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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In October 2000 the Shaws lodged a Notice of Objection to the application for additional surface area on the grounds that the original mining lease itself had not been validly granted, and therefore the application for additional surface area could not be granted.

In 1985 the application for the mining lease was lodged. A parcel of land owned by the Shaws was partly covered by the proposed mining lease area, and the Shaws lodged an objection to the grant of the mining lease. On 17 July 1986 the Mining Warden delivered his report on the mining lease application, recommending that the mining lease be granted, subject to various conditions. The conditions recommended by the Mining Warden included the following:

> That the mining tenement be limited to a depth below the surface of private land of 120 metres with the exception of the surface area applied for where there be no limit.

No formal lease instrument was ever issued in relation to the mining lease (which is relatively common in Queensland). Nor was there any evidence of an Order-in-Council ever having been made granting the mining lease (the need for an Order in Council is an issue to which we will return later).

The evidence of the grant of the mining lease was in the form of a letter dated 18 April 1990 from the Director-General, Department of Resource Industries (a predecessor to the Department of Natural Resources and Mines), which stated that a mining lease had been granted by the Governor in Council on 12 April 1990. The letter set out details of the area, duration and rental of the mining lease, and attached an annexure containing the mining lease conditions.

The Department's letter confirming the grant of the mining lease, and the lease conditions attached to that letter, did not contain any express limitation as to depth. It was this omission which the Shaws seized upon in arguing that the mining lease was not validly granted.

The mining lease was granted under the *Mining Act* 1968 (which has since been replaced by the *Mineral Resources Act* 1989). The land owned by the Shaws was private land and improved land for the purposes of the Mining Act. Section 114 of the *Mining Act* prohibited the grant of a mining lease in relation to private land that is improved land unless either:

- the consent in writing of every owner of the private land in question was first obtained; or
- the mining lease was limited to such depth below the surface or the lowest part of the surface of the private land in question as the Warden's Court determines.

The Shaws had not consented in writing to the grant of the mining lease. As a result, it was only competent for the mining lease to be granted if it was limited to such depth below the surface of the land as the Warden's Court determined.

Although the Mining Warden had recommended that the mining lease be granted subject to a condition that the mining lease be limited to a depth below the surface of private land of 120 metres, that condition was not expressly reflected in the mining lease conditions which subsequently issued.

The Shaws argued that whilst the Warden's Court had made a determination in relation to a depth limitation, the mining lease which issued was not limited to the depth below the surface which had been determined by the Warden, and on that basis the mining lease was invalid.

The Decision

The Court of Appeal agreed with the Shaws.

The Court stated that section 114 of the *Mining Act* "….clearly prohibits the grant of a mining tenement in relation to private land unless it is limited to the depth below the surface determined by the Warden."

The Court of Appeal went on to say that "…it should not necessarily be assumed that the granting authority did intend that the Warden's recommendations should be accepted…".

The Court ultimately concluded that "…insofar as the lease purports to grant rights over the Shaws' land, it is a nullity."

Some Matters of Concern

Whilst the actual decision in the Shaw Case was based on the absence of a depth restriction in the mining lease, the Court made some observations which are of general application to any mining lease.

The Court said that the evidence of the "purported grant" of the mining lease was in some respects unsatisfactory, because:

- no formal lease instrument (or copy thereof) was produced to the Court;
- there was no map that enabled a clear picture to be obtained of what land was or was not covered by the lease; and
- there was no evidence of any Order-in-Council ever having been made granting the lease.

The only evidence of the grant of the mining lease was in the form of the letter from the Director-General, Department of Resource Industries, advising that the lease had been granted, attaching an annexure of mining lease terms and conditions, and attaching a computer register search for the newly granted lease.

The Court appeared to be of the view that in these circumstances there was no lease ever granted. However, the Court did not ultimately base its decision on these grounds because this was not an issue which the parties had themselves raised. Nevertheless, the statements by the Court are of concern because:

- in Queensland it is common for mining leases to have been granted without formal lease instruments ever being issued;

- at the point in time when mining leases are issued it would be unusual for there to be a detailed map showing the land included in the lease, as the lease area would ordinarily be surveyed only after the grant of the lease; and
- the Court clearly assumed that in order for a mining lease to be validly granted, it must be granted by Order in Council. However there appears to be grounds for questioning whether this assumption is indeed correct.

Whilst the *Mining Act* 1968 did require certain decisions to be made by the Governor in Council by Order-in-Council (such as the correction of a lease instrument), the grant of a mining lease itself was not expressed to require an Order-in-Council. There are other ways in which the Governor in Council is able to validly make decisions, and an Order-in-Council will only be required where the Act under which the Governor in Council is to make a decision requires that decision to be made by Order-in-Council. Where a decision is made other than by Order-in-Council, there should nevertheless be an Executive Council Minute recording the decision made.

In addition, in the case of mining leases that include areas over which surface rights do not exist, it is not clear whether relevant depth restrictions were always included in the mining lease where required.

THE NEW COAL ROYALTY REGIME IN QUEENSLAND[*]

On 19 June 2001 the Queensland Government announced a proposal to refine Queensland's coal royalty regime, and details of the proposed changes were released for comment on 11 July 2001. The proposed changes were intended to take effect from 1 October 2001.

In the wake of staunch opposition from Queensland's coal mining industry, the Government deferred the commencement of the changes, before releasing its final decision on the revised coal royalty regime on 7 December 2001. The new regime took effect from 1 January 2002.

The new regime replaces the old Departmental Policy No.140 on valuing coal for the purpose of applying the 7 percent royalty rate.

The major difference between the old valuation method and the basis for valuation that the State Government proposed in July 2001, was that the following amounts which were allowable deductions under the old valuation method would no longer have been deductible:

- rail freight;
- port operating costs;
- non-refundable contributions made towards port or rail infrastructure in Queensland;
- despatch and demurrage charges;
- agent's commissions in respect to the disposal of produce acquired through a "counter trade" arrangement; and

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