[2022] QCA 206

COURT OF APPEAL

BOND JA
DALTON JA
BODDICE J

Appeal No 8971 of 2022
SC No 6211 of 2022

MINERALOGY PTY LTD **ACN 010 582 680**	**Appellant**
v	
ADANI MINING PTY LTD **ACN 145 455 205**	**First Respondent**
RUSSELL THIRGOOD	**Second Respondent/** **Not a Party to the Appeal**

BRISBANE

FRIDAY, 21 OCTOBER 2022

JUDGMENT

DALTON JA: This is an appeal from a decision made in the applications jurisdiction refusing to enjoin an expert determination between the appellant and the first respondent (the second respondent was the nominated expert and he played no part in the litigation).

By a royalty deed dated 29 November 2011, the appellant and respondent agreed that the respondent would pay the appellant royalties for mining a particular mining tenement. The deed included:

"7.1 As security for Mineralogy's rights under this deed, including to receive payment of the Royalty, Adani agrees it will not create or permit the creation of any Encumbrance over any or any part of the Royalty Tenement or its interest under this Deed unless the person taking the benefit of the Encumbrance (financier) executes a chargee's priority deed, agreeing that:

(a) the Encumbrance will rank in priority after unpaid Royalty;

(b) any sale, assignment or foreclosure by the financier under the Encumbrance will be subject to compliance with the provisions of this Deed relating to assignment by Adani; and

(c) the financier will release its Encumbrance if Adani withdraws from this Deed.

…

8.1 The mechanisms set out in this clause 8 apply to all disputes or claims arising out of or relating to this Deed and the alleged breach, termination or claimed invalidity of this Deed (dispute).

8.2 Unless expressly provided to the contrary in this Deed, either party may give to the other party written notice setting out the particulars of a dispute and requiring that it be dealt with in the manner set out in this clause 8.

8.3 For the purposes of this clause 8:

(a) technical matter means a matter involving issues relating to the production of coal and the determination of coal Mined or the like which is capable of determination by reference to engineering or scientific knowledge and practice;

(b) financial matter means a matter involving financial calculations which is capable of determination by audit or reference to accounting, taxation or normal financial practices; and

(c) legal matter means a matter involving the meaning or interpretation of the provisions of this Deed or the rights, duties or liabilities of the parties under or in connection with this Deed which is capable of determination by reference to the law and any other matter that is not a technical matter or a financial matter.

8.4 Either party may refer a dispute to the Australian chief executives (or their nominees) of the parties' respective global corporate groups.

8.5 Failing resolution of the dispute by the chief executive officers (or their nominees) of the parties within 20 Business Days, either party may refer the dispute to an Independent Expert for determination.

8.6 Where a dispute is referred to an Independent Expert in accordance with clause 8.5, an Independent Expert must be appointed by the

parties. If the parties fail to appoint or are unable to agree upon the appointment of an Independent Expert within 20 Business Days of the date of the referral under clause 8.5, either party may refer the matter:

(a) if or to the extent it is a technical matter, to the President for the time being of the Institute of Engineers, Australia;

(b) if or to the extent it is a financial matter, to the Chairman for the time being of the Queensland Branch of the Australian Institute of Arbitrators and Mediators; or

(c) if or to the extent it is a legal matter, to the President for the time being of the Queensland Law Society,

who will nominate a suitably Qualified person to act as the Independent Expert to determine the dispute.

8.7 An Independent Expert appointed (otherwise than by agreement of the parties) under this clause 8 must:

(a) have reasonable qualifications and practical experience in the area of the matter of dispute;

(b) have no interest or duty which conflicts or may conflict with his or her function as an expert, he or she being required to disclose fully any relevant interest or duty before his or her appointment; and

(c) not be a current or former employee or officer of a party or a Related Body Corporate of any of them.

8.8 The Independent Expert will act as an expert and not as an arbitrator and the law relating to arbitration will not apply to him or her or his or her determination or the procedures by which he or she may reach his or her determination.

8.9 Each party may be legally represented at a hearing before the Independent Expert and will be entitled to produce to the Independent Expert written submissions and any materials or evidence which that party believes is relevant to the matter in dispute.

8.10 Each party will make available to the Independent Expert all materials requested by the Independent Expert and all other materials that are relevant to the Independent Expert's Determination.

8.11 Unless otherwise agreed by the parties. the Independent Expert will be required to keep confidential all material and evidence made available for the purposes of the determination.

8.12 The Independent Expert will make a determination on the matter in dispute and will determine what if any adjustments may be necessary between the parties.

8.13 In the absence of manifest error, the determination of the Independent Expert will be final and binding upon the parties.

8.14 Unless otherwise agreed to by the parties, the Independent Expert will be required to keep confidential the determination made in relation to a dispute.

8.15 Each party will be responsible for its own legal and other costs in relation to any determination of a dispute by an Independent Expert but the costs of the Independent Expert will be borne by the parties equally.

8.16 For the avoidance of doubt, the parties agree that to the extent that this clause 8 is not certain in its application, the Institute of Arbitrators and Mediators Australia Expert Determination Rules will apply.

…

12.5 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this Deed.

12.6 Consents

A consent required under this Deed from a party may not be unreasonably withheld, unless this deed expressly provides otherwise."

In 2021 the first respondent sought funding and the financiers required security. Priority deeds were prepared by the first respondent so as to comply with clause 7.1. The first respondent prepared the priority deeds to be formally executed by the appellant as well as the financier. The priority deeds were drawn so that the appellant acknowledged (*inter alia*) the provisions which the first respondent and its financiers had made satisfied the requirements of clause 7 of the royalty deed and did not breach the royalty deed.

The appellant refused to sign the deeds. By letter dated 7 September 2001 the appellant's solicitors denied it was obliged to do so. On 14 December 2001 the first respondent sent a letter to the appellant, making what it said was its final request that the appellant sign the deeds. It asserted that on the basis of clauses 7, 12.5 and 12.6 of the royalty deed, that the appellant was obliged to sign the deeds and said:

"Dispute resolution procedure – notice

If your client does not sign and return the enclosed Priority Deeds within the time set out above, then this letter will be deemed to serve as a written

> notice given by our client to your client under and for the purposes of clause 8 (in particular, clause 8.2) of the Royalty Deed. The matters set out above are the particulars of the dispute the subject of this notice.
>
> In accordance with clause 8.4 of the Royalty Deed our client refers the dispute the subject of this notice to the Australian chief executives (or their nominees) of the parties' respective global corporate groups."

The "matters set out above" as being the particulars of the dispute were a 15 paragraph summary of communications between the appellant and the first respondent in which the first respondent had consulted and negotiated with the appellant about the terms of the deeds it wished the appellant to sign and the history of its requests to the appellant to sign the deeds. There followed two paragraphs in which the first respondent reasserted its view that the appellant was contractually obliged to sign the priority deeds.

The appellant did not reply to the letter of the 14th of December. One can only infer that its position as to its contractual obligations under clauses 7 and 12 had not changed.

On this appeal it was not argued that this letter did not constitute an effective notice within clause 8.2. I note that in any event when the appellant did not reply to the letter of 14 December, a further separate notice was sent (17 December 2021).

In due course, the first respondent's solicitors wrote to the appellant's solicitors, referring the dispute to the Australian chief executives of the appellant and first respondent. There was again no response from the appellant. And on 21 January 2022 the first respondent's solicitors wrote to the appellant's solicitors referring the dispute to an independent expert. That letter nominated four potential experts and said that if it received no response from the appellant, the first respondent would ask the president of the Queensland Law Society to choose an expert.

In due course, the first respondent's solicitors asked the president of the Law Society to nominate an expert. The president wrote to the parties, seeking their consent to a nomination. Both the appellant and the first respondent did consent to the second respondent being appointed, and he was. The second respondent held a procedural conference which both the appellant and first respondent participated in, in May 2022. The appellant participated in the conference and took no objection to the process.

After that, this proceeding was filed. The appellant sought declarations that: there had been no valid notice of dispute within the meaning of clause 8; no valid appointment of an independent expert; and further, or alternatively, an injunction permanently restraining what it called the purported expert determination.

The appeal is on the basis that the primary judge misconstrued clause 8 of the royalty deed. The primary judge held that the dispute as to whether or not the appellant was obliged to sign the consent deeds, was a dispute within the meaning of clause 8.1 of the royalty deed. In my view, it plainly was. The first respondent contends that clauses 7, 12.5 and 12.6 of that deed, oblige the appellant to sign the consent deeds. The appellant contends that it is not obliged to do so. That is a dispute arising out of the royalty deed, and a dispute relating to the royalty deed – see the language of clause 8.1. The dispute is also:

> "a matter involving the meaning or interpretation of the provisions of [the Royalty] Deed or the rights, duties or liabilities of the parties under or in connection with [the Royalty] Deed which is capable of determination by reference to the law" – (cl 8.3(c)).

Wider arguments were made as to whether or not the three "matters" at cl 8.3(a), (b) and (c) limited the width of the words "all disputes and claims" in cl 8.1 and whether there were disputes which were inapt to be determined by the dispute resolution mechanism in clause 8, but which could only be determined in a Court. Where the present dispute is plainly within the words of cl 8.1 and cl 8.3(c) it is unnecessary to embark on an examination of these arguments.

It was contended below, and before this Court, that cl 8.1 ought to be construed in the context of, and harmoniously with, the remainder of clause 8 and the royalty deed as a whole. That submission is undoubtedly correct. However, I cannot see that the primary judge did not do that. It is true that the judgment first discusses cl 8.1 before going on to discuss, in particular, clauses 8.3 and 8.6. Nonetheless, any interpretation must have a starting point, and I cannot see that the primary Judge proceeded irregularly or incorrectly.

It was argued that clause 12.2 of the royalty deed meant that only limited disputes fell within clause 8. Clause 12.2 is to the effect that each party to the royalty deed submits to the

non-exclusive jurisdiction of the Queensland Courts and waives any *forum non conveniens* argument it might have in the future. Such a clause is not inconsistent with the plain words of clause 8 because (at least):

(a) the provisions of clause 8 are permissive, so that if both parties were content to litigate rather than pursue a clause 8 determination they could do so;

(b) recourse might be necessary to the Court in its supervisory jurisdiction even if a clause 8 determination were underway; and

(c) recourse might also be had to the Court in respect of orders ancillary to, or to enforce conclusions on, a clause 8 determination, such as an injunction or an order for specific performance.

It was submitted by the appellant that some disputes would not fall within the definition of any one of the clause 8.3 terms: technical matter, financial matter, or legal matter. Therefore, it was said, that "all disputes or claims" in clause 8.1 ought to be limited to disputes which fell within one or other of these definitions. That ignores the last words of clause 8.3(c) "and any other matter that is not a technical matter or a financial matter". It is also an inutile submission to make in a case like this, where whether or not the appellant is bound to sign the priority deeds, is a matter in connection with this deed which is capable of being determined by reference to the law, to use the words of clause 8.3(c).

It was said that matters of contested fact could not fall within the definition of "legal matter" at clause 8.3(c). Having regard to the rights of the parties to put evidence before the independent expert at a hearing – clause 8.9 – I cannot accept that submission. The words of clause 8.1 "the alleged breach, termination… of this deed" also plainly contemplate that the dispute sent to the expert may involve contested issues of fact. Technical or accounting experts must necessarily be determining questions of fact rather than questions of law.

Outside the notice of appeal, but within the written submissions of the appellant, is the contention that clause 8 does not apply because the dispute between the parties "concerns third

parties namely the financiers". The primary judge rejected that contention and so do I. The dispute is as to the rights of the first respondent and the appellant and it is those rights which will be determined by the second respondent. It makes no difference to this conclusion that the priority deeds were drawn anticipating that the financiers will sign them as well as the first respondent and the appellant.

Lastly, the appellant has participated in the clause 8 process in consenting to the second respondent being appointed expert, and attending, without objection, the first hearing date organised by the second respondent. Those matters must weigh in the Court's discretion when it is asked to grant an injunction.

I would dismiss the appeal.

BOND JA: I adopt the recitation of the facts made by Justice Dalton. While I generally agree with her Honour's analysis and agree with the order that her Honour proposes, I prefer to express my own brief reasons for reaching that result.

Once the appellant failed to respond to the request expressed in the first respondent's solicitors' letter dated 14 December 2021, there was evidently a dispute between the parties as to whether in all the circumstances the appellant was obliged under the royalty deed to execute the proposed deeds as the first respondent had contended. Indeed, such a dispute had probably existed earlier, once the appellant's solicitors' letter of 7 September 2021 had advised the first respondent's solicitors that the royalty deed did not require the appellant to execute the proposed deeds.

I express no view on whether the deeming mechanism expressed in the letter of 14 December 2021 is a legitimate way to give a notice of dispute in compliance with clause 8. No argument was addressed to that question and, as Justice Dalton observed, a notice was separately given on 17 December 2021. That notice both required the dispute to be dealt with under clause 8 and, pursuant to clause 8.4, referred it to a nominee of the chief executive.

It was common ground on the appeal that the approach to be taken to the construction of clause 8 is that set out in *The Illawarra Community Housing Trust Limited v MP Park Lane Pty*

Ltd [2020] NSWSC 751 at [44]-[49], and the authorities there cited.

On that approach, three conclusions must be reached.

First, the proposition that the dispute did not fall within the wide scope of clause 8.1 has no merit. The dispute plainly related to the royalty deed.

Second, the evident purpose of clauses 8.3 and 8.6 (including when read with the definition of "Independent Expert" in clause 1.1) was to set out a triage mechanism by which disputes referred to an independent expert might be characterised so that they might ultimately be allocated to an independent expert with qualifications best suited to their determination, having regard to their character. The suggestion that the clauses should be construed as evidencing the parties' intention to narrow the ambit of clause 8.1 has no merit.

Finally, the proposition that the dispute fell outside the scope of clause 8.3(c) also has no merit. Even if the resolution of the present dispute would require the resolution of some questions of fact, or of mixed fact and law by virtue of reliance of the first respondent on the reasonableness aspects of clauses 12.5 and 12.6, the dispute is plainly of a character which falls within the wording of clause 8.3(c). It is evidently capable of determination by reference to the law. Indeed, clause 8.9 contemplates that the parties might provide relevant evidence to the independent expert, which plainly reveals the contemplation that the expert might have to make a decision of fact by reference to relevant evidence. The submissions to the contrary advanced by the appellant would render the whole procedure in clause 8 inapposite to the resolution of any dispute which involved a factual question. That cannot have been the contemplation of the parties.

What has happened in this case is that the first respondent properly engaged the dispute resolution procedure on 17 December 2021 at the latest. The dispute not having resolved within 20 business days, pursuant to clause 8.5 by letter dated 21 January 2022, the first respondent referred the dispute to expert determination. The parties having failed to agree upon the appointment of an independent expert within a further 20 business days, pursuant to clause 8.6 by letter dated 22 February 2022, the first respondent referred the matter to the President of the

Queensland Law Society for nomination of an independent expert, having formed the view, correctly, that the dispute fell within the ambit of clause 8.3(c). That view was apparently then shared by the appellant because its solicitor, by email dated 17 March 2022 to the Queensland Law Society, advised:

> "[O]ur client will agree to the independent expert as chosen by the Queensland Law Society…."

Thereafter the Queensland Law Society nominated the second respondent as the independent expert.

The independent expert was appointed by steps taken in compliance with the terms of clause 8. It was thereafter that the appellant commenced proceedings in Court. I did not understand the appellant to contend that there was any basis on which the Court might interfere with the continuation of the expert determination, if this Court concluded that the process had been engaged in compliance with the terms of clause 8. As will have been obvious so far, I reach that conclusion. There was a faint suggestion that, for example, if the expert found against the appellant and concluded that the appellant was bound to execute the deeds, the prospect that the appellant might not thereafter comply with that determination or might be liable for some form of damages for not having executed the deeds before the determination, might give such a reason. There is no reason to believe that the appellant will not act according to its obligations when they have been determined in a way consistent with its deed. The speculation that it might not does not provide any reason to interfere with the continuation with the expert determination on the present facts.

In order to resolve this appeal, it is neither necessary nor appropriate to opine further on how any tension between clauses 8 and 12 might be resolved in factual scenarios which have not yet happened and which may never happen. Nor is it necessary to express views as to how the triage mechanism might work in relation to disputes which might be regarded as hybrid, in the sense of having characteristics which might arguably fall within more than one of the categories in clause 8.3. Especially is this so in light of the apparent long-term nature of the royalty deed and the possibility that further disputes might arise in the future.

The present appeal must fail.

BODDICE J: I agree that the appeal should be dismissed for the reasons given by Justice Dalton. I also agree with and adopt the three reasons identified by Justice Bond for there being no merit in the proposition that the dispute did not fall within the wide scope of clause 8.1.

BOND JA: The Court orders that the appeal is dismissed. Is there any reason why costs should not follow the event?

MR DUNNING: No, your Honour.

BOND JA: The appellant must pay the first respondent's costs of the appeal.

MR DOYLE: Thank you, your Honour.

BOND JA: Is there anything further?

MR DUNNING: Not from us. Thank you, your Honour.

MR DOYLE: No. Thank you, your Honour.

BOND JA: Adjourn the Court.