SUPREME COURT OF QUEENSLAND

CITATION:	*Armstrong & Anor v Brown & Anor* [2004] QCA 80
PARTIES:	**DEAN LINDSAY ARMSTRONG** **LISA MAREE ARMSTRONG** (applicants/appellants) **v** **GREGORY JOHN BROWN** (first respondent/first respondent) **MINING REGISTRAR (EMERALD)** (second respondent)
FILE NO/S:	Appeal No 7544 of 2003 APTP No 00062 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Land and Resources Tribunal at Brisbane
DELIVERED ON:	26 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2004
JUDGES:	McPherson and Jerrard JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellants to pay the respondent's costs of and incidental to this appeal to be assessed**
CATCHWORDS:	MINING LAW – LEGISLATION RELATING TO MINING FOR MINERALS – MINER'S RIGHTS AND MINING LICENCES, TENURES AND INTEREST – MINING TENURES AND INTERESTS – NATURE OF TENURES AND INTERESTS WHICH MAY BE GRANTED AND OVER WHAT LANDS – MINING LEASES – where land is part of Restricted Area 1 – where application for mining lease granted in part – where application for leave to appeal – whether President erred in the exercise of discretion to refuse leave to appeal – whether land is mineralised – whether economic viability of project is required – whether Tribunal could adopt factual findings in previous decisions ADMINISTRATIVE LAW – JUDICIAL REVIEW AT COMMON LAW – PROCEDURAL FAIRNESS – EXISTENCE OF OBLIGATION – UNDER LEGISLATION – PARTICULAR CASES – where Tribunal required to hear

application and any objections – where objections not advanced at hearing – whether applicants were denied natural justice

Land and Resources Tribunal Act 1999 (Qld), s 67
Mineral Resources Act 1989 (Qld), s 268(1), s 269(1), s 269(4), s 269(4)(b)
Mineral Resources Regulation 1990 (Qld), r 63, Schedule 4 Part 2 s 1,

Elliot v Hicks [2001] QLRT 38, considered
Salmon v Armstrong [2001] QLRT 72, approved
Sinclair v Maryborough Mining Warden (1975) 132 CLR 473, followed

COUNSEL: D A Skennar for the appellants
A C Barlow for the respondent

SOLICITORS: Alroe & O'Sullivans (Toowoomba) for the appellants
No appearance for the respondent

[1] **McPHERSON JA:** I agree with the reasons of McMurdo J. The appeal should be dismissed with costs.

[2] **JERRARD JA:** In this matter I have had the advantage of reading the reasons for judgment of McMurdo J and the orders he proposes. I respectfully agree with his Honour that the relevance of the subject land falling within Restricted Area 1 (as defined in the *Mineral Resources Regulation* 1990, Schedule 4 Part 2 s 1, that Restricted Area 1 ["RA1"] consisting of what were previously Restricted Mining Areas provided for by the *Mines Regulation Act Regulations* 1964, as amended) is that it supports a conclusion that land in RA1 is probably mineralised. I do not think it supports any stronger inference.

[3] The judgment of Smith DP in the instant matter held, at [17] of his reasons, that the land being within RA1 was "relevant to this application"; quoting from his earlier historical survey in *Elliott v Hicks* [2001] QLRT 38 at [117] – [120]. He was in error in this matter if he applied his earlier judgment to hold that a prospective miner would have to do no more than establish that a proposed mining lease fell within RA1, but he did not specifically so hold in this matter; and in any event in this matter, immediately after his paragraph [17], made reference to the fact that the applicant before him for a mining lease had given evidence of having found minerals on the land the subject of the application. While that evidence was challenged or tested by cross-examination, it was not contradicted by any other evidence, and it was open to the Deputy President to accept it, as he did.

[4] It would have been both more helpful and more convincing had the Deputy President set out or described the challenged evidence in his judgment, and given his reasons for accepting it; but a perusal of the transcript shows that evidence of location of minerals was sworn to and apparently capable of acceptance. The President's reasons for judgment, at [6], correctly refer to the fact of the Deputy President having accepted evidence that the land applied for contained the minerals sought by the application, and that that was sufficient to establish mineralisation.

[5] I also agree with the observations of McMurdo J concerning "economic mineralisation", and note that the applicant for a mining lease gave sworn evidence that he believed mining the area applied for would be viable, and that "I'd be able to run a mining company and make money" (at AR 7), by which he explained he meant make a profit.

[6] I otherwise respectfully agree with the judgment and orders proposed.

[7] **McMURDO J:** The appellants, Mr and Mrs Armstrong, own a freehold grazing property near Emerald. The respondent, Mr Brown, is the applicant for a mining lease over part of their land. He wishes to mine for sapphires and zircon. He applied for a mining lease over an area of 785 hectares. His application was heard by the Land and Resources Tribunal, constituted by Smith DP, who made a recommendation to the Minister that the application be granted in part, in that it should be granted for an area of 150 hectares.

[8] Mr and Mrs Armstrong sought to appeal that decision. Their right of appeal came from s 67 of the *Land and Resources Tribunal Act* 1999. According to that section, their appeal was to the President of that Tribunal, but only with the President's leave, and on a question of law. The President of the Tribunal dismissed their application for leave to appeal.

[9] In this court, Mr and Mrs Armstrong have appealed against the President's decision pursuant to s 67(2)(b) of that Act. To succeed the appellants must demonstrate that there was at least one question of law raised for the President's consideration for which, in the proper exercise of his discretion, he should have granted leave.

[10] In the application before the President, three matters were argued on behalf of Mr and Mrs Armstrong. They now submit that each of those matters involved a question of law, in respect of which the President erred in not recognising its suggested merit.

[11] The first matter involves the consideration given by Smith DP to whether the area of land the subject of the application was mineralised. According to s 269(4) of the *Mineral Resources Act* 1989 ("the Act"), the Tribunal, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, must take into account and consider the matters set out in the 13 paragraphs within that subsection. Section 269(4)(b) requires the Tribunal to consider whether "the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate". Not surprisingly then, the Tribunal is obliged to consider whether there are minerals to be mined. The appellants' submission is that Smith DP erred in law because there was said to be no evidence by which it was open to conclude, as he did, that the area was mineralised. His reasons on this point were as follows:

> "[17] I rely on what I said in *Elliot v Hicks*[1]. RA 1 is relevant to this application.
>
> [18] The evidence of the Applicant is that the land applied for contains the minerals sought by the application. Expert Saunders confirmed that sapphire, zircon and corundum are,

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1 [2001] QLRT 38 at pp 117-120

> in effect, the same mineral.[2] I am satisfied, for the purposes of the mining lease application, that the Application is properly made out relating to recovery of the minerals sought in the application area."

[12] In his reference to *Elliot v Hicks*, Smith DP, by a footnote, specifically referred to paras [117]-[120] of his reasons for decision in that matter. The appellants' present point focuses upon para [120], coupled with the reference in para [17] of his decision in the present matter to "RA 1". That is a reference to an area of land, of which the land subject of this present mining application is part, which was affected by a regulation[3] which restricted the extent of mining operations within that area. In his decision in *Elliot v Hicks* Smith DP said at [120]:

> "For instance, in my view, save in the most exceptional of circumstances, a prospective miner would have to do nothing more than establish that a proposed mining lease fell within RA 1 (and thus with it have the benefit of the established history as set out earlier in this judgment) to satisfy the test in s 269(4)(b) of the *Mineral Resources Act* 1989 that the land is mineralised. Examples of exceptional circumstances to the contrary may be, for instance, proof of previous drilling which revealed no trace of minerals, or perhaps previous unsuccessful mining, on the land applied for."

The appellants submit that the statement in para [17] of the reasons of Smith DP in the present matter, taken with what he said at para [120] in *Elliot v Hicks*, shows that he did not address the question of whether the area the subject of this application was in fact mineralised. It was argued that instead he has presumed that it is mineralised from the fact that it is within the area of RA 1.

[13] However, that does not accurately describe the Deputy President's reasoning. The reference in his reasons in this case to *Elliot v Hicks* and to RA 1 was by way of repeating the extensive factual findings which he had made in that other case. In *Elliot v Hicks*, he traced the history of mining for gemstones, including sapphires, within the area of RA 1 and he found that there had been extensive discovery of and mining for gemstones across what is now RA 1 for well over a century. His findings in *Elliot v Hicks* as to the mineralisation of the area within RA 1 were relevant to his consideration of whether this land, within RA 1, was probably mineralised. According to s 268(2) of the Act, this Tribunal is not bound by the rules of evidence, and is entitled to inform itself in such manner as it considers appropriate in order to determine the relative merits of the application and the objection. It was then legitimate for the Tribunal to adopt its factual findings from *Elliot v Hicks* as supporting a conclusion of mineralisation in the present case. This caused no surprise to the objectors because Mr Brown's case had made it clear that he would ask the Tribunal to proceed in this way. And further to the evidence and findings in *Elliot v Hicks*, there was Mr Brown's own evidence which is referred to in para [18] of the decision in the present matter. In these circumstances, there is no substance in the submission that the factual question of mineralisation was not considered in this case, or that the conclusion of mineralisation was not supported

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2 See transcript 25 February 2003 p 39

3 *Mineral Resources Regulation* 1990, s 63

by any evidence. It follows that the first matter raised with the President was correctly rejected.

[14] The second question concerns what the submissions made for Mr and Mrs Armstrong in this court and in the Tribunal have referred to as "economic mineralisation". If the Tribunal was entitled to conclude that the area applied for contained the relevant minerals, Mr and Mrs Armstrong argue that the Tribunal should not have recommended the grant of a lease without being satisfied that those minerals could be mined profitably. Within the various matters required to be considered by the Tribunal according to s 269(4) of the Act, there is no reference in terms to "economic mineralisation" or profitable mining. But the submission is that it is implicit within paras (b) and (c) of s 269(4) of the Act that the Tribunal must consider this question. Section 269(4)(c) of the Act provides that the Tribunal is obliged to take into account and consider whether:

> "(c) if the land applied for is mineralised there will be an acceptable level of development and utilisation of the mineral resources within the area applied for;"

[15] The submission strongly relies upon statements in *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473. *Sinclair* was a case dealing with an earlier statutory regime, but to some extent the statements relied upon are relevant to the operation of s 269. What *Sinclair* shows is that the Tribunal should not recommend the grant of a mining lease unless the circumstances warrant that recommendation, having regard to the purposes for which the Crown should give a right to mine its minerals. There would be no proper purpose in recommending the grant of a mining lease which was not going to be used for or in relation to any mining. It is relevant for the Tribunal to enquire whether the mining for which the lease is sought is likely to be profitable, because mining is unlikely to occur if it is unlikely to be profitable. The relevance in this way of the likely profitability of mining is effectively recognised by para (c) of s 269(4), which requires the consideration of whether there will be an acceptable level of development and utilisation of the mineral resources. If there is unlikely to be a profit from the mining of the resources, it is unlikely that there would be an acceptable level of development and utilisation of those resources. What the appellants refer to as "economic mineralisation", is thus a point which is relevant in the consideration of the matters within s 269(4)(c). Accordingly, I agree with the views of Kingham DP in *Salmon v Armstrong* [2001] QLRT 72, where she said that whilst there is no specific reference in s 269(4) to the "economic viability" of a project, "it is relevant to interpreting the information about mineralisation" and to at least the matters set out in s 269(4)(c).

[16] As I read the reasons of Smith DP, he did consider the likely profitability of the mining operation as far as it was relevant, which was the extent to which it indicated that there would be an acceptable level of development and utilisation of the mineral resources. He said that: "What is relevant is whether or not the land holds mineral and if it does, there will be an acceptable level of development and utilisation of the mineral, given the size and shape of the application and the term of the application." Then after specifically referring to s 269(4)(c), and citing Barwick CJ in *Sinclair* and Kingham DP in *Salmon v Armstrong*, he concluded that there would be an acceptable level of development and utilisation of the mineral resources if the mining lease was granted not in relation to the whole of the 785 hectares for which Mr Brown had applied, but in relation to an area of 150 hectares. There was

evidence to support that conclusion. It came from Mr Brown himself, a person of some 14 years of experience in exploration and mining within this area, who said that he intended, on the basis of his own assessment, to spend considerable amounts in the course of a 10 year mining operation, no doubt with a view to profit. It was open to Smith DP to conclude that he was satisfied as to the matters within s 269(4)(c) and that there was a proper purpose to be served by a grant of this mining lease. In my view then, the submissions which involve this concept of economic mineralisation show no error of law by Smith DP which was of significance for his conclusion, and it follows that the President was not in error in exercising his discretion to refuse leave to appeal on this point.

[17] The third matter involves, in effect, an assertion that Mr and Mrs Armstrong were denied natural justice when it came to the specification of which 150 hectares should be the subject of the recommended grant. The Tribunal was entitled to recommend a grant "in whole or in part",[4] and accordingly it was entitled to recommend a grant of a lease of but a part of the area for which the application had been made. It is argued however that Smith DP should not have chosen a particular 150 hectares without evidence that the area was of an appropriate "size and shape" and location. The questions for the President, when asked to give leave upon this ground, were whether Mr and Mrs Armstrong had been denied an opportunity to put whatever case they might have had on those matters and, if so, whether that warranted the grant of leave. The application was heard by Smith DP on 25 and 26 February and 18 March 2003. This court has the transcript of the dates of hearing in February, but not of the March date. The appellants put before this court an affidavit of the person who appeared for them in the Tribunal, as to what occurred on 18 March. According to that affidavit, Smith DP:

> "… raised various issues including the issue of granting an area smaller than that applied for. In relation to this issue Deputy President Smith said that while he had reached no final decision, he was giving careful consideration to the size of the application area, the fact it is restricted land and the nature of the improvements. He asked whether, should he be minded to recommend a smaller area for grant, he could choose it or whether he should let the applicant (Mr Brown) choose it."

[18] On that date, Smith DP made an order for further submissions, the first of which required the respondents through their representatives to file and serve "additional submission as to size and shape of the application area by 4 p.m. Friday 21 March 2003". The representative of Mr and Mrs Armstrong filed a written submission on 21 March which sought to make three points. The first was not directed to the matter which had been raised for further argument. Secondly, it was submitted that the Tribunal should not leave it to Mr Brown to choose the relevant area "without the Landholders having an opportunity to be heard on it". Thirdly, it was submitted that "the Landholders would be seriously disadvantaged and in fact denied natural justice if part of the application were selected for grant without them having had the opportunity to be heard on it". The written submission went on to refer to Mr Brown's evidence that he proposed to mine about 100 hectares and that "he never defined the size or location of the area referred to, other than to say it was 150 to 200 metres inside the (western) boundary", which the submission pointed out was

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[4] Section 269(4)

about 700 metres long. This was followed by a contention that the mineralisation of an area of 100 hectares in the location as described by Mr Brown had not been sufficiently proved. This written submission makes it clear enough that Mr and Mrs Armstrong knew, or should have known, that the Tribunal was considering the grant of a mining lease over an area of the order of 100 hectares, together with some further area for infrastructure, and close to the western boundary. In these circumstances, it appears to me that they were given an opportunity to make submissions as to why a mining lease should not be granted over some particular part of their land, and they could have sought to adduce evidence in support of such a submission. Rather than doing so, they simply complained that they had had "no opportunity to consider the effect on them of grant of a lease over any specific part of the application, rather than the whole".

[19] By s 268(1) of the Act, the Tribunal was obliged to hear the application and any objection thereto and "all other matters that … are to be heard, considered and determined by the Tribunal in respect of that application at the one hearing of the Tribunal". And by s 269(1), upon the completion of that hearing, the Tribunal was required to forward to the Minister the Tribunal's recommendation. According to the appellants' submission, the Tribunal was obliged to conduct effectively two hearings: the first to decide whether it should make any recommendation for the grant of a mining lease in whole or in part, and the second to decide what particular land should be the subject of that recommendation. I doubt that this is consistent with the terms of s 268 and s 269. In any case, in the way in which this hearing proceeded, Mr and Mrs Armstrong were given a fair opportunity to put their case, if any, as to the specific location of the area to be mined.

[20] In my view Mr and Mrs Armstrong were not denied natural justice. It was made clear enough that the outcome might involve a recommendation for a grant over about 100 or 150 hectares, and that unless the Tribunal, over the protest of the Armstrongs, was going to let Mr Brown choose which 150 hectares would be the subject of his lease, then the Tribunal's decision could involve a selection of a particular area. If Mr and Mrs Armstrong had a particular objection to the grant over a certain part of their land, they had the opportunity to advance that particular case at that point. Moreover, the possibility that the Tribunal would recommend the grant over only part of their land should have been apparent to them from the outset of this hearing. The objection which they had lodged raised an argument that "the area applied for is excessive for a sapphire mining lease"[5] and that "as the proposed mining operation will not disturb more than 10 hectares at any one time, the vast majority of 785 hectares may lie unused for the duration". I conclude therefore that this third matter raised no arguable question of law and that the President is not shown to have erred in the exercise of his discretion to refuse leave to appeal on this basis.

[21] There was a fourth matter sought to be argued in this court which related to the validity of the conditions imposed by Smith DP. That matter is not mentioned in the reasons given by the President and nor was it argued before him. This is an appeal from the President's decision, and as this point was not raised for his consideration, it is not open to the appellants to raise it here.

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5 Objection para 4

[22] I conclude that the appeal should be dismissed and the appellants should pay the respondent's costs of and incidental to this appeal to be assessed.