BEWARE! THE UNFAIR CONTRACTS JURISDICTION

NEWMONT PAJINGO PTY LTD AND TOMAC ENTERPRISES PTY LTD[27]

Industrial Relations Act 1999- s. 341 - appeal against decision of Queensland Industrial Commission Unfair contract – Commission's power to amend contracts, characterisation of "contract" as a "contract for service"- extension of remedies available to an arrangement or understanding or a related collateral contract.

Michael Moy*

The recent Industrial Relations Court of Queensland ('Court') decision of *Newmont Pajingo Pty Ltd and Tomac Enterprises Pty Ltd* (11 April 2005) has sent shockwaves through contracting industries and the mining industry in particular. The decision confirms the reach of the Queensland Industrial Relations Commission ('Commission') and its unfair contracts jurisdiction into standard commercial contracting, as opposed to what many believe to be its area of responsibility – that of employment and quasi-employment relationships.

1. SUMMARY OF FACTS AND FINDINGS

Tomac (a contract drilling company) entered into a purchase order with Newmont for the drilling of '*approximately 30,000 metres*' (or around 3 months drilling) on Newmont's Pajingo mine in north Queensland. Tomac purchased a new drill from Sweden for $575,000 (excluding GST) on the alleged representation from Newmont that, despite the short term nature of the purchase order, Tomac would be a long-term contractor. Tomac commenced drilling in June 2002. Tomac continued to drill after the original 30,000 metres had been drilled. After 13 months and approximately 79,000 metres drilled, Newmont advised Tomac that the drilling work would be given to a different contractor. Newmont claimed that the reason for the change in contractor was due to an unreasonably high proposed per metre rate from Tomac and unsatisfactory performance.

The Court agreed with the Commission at first instance that the contract became 'unfair' (as defined by section 276 of the *Industrial Relations Act 1999* (Qld) because of the conduct of Newmont and upheld the Commission's order that Newmont pay Tomac $414,250.87.

2. EVENTS LEADING UP TO THE CONTRACT

In April 2002 a meeting took place on the Pajingo site between Tomac representatives and Newmont representatives about the possibility of Tomac doing some underground drilling work at the mine. Tomac alleged that a Newmont representative said words to the effect '*we are looking for a long term relationship with a small contractor*'. When asked whether they had a drill that could do the work, Tomac stated that they did not but said that they had already made enquiries with Atlas Copco who had confirmed that a suitable drill could be flown out from Sweden if needed urgently. Newmont understandably were pleased that Tomac was prepared to put a new drill into service at Newmont.

---

27 [2005] QIC 21 (11 April 2005); 178 QGIG 404. Hall, P.

* LLB (Hons), BSC, Solicitor, McCullough Robertson

It was common ground that Tomac were 'nervous' about purchasing a new drill on the basis of only 30,000 metres drilling that Newmont were proposing to contract. It was common ground that a Newmont representative had indicated that there was a lot of drilling to be done. Tomac alleged that a Newmont representative had stated that Tomac would be at Pajingo '*for years*' and for a '*long time*'. The Newmont witnesses denied making these representations. Despite the Newmont witnesses not being cross-examined by Tomac's legal counsel, Tomac's version of events was favoured by the Commission.

Tomac needed the purchase order for the 30,000 metres of drilling so that it could raise the finance for the new drill. The finance company did not require any evidence from Tomac of future work, either contracted or potential, beyond the 30,000 metres. This purchase order was provided in May 2002 and Tomac began drilling on site in July 2002.

3. EVENTS AFTER CONTRACT FORMATION

In February 2003, a Tomac representative raised with Newmont his concern about the limited extent of the existing purchase order and the further drilling that was required. Newmont said that it would issue a letter of intent to prolong the work described in the original purchase order. Newmont provided a draft Letter of Intent in April. It said that if Tomac had any points of contention, it should email Newmont with its '*wish list*'. Tomac responded by proposing an increase in rates from $20 per drilled metre to $25.11 per drilled metre and suggested that the increased rate be applied retrospectively to claims commencing 1 February 2003.

In June 2003 Newmont decided to put the drilling work out to tender. In July Tomac was advised it had been unsuccessful in its tender and was invited to continue to work on the mine for another 2 weeks.

4. TOMAC'S ARGUMENTS

Tomac alleged that Newmont's representations that it would be engaged '*for a long time*' or '*for years*' induced Tomac to purchase the drill and that Newmont should have known that the statements would have this effect.

It further alleged that the Letter of Intent and Newmont's approach to it operated unfairly because it gave Newmont a basis to claim that it could avoid any obligation from the original obligations that were put in place in the original meeting on site. It alleged that, if performance was an issue, it was incumbent on Newmont to set standards and communicate them. It argued that in any contract involving a performance component that procedural fairness requires that the person performing the contract be on notice as to what is required of them and forewarned that any breach of at least an important part of the requirement jeopardizes their engagement. Tomac used Newmont's alleged lack of notification to Tomac about poor performance as evidence of the unfair nature of Newmont's contractual conduct.

An argument that will alarm many contracting parties was that Newmont had an obligation under section 276 of the Act to avoid the issue of unfairness because it was the party in the position of power. Tomac argued Newmont had an obligation not to use its position of superiority – in this case, the capacity to deal out work – in a way that unfairly prejudiced the other party. This argument should frighten owners and contractors who sub-contract works because it effectively would mean that parties who contract out work have to consider not only what is best for them, but

what is in the interests of the proposed contractor or subcontractor and balance the 2 competing interests.

In measuring its damage, Tomac argued that the contract should be amended to reflect a 3 year engagement.

5. NEWMONT'S ARGUMENTS

On the other hand, Newmont argued that if Tomac was entering the arrangement on the basis that it needed 3 years drilling work, it was under an obligation to let Newmont know that this was the basis upon which it was proceeding. It was unfair (Newmont argued) to Newmont for Tomac to claim that the contract included a condition that 3 years' work (or any other definite period) would be provided to Tomac when Tomac had every opportunity to say something to Newmont but said nothing.

Newmont pointed out that when it sent Tomac a draft Letter of Intent for further work, Tomac wanted to increase its price from $20 to $25.11 per metre. It argued that, given the significance of Tomac's claim, it was not unfair for Newmont to go out to tender and, further, that it was not unfair for Newmont to accept a tender for $18 per metre after Tomac only dropped its price to $22.35 per metre. It argued that if Tomac had not attempted to increase its price by such a degree it could have remained on the mine for a lot longer than it did.

Newmont argued that Tomac took the risk of purchasing the drill and should bear the consequences.

6. CONTRACT UNFAIR

The Commission found (and the Court agreed) that the contract became an unfair contract through Newmont's conduct for a range of reasons, including:

1. Newmont led Tomac to believe it was entering into a long-term relationship with Newmont and would be at Pajingo for along time.
2. Newmont at least knew Tomac were nervous about making the decision to purchase a new drill but sought to allay their fears by suggesting to Tomac that it would be '*alright*' and that they would be '*here for years*'.
3. Newmont should have known the cost of a new drill and the amount of work needed to justify its purchase.
4. Tomac was allowed to keep drilling past 30,000 metres.
5. In the Commission's opinion, Newmont abused its position of power (as the company contracting out the work) by refusing to acknowledge, or discuss issues raised by Tomac.
6. Newmont had an obligation to discuss safety and cost concerns with Tomac, including Tomac's responses to those matters. In this manner, the Commission is imposing what have otherwise been standards of 'fair dealing' from unfair dismissal case law into commercial contractual dealings between 2 companies at arm's length.
7. Tomac was denied any opportunity to meet with Newmont to talk about the outstanding issues or Letter of Intent.

8. The statements allegedly made by Newmont representatives that Tomac would be at the mine '*for years*' and '*for a long time*' and that there was '*more metres here than Tomac could ever drill*', were, in fact, undertakings.

The Court agreed with the Commission that the contract should be amended by the inclusion of terms to the effect that Newmont is to provide Tomac with 120,000 metres of drilling work or, in the alternative, 2 years of drilling. The drilling rate from September 2002 was to remain $20 per metre.

7. IMPLICATIONS

Contractors and their advisors should take a number of important points from this decision.

1. The decision confirms that the Commission has the power to impose its opinion of 'fair' contracting behaviour and 'business morality' onto all contractual dealings which have **some** connection to the provision of services. In the mining industry, where almost all contracts contain some element dealing with the provision of services, this will be especially relevant. It could conceivably apply to a contract for the removal of overburden between a mine owner and contract miner – normally 2 very large companies at arm's length from each other.
2. Unfairness may arise through the conduct of the contracting parties long after the contract was signed even though the initial contract and the negotiations surrounding the initial contract are not in any way unfair.
3. All conduct and statements made by contracting parties around the time of a formal written contract can be used as evidence of unfairness despite the terms being formalized in writing. Statements that individuals may consider are simply 'puff' can actually be classed as undertakings and held against the makers of those statements.
4. If the Commission finds that a contract is or has become unfair through the conduct of a contracting party, the Commission can re-write the contract so that it directly conflicts with written terms of the contract. In this case, a contract for 30,000 metres drilling (approximately 3 months) was varied to 120,000 metres (or 2 years). The appropriate drilling rate for the remainder of the period was set by the Commission at $20 per metre. Considering Tomac had tendered at $25.11 and then $22.35 per metre, the Commission's power to depart from the course of commercial negotiations and impose its own evaluation of a 'fair deal' is significant.
5. A contract that you may think was negotiated on an arm's length basis may impose an obligation on the party who is contracting out the work to consider the interests of the other party and effectively insure the other party against poor commercial decision-making. This is despite a company's primary obligation to its shareholders.
6. "Unfairness" is much easier to establish than unconscionability in the trade practices jurisdiction. The unfair contracts jurisdiction has remedies that are as powerful as those granted by the *Trade Practices Act*. The Commission in this case sought to put the contracting parties in the position they would have been in had the "unfairness" not existed or occurred.
7. An option to avoid this jurisdiction may be to specify in the contract that it is governed by the laws of a different State, however, the Commission may consider that this is not sufficient to oust its jurisdiction over contracts that deal in some way with the provision of services in Queensland.