SUPREME COURT OF QUEENSLAND

CITATION:	*Unimin Australia Limited v State of Queensland* (No 2) [2010] QSC 23
PARTIES:	**UNIMIN AUSTRALIA LIMITED** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO:	9409 of 2009
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	8 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Applegarth J
ORDER:	**1. On the proper construction of section 6 of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product, that is obtained by the applicant in the course of mining higher purity A Grade silica sand, is not a "*mineral*" within the meaning of s 6 of the *Mineral Resources Act* 1989 unless mined "for use for its chemical properties".** **2. On the proper construction of s 6(3)(b) of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product that is mined for use in white mortars and white renders is not mined "for use for its chemical properties" within the meaning of s 6(3)(b) of the *Mineral Resources Act* 1989.** **3. The application insofar as it seeks a declaration in accordance with paragraph 79(d) of the applicant's submissions is dismissed.** **4. The applicant pay the respondent's costs, including any reserved costs, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – Form of declarations to be made arising from determination of issues of statutory interpretation under the *Mineral Resources Act* (1989) Qld.
COUNSEL:	J E Murdoch SC and C J Arnold for the applicant

R J Douglas SC and G D Sheahan for the respondent

SOLICITORS: Sparke Helmore for the applicant
Crown Law for the respondent

[2] On 30 November 2009 I published my reasons for judgment in this matter[1] and declined to make declarations in the form proposed by the applicant. I ordered that the parties consult and submit minutes of order within seven days. By consent, the time for submitting minutes of order was extended until 14 December 2009. The parties consulted but were unable to agree on the proposed form of declarations arising from the judgment. As a consequence, directions were made for the filing of written submissions concerning the declarations and orders to be made.

The first and second declarations

[3] At paragraph [126] of my reasons I stated that it seemed appropriate to determine the dispute between the parties by making declarations to the effect that:

1. On the proper construction of section 6 of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product, that is obtained by the applicant in the course of winning and extracting higher purity A Grade silica sand, is not a "*mineral"* within the meaning of s 6 of the *Mineral Resources Act* 1989;

2. On the proper construction of s 6(3)(b) of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product that is mined for use in white mortars and white renders is not mined "for use for its chemical properties" within the meaning of s 6(3)(b) of the *Mineral Resources Act* 1989.

[4] The parties have agreed concerning the terms of the second declaration. The first proposed declaration cast in a negative form the form of declaration proposed by the applicant in paragraph 79(a) of its submissions at trial. The applicant now submits that this form of declaration should be modified in two respects. The first is to insert the word "mining" in lieu of the words "winning and extracting". The respondent does not oppose this change, and I intend to make it.

[5] The second proposed modification is contentious. The applicant proposes the addition of the words "unless mined 'for use for its chemical properties'" at the conclusion of the first declaration. It submits that the inclusion of this phrase is appropriate to confine the declaration to the facts before the Court and that if the phrase is not included in the declaration then the declaration would create an absolute prohibition on all uses of B Grade silica sand, regardless of the purpose for which the silica sand might be mined.

[6] The respondent submits that these words should not be added since their addition would have the effect of reinstating the issue between the parties as to whether or not the mining of the lower purity B Grade silica sand by-product is mined for use for its chemical properties. I do not accept this submission because that issue is effectively resolved by the second declaration. Nor do I accept that the addition of the words entitles the applicant to unilaterally determine the purpose for the mining

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1 *Unimin Australia Ltd v State of Queensland* [2009] QSC 384.

of the sand and, thereby, to "self determine whether or not the B Grade silica sand is mined for use for its chemical properties." The second declaration determines the issue in relation to mining for use in white mortars and white renders. That was the matter in dispute between the parties and the first two declarations proposed by the applicant resolve that dispute. I accept the applicant's submissions concerning the form of the declarations.

The third proposed declaration

[7] The respondent proposes a further declaration in the following form:

> "3. No property passed from the respondent to the applicant, or any other person, in respect of the lower purity B Grade silica sand by-product won and extracted by the applicant, after December 2008, under mining leases 1108, 1124, 1132 or 7064."

[8] The respondent submits that none of the arguments advanced by the applicant to support a finding of the passing of title in the B Grade silica sand from the respondent to the applicant were made out. It submits that the negative declaration proposed by it has utility in that it provides certainty to the parties as to the issue of property of the B Grade silica sand by-product which was won and extracted by the applicant, limited temporally to the period after December 2008. Limitation of the period to which the declaration applies is submitted as appropriate to address the Court's concerns expressed in paragraph [128] of the reasons for judgment.

[9] The applicant contends that a declaration should not be made either in the terms proposed by the respondent or at all. It raises concerns about the effect of the declaration which purports to address the passage of property to non-parties, and that were the Court to make a declaration in the terms proposed by the respondent, or in similar terms, those whose title in the sand may be affected should be afforded an opportunity to be heard. I accept the applicant's submission that the form of declaration proposed by the respondent is too wide. In addition, I am not in a position to determine whether the Department of Mines and Energy has accepted royalties in relation to sand that was extracted after December 2008 for which title has not passed. Accordingly, the form of declaration proposed does not completely address the concern expressed at paragraph [128] of my reasons for judgment.

[10] More importantly, the form of declaration proposed by the respondent is far more extensive than the negative form of the declaration sought by the applicant in relation to the relevant issue at the hearing. At the hearing the respondent's principal submission was that the application be dismissed. It submitted, in the alternative, that a declaration ought to be made in respect of the present issue to the following effect:

> "no condition of the mining leases, environmental authorities, or any provision of the MR Act or any other Act operates to pass property to Unimin in respect of anything other than what constitutes "a mineral" for the purposes of s 6 of the MR Act."

The respondent did not seek, by cross-application or submission, a declaration in the form now proposed. I decline to make a declaration in that form.

[11] My judgment at paragraph [124] concluded:

> "... that neither the conditions of the relevant leases, any environmental authority, the provisions of the *MR Act* nor the provisions any other Act operate to pass property to the applicant in respect of anything other than what constitutes a "mineral" for the purposes of section 6 of the *MR Act*."

That conclusion resolved the issue in dispute between the parties. In conformity with my reasons I decline to make the declaration sought in paragraph 79(d) of the applicant's submissions. An order will be made accordingly. That is sufficient to resolve the issue of construction in respect of which a declaration was sought by the applicant.

Costs

[12] The parties are agreed that the costs order should be:

> "The applicant pay the respondent's costs, including any reserved costs, to be assessed on the standard basis."

Orders

[13] The declarations and orders of the Court will be:

1. On the proper construction of section 6 of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product, that is obtained by the applicant in the course of mining higher purity A Grade silica sand, is not a "*mineral"* within the meaning of s 6 of the *Mineral Resources Act* 1989 unless mined "for use for its chemical properties".

2. On the proper construction of s 6(3)(b) of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product that is mined for use in white mortars and white renders is not mined "for use for its chemical properties" within the meaning of s 6(3)(b) of the *Mineral Resources Act* 1989.

3. The application insofar as it seeks a declaration in accordance with paragraph 79(d) of the applicant's submissions is dismissed.

4. The applicant pay the respondent's costs, including any reserved costs, to be assessed on the standard basis.