

SUPREME COURT OF QUEENSLAND

CITATION: *Foxleigh Land Pty Ltd v Kenny & Ors* [2016] QSC 21

PARTIES: **FOXLEIGH LAND PTY LTD (ACN 088 327 226)**
(applicant)
v
KEVIN DAMIEN KENNY
(first respondent)
CELESTINE KENNY
(second respondent)
MATTHEW KENNY
(third respondent)
KERRI KENNY
(fourth respondent)

FILE NO: BS932 of 2016

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 19 February 2016

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2016

JUDGE: Mullins J

ORDER: **1. The first respondent's application for a stay of the originating application is dismissed.**
2. The application filed on 2 February 2016 and the originating application are otherwise adjourned to a date to be fixed.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where buyer purchased the seller's property for mining purposes – where buyer entered into an agistment license with the seller for the term of the mining lease granted over the land – where the agistment license gave the buyer a right to terminate if the land was required for mining or ancillary activities – whether a requirement of the land for mining or ancillary activities was a precondition to termination – whether in the circumstances there was an issue of fact to be addressed on whether the precondition was satisfied – where the parties sought declarations of rights – where outstanding issues of fact

precluded determining the rights of the parties on a summary basis

Mineral Resources Act 1989 (Qld), s 235, s 402
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 11, s 12, s 329

Cowell v Rosehill Racecourse Co Ltd (1937) 56 CLR 605; [1937] HCA 17, considered
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited (2015) 89 ALJR 990; [2015] HCA 37, followed

COUNSEL: D M Logan QC with S J Carius for the applicant
 E J Morzone for the respondents

SOLICITORS: Blackston Lawyers for the applicant
 Emanate Legal for the respondents

- [1] By sale agreement dated 26 April 2012 the applicant purchased land near Middlemount, having an area of about 12,140 hectares, from the first respondent for \$33.5m plus GST to facilitate a mining joint venture. The full purchase price (which also covered the compensation payable by the mining tenement holders arising from the grant of mining leases over the land) was paid over the period from 30 April 2012 to 15 January 2016 and the applicant became the registered owner of the subject land on 7 May 2013.
- [2] Pursuant to the sale agreement the applicant agreed to enter into an Agistment Licence with the first respondent granting the first respondent a licence to agist livestock on the Agistment Area (as defined in the Agistment Licence) and occupy the Tralee Homestead Area together with other authorised persons. The parties entered into the Agistment Licence on or about 18 February 2013. One mining lease (ML70470) was granted on 13 November 2012 for 22 years with an expiry date of 30 November 2034 in relation to a part of the subject land. Another three mining leases (ML70429, ML70430 and ML70431) were granted on 22 September 2014 with the same expiry date of 30 November 2034 in relation to other parts of the subject land, but the mining leases do not cover the whole of the subject land. They cover about 4,233 hectares.
- [3] On 23 November 2015 the applicant gave the first respondent 90 days' notice of the termination of the Agistment Licence and requiring the first respondent to vacate the Agistment Area and the Tralee Homestead Area. The notice specifies that the applicant "requires part of Tralee Station for mining and ancillary activities, as shown in the enclosed plan". The enclosed plan basically shows the whole of the land (apart from the part covered by ML70470) and another part excised on the western boundary. The application has proceeded on the basis that the notice intended to terminate the licence in respect of the entire Agistment Area. The respondents dispute the validity of the termination of the licence. The applicant also gave the respondents a notice to leave dated 22 December 2015 issued under the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (RTA). The applicant seeks a declaration that, on the proper construction of the Agistment Licence, the notice of termination was effective to terminate the Licence

Agreement and that the licence to the respondents to occupy the Tralee Homestead Area was validly terminated by both the notice of termination and the notice to leave.

The sale agreement

- [4] The applicant agreed to grant the Agistment Licence to the first respondent from the Date of Completion, as defined in the sale agreement.
- [5] Clause 65 of sale agreement made provision for the occupation of the Tralee Homestead Area in accordance with the terms of the Agistment Licence, but also set out additional provisions concerning the relocation of specified improvements on the Tralee Homestead Area. Under clause 65.5 of the sale agreement the parties agreed that if the Tenement Holder were to acquire the Tralee Homestead Area, the applicant would relocate the two houses and all auxiliary improvements located in the Tralee Homestead Area to an area located within identified paddocks to a location as directed by the first respondent. Pursuant to clause 65.6 the parties agreed that the relocation in accordance with clause 65.5 would occur no later than June 2013. That relocation did not take place. A second right of relocation is provided for in clause 65.9 of the sale agreement.
- [6] Clause 66 of the sale agreement provides for the re-transfer of the land to the first respondent at the end of the term of the mining lease or upon earlier notice by the applicant for the amount of \$1 on the terms and conditions set out in clause 66.2, but subject to the preconditions of sale set out in clause 66.3.
- [7] Clauses 66.2 and 66.3 provide:
- “66.2** The terms and conditions of sale are:
- (a) The Seller agrees to take the reconveyance of the Land on an as is basis as at the date of the reconveyance;
 - (b) The Seller will not raise any objection or seek any compensation from the Buyer for any alterations or changes to the Land made by the Buyer while the Buyer was the registered owner of the Land or as a result of any Mining Leases over the Land, including, but not limited to:
 - (i) Any damage to, removal or relocation of or alteration to any buildings, improvements, water courses, dams, fencing or soil on the Land;
 - (ii) Any damage, alteration or reduction in the productivity of the Land for farming purposes; and
 - (iii) Any impact on the Seller’s ability to use the land for its desired purposes.
 - (c) The Buyer is not obligated or required to restore the Land or any building or improvements on the Land to their original condition prior to the sale of the Land to the Buyer.

66.3 The preconditions for sale are:

- (a) The Buyer has given the Seller written notice that the Buyer no longer requires the Land or the term of the Mining Lease(s) over the Land has ended.”

[8] Under clause 68.1 of the sale agreement, the parties agreed that any dispute arising from the sale agreement would be resolved in the manner detailed in clause 68 which provides for expert determination and that either party may not commence court proceedings or arbitration concerning the dispute unless the requirements set out in clause 68.1 were fulfilled.

The Agistment Licence

- [9] There are a number of relevant definitions in the Agistment Licence.
- [10] “Agistment Area” is defined to mean “the area of the Land identified as red (that is, the shaded part) in the attached plan of Tralee as detailed in **Annexure A** but subject to Clause 8 and excluding any part of the Land that is subject to a Mining Lease.”
- [11] Annexure A is a map in which the land, excluding that covered by ML70470, is shaded.
- [12] The term “Land” refers to the land defined in the sale agreement.
- [13] “Licence” is defined to mean “this licence agreement and includes any schedules, annexures, attachments, modifications or variations to it”.
- [14] The definition of “Mining Activities” is:
 “all works performed for the purposes of extracting resources, including ancillary operations required to facilitate the extraction of resources, including, but not limited to, transport access, pipelines and environmental works such as creek diversions and levees.”
- [15] The term “Mining Lease” refers to the mining lease or mining leases over the land to be granted in accordance with the terms of the *Mineral Resources Act 1989 (Qld) (MRA)*.
- [16] The term of the Agistment Licence is specified to be the period commencing on the Date of Completion of the sale agreement and expiring on termination of the Mining Lease, or as otherwise agreed between the parties in accordance with the terms of the Agistment Licence.
- [17] The definition of “Tralee Homestead Area” is:
 “the homestead known as ‘Tralee’ and the curtilage of such as directed by the Licensee as detailed in the attached plan of Tralee in **Annexure B**.”
- [18] The plan which is Annexure B shows the curtilage as an area of approximately 25 hectares. Using that plan in conjunction with the plan of the areas the subject of the

mining leases (p 10 of exhibit AJD4 to the affidavit of AJ Douglas filed on 3 February 2016), locates the Tralee Homestead Area on ML70431. That was not conceded by the applicant, but it is clear from a comparison of these plans.

- [19] The licence fee payable by the first respondent under the Agistment Licence is the amount of \$1 per annum (if demanded, payable yearly in advance).
- [20] Under clause 2.1 the applicant grants the first respondent a licence to use the Agistment Area for the purpose of agisting livestock for the term, subject to the terms and conditions set out in the Agistment Licence.
- [21] Clause 5.1 contains an acknowledgement by the first respondent that the rights granted by the Agistment Licence are subject to the applicant, the Tenement Holder and their employees, agents and contractors, having access to the Agistment Area at all times on first giving the first respondent 24 hours' notice, together with all necessary vehicles, machinery and equipment for any activities associated with the exploration, development of, or mining on the land and any part of the Agistment Area, caretaking, and survey and completion of necessary investigations for development of the land. Under clause 5.2, the applicant is given access to the Agistment Area at all times in its absolute discretion for exploration or inspection purposes or for any reason whatsoever provided 24 hours' notice is given. By clause 5.3, the first respondent must comply with any reasonable directions issued by the applicant in relation to the land from time to time.
- [22] Clause 6 specifies the obligations of the first respondent in relation to the grazing of livestock on the Agistment Area. Under clause 7.1, the applicant must not interfere with the first respondent or any of its authorised persons in the enjoyment of any powers or rights granted to the first respondent under the Agistment Licence, but subject to clause 7.2 which contains an acknowledgement in terms that reflect the applicant's right of access to the Agistment Area set out in clause 5.1:

“7.2 The Licensee acknowledge the rights granted by this Agreement are subject to the Licensor, the Tenement Holder and their employees, agents and contractors, having access to the Agistment Area at all times on first giving the Licensee twenty four (24) hours' notice, together with all necessary vehicles, machinery and equipment for:

- (a) Any activities associated with the exploration, development of or mining on the Land and any part of the Agistment Area, including, without limitation:
- (i) any Mining Activities;
 - (ii) any Authorised Activities; and
 - (iii) any activities associated with any Mining Tenement, Mining Lease, Exploration Permits for Coal, Compensation Agreement or Environmental Authority;
- (b) Caretaking; and

(c) Survey and completion of necessary investigations for development of the Land.”

[23] Clause 8 provides for a reduction in the Agistment Area in respect of that part of the Agistment Area required by the applicant or other Tenement Holders for mining activities upon giving the first respondent not less than three months’ written notice which has attached to it a plan identifying that part of the Agistment Area required for mining activities. When clause 8.1 is invoked, there are detailed provisions about constructing new fences and gates to keep livestock from entering areas required for mining activities.

[24] Clause 9.1 provides:

“The Licensor may in the Licensor’s discretion terminate this Licence at any time without compensation or explanation in respect of any part of the Agistment Area upon giving to the Licensee ninety (90) days prior written notice where the any part of the Agistment Area is required by the Licensor or the Tenement Holder for mining and/or ancillary activities. The Licensee shall, during the ninety (90) day notice period referred to in this clause remove all Livestock and the Licensee’s chattels from that part of the Agistment Area thereof to be vacated.”

[25] The applicant is authorised to terminate the Agistment Licence under clause 9.2 for breach, as specified in that clause.

[26] Clause 12.1 provides:

“The Licensor agrees to allow the Licensee and its Authorised Persons to occupy the Tralee Homestead Area, at no extra charge. In accordance with the terms of the Agreement for Sale, the homestead, associated sheds and accommodation area (Tralee Homestead) are for the sole use of the Licensee and its Authorised Persons for the Term unless otherwise agreed in writing by the parties. Maintenance of the Tralee Homestead and payment of service charges at that location will be the responsibility of the Licensee.”

[27] The obligations of the applicant in relation to the Tralee Homestead Area are set out in clause 12.2 which are qualified by the first respondent’s acknowledgement in the last paragraph of clause 12.2:

“Notwithstanding the above the Licensee acknowledges that the Licensor will be carrying on Mining Activities on the Land which will generate noise and cause certain disturbances which may impact on the quiet enjoyment and the peace, comfort or privacy of the Licensee and the Licensee must not make any objection to such noise and disturbance.”

[28] Under clause 12.3 the first respondent must pay all service charges to the service provider in relation to the Tralee Homestead Area and the obligations imposed on the first respondent in respect of its occupation of the Tralee Homestead Area are set out in clause 12.4 which includes an obligation not to raise any objection in relation to the applicant’s current or future use of the land, including any objection to mining activities or applications for mining tenements of any kind.

- [29] Clause 12.7 confers on the first respondent the right to terminate unilaterally the right of occupancy in relation to the Tralee Homestead Area on six months' written notice to the applicant. There is no express right of termination conferred in clause 12 on the applicant in respect of the first respondent's occupancy of the Tralee Homestead Area.
- [30] Clauses 12.10 and 12.11 of the Agistment Licence reflect the right conferred under clauses 65.5 and 65.6 of the sale agreement for relocation of the Tralee Homestead Area no later than June 2013. Clause 12.12 of the Agistment Licence is an acknowledgement by both the applicant and the first respondent "that in accordance with the terms of the Agreement for Sale the Licensor is entitled to relocate the Tralee Homestead Area for a second time".
- [31] Under clause 22.1, the parties agreed the Agistment Licence would be subject to the law in force in the State of Queensland and any proceedings in respect of any cause or action arising under the Agistment Licence would be brought in a court of competent jurisdiction in Queensland.
- [32] Clause 25.1 provides:
- "Nothing contained in this Licence shall be construed as granting or shall be deemed to grant to the Licensee any greater estate or interest in the Land than the Licensee holds without the benefit of this Licence and save as to the rights hereby conferred on the Licensee, the surface of the Land remains in the possession of and under the control of the Licensor."
- [33] Clause 29.1 provides:
- "This Licence represents the entire agreement between the parties hereto in relation to the subject matter hereof and no variation to this Licence shall be of effect unless in writing and signed by the parties."

Stay application

- [34] By application filed on 2 February 2016, the first respondent applies for a stay or the dismissal of the applicant's application on the basis the applicant failed to comply with the alternative dispute resolution provisions of clause 68.1 of the sale agreement. The first respondent submits the entry into, and the obligations under, the Agistment Licence arose from the sale agreement.
- [35] Although the Agistment Licence was anticipated by the sale agreement and the existence of the sale agreement is part of the context in which the Agistment Licence must be construed, the Agistment Licence is a contract between the parties that is separate from the sale agreement, as reinforced by clause 29 of the Agistment Licence.
- [36] The dispute in respect of the termination of the Agistment Licence and the licence to occupy the Tralee Homestead Area conferred by clause 12.1 of the Agistment Licence arises under the Agistment Licence and therefore is not characterised properly as a dispute between the parties arising from the sale agreement that is covered by clause 68.1 of the sale agreement. It is the jurisdiction clause of the Agistment Licence that applies.

- [37] The application to stay or dismiss the applicant's application for declarations on the basis of clause 68.1 of the sale agreement cannot succeed.

Principles of construction of a commercial contract

- [38] In the circumstances in which the applicant and first respondent entered into the Agistment Licence, it is appropriate to characterise it as a commercial contract and apply the principles that govern the construction of a commercial contract: *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 89 ALJR 990 at [46]-[52].
- [39] The purpose or object of the Agistment Licence is clarified by its genesis out of the sale agreement pursuant to which the applicant paid a very significant purchase price to the first respondent to acquire the land for its proposed mining activities. The applicant's right to full beneficial ownership of the land and use of the land in connection with its mining activities must be considered in the light of its contractual obligations under the Agistment Licence to facilitate the first respondent's continuing use of parts of the land for agisting livestock and to maintain residences on the land. The Agistment Licence complements the right granted by the applicant under the sale agreement to the first respondent to take a reconveyance of the land at the conclusion of the term of the mining leases or if the applicant gives earlier notice under clause 66.1 of the sale agreement. These objective facts give context to the parties' obligations under the Agistment Licence.

The Agistment Area

- [40] One issue of construction of the Agistment Licence is the identification of that part of the land that falls within the meaning of "Agistment Area". The plan attached to the notice of termination suggests that the applicant treats the Agistment Area as including the land that is subject to the mining leases that were granted after the Agistment Licence was entered into by the parties. The definition of Agistment Area in the Agistment Licence contemplates its reduction pursuant to clause 8, but also the exclusion of any part of the land that is subject to a mining lease. The definition of a Mining Lease extends to those mining leases that were granted after the Agistment Licence was entered into by the parties. That means the Tralee Homestead Area was not within the Agistment Area at the time the notice of termination was given in respect of the licence of the Agistment Area.
- [41] The fact that there is a more formal means under clause 8.1 for reducing the Agistment Area where the applicant or the Tenement Holders at any time require part of the Agistment Area for mining activities does not justify not giving the meaning to Agistment Area that is plainly contemplated by the definition that a mining lease may be granted after the date of entering into the Agistment Licence. The detailed provisions in clause 8.1 for new gates and fences suggests clause 8.1 is apt when it is contemplated that the agisting of livestock will continue on the balance of the Agistment Area adjoining that part required for mining activities with consequential regulation of fences and gates.

Precondition for termination of the Agistment Licence

- [42] Clause 9.1 contemplates that the applicant would be exercising its discretion to terminate the licence in respect of any part of the Agistment Area to the extent that the relevant part

of the Agistment Area is required by the applicant or the Tenement Holder for mining and/or ancillary activities. There must be a connection between that part of the Agistment Area where the licence is terminated and its requirement for mining and/or ancillary activities. The discretion to terminate under clause 9.1 only arises when the precondition exists that the applicant or the Tenement Holder requires the relevant part of the Agistment Area for mining and/or ancillary services. Although the power to terminate under clause 9.1 may be exercised “without explanation” that does not dispense with the requirement for satisfaction of the precondition before the applicant can exercise the discretion to terminate the licence.

- [43] It is conceded by the first respondent that the power conferred by clause 9.1 to terminate the Agistment Licence in respect of any part of the Agistment Area extends to terminating the Agistment Licence in respect of the entire Agistment Area, provided the precondition of the entire Agistment Area being required by the applicant or the Tenement Holder for mining and/or ancillary activities is satisfied.
- [44] The focus of the submissions at the hearing was whether the precondition contained within clause 9.1 of the Agistment Licence had been satisfied, i.e. that the applicant or the Tenement Holder requires the Agistment Area that is the subject of the notice of termination “for mining and/or ancillary activities”.
- [45] The applicant relied on the affidavit of Mr Job filed on 4 February 2016 who, in his capacity as a general manager and senior site executive of Foxleigh Coal Mine, deposed that:
- “It has been determined by the Applicant that they now require all the Applicant’s land, which includes the entire Agistment Area, for mining activities (as that term is defined in the Agistment Licence which is exhibit GB-7 to the Batt affidavit) and/or ancillary activities.”
- [46] The applicant submits that it is entitled to rely on the terms of clause 9.1 of the Agistment Licence which allow it to terminate the Agistment Licence without explanation where the Agistment Area is required by the applicant for mining and/or ancillary activities. It is submitted that to require the applicant to demonstrate by evidence that the land is, in fact, required for “mining and/or ancillary activities” is to deny the applicant the benefit of clause 9.1 which contemplates a discretionary right to terminate without any explanation. It would also have the effect of precluding the applicant’s reliance on the commercial efficacy of the 90 day notice procedure, if the first respondent were able to contest the merits of the applicant’s decision to terminate.
- [47] The first respondent submits that mining activities lawfully cannot extend beyond the bounds of the mining of leases (in reliance on s 235 and s 402 of the *MRA*) which limits the applicant’s requirement for the Agistment Area to ancillary activities. The first respondent submits that on the face of the material relied on by the applicant, a real question must be raised as to whether the precondition was, in fact, satisfied before the notice of termination was given by the applicant, in view of the fact that the mining leases cover some 4,233 hectares of the land which leaves almost 8,000 hectares of the land now required by the applicant for ancillary activities.

- [48] It is an unusual aspect of clause 9.1 that it contains a precondition, but also allows the applicant to terminate the Agistment Licence in respect of the part of the Agistment Area to which the precondition applies “without ... explanation”. That unusual aspect does not mean that the precondition is any less a precondition that must be satisfied before the discretion to terminate may be exercised by the applicant. The precondition in clause 9.1 is consistent with the precondition that applies to clause 8.1.
- [49] The applicant’s assertion that treating the precondition as raising an issue of fact between the parties would “rob” clause 9.1 of “any commercial efficacy” loses its force, when the applicant is using clause 9.1 to terminate the Agistment Licence over the entire Agistment Area, where its terms anticipated its usual application would be from time to time, as any part of the Agistment Area was required for mining and/or ancillary activities.
- [50] In the context of the objective facts surrounding the relationship between the parties, the applicant’s requirement at the one time for almost 8,000 hectares of the land for those mining and/or ancillary activities that can be carried out on that land (which is not the subject of the mining leases) raises an issue whether the precondition for exercising the right to terminate under clause 9.1 was, in fact, satisfied.
- [51] It is not appropriate for the court to exercise the jurisdiction to declare the rights of parties under the Agistment Licence where there is a factual issue that invites further clarification or investigation which may affect those rights.

Nature of the licence to occupy Tralee Homestead Area

- [52] The issue of construction which arises under the Agistment Licence is whether the termination of the licence in respect of the entire Agistment Area extends to the licence to occupy the Tralee Homestead Area.
- [53] The grant of the Agistment Licence under clause 2.1 is expressly for the purpose of agisting livestock on the Agistment Area, but subject to the terms and conditions set out in the Agistment Licence. Clause 12.1 provides for an additional and separate licence to be granted to the first respondent and his authorised persons to occupy the Tralee Homestead Area (which includes two residences) for their sole use (unless otherwise agreed in writing by the parties). The licence to occupy the Tralee Homestead Area for the first respondent and his authorised persons is in contrast to the licence to agist livestock on the Agistment Area in common with access by the applicant to the Agistment Area. Particularly as the Agistment Area no longer included the Tralee Homestead Area by the time the notice of termination was given, any termination of the Agistment Licence under clause 9.1 could not have the effect of terminating the licence to occupy the Tralee Homestead Area.
- [54] The applicant also submitted that the use of “Licence” in clause 9.1 which incorporates the definition of “Licence” in the Agistment Licence meant the Agistment Licence as a whole, including the licence to occupy the Tralee Homestead Area. The problem with that submission is that the power to terminate in clause 9.1 is linked to the satisfaction of the precondition in relation to any part of the Agistment Area, so that at the time the notice

of termination was given, clause 9.1 could not be used in relation to the Tralee Homestead Area that was outside the Agistment Area.

- [55] The applicant has bound itself contractually under clause 12.12 of the Agistment Licence to relocate the Tralee Homestead Area for a second time which remains an existing obligation at the least while there is any balance Agistment Area. The second relocation entitlement under clause 12.12 is independent of and continues, notwithstanding the parties did not proceed with the first relocation of the Tralee Homestead Area.
- [56] Until the issue of whether the applicant has validly terminated the Agistment Licence over the entire Agistment Area is resolved, it cannot be determined that the applicant has no obligation under clause 12.12 of the Agistment Licence.
- [57] The applicant had an alternative argument, if it were found that the termination under clause 9.1 did not have the effect of terminating the licence under clause 12.1 of the Tralee Homestead Area based on an implied right for the applicant to revoke the licence, relying on *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 630-631. Even accepting that, in the absence of an express right in the Agistment Licence to terminate the licence conferred under clause 12.1, there is an implied right of the applicant to revoke the licence, the implied right has to be considered in the light of the reservation in the sale agreement that is replicated in clause 12.12 of the Agistment Licence of the relocation entitlement in respect of the Tralee Homestead Area. That is a right for which the first respondent's remedy may not be limited to damages for breach of contract, having regard to its nature, and any reliance on an implied right to revoke the licence to occupy the Tralee Homestead Area has to be considered in the light of clause 12.12.
- [58] Another complication in respect of the licence to occupy Tralee Homestead Area is that it includes two residences and it is arguable that, at least to the extent of the residences, the applicant is bound to comply with the provisions of the *RTA*. This is on the basis that the Agistment Licence can be characterised as a residential tenancy agreement by the application of the definitions in s 11 and s 12 of the *RTA*. That would make the residential tenancy of the residential premises one for a fixed term pursuant to clause 12.1 of the Agistment Licence. That raises the issue of whether the notices to leave given to the respondents in reliance on the *RTA* were valid in the absence of any breach by the respondents of the licence to occupy the residences: s 329(2)(k) *RTA*. That is a matter on which full argument was not addressed at the hearing.

Should the originating application be decided on a summary basis?

- [59] Irrespective of which party bears the evidential burden in relation to the applicant's requirement of the entire Agistment Area for mining and/or ancillary activities, it is apparent that there is an issue of fact as to whether the precondition for exercising the power to terminate under clause 9.1 of the Agistment Licence has been satisfied.
- [60] On the state of the material at the hearing that took place on 4 February 2016, that issue of fact is not addressed in such a way that warrants a summary determination of the validity of the notice of termination.

Orders

- [61] The parties will need to determine how they wish to proceed in resolving the issues that remain between them arising from the service of the notice of termination. In the meantime, I make the following orders:
1. The first respondent's application for a stay of the originating application is dismissed.
 2. The application filed on 2 February 2016 and the originating application are otherwise adjourned to a date to be fixed.
- [62] Subject to the parties' submissions, I propose that costs be reserved at this stage, so that they can be determined when the ultimate outcome of the application is known. I invite the parties to make submissions on what further orders should be made, pending the resolution of the outstanding issues.