

SUPREME COURT OF QUEENSLAND

CITATION: *Construction, Forestry, Mining & Energy Union v Lyne & Anor* [2004] QSC 259

PARTIES: **CONSTRUCTION, FORESTRY, MINING & ENERGY UNION**
(applicant)
v
BRIAN LYNE, CHIEF INSPECTOR OF COAL MINES
(first respondent)
ANGLO COAL (GRASSTREE MANAGEMENT) PTY LTD
(ACN 078 099 313)
(second respondent)

FILE NO/S: BS 6680 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court
Brisbane

DELIVERED ON: 18 August 2004

DELIVERED AT: Brisbane

HEARING DATE: 6 August 2004

JUDGE: McMurdo J

ORDER: **The originating application, which seeks a declaration that the directive is invalid, is dismissed.**

CATCHWORDS: MINING LAW – STATUTORY REGULATION OF CONDUCT OF MINING OPERATIONS – REGULATION AS TO SAFETY OF MINES AND MACHINERY – IN GENERAL AND DEFINITIONS – where a directive purported to suspend all underground operations except for certain activities – whether directive could suspend some of the operations – whether directive is valid

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – QUEENSLAND – whether s 32C *Acts Interpretation Act* 1954 applies – whether to suspend "operations" in s 167 *Coal Mining Safety & Health Act* includes the singular "operation" – whether contrary intention appears in the Act

Acts Interpretations Act 1954 (Qld), s 32C
Coal Mining Safety and Health Act 1999 (Qld), s 6, s 10, s 31

166, s 167

Coal Mining Safety and Health Regulation 2001, 296(1)

Blue Metal Industries Ltd v Dilley [1970] AC 827, cited

Johns v ASC (1993) 178 CLR 408, cited

Sin Poh Amalgamated (HK) Ltd v Attorney-General of Hong Kong [1965] 1 WLR 62, followed

COUNSEL: J A Griffin QC, with M A Slevin, for the applicant
P J Flanagan SC, with D J Campbell, for the first respondent
D J S Jackson QC, with J H Dalton, for the second respondent

SOLICITORS: Hall Payne Lawyers for the applicant
Crown Solicitor for the first respondent
Blake Dawson Waldron for the second respondent

[1] **McMURDO J:** On 25 July 2004, the first respondent, who is the chief inspector of coal mines, issued a directive purportedly under s 167 of the *Coal Mining Safety and Health Act* 1999 (Qld), for the suspension of all underground operations, except for certain activities, at the Grasstree Mine near Middlemount. The question in this case is whether it is a valid directive. The applicant, which under the Act is the Union having certain responsibilities for safety in coal mines, contends that the direction is beyond power on the correct interpretation of s 167.

[2] Section 167(1) provides:

“167 Directive to suspend operations for unacceptable level of risk

(1) If an inspector, inspection officer or industry safety and health representative believes risk from coal mining operations is not at an acceptable level, the inspector, officer or representative may give a directive to any person to suspend operations in all or part of the mine.

...”

[3] The Union’s case is that, in relation to any given part of a mine, a directive cannot require the cessation of some activities but permit others to continue. It says that the suspension of operations in any part of the mine can only involve the cessation of each and every activity which is part of mining operations. The chief inspector argues that his directive is within s 167 upon its proper interpretation, and alternatively that it is valid as a directive given under s 166. Each of his arguments is supported by Anglo Coal (Grasstree Management) Pty Ltd, which is effectively the operator of this mine. The main issue is therefore one of the correct interpretation of s 167.

[4] The objects of the Act are expressed in s 6 as follows:

“6 Objects of Act

The objects of this Act are –

- (a) to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations; and
- (b) to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level.”

[5] Section 7 provides for those objects to be achieved by, amongst other things:

- “ ...
- (e) providing for safety and health representatives to represent the safety and health interests of coal mine workers; and
 - (f) providing for inspectors and other officers to monitor the effectiveness of risk management and control at coal mines, and to take appropriate action to ensure adequate risk management;
- ...”

[6] According to s 30, an acceptable level of risk for operations is to be achieved by putting in place appropriate management and operating systems¹ and further by ways prescribed under a regulation.² Section 31 then provides as follows:

“31 What happens if the level of risk is unacceptable

- (1) If there is an unacceptable level of risk to persons at a coal mine, this Act requires that --
 - (a) persons be evacuated to a safe location; and
 - (b) action be taken to reduce the risk to an acceptable level.
- (2) Action to reduce the risk to an acceptable level may include stopping the use of specified plant or substances.
- (3) The action may be taken by the coal mine operator for the mine, the site senior executive for the mine, industry safety and health representatives, site safety and health representatives, coal mine workers, inspectors or inspection officers.”

[7] An industry safety and health representative is a person appointed as such by the Union under s 109, and having functions as defined by s 118 and powers as defined by s 119. One of those powers is to issue a directive under s 167.³

[8] Inspectors, including the chief inspector of coal mines, and inspection officers are appointed by the government under s 125. Inspectors and inspection officers have functions as defined by s 128 and inspectors have certain additional functions according to s 129. Their functions include that of ensuring timely corrective or

¹ Section 30(1)

² Section 30(3)

³ Section 119(1)(f)

remedial action is being taken or will be taken in response to any safe practices or conditions.

- [9] Division 3 of Part 9 of the Act provides for directives by inspectors, inspection officers and industry safety and health representatives. The various types of directives are authorised by s 164 to s 172. A person to whom the directive is given must comply with the directive as soon as reasonably practicable.⁴ A directive by an industry safety and health representative remains effective until it is withdrawn by the representative or an inspector, or until it is varied or set aside by the chief inspector or the Industrial Court.⁵ A person who is given a directive may apply for review by the chief inspector, who under s 177, may confirm, vary or set it aside, and give a substituted directive. The chief inspector's decision and any directive given by him is subject to an appeal to the Industrial Court.⁶
- [10] Section 166 is potentially relevant here, not only for the interpretation of s 167 but because the respondents say that it authorises this directive insofar as it is not authorised by s 167. Section 166(1) provides:

“166 Directive to reduce risk

- (1) If an inspector or inspection officer reasonably believes a risk from coal mining operations may reach an unacceptable level, the inspector or officer may give a directive to any person to take stated corrective or preventative action to prevent the risk reaching an unacceptable level.
...”

- [11] The belief necessary for a directive under s 166 is that a risk from coal mining operations may reach an unacceptable level, whereas the necessary belief for s 167 is that the level of risk is unacceptable. A directive under s 166 is for certain action to be taken whereas a directive under s 167 is for the suspension of operations. Section 166 is apparently concerned with the avoidance of an unacceptable level of risk whilst s 167 is concerned with stopping that which has made unacceptable the level of risk. Yet, there could be circumstances where it would be appropriate for the powers under both sections to be exercised in order to meet the particular threat to safety and health. It could be necessary to stop the activities creating the risk but at the same time require corrective action to be taken. In such a case a directive might be valid through the combined operation of s 166 and s 167, and the directive would not be invalid although its legal basis was wrongly thought to be one section and not also the other: *Johns v ASC* (1993) 178 CLR 408, 426.

- [12] The power in s 167(1) is to suspend “operations”, which is plainly a reference to “coal mining operations” earlier referred to in the sub-section. The Act⁷ defines “coal mining operations” as follows:

⁴ Section 174(2)
⁵ Section 174(5)
⁶ Section 243 to s 248
⁷ Dictionary to the Act

“coal mining operations” means activities, including on-site activities, carried out at a coal mine that are associated with the following in relation to coal --

- (a) exploration;
- (b) extracting;
- (c) the processing and treatment;
- (d) installing and maintaining equipment used for extraction, processing and treatment.”

The expression “on-site activities” used within that definition is defined⁸ as follows:

“10 Meaning of “on-site activities”

- (1) “On-site activities” are activities carried on principally for, or in connection with, exploring for or winning coal and include the following—
 - (a) constructing—
 - (i) things required or permitted to be constructed under an exploration permit, mineral development licence or mining lease; or
 - (ii) for a place mentioned in section 9(1)(c)—things that are required or permitted to be constructed under an exploration permit, mineral development licence or mining lease;
 - (b) treating coal and disposing of waste substances;
 - (c) rehabilitating of a place after coal mining operations;
 - (d) maintaining and testing plant, equipment or machinery.
- ...”

[13] It can be seen that coal mining operations include activities of a kind which might occur regardless of whether coal is then being extracted, processed or treated. In particular, the activities of installing and maintaining equipment used for extraction, processing and treatment are themselves amongst those which are coal mining operations as defined. Within the power to suspend coal mining operations, there is a power to suspend activity of any of the kinds by which the term “coal mining operations” is defined. But the unacceptable risk may be the result of one such activity and not of others, so that the cessation of that activity could remove an unacceptable risk without the need to stop other activities. The activity creating the unacceptable risk could be the extraction of coal and the cessation of that activity could permit, for example, the activity of the maintenance of equipment to be safely conducted. The equipment would remain of a kind which is “equipment used for extraction” whilst not in active use. Yet according to the applicant’s argument, no person would have the power to direct the cessation of coal extraction without

requiring all other activities, including the installation or maintenance of equipment used for extraction to cease also. It seems unlikely that such an effect of the statute was intended. In many cases, it would require a disproportionate response to a problem which is specific to a particular activity. In addition, there could be a case where a coal mine would be safer for allowing or indeed requiring a certain activity to occur. In the example just given, it might be within the power under s 166 to require that the equipment to be installed or repaired, but there would then be an inconsistency between that directive and one under s 167 whereby all activities, including the installation or maintenance of equipment, are to cease.

- [14] Plainly a person exercising the power under s 167 may distinguish between operations according to in which part of the mine an operation would occur. The question is whether there is a power to distinguish between operations according to the kind of activity. Because of the way in which “coal mining operations” is defined, it is possible to speak of some operations continuing whilst others do not; the cessation of one activity would not affect the nature of other activities as coal mining operations. Had s 167 been expressed in terms of a power to “suspend any or all operations”, it would be compatible with the definition of coal mining operations. The question is whether s 167 should be read as if it was in those terms. In my view it should be so read.
- [15] It is logical that someone having a power should be authorised to do less than what the power enables him to do: *non debet, cui elus licet, quod minus est non licere*.⁹ For the applicant, it was submitted that there was indeed a reason for conferring this power on an all or nothing basis because it avoided the possibility that the person issuing the directive might err in the identification of the critical activity or activities. However, the section specifically provides for a judgment as to whether all or part of the mine should be affected. Moreover, the section is in terms which permit but not require a directive in the event of an unacceptable level of risk. On any view, the section confers a wide discretion requiring a judgment of what is necessary in the circumstances of the particular case. As discussed, the unacceptable risk may have resulted from some activities or operations and not others. It is illogical to suggest that a person should not have power to stop some activities whilst being empowered to stop all of them. Because of the definition of coal mining operations, there is no strain on the language to speak of the suspension of an operation. The term “suspend operations” is a power to suspend any operation.
- [16] That the plural “operations” includes the singular “operation” also results from s 32C of the *Acts Interpretations Act 1954* (Qld). For reasons already given, there is no contrary intention which appears within this section, when read in the context of the Act as a whole and with regard to its stated objects. In considering whether a contrary intention appears, Lord Pearce in *Sin Poh Amalgamated (HK) Ltd v Attorney-General of Hong Kong* [1965] 1 WLR 62 said at 67:

“The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular except in such cases as one finds in the context of the legislation reason to suppose

⁹ Broom’s *Legal Maxims* 10th ed (1939), p 111; Butterworth’s *Australian Legal Dictionary*, p 791

that the legislature, if offered such amendment to the bill, would have rejected it.”¹⁰

Rather than the context suggesting an intention contrary to the operation of s 32C, in my view the context strongly supports its operation.

- [17] Upon its proper interpretation, s 167 empowers a directive to be given to a person to suspend each or any of the activities by reference to which coal mining operations is defined. It is necessary then to relate that conclusion to the facts of this matter. In earlier proceedings, I declared that the design of this mine did not then comply with s 296(1) of the *Coal Mining Safety and Health Regulation 2001*.¹¹ On the date of that judgment, Mr Vaccaneo, an industry safety and health representative, issued a directive suspending all underground operations at the mine. On 23 June, the site executive of the mine applied for a review of that directive and on 25 July, the chief inspector of coal mines determined to set aside Mr Vaccaneo’s directive and to substitute the subject directive. The directive was in the following terms:

“I hereby direct under section 167 of the Act that all underground operations at Grasstree mine are suspended except for the activities detailed in the Inspection and Restoration of Services Plan. Those activities must be carried out in accordance with the Existing Controls and the Additional Controls set out in GRA080.2 and GRA081, (except those relating to the operation and use of diesel powered plant which is not allowed under this directive) and the Further Controls outlined below.

Further Controls

- The activities to be undertaken are limited to the Inspection and Restoration of Services Plan and so there can be no misunderstanding, no more than the three people nominated in the Inspection and Restoration of Services Plan are to be underground at any time except for the purpose of:
 - inspections compelled or permitted by the Act or the *Coal Mining Safety and Health Regulations 2001*; and
 - in the case of serious accident where the persons underground require assistance, additional people may enter underground (as required) to assist the evacuation or treatment of the injured person.
- The only activities that can be carried out will be those associated with statutory inspections, restoring power, restoring pumping operations and the installation of safety apparatus and monitoring equipment.
- There is to be no operation, use or refuelling of diesel powered plant in the underground areas of the mine.

¹⁰ Applied by Privy Council in *Blue Metal Industries Ltd v Dilley* [1970] AC 827 at 846-847

¹¹ *Construction Forestry Mining and Energy Union v State of Queensland and Anor* [2004] QSC 181

- Procedures with respect to actions in the event of accident to any member of the 3 persons underground must be provided to an Inspector and an Industry Safety and Health Representative and put in place before any labour is allowed underground;
- If there is any work to be carried out on the surface that could affect the availability of either winding installation no labour is allowed to be underground while that work on the surface is being carried out;
- No labour is allowed underground where there is a real chance of contaminants from a fire on the surface being drawn into the mine such that those contaminants could affect the ability of a person to escape from the mine;
- Cleanliness of the mine surface adjacent to both shafts must be ensured, specifically any flammable materials, other than infrastructure in place prior to 18 June 2004 must be removed to ensure the intake airway is not affected by smoke or other contaminants;
- Fuel pods currently stored underground must have physical barriers installed on all access ways to prevent any impact by mobile plant.
- The emergency generator is to be readied for immediate use and tested weekly in accordance with standard procedures;
- Before any labour is allowed underground a suitable spare cable must be sourced as a back up in the event of possible damage to the existing cable from the emergency generator to the installations;
- The electrical supply cable between the emergency generator and intake shaft winder controls must be separated as far as practicable from other supply cables currently installed; and
- A documented care and maintenance safety management plan must be developed and implemented before any labour is allowed underground.

Copies of the letter dated 23 June 2004 from the Site Senior Executive to the Chief Inspector of Coal Mines and the documents GRA080.2 and GRA081 are attached and form part of this Directive and the Mine Record.”

[18] The sole ground for challenging the validity of this directive is that, unlike Mr Vaccaneo’s directive, it does not suspend all underground operations but permits some to continue. It follows that the challenge must fail. It is then unnecessary to consider the operation of s 166 in this case, and in particular whether this directive, in so far as it permits but does not require any activity to be carried out, could be said to have been authorised also by that section. The originating application, which seeks a declaration that the directive is invalid, must be dismissed.