursuant to rule 27.08, no doubt our friends will co-operate in a sensible way to progress that. So it may not be necessary to put a date on it yet.

HER HONOUR: Yes. Would you agree with that, Mr Solicitor?

MR THOMSON: Yes. The only reservation I have is…..previously foreshadowed probably he and I may be unavailable in January but I would make myself available to settle the drafts if that is necessary.

MR McHUGH: I should certainly say to the Court, and also for the benefit of my friend, for my part on our side, we will be endeavouring to get something organised by the timeframe that was contemplated in the order. I just do not know if it will be possible, but that is certainly what we will endeavour to do so that my friend would get a good chance to look at it well before January and well before Christmas is what I would be hoping in any event.

There is one other matter I should raise, your Honour, which is that my friend in his orders contemplated the possibility of filing a reply. At the moment I am not sure that one is necessary. It is possible that in the course of formulating the special case it will become apparent that it is appropriate, but on my consulting the rules, it does not seem to be required unless there was something in the nature of a fact that would take a party by surprise or a pleading in defeasance of a positive, affirmative defence. I do not understand my friend's defence at the moment really to be of that kind.

So it may be that if it becomes appropriate to file a reply, we will do one, but, your Honour, my friend was suggesting that we do one within about a week or two and I do not regard that as something that is necessary for the matter to proceed.

HER HONOUR: Mr Solicitor, do you say a reply is essential, or was this just a pro forma direction?

MR THOMSON: I had assumed that there might be a reply. Whether there is or not is a matter for my friend.

HER HONOUR: Yes.

MR THOMSON: So I am content with a view that if he regards a reply as being appropriate during the course of the preparation of the special case, that he would file one. I am putting 27 November for the sake of good order.

HER HONOUR: All right. Shall I then make orders in terms that:

1. The plaintiff prepare a special case pursuant to rule 27.08 of the *High Court Rules 2004* (Cth) for agreement by the defendant.

2. The parties thereafter confer about the preparation of a special case and reserve questions of law.

3. The matter be adjourned for further directions to Friday, 29 January 2021 at 11.00 am –

but on the understanding, which is not necessary to be expressed, that if that date needs to be changed to line up with directions in the other two matters, the Court will confer with the parties to reset a date.

Yes, thank you, gentlemen, and Ms Seaward. There will be orders in those terms.

The Court will now adjourn.

AT 12.44 PM THE MATTER WAS ADJOURNED