SUPREME COURT OF QUEENSLAND

CITATION:	*BHP Coal Pty Ltd & Ors v Minister for Natural Resources and Mines & Anor* [2005] QSC 121
PARTIES:	**BHP COAL PTY LTD (ACN 010 595 721), QCT MINING PTY LTD (ACN 010 487 840), MITSUBISHI DEVELOPMENT PTY LTD (ACN 009 779 873), QCT INVESTMENT PTY LTD (ACN 010 487 831), BHP QUEENSLAND COAL INVESTMENTS PTY LTD (ACN 098 876 825), QCT MANAGEMENT LIMITED (ACN 010 472 036) and UMAL CONSLIDATED PTY LTD (ACN 000 767 386)** (applicants) v **STEPHEN ROBERTSON, MINISTER FOR NATURAL RESOURCES AND MINES** (first respondent) **CHERWELL CREEK COAL PTY LTD (ACN 063 763 002)** (second respondent)
FILE NO/S:	BS 10198/03
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2005
JUDGE:	McMurdo J
ORDER:	**The application filed 5 April 2005 is dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – PERSON AGGRIEVED – where applicants hold a mining lease and a special lease over land that overlaps with land over which an exploration permit was granted by the first respondent to the second respondent – where applicants have sought judicial review of the decision to extend the exploration permit – whether applicants are "persons aggrieved" under the *Judicial Review Act* 1991 (Qld) PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY –

PRACTICE UNDER RULES OF COURT – PLEADING – DEFENCE AND COUNTERCLAIM – where the applicants have pleaded that they are "persons aggrieved" because they are the holders of a mining lease and a special lease, as well as the actual use of the lands subject to the leases – where the second respondent has pleaded that some of the actual use of the area of the special lease is unlawful – whether these parts of the second respondent's pleading are irrelevant and should be struck out

Judicial Review Act 1991 (Qld), s 7, s 20
Mineral Resources Act 1989 (Qld), s 147
Uniform Civil Procedure Rules 1999 (Qld), r 171

Boe v Criminal Justice Commission (unreported, de Jersey J, SC No 319 of 1993, 10 June 1993)
North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service [2000] QSC 172
Purcell v Venardos [1996] 1 Qd R 310
Rayjon Properties Pty Ltd v Director-General, Department of Housing, Local Government and Planning [1995] 2 Qd R 559
Save Bell Park Group v Kennedy [2002] QSC 174
Tooheys Ltd v Minister for Business and Consumer Affairs (1981) 54 FLR 421

COUNSEL: J McKenna SC, with I R Perkins, for the applicants
D G Clothier for the second respondent

SOLICITORS: Allens Arthur Robinson for the applicants
McCullough Robertson for the second respondent

[1] **McMURDO J:** In the principal proceedings, the applicants seek judicial review of a decision by the first respondent, the Minister for Natural Resources and Mines. On 22 August 2003 he decided that pursuant to s 147 of the *Mineral Resources Act* 1989 (Qld), Exploration Permit for Coal No 545 ("the EPC") should be extended so as to expire on 30 August 2005. The EPC is held by the second respondent.

[2] Pleadings have been filed. The applicants plead that they are persons aggrieved by the decision because of the facts pleaded in paragraphs 1 through 5 of their Application, and they then plead the grounds of their application for review. The second respondent's Defence denies that the applicants are persons aggrieved by the decision having regard to the matters pleaded in paragraphs 1 through 5 of its pleading. This is an application in reliance upon *Uniform Civil Procedure Rules* 1999 (Qld), r 171, to strike out parts of those paragraphs of the second respondent's Defence.

[3] The applicants are the holders of Mining Lease No 1775 ("the mining lease") and Special Lease No 12/42239 ("the special lease"), and the applicants conduct mining operations on the mining lease by what is commonly known as the Peak Downs Coal Mine. The special lease is adjacent to the area of the mining lease and across the common boundary are a number of ramps connecting areas which are being

mined with a haul road constructed within the special lease, which in turn leads to a coal processing plant within the area of another mining lease. Much of the area the subject of the EPC overlaps with the area of the special lease, and this land is described in the Defence as the "overlap land".

[4] The applicants are entitled to apply for review of this decision only if they are persons "aggrieved by" it: *Judicial Review Act* 1991 (Qld), s 20. By s 7 a reference to a person aggrieved by a decision includes a reference to a person whose interests are adversely affected by the decision. The applicants plead and the second respondent admits that the applicants are the holders of the mining lease for the Peak Downs Coal Mine and the holders of the special lease. But the applicants have also seen fit to plead, as part of their case that they are aggrieved by the decision, that they use the lands by conducting mining operations on the mining lease and using the land the subject of the special lease for certain related purposes. Their use of the mining lease is admitted but it is the Second respondent's response to the allegation of their use of the special lease which gives rise to the present application.

[5] Paragraphs 4 and 5 of the Application are as follows:

> "4. The Applicants use the land the subject of the Special Lease for purposes incidental to the Peak Downs mine, ~~including~~ with the Common Area (as defined below) relevantly used for ~~the operation of essential infrastructure for the mine such as~~ haul roads, ramps, dams, a water transfer pipeline, and powerlines ~~and the reject stockpile~~.
>
> 5. Exploration Permit for Coal no.545 (***EPC 545***) was purportedly granted on 31 August 1994, in part, over an area of land which forms part of the land the subject of the Special Lease (the ***Common Area***). The Decision to renew EPC 545 gives rise to a conflict between the Applicants and the purported holder of EPC 545 regarding the use of the Common Area. In the absence of the Decision, such a conflict would not arise."

[6] The second respondent pleads to those allegations as follows:

> "4. As to the matters of fact in paragraph 4 of why the applicants are aggrieved by the decision, the second respondent:
>
> (a) admits that the applicants have constructed haul roads, ramps, a dam, a water transfer pipeline and powerlines on the land the subject of the special lease;
> (b) says that in respect of the land that is both the subject of special lease 12/42239 and EPC 545 ("the overlap land"), the applicants:
>
> (i) dump reject ore mined from ML1775 on the overlap land, in a reject coal stockpile known as "black mountain";
> (ii) dispose of waste substances resulting from the winning or extraction of minerals in spoil piles;

(iii) dispose of waste substances resulting from the winning or extraction of minerals in an environmental and tailings dam;

(c) says that the applicants have constructed on the overlap land, and make use of, haul roads, ramps and powerlines in order to facilitate or as a consequence of the dumping of reject ore and the disposing of waste substances mined or extracted from ML1775;

(d) says that the items referred to in (a), (b) and (c) are used in conjunction with the applicants' operation of the Peak Downs Coal Mine on ML1775;

(e) says that the operations referred to in (a), (b) and (c) on the overlap land are not essential to the operation of the Peak Downs Mine, in that the mine could be conducted with those operations relocated outside of the overlap land.

5. As to the matters of fact in paragraph 5 of why the applicants are aggrieved by the decision, the second respondent:

(a) says that special lease 12/42239 does not entitle the applicants to explore for or mine for coal or other minerals;

(b) says that special lease 12/42239 reserved to the State of Queensland the right to authorise any person to explore for coal on the land;

(c) says that EPC 545 authorises the second respondent to explore for coal on the overlap land;

(d) says that it is a condition of EPC 545 that the second respondent not obstruct or interfere with any right of access at any time in respect of the land without the prior approval in writing of the Minister for Natural Resources and Mines.

Particulars

The condition was imposed by s 5.15(1)(e) of the Mineral Resources Act as it stood at the time EPC 545 was granted, which has now been renumbered as s.141(1)(d);

(e) says that no approval of the Minister authorises obstruction of or interference with the applicants' right of access;

(f) says that the applicants' use of the overlap land for dumping reject ore and disposing of waste substances mined or extracted from ML1775 (referred to in paragraph 4(b) and

(c)) is not in exercise of rights conferred under special lease 12/42239, in that:

(i) those activities amount to carrying on mining on the overlap land within the meaning of the *Mineral Resources Act;*
(ii) mining on the overlap land is not authorised by special lease 12/42239;
(iii) conducting mining operations on the overlap land contravenes the *Mineral Resources Act 1989* and, prior to 1989, contravened the *Mining Act 1968*;

(g) says that the rights granted under EPC 545 do not adversely affect the right to make use of the overlap land granted to the applicants under special lease 12/42239;

(h) in the premises, denies that the applicants are aggrieved by the renewal of EPC 545."

[7] Thus the second respondent's case is that some of the use of the area of the special lease is unlawful, and that when it is disregarded, the lawful use of the special lease could not be adversely affected by the EPC so as to make the applicants aggrieved by the decision.

[8] The applicants argue that the second respondent's plea that some of the use of the special lease is unlawful is irrelevant, because it cannot affect the outcome of the issue of whether the applicants are aggrieved. The applicants argue that they are aggrieved by the Minister's decision merely on the basis of their being the holders of the mining lease and the special lease. Alternatively, they argue that the entitlements under those leases, coupled with that use of the overlap area which is not said to be unlawful, surely provides them with the requisite standing as persons aggrieved. As the second respondent's argument confirmed, its pleading should not be understood as an allegation that *any* actual use of the area of the special lease is unlawful: the second respondent pleads that some of it is unlawful and by implication, that some is lawful and according to the rights granted by the special lease. In particular, the second respondent appears to concede that the applicants' use of the haul road for transporting coal to the processing plant is an actual use of the overlap land which is according to the special lease.

[9] The present application is to strike out paragraphs 4(b), 4(c) and 5(f) of the Defence, which contain the allegations that some of the use made of the relevant area is unlawful. The applicants do not seek to strike out paragraph 5(g), which alleges that the rights granted under the EPC do not adversely affect the right to make use of the overlap land according to the special lease. Nor do they seek to strike out paragraph 5(h), which denies that the applicants are aggrieved by the decision. And they do not seek to have the question of their standing determined as a preliminary issue. Yet they argue that their standing is so clear that the allegations of unlawful use cannot affect what they say is the inevitable outcome in relation to this issue of standing.

[10] There is considerable force in the applicants' submissions that they are persons aggrieved by the decision, regardless of whether some of their use of the overlap

area is unlawful. In *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421, in a passage which has been frequently cited on this point, Ellicott J said at 437 that the words "a person who is aggrieved"[1] should not be given a narrow construction and that they cover at least a person who can show a grievance beyond that which the person has as an ordinary member of the public. A number of Queensland decisions demonstrate a similarly broad construction to be given to the words: *Boe v Criminal Justice Commission* (unreported, de Jersey J, SC No 319 of 1993, 10 June 1993); *Rayjon Properties Pty Ltd v Director-General, Department of Housing, Local Government and Planning* [1995] 2 Qd R 559*; Purcell v Venardos* [1996] 1 Qd R 310; *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172; *Save Bell Park Group v Kennedy* [2002] QSC 174.

[11] In the present case the applicants have legal interests as the holders of the special lease. Their interests are subject to the rights under a validly granted exploration permit for coal, so that in general their use of the overlap area would have to give way to the valid exercise of rights under a duly granted exploration permit. At least if there is a real possibility that in practice their enjoyment of the special lease would be affected, their interests would be sufficiently affected to make them persons aggrieved by the decision. The second respondent pleads[2] that a condition of the EPC is that it will not obstruct or interfere with any right of access in respect of the land without the prior written approval of the Minister and that the Minister has given no such approval.[3] That condition would not preclude the possibility that, with the benefit of the Minister's approval if and when it is sought, the second respondent could adversely affect the applicants' enjoyment of the special lease.

[12] Notwithstanding the force of those submissions, the applicants are not content to rely only upon their rights under the mining lease and the special lease, or upon those rights together with use in practice of the relevant area, to the extent that it is not said to be unlawful. In a previous version of the Application, the applicants included within the uses alleged in paragraph 4 the use of the overlap area for a reject stockpile. That particular use is not relied upon now, except that in the present paragraph 4, the applicants still rely upon their use of the haul roads and certain other infrastructure without distinguishing between the use of those things for the dumping of reject ore and the disposing of waste substances on the one hand, and other uses on the other.

[13] Further, the applicants' proposed evidence at the trial includes an affidavit sworn by Mr T J Clarke, which describes the applicants' use of the area. He refers to the use of the haul roads not only for the transportation of coal to the treatment plant but also for the transportation of reject coal from the plant to the reject stockpile. And there are other parts of this affidavit which show an intention of the applicants to rely upon the use of a dam and powerlines in a way which the second respondent pleads is unlawful.

[14] The position is that however confident the applicants may be that they are persons aggrieved by the decision, they have chosen to rely upon, amongst other things, some uses of the area which are said to be unlawful, just in case those controversial uses would make a difference. They are quite entitled to plead their case in that

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1 In s 5(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

2 Paragraph 5(d) set out above.

3 Paragraph 5(e).

way. But as long as the applicants persist in relying upon the facts of those controversial uses in support of their case that they are aggrieved by the decision, the applicants must accept that they are material facts relating to that issue. That being so, the second respondent is entitled to plead matters in response to those allegations, if those matters arguably warrant the alleged facts to be disregarded. The applicants cannot say that the allegations of use, insofar as the use is said to be unlawful, are immaterial to their standing but at the same time insist upon pleading them, leading evidence of them and reserving a right to ultimately rely upon them.

[15] It is therefore relevant for the second respondent to plead that these particular uses are unlawful. At least arguably, a use which the applicants should not be making of the area ought to be disregarded in considering the actual or potential impact of the decision upon the applicants' rights and interests. In my conclusion, whilst the applicants continue to rely upon these particular uses as supporting their case that they are aggrieved, the paragraphs presently attacked are relevant and should not be struck out.

[16] The application filed on 5 April 2005 is dismissed with costs.