

Oil and Gas vs. Hard Rock Mining

A major factor in the making of the Tribunal's decision was that the proposed tenement related to petroleum exploration and not hard rock mining. The Tribunal saw the real benefit of conjunctive determinations as lying with petroleum exploration and production, as opposed to hard rock mining, as the major expenditure in petroleum operations occurs at the exploration stage. Further, the Tribunal considered that any disturbances to land and environment occur principally in the exploration phase for petroleum operations, with the opposite being true for hard rock mining, where land disturbing operations tend to expand considerably in the production phase.

Decision

After taking the Consent Determination considerations into account, the Tribunal was satisfied that YY had, with full knowledge, given its consent to the making of the determination sought by the Negotiation Parties.

Further, the Tribunal considered a conjunctive determination to be appropriate in these circumstances, especially given that the proposed tenement related to the exploration and production of petroleum and not hard rock mining.

RIGHTS OF FIRST REFUSAL – CAN THEY BE INVALID AS BEING A RESTRAINT ON ALIENATION?*

John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc [2004] SASC 128 (South Australian Court of Appeal – Full Court; 6 May 2004; Mullighan, Gray and Besanko JJ)

Appeal from decision of trial judge – right of first refusal – pre-emptive right – unlawful restraint on the alienation of property – Hall v Busst

Facts and Nature of the Action

In 1994, John Nitschke Nominees Pty Ltd ("Nitschke") as vendor and Hahndorf Golf Club Inc ("Hahndorf") as purchaser executed a contract for the sale of land. The contract included a number of special conditions, including:

- (1) a right of first refusal by John Nitschke, should Hahndorf subsequently decide to sell the land; and
- (2) should Nitschke decide not to exercise its right of first refusal, Hahndorf would only be entitled to sell the land, subject to the proviso that any future sale by the purchaser would be subject to the same right of first refusal by Nitschke as attached to Hahndorf's interest.

Hahndorf argued that each of these conditions constituted an unlawful restraint on the alienation of property, and as such were void and unenforceable.

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Decision and reasons

The South Australian Court of Appeal, in allowing the appeal, held that a right of first refusal (or pre-emptive right) will attract the operation of the doctrine of unlawful restraint on the alienation of property in certain circumstances.

The High Court case of *Hall v Busst*¹ is the leading Australian authority for the doctrine that contractual restraints on the alienation of property may be unlawful and thus void. This doctrine is based on the common law principle that private property should be freely alienable.

The Court in this case provided further clarification as to when rights of first refusal may be considered to attract the doctrine of unlawful restraints on the alienation of property. The Court set out the following factors as being relevant in such a consideration:

- the scope of the initial prohibition;
- whether the right exists for a limited period or indefinitely;
- whether the grantor of the right must extract a similar promise from subsequent purchasers; and
- whether the right is to be exercised by reference to a fixed price.

In considering these factors, the Court held that whilst the first special condition of the Hahndorf land contract (described above) did not constitute an unlawful restraint on the alienation of property, the second condition did offend the doctrine. It was therefore unenforceable. There was evidence to the effect that the second condition would mean that if Nitschke chose not to exercise its right to purchase the land, the continued existence of the right of first refusal would depress the value of the land and lead it to being sold at a substantial discount to its market value.

Conclusion and Discussion

This case illustrates that pre-emptive rights, or right of first refusal provisions, may be unenforceable where a party is restricted from selling land without the consent of a party who has a right of first refusal. This could be the case even where the party with the right has chosen not to exercise its right. Further, a requirement that a party must procure that a new purchaser grants a similar right may also be unenforceable. Whilst the validity of such provisions will depend on the courts balancing a range of relevant factors, it is important that these factors be considered before including provisions that may restrain the alienation of land in commercial agreements.

¹ (1960) 104 CLR 206.