BREACH OF COAL SUPPLY CONTRACT — WITHDRAWAL OF OFFER — REPUDIATION*

Macquarie Generation v CNA Resources Ltd (formerly Peabody Resources Ltd)

(Supreme Court of New South Wales, Commercial List [2001] NSWSC 1040 Palmer J, 15 November 2001)

The Plaintiff sought declaration that the Defendant wrongfully repudiated an agreement for the supply of coal and claimed damages. The question of liability arose and at issue was whether any contract for the supply of coal came into existence between the parties at all.

Facts

In mid 2000, the Plaintiff invited tenders for the supply of coal in accordance with quality requirements defined in specifications. It was a term of the invitation to tender that all tenders were irrevocably submitted, open for 180 days after the close of the tender period and capable of immediate acceptance. The Defendant submitted its response on 29 September 2000 called "general tender" proposing to supply coal from two mines. Clauses 1.1 and 1.2 of the General Tender provided as follows:

> 1.1 The Tenderer
>
> The tendering company is Peabody Resources Ltd, Australian Business Number (ABN 96 004 447 938.
>
> This tender contains a conforming tender, and has been prepared in response to and in accordance with Specification 47/2000 issued by Macquarie Generation for the supply of coal to the Bayswater and Liddell Power Stations.
>
> 1.2 Subject to Board Approval
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> All proposals contained herein are tendered subject to final approval by the Board of P&L Coal Holdings Corp, the ultimate owner of Peabody Resources Ltd. The US parent has decided to sell its Australian coal industry investments by way of sale of shares in the UK based subsidiaries through which this investment is held. There is a likelihood that a change of ownership of Peabody Resources Ltd will occur during the validity period of this tender, ie, within the next six months.

One condition of the general tender, as described above, was for final approval of the board of directors of the Defendant's ultimate holding company, P&L Holdings, because the parent company was proposing to sell off subsidiaries which held coal industry investments. The parent company sold those subsidiaries during the tender process and the purchase of the shares by Coal & Allied was completed in January 2001.

On 12 February 2001, the Plaintiff notified the Defendant that it was one of the preferred tenderers. On 2 March 2001, Coal & Allied replied to the Plaintiff advising that it was conducting a review of the Defendant's operations. The conditional offer submitted was that the tender was

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capable of acceptance only with P&L's approval, which had not been obtained. On 7 March 2001 at the meeting of representatives, the Defendant advised it was not possible to fulfil their condition of approval from P&L. On 15 March 2001 the Plaintiff wrote to the Defendant stating that it did not accept their position that the tender was not binding and provided a notice accepting the tender. On 11 April 2001, the Plaintiff enclosed Coal Supply Contracts which it had prepared from the general tender containing terms of a binding agreement. On 27 April, after no reply by the Defendant, the Plaintiff filed a Summons seeking a declaration that the Defendant had wrongfully repudiated the agreement (brought into existence upon submission of the general tender and Coal Supply Contract). The Plaintiff submitted that the Tender Agreement came into existence as a binding contract between the parties.

Issues

1. Did a tender agreement come into existence between the parties when the Defendant delivered the general tender?
2. If a contract was formed, what did the terms of the tender agreement become?
3. Did the general tender itself comprise of an unconditional offer by the Defendant, immediately capable of acceptance?
4. If so, was the offer open to the Plaintiff on 15 March 2001?
5. Did the Contract for Supply of coal come into existence on 15 March 2001 by reason of the Plaintiff's notice of acceptance and if so what were the terms?
6. If so, did the Plaintiff wrongly repudiate by insisting the Defendant execute a formal contract?
7. If the contracts for the supply of coal existed, did the Defendant wrongfully repudiate it?

Decision and Reasoning

Palmer J found that the Plaintiff failed on all issues.

Was there a tender agreement?

The Plaintiff argued that the general tender created a binding contract between the parties in the terms and conditions set out in the invitation to tender. Palmer J accepted that if the invitation to tender was only to be taken as an offer by the Plaintiff to evaluate tenders received prior to closing time, it can only be taken as an offer to evaluate those tenders which complied with the requirements of the invitation to tender. The Defendant did not accept that offer in those terms, because being conditional, the general tender did not comply with the requirements of the invitation to tender.

Palmer J was unable to accept the submission of the Plaintiff that the words of Clause 1.1 demonstrates an intention for the Defendant to comply in every respect with its tender, which means in effect that Clause 1.2 should be treated as having no contractual effect or consequence. Palmer J found this placed too much weight on the general introductory words of Clause 1.1 and "no weight at all on the clear, express and intractable words of Clause 1.2".

Further, Clause 1.2 cannot be construed as conferring a right to withdraw the tender at some later time. The tender proposal was clearly to have no effect if the P&L Board approval was not given. As the general tender was not an acceptance in the terms of the Plaintiff's offer as the invitation to tender had specified, no tender agreement came into existence upon delivery of the general tender.

Was the general tender offer capable of acceptance?

The Defendant submitted five conditional offers for coal supply were made by the general tender. The Defendant relied upon the case *Buhrer v Tweedie* [1973] 1 NZLR 517 to argue that an offer expressed to be subject to a condition is not an offer capable of acceptance until the condition is fulfilled. Following that case, the offer contained in the general tender was incapable of acceptance by the Plaintiff unless and until the Board of P&L gave final approval. The condition in Clause 1.2 was for obvious commercial purpose and the intended operation was quite clear in the opinion of Palmer J.

Palmer J found that the clause was not spent by 15 March 2001, it had by that time achieved its purpose which was preventing the Defendant's new owner from being burdened by the Plaintiff's acceptance of unconditional offers. He was satisfied that as at 15 March 2001 all offers contained in the general tender remained conditional offers subject to the fulfilment of the condition specified by Clause 1.2. The offers were therefore incapable of acceptance by the Plaintiff and the purported notice of acceptance was ineffective to bring into existence any contract.

Withdrawal of Offer

The Defendant argued that even if the offers in the general tender had become unconditional after the acquisition by Coal & Allied, the offers were withdrawn by the Defendant prior to the acceptance by the Plaintiff on 15 March 2001. Palmer J agreed that there was no tender agreement which prevented the Defendant from withdrawing any offer in the general tender at any time.

The letter sent by Coal & Allied on 2 March 2001 and conduct at the meeting of the Defendant's representatives on 7 March 2001 made it quite clear to the Plaintiff that the Defendant did not wish to proceed. The Defendant did not regard itself as subject to any unconditional offer in the general tender capable of acceptance by the Plaintiff and did not regard the acceptance by the Plaintiff as binding. Therefore Palmer J found that if there was an offer in the general tender that was at any time unconditional and open for acceptance, it had been effectively withdrawn by the Defendant prior to the purported acceptance on 15 March 2001.

Wrongful Repudiation by the Plaintiff

Palmer J agreed with the Defendant that even if a coal supply contract came into existence by reason of the Plaintiff's notice of acceptance the contract was repudiated by the Plaintiff. The Plaintiff expressed clear intention not to be bound by the terms of agreement which was made on 15 March 2001 when it insisted that the Defendant execute coal supply contract which was not in conformity with this agreement. Palmer J held that the position of the party was made clear on 7 March 2001 at the meeting of representatives.

Despite having known the intention of the Defendant not to proceed, the Plaintiff sent the Notice of Acceptance to the Defendant. Formal contracts for the supply of coal were also prepared and

executed for the Defendant. Palmer J was satisfied that the Plaintiff had shown a firm intention that it would only enter an agreement with the Defendant if it could do so upon the terms contained in the coal supply contracts delivered to the Defendant. He found those terms of the contracts differed in material respects from those of the 15 March 2001 agreement. Therefore the Plaintiff demonstrated an intention not to be bound by the terms of the agreement of 15 March 2001, if it existed or otherwise demonstrated an intention to perform an agreement only in a manner inconsistent with its obligations thereunder.

Wrongful Repudiation by the Defendant

The Plaintiff alleged that the contract for the supply of coal was wrongfully repudiated by the Defendant in its letter of 2 March 2001. This letter precedes the formation of the coal supply agreement which came into existence on 15 March 2001. Therefore, Palmer J found the letter could not repudiate a contract which did not exist at that time.

QUEENSLAND

VALIDITY OF MINING LEASES IN DOUBT – NO DEPTH RESTRICTION – NO FORMAL LEASE INSTRUMENT*

Queensland Coal Pty Ltd & Anor v. Shaw & Anor [2001] QCA 463

(Queensland Court of Appeal, 26 October 2001)

On 26 October 2001 the Queensland Court of Appeal handed down its decision in the case of *Queensland Coal Pty Ltd & Anor v. Shaw & Anor* [2001] QCA 463 (the "Shaw Case"), in which the Court held that the Kestrel (formerly Gordonstone) mining lease is invalid in respect of at least part of the mining lease area.

Whilst the Kestrel mining lease is largely an underground mining lease, comments made by the Court of Appeal in the Shaw Case are potentially a cause for concern for the holder of any mining lease in Queensland.

The Facts

The Kestrel Mining Lease provided for surface rights over a portion of the mining lease area, but no surface rights in respect of the remaining (larger) portion of the mining lease area.

In September 2000 Queensland Coal and Mitsui Kestrel (the current holders of the mining lease) made an application for additional surface area to be added to the mining lease. The additional surface area sought by Queensland Coal and Mitsui Kestrel covered land owned by the Shaws.

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