Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

BATHURST RESOURCES LTD v L & M COAL HOLDINGS LTD

(SC 29/2020) [2021] NZSC 85

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

This appeal arises out of a dispute concerning the proper interpretation of a contract for the sale of coal mining rights in the Buller Coalfield. In June 2010, Bathurst Resources Ltd (Bathurst) agreed to purchase coal exploration rights and mining-related applications from L & M Coal Holdings Ltd (L&M). The transaction was structured as a sale of all the shares in the company which held the assets, Buller Coal Ltd.

The purchase price for these rights provided by the Agreement for Sale and Purchase (the Agreement) was a deposit of USD 5 million and settlement cash of USD 35 million. Further, two performance payments, each of USD 40 million, were agreed to be payable when 25,000 tonnes, and then one million tonnes, of coal had been "shipped from the Permit Areas". Alongside the Agreement, the parties executed a royalty deed which had the effect that Bathurst was obliged to pay royalties to L&M on all coal sales at a graduated rate, depending on the stage of mining operations.

In 2012, Bathurst and L&M entered into a deed varying the original written Agreement. The deed inserted a new cl 3.10 into the Agreement, which provided that the failure by Bathurst to make the performance payments when and as due would not be an actionable breach, for so long as the relevant royalty payments continued to be made under the royalty deed.

By September 2015, Bathurst had extracted more than 25,000 tonnes of coal which it sold to a domestic buyer. By early 2016, there had been a significant fall in international coal prices and Bathurst's domestic buyer had announced its closure. Following these developments, in

March 2016 Bathurst suspended mining operations and stopped paying royalties for ongoing mining.

Issues on appeal

There were two core issues between the parties as to the interpretation of the Agreement, both of which were resolved in favour of L&M in the High Court and Court of Appeal. The first, whether the first performance payment obligation had been triggered, turned on the interpretation of the expression "shipped from the Permit Areas". Bathurst argued "shipped" should be given a literal interpretation, carriage by ship, and therefore the first performance payment had not been triggered by its extraction and transport off-site of 25,000 tonnes of coal which it sold into the domestic market.

The second issue was whether, if the first performance payment obligation had been triggered, Bathurst was contractually entitled by way of cl 3.10 to continue to defer that payment even though it has stopped mining and paying royalties. L&M said that Bathurst's entitlement to defer payment lasted only so long as it was continuing to pay royalties flowing from ongoing mining. If this meaning could not be reached through the process of interpretation, L&M asked the Court to imply a term to this effect. Bathurst argued cl 3.10 was clear on its own terms, and meant that Bathurst could indefinitely defer paying the performance payment so long as it continued to pay any royalties that became due under the royalty deed.

More generally, this appeal raised the issue of what evidence outside the words of the contract should be allowed to assist with the task of contractual interpretation, and the application of the Evidence Act 2006 in this area. It also raised the question as to the test to be applied to the implication of contractual terms.

Decision

By a majority, comprising Glazebrook, O'Regan and Williams JJ, the Supreme Court has allowed the appeal. The Court was unanimous on the first issue and on the approach to be taken to extrinsic evidence and implied terms in contractual interpretation.

The Court agreed that the approach to be taken to the interpretation of written contracts is governed by the law of contract and is an objective task. However, the admissibility or otherwise of extrinsic evidence is an evidential issue, to be determined in accordance with the law of evidence in light of the substantive law of contract. As New Zealand's evidence law is governed by the Evidence Act, relevance and probative value are the touchstones for admissibility of such evidence. This means, for example, that a blanket rule rendering evidence of pre-contractual negotiations inadmissible is not justifiable. Regarding the implication of terms, all members of the Court agreed that the implication of a term is part of the construction of the written contract as a whole. They held that an unexpressed term can only be implied if it is strictly necessary, in that the term would spell out what the contract, read against the relevant background, must be understood to mean.

As to the first issue in the case at hand, all members of the Court found in favour of L&M's interpretation of the expression "shipped from the Permit Areas". The Court, in agreement with the High Court and Court of Appeal, found that "shipped" should be given the generic meaning of "transported". In doing so, it rejected as inadmissible the subjective and uncommunicated declarations of intent as to the meaning of "shipped" from the principals of

both parties. Therefore, the Court found that the first performance payment had been triggered.

On the second issue, Glazebrook, O'Regan and Williams JJ held that, contrary to the High Court and Court of Appeal judgments, cl 3.10 correctly interpreted simply required royalty payments to be made under the royalty deed as and when the royalty deed required them. It did not impose any new requirement in relation to a certain minimum level of royalties, or any obligation on the part of Bathurst to develop and exploit the mine. Further, they found that the requirements for the implication of a term to this effect were not met, and that L&M's other fallback arguments could not succeed. Therefore, Bathurst's deferral of its obligation to pay the performance payment while suspending mining operations had not created an actionable breach, and the appeal was allowed.

Winkelmann CJ and Ellen France J were of the view that a reasonable person with all the available background would interpret cl 3.10 to mean that Bathurst could only rely on the right to deferral if it was paying royalties at a level consistent with a productive mine. Since Bathurst was not doing so, L&M had become entitled to be paid the debt owing to it. On this approach it was not necessary to consider the alternative argument for L&M of an implied term. If it had been necessary, Winkelmann CJ and Ellen France J would have implied a term that Bathurst ceasing to mine on a level equating to that which triggered the obligation to make the performance payment (while, at the same time, refusing to pay the USD 40 million payment that had become due) was a breach of contract, entitling L&M to compensation. Winkelmann CJ and Ellen France J would have dismissed the appeal.

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