

SUPREME COURT OF QUEENSLAND

CITATION: *D'Aguilar Gold Limited v Gympie Eldorado Mining Pty Ltd*
[2006] QSC 326

PARTIES: **D'AGUILAR GOLD LIMITED**

(applicant)

AND

GYMPIE ELDORADO MINING PTY LTD

(respondent)

FILE NO/S: BS4447 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 1 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 10 July 2006

JUDGE: Atkinson J

ORDER: **Application dismissed**

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – TITLES: RIGHTS, PERMITS, LICENCES AND LEASES ETC – EXPLORATION TITLES – NATURE AND EXTENT OF INTEREST – where the parties had entered into an agreement – whether priorities of different interests determined by statute – whether registered holder of exploration permit bound by prior agreement, arrangement, other dealing or interest

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – GENERALLY – where the meaning of s 158(4) of the *Mineral Resources Act 1989* is unclear – whether provision should be given purposive construction – where s 14A of the *Acts Interpretation Act 1954* was applied

Acts Interpretation Act 1954 (Qld) s 14A
Mineral Resources Act 1989 (Qld) ss 2, 8, 9, 10, 126, 127, 129, 131, 132, 139, 140, 141, 144, 146, 147, 147A-147F, 151, 152, 158, 205, 387, 390

Jumbunna Coal Mine NL v Victorian Coal Miners'

Association (1908) 6 CLR 309, cited
Moneywood v Salamon Nominees (2001) 202 CLR 351, cited
Saraswati v The Queen (1991) 172 CLR 1, cited
Uittenbosch v Department of Corrective Services [2005]
 QCA 300, cited

COUNSEL: P J Dunning SC for the applicant
 H B Fraser QC with P R Franco for the respondent

SOLICITORS: Hopgood Ganim Lawyers for the applicant
 Zoe Farmer for the respondent

- [1] This application concerned the rights, if any, of the applicant, D’Aguilar Gold Limited ACN 052 354 837 (“D’Aguilar Gold”), in an exploration permit for minerals, EPM 6031, held by the respondent Gympie Eldorado Mining Pty Ltd ACN 110 465 177 (“Gympie Eldorado No 2”).
- [2] D’Aguilar Gold filed an originating application seeking a number of declarations. It sought a declaration that, in relation to EPM 6031, the respondent, Gympie Eldorado No. 2, is subject to and bound by D’Aguilar Gold’s entitlement pursuant to an agreement, arrangement, dealing or interest which was recorded in an agreement entered into by D’Aguilar Gold, Gympie Eldorado Gold Mines Pty Ltd ACN 068 754 530 (Receivers and Managers Appointed) (In Liquidation) (“Gympie Eldorado No. 1”) and Gympie Gold Ltd ACN 000 759 535 (now known as Toodyay Resources Ltd) (“Gympie Gold”) (“the D’Aguilar Gold agreement”). Particulars of this agreement, arrangement, dealing or interest were registered on the register maintained by the chief executive of the Department of Natural Resources and Mines pursuant to the *Mineral Resources Act 1989* Qld (“the *MR Act*”).
- [3] The applicant also sought a declaration that Gympie Eldorado No. 2 was bound by the D’Aguilar Gold agreement as if it had been a party and named therein to the same extent as Gympie Eldorado No 1.
- [4] Leave was sought during the hearing to amend paragraph 3 of the originating application. The precise form of the amendment was provided pursuant to directions made during the hearing and the form of the amendment was not opposed by the respondent. That was a declaration that “the respondent holds its interest pursuant to EPM 6031 in the six designated sub-blocks within EPM 6031, being blocks M, O, S, T, W, X, on trust for the applicants.”
- [5] In order to determine whether or not the declarations should be granted it is necessary first to understand the scope and detail of the *MR Act*.

The *MR Act*

- [6] The long title of the *MR Act* says that it is an Act to provide for the assessment, development and utilisation of mineral resources to the maximum extent practicable

consistent with sound economic and land use management. The objectives of the *MR Act* are set out in s 2 which provides:

“2 Objectives of Act

The principal objectives of this Act are to –

- (a) encourage and facilitate prospecting and exploring for and mining of minerals;
- (b) enhance knowledge of the mineral resources of the State;
- (c) minimise land use conflict with respect to prospecting, exploring and mining;
- (d) encourage environmental responsibility in prospecting, exploring and mining;
- (e) ensure an appropriate financial return to the State from mining;
- (f) provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals;
- (g) encourage responsible land care management in prospecting, exploring and mining.”

- [7] Minerals are defined in s 6 of the *MR Act*. Minerals, as defined, generally remain the property of the State.¹ Even if the State has not retained property in a particular mineral deposit, only the State has the capacity to grant a mining tenement over the land.² A mining tenement may be a prospecting permit, mining claim, exploration permit, mineral development licence or mining lease.³ The grant of a mining tenement by the State does not create an estate or interest in land.⁴ Prospecting permits are dealt with in Part 3 of the *MR Act*; mining claims in Part 4; exploration permits in Part 5; mineral development licences in Part 6 and Part 6A; and mining leases in Part 7, 7AAA and 7AA. This application deals primarily with exploration permits. Parts 12-18 deal with native title which is not relevant to this application. Part 11 contains some general administrative matters which are relevant in this application.

Part 11 of the *MR Act*

- [8] Section 387 of the *MR Act* provides that registers must be maintained recording various types of mining tenements and dealings and proposed dealings in them. It provides:

“Registers to be maintained

- (1) Within each mining district the mining registrar shall maintain a register in which shall be recorded particulars as prescribed of –

¹ *MR Act* s 8.

² *MR Act* s 9.

³ *MR Act* s 5, Schedule Dictionary; s 422.

⁴ *MR Act* s 10.

- (a) all prospecting permits, mining claims and mining leases the applications for the grant of which were lodged with the mining registrar; and
 - (b) applications for the grant of mining claims and of mining leases the lodgement of which is accepted by the mining registrar; and
 - (c) assignments, mortgages and other dealings in respect of mining claims, mining leases and of applications for mining leases duly lodged with the mining registrar and approved as provided for under this Act; and
 - (d) caveats duly lodged in respect of mining claims, mining leases and of applications for mining leases recorded in the register; and
 - (e) such other matters and things relating to the mining district as are prescribed to be recorded in the register.
- (2) The chief executive shall maintain a register in which shall be recorded particulars of –
- (a) all exploration permits and mineral development licences; and
 - (b) applications for the grant of exploration permits and of mineral development licences; and
 - (c) assignments of exploration permits and assignments and mortgages of mineral development licences duly lodged and approved as provided for under this Act; and
 - (d) caveats duly lodged in respect of exploration permits and of mineral development licences; and
 - (e) such other matters and things as are prescribed to be recorded in the register maintained by the chief executive.”

Other sections of the *MR Act*, which will be referred to later in these reasons, also provide for other matters that are to be recorded in the register maintained by the chief executive.

[9] Part 11 also contains general priorities provisions. Section 390 provides:

“Priority of competing applications

- (1) The types of grant to which subsection (2) applies are –
- (a) mining claims;
 - (b) exploration permits;
 - (c) mining leases.

- (2) Except as provided in sections 63⁵, 131⁶, 185⁷ and 251⁸, an application for a type of grant that is effectively lodged prior to another application for a different type of grant in respect of the whole or part of the same land being effectively lodged shall take priority over that other application for the purpose of the consideration of the application.
- (3) For the purposes of subsection (2), an application is effectively lodged –
- (a) in the case of an application for the grant of a mining claim or a mining lease upon the acceptance of the lodgement of the application;
 - (b) in the case of an application for the grant of an exploration permit on the day next following the acceptance of the lodgement of the application.”

Other specific priority provisions are found in other sections of the *MR Act*. The priorities of mining tenements are comprehensively covered by statute and not by the general law.

Exploration permits

- [10] Part 5 of the *MR Act* deals with exploration permits (EPMs). It commences with a section which appears to have the widest possible territorial and extra-territorial reach, s 126. It provides that, for the purposes of the *MR Act*, the surface of the earth is deemed to be divided into blocks and sub-blocks. The blocks are precisely defined by their latitude and longitude with reference to Greenwich. Each block is divided into 25 sub-blocks, once again precisely measured by their latitude and longitude.⁹ The Act must, however, be presumed not to have extraterritorial effect.¹⁰

⁵ Applications for the grant of mining claims duly made in respect of or including the same land shall take priority for the purpose of consideration and determination of applications according to the order of the time on which they are lodged as prescribed.

⁶ An exploration permit shall not be granted in respect of a sub-block over which a current exploration permit authorises the exploration for a mineral in respect of which the exploration permit is sought. The lodgement of an application for an exploration permit that includes a sub-block over which the exploration permit shall not be granted may be accepted but, except where the application is made by the holder of the current exploration permit, that sub-block shall be excised from the application.

⁷ Applications for the grant of mineral development licences duly made in respect of or including the same land shall take priority according to the Minister’s determination.

⁸ Applications for the grant of mining leases duly made in respect of or including the same land shall take priority for the purpose of consideration and determination of applications according to the order of the time on which they are lodged as prescribed.

⁹ This is remarkably similar to the scheme for surveying and allotting the land west of the Ohio River promulgated by Jefferson and others in the United States in the late eighteenth century: Linklater A, *Measuring America* 2002, Walker & Company, New York.

¹⁰ *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 363.

[11] An application for an EPM may be made by an eligible person.¹¹ Applications have priority according to the day on which they were lodged. An EPM may not be granted:

- (1) in respect of a sub-block if there is a current EPM for the same mineral;¹²
- (2) over land which is the subject of a mining claim, mineral development licence or mining lease or an application of any of those tenements.¹³

An EPM may be granted pursuant to s 137 of the *MR Act*, for a period not usually exceeding five years.¹⁴

[12] Section 129(16) of the *MR Act* provides that during the term of an EPM, the rights of the holder of the EPM relate to the whole of the land to which the permit applies. The area of land covered by the EPM is liable to be reduced by having sub-blocks excised from it during the period when the land is covered by the EPM. The holder of the EPM may also voluntarily reduce the area of land covered by the EPM.¹⁵ Section 139 of the *MR Act* now provides, inter alia:

“Periodic reduction in land covered by exploration permit

- (1) Unless the Minister otherwise decides, whether before the grant of an exploration permit or during its term the area of the permit must be reduced –
 - (a) for a permit for a mineral other than coal –
 - (i) by 50% by the end of the first 2 years after the permit is granted; and
 - (ii) by a further 50% by the end of each subsequent year;
- ...
- (2) The area remaining after the reduction must consist of whole sub-blocks.
- ...
- (4) At least 20 business days (or such shorter period as the Minister in the particular case allows) prior to the date when, pursuant to subsection (1), the area of land is to be reduced in respect of an exploration permit, the holder of the permit shall make a submission to the chief executive identifying the sub-blocks of land to which the holder desires the exploration permit to apply after that reduction.”

¹¹ Defined in the Schedule to the *MR Act*.

¹² *MR Act* s 131.

¹³ *MR Act* s 132.

¹⁴ *MR Act* s146; subject to renewal under *MR Act* s 147, 147A-F.

¹⁵ *MR Act* s 140.

- [13] An EPM authorises entry to the sub-blocks specified in the permit¹⁶ to facilitate exploration.¹⁷ The conditions of an EPM are set out in s 141 of the *MR Act*. They include a condition that the holder of the EPM not assign the EPM without the consent in writing of the Minister.¹⁸ If there is a breach of any condition, the holder of the EPM is liable to forfeit the security which it is obliged to provide.¹⁹
- [14] Section 129(1)(b) provides that in respect of any land, or part of the land, to which an EPM applies, the holder of the EPM may have considered, in priority to all other persons, the grant of any number of mineral development licences and mining leases. This is consistent with the priorities created under s 390 of the *MR Act*. The holder of an EPM who applies for a mining lease or mineral development licence over the same land is afforded rights and obligations pursuant to s 148 of the *MR Act*.
- [15] An EPM may be assigned, but only on application to, and with the approval of, the Minister under s 151 of the *MR Act*. Section 151 provides:

“Assignment of exploration permit

- (1) The holder of an exploration permit desirous of assigning the holder’s interest in the exploration permit shall apply to the chief executive for the Minister’s approval to that exercise and shall furnish to the chief executive such information with respect thereof as the Minister requires.
- (2) Where there are 2 or more holders of an exploration permit, an application under subsection (1) shall be made by all the holders.
- (3) The chief executive must, within 5 business days after an application under subsection (1) is lodged, give a copy of it to the EPA administering authority.
- (4) Upon an application made pursuant to subsection (1) the Minister may cause the applicant to be given notice –
 - (a) that, subject to compliance with this Act in respect thereof and with any conditions specified in the notice, within 3 months from the date of the notice or such other period as is specified in the notice the Minister will approve the exercise; or
 - (b) that the Minister does not approve the exercise.
- (5) Upon receipt within the prescribed time of the prescribed document of assignment that gives effect to an assignment referred to in subsection (1) and upon compliance with this

¹⁶ *MR Act* s 127.

¹⁷ *MR Act* s 129.

¹⁸ *MR Act* s 141(1)(e).

¹⁹ *MR Act* s 144.

Act and all conditions specified in the notice given pursuant to subsection (4)(a) in respect of that assignment and payment of the prescribed fee, the assignment shall be approved and such particulars as are necessary to give effect to or evidence that assignment shall be recorded in the appropriate register and endorsed on the exploration permit.

- (6) The Minister may approve, and record particulars of, the exercise of a power mentioned in subsection (1) even though subsections (1) and (4) have not been complied with if the Minister would have approved the exercise of the power if the subsections had been complied with.
- (7) An assignment of an exploration permit shall not be in respect of part only of the land the subject of the exploration permit.
- (8) A purported assignment of an exploration permit or of an interest shall not be effective unless it is made in accordance with this section and approved as provided in subsection (5) and shall take effect on the day next following its approval by the Minister under subsection (5)."

[16] Before an application for approval is lodged with the Minister, a person who claims a right or interest in or in respect of an EPM may prevent an assignment from being approved by the Minister and placed on the register by the lodging of a caveat under s 152 of the *MR Act*.²⁰ Such a caveat may be withdrawn or removed or it may lapse.²¹

[17] Agreements, arrangements, dealings or interests in EPMs, whether they be legal or equitable, other than an assignment of the EPM, may be recorded on the register under s 158 of the *MR Act*. Section 158 provides for their recording on the register and their priority position.

“158 Recording of agreements, arrangements, dealings or interests

- (1) Upon application made in the approved form, payment of the prescribed fee, and production of a document purporting to evidence an agreement, arrangement or other dealing or interest (legal or equitable) in or in relation to an exploration permit (other than an assignment of the exploration permit) to the chief executive, the chief executive shall –
 - (a) record in the register maintained by the chief executive, the relevant particulars set out in the application form; and

²⁰ See also *MR Act* ss 153-154.

²¹ *MR Act* ss 154-156.

- (b) retain the document or a copy thereof.
- (2) The chief executive shall make the recordings prescribed by subsection (1) in the order of time in which applications are lodged with the chief executive.
- (3) The chief executive is not required to examine any document produced under this section or to determine the validity of any agreement, arrangement, dealing or interest alleged in an application made under subsection (1).
- (4) An agreement, arrangement, dealing or interest, particulars of which are recorded under this section shall, subject to being otherwise legally enforceable, take priority over any other agreement, arrangement, dealing or interest –
 - (a) particulars of which have not been recorded under this section; or
 - (b) particulars of which have been recorded under this section after particulars of the first mentioned agreement, arrangement, dealing or interest had been recorded.
- (5) Subsection (4) does not apply in respect of –
 - (a) an interest that is a charge that, under the *Corporations Act*, part 2K.1, is required to be registered; or
 - (b) an estate or interest in land (whether freehold or leasehold) or a dealing therein which is registered or registrable by the registrar of titles or other like registering authority.”²²

[18] Section 158 both provides the opportunity to register particulars of an agreement, arrangement or other dealing or interest, and sets out what priority it has once registered. The type of agreement, arrangement, other dealing or interest that s 158 deals with is the type of agreement, arrangement, other dealing or interest that can be recorded on the register under s 158: that is an agreement, arrangement, other dealing or interest (legal or equitable) in or in relation to²³ an EPM other than an assignment of the EPM. That is explicitly set out in s 158(1). It follows, in my view, that that is the type of “agreement, arrangement, dealing or interest” referred to in s 158(4) because that is a registrable “agreement, arrangement, dealing or interest”. When particulars of such an agreement, arrangement, dealing or interest are registered then that takes priority over any other agreement, arrangement,

²² A similar provision applies to the registration of a document evidencing an agreement, arrangement or other dealing or interest in a mineral development licence: *MR Act* s 205.

²³ “in relation to” are words of the widest connotation: *Moneywood v Salamon Nominees* (2001) 202 CLR 351 at 380.

dealing or interest that could have been registered under s 158, but was not, or an agreement, arrangement, dealing or interest which was registered under s 158 but later in time than particulars of an earlier agreement, arrangement, dealing or interest.

- [19] It was submitted by the applicant that s 158 gives priority to a registered “agreement, arrangement, other dealing or interest (legal or equitable in or in relation to an exploration permit (other than an assignment of the exploration permit)” over any agreement, arrangement or other dealing or interest, including an assignment for an exploration permit, which was not registered under s 158. Since an assignment of an EPM cannot be registered under s 158, it was argued that an agreement, arrangement or other dealing or interest which could be and had been registered under s 158 would always take priority over an assignment of an EPM because of the terms of s 158(4). But that argument assumes, in my view wrongly, that the words “agreement, arrangement, dealing or interest” where they appear for the second time in s 158(4) are used to refer to a wider or different type of agreement, arrangement, dealing or interest from that referred to in s 158(1) or the first time they appear in s 158(4). The only particulars of an “agreement, arrangement, dealing or interest” which can have been recorded under s 158(4) are those which evidence an agreement, arrangement, other dealing or interest (legal or equitable) in or in relation to an EPM, other than an assignment of the EPM, and that is the meaning that ought be given to those words wherever they appear in s 158. If that is so, then it follows that such an agreement, arrangement, dealing or interest takes priority over any other agreement, arrangement, other dealing or other interest (legal or equitable) in or in relation to an EPM, other than an assignment of an EPM, that was not registered or was registered later in time. It does not give the registered particulars statutory priority over an assignment of an EPM or a notice of an assignment of an EPM, registered later in time.
- [20] It is true that the interpretation of s 158(4) of the *MR Act* is not without its difficulties. Section 14A of the *Acts Interpretation Act 1954* provides that when the court is interpreting a statute, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.²⁴ However a purposive interpretation of the section similarly favours such an interpretation of the section.
- [21] The *MR Act* prohibits the partial assignment or registration of a partial assignment of an EPM. It also ensures the exercise of State control over the administration of the exploration of mineral resources in this State: see particularly the objective set out in s 2(f) of the *MR Act*. It would be inconsistent with the purpose of the *MR Act* to give a private agreement or arrangement not sanctioned by the Minister which purports to bestow exclusive rights over part of an EPM, statutory priority over any other mining tenement over the land which can be registered under other sections of the *MR Act*, particularly the assignment of the whole of an EPM. Further it would not appear to be consistent with the priorities given by s 390 which are not said to be subject to s 158.

²⁴ See *Saraswati v The Queen* (1991) 172 CLR 1 at 22; *Uittenbosch v Department of Corrective Services* [2005] QCA 300 at [19] – [20].

- [22] It follows that it is more consistent with the purpose of the *MR Act* to restrict the meaning of the words “agreement, arrangement, dealing or interest” wherever they appear in s 158 to the full meaning of that phrase as set out in s 158(1) that is, an agreement, arrangement, other dealing or interest (legal or equitable) in or in relation to an EPM (other than an assignment of the EPM). This is a case where the ordinary meaning of the legislation gives effect to its purpose.²⁵

Application of the *MR Act* to the facts of this case

- [23] EPM 6031 was granted on 7 September 1989 over a block of land, consisting of 50 sub-blocks, at Kilkivan, a town about 50 kilometres northwest of Gympie. Gympie Eldorado No. 1 became the registered holder of EPM 6031 on 17 March 1992.
- [24] Gympie Eldorado No 2 acquired EPM 6031 on 29 October 2004 from the receivers and managers who were appointed to Gympie Eldorado No 1. Such an assignment requires an application to, and approval by, the Minister pursuant to s 151 of the *MR Act*. Once approved, the assignment is endorsed on the exploration permit and recorded in the register. The assignee then becomes the registered holder of the EPM. Gympie Eldorado No. 2 became the registered holder of EPM 6031 on 14 January 2005. The register is the register maintained by the chief executive pursuant to s 387(2)(c) of the *MR Act*. Significantly for this case, s 151(7) of the *MR Act* prohibits assignment of part only of the land the subject of the exploration permit.
- [25] Prior to that assignment, Gympie Eldorado No 1 and D’Aguilar Gold had entered into the D’Aguilar agreement by contract dated 29 May 2003. By the D’Aguilar Gold agreement, Gympie Eldorado No 1 agreed to sell to D’Aguilar Gold two EPMs, which are not the subject of this dispute and to which no further reference will be made. Gympie Eldorado No. 1 also agreed to register an arrangement, dealing or interest over “a portion of tenement EPM 6031” in favour of D’Aguilar Gold and D’Aguilar Gold agreed to accept the arrangement, dealing or interest over a portion of EPM 6031 on the terms and conditions set out in the D’Aguilar Gold agreement. The total consideration was the issue of 7,500,000 ordinary 20 cent shares by D’Aguilar Gold in favour of Gympie Eldorado No. 1. The “portion of tenement EPM 6031” is defined in the contract to mean “the area under EPM 6031 (as it exists at the date of this agreement) defined in Schedule 4, over which the seller agrees to register an arrangement, dealing or interest.” Schedule 4 provides that the portion of tenement EPM 6031 is to consist of Block No. 1758, sub-blocks N, O, S, T, W, and X. An “arrangement, dealing or interest” is defined in the contract to mean:

“the commercial arrangement pursuant to s 158 subsections 1 to 5 of the Act to be effected pursuant to clause 4.1(b) hereof having the effect of giving the [D’Aguilar Gold] the same rights of enjoyment and liabilities as if there had been a transfer by [Gympie Eldorado No 1] of 100 per cent beneficial ownership of the portion of tenement EPM 6031 to [D’Aguilar Gold].”

²⁵ *Saraswati v The Queen* (supra) at 21 per McHugh J.

- [26] It was not an assignment of the beneficial interest in the EPM or the sub-block which were part of the EPM because such a purported assignment of an interest in an EPM would be invalid pursuant to s 151(8) of the *MR Act*.
- [27] The “arrangement, agreement, other dealing or interest” over a portion of EMP 6031 was registered by D’Aguilar Gold on the register maintained under s 158 of the *MR Act* on 30 September 2003, before receivers and managers were appointed to Gympie Eldorado No. 1 and before Gympie Eldorado No. 1 assigned its interest in EPM 6031 to Gympie Eldorado No. 2. The particulars of the agreement, arrangement, other dealing or interest of D’Aguilar Gold was described in the register as “Farm out interests in 6 sub-blocks of EPM 6031 namely N, O, S, T, W, X of Block Bris 1758 between [Gympie Eldorado No. 1] and [D’Aguilar Gold] dated 5/6/03.”
- [28] A farm out interest is not defined in the agreement. However the rights granted to D’Aguilar Gold are set out in clause 4.1(b) of the D’Aguilar Gold agreement and these bundles of rights may be considered to be a farm out interest. That interest may be usefully described as a working interest in a mineral property. It is a phrase apparently commonly used in the mining industry. The bundle of rights to which it refers in the D’Aguilar Gold agreement are that Gympie Eldorado No. 1 agrees to grant to D’Aguilar Gold until such time as D’Aguilar Gold is able to become the registered holder of EPM 6031, the following rights of use and enjoyment in respect of the Portion of EMP 6031:
- “(i) the sole and exclusive right and at its sole risk and expense to carry out exploration for and to extract Minerals within the Portion of Tenement EPM 6031 in accordance with the Act and any applicable environmental authorities, plans, programs or other legislative requirements;
 - (ii) at its sole discretion, to reduce the area of Portion of Tenement EPM 6031 by excluding from this Agreement any of Portion of Tenement EPM 6031 if the expenditure by [D’Aguilar Gold] upon the Portion of Tenement EPM 6031 to be excluded equals or exceeds the expenditure obligation in respect of such of Portion of Tenement EPM 6031 as set by the Minister. Upon such a reduction [D’Aguilar Gold] shall cease to have any interest in any part of Portion of Tenement EPM 6031 so excluded and any reference in this Agreement to Portion of Tenement EPM 6031 shall be taken to be a reference to the Portion of Tenement EPM 6031 as so reduced;
 - (iii) to carry out all exploration in Portion of Tenement EPM 6031 and determine all exploration and evaluation programmes on Portion of Tenement EPM 6031;
 - (iv) subject to complying with all laws, acts, rules and orders and regulations governing its activities on Portion of Tenement EPM 6031 expend monies which are reasonably required in respect of the Portion of Tenement EPM 6031 and when taken as a proportion of all expenditure required on EPM 6031, will facilitate renewal of EPM 6031 by

[Gympie Eldorado No. 1]. [D'Aguilar Gold] agrees that it shall present such programmes and budgets with such guarantees as are appropriate so as to provide reasonable support to [Gympie Eldorado No. 1] so as to ensure the success of the applications by [Gympie Eldorado No. 1] to have the period of Portion of Tenement EPM 6031 extended.

- (v) at any time, assign, transfer, sell mortgage or otherwise deal with the whole or part of its right, title or interest in and to Portion of Tenement EPM 6031 under this Agreement provided that but [*sic*] any such assignment, transfer, sale, mortgage or dealing will be:
 - (A) subject to the rights of the [Gympie Eldorado No. 1] under this Agreement; and
 - (B) [D'Aguilar Gold] as a condition of any such assignment, transfer, sale, mortgage or other dealing procuring the execution by any assignee, transferee, buyer, mortgagee or other person of a deed whereby the assignee, transferee, buyer, mortgagee or other person covenants to be bound by all the terms and conditions of this Agreement;
- (vi) do all acts and things reasonably required to provide [D'Aguilar Gold] with full beneficial ownership and enjoyment of Portion of Tenement EPM 6031 as if it were the registered holder.”

[29] Clause 4.4 of the D'Aguilar Gold agreement imposed certain obligations on Gympie Eldorado No. 1 until D'Aguilar Gold became the registered holder of Portion of EPM 6031. They included an obligation to hold EPM 6031 free of any claims and interests of any other person (cl 4.4(b)), and to do acts to give effect to the provisions of cl 4, including consenting to any application by D'Aguilar Gold for a mining lease over Portion of Tenement EPM 6031 (cl 4.4(f)). It would appear that Gympie Eldorado No. 1 has breached its contract with D'Aguilar Gold, if the contract is enforceable, but D'Aguilar Gold did not seek contractual remedies against Gympie Eldorado No. 1 and accordingly I make no specific findings to that effect.

[30] Under clause 4.1(c), Gympie Eldorado No. 1 agreed to have the D'Aguilar Gold agreement registered, and specifically the provisions in clause 4.2(b), as an arrangement, dealing or interest over the portion of tenement EPM 6031 in favour of D'Aguilar Gold. It was not, of course, an assignment of an EPM under s 151 of the *MR Act*. Because of the statutory prohibition, it was not possible to assign, in law or in equity, part only of the EPM, i.e. sub-blocks, M, O, S, T, W and X of block No. 1758 of EPM 6031. No equitable interest in those sub-blocks could or did arise in favour of D'Aguilar Gold.²⁶

²⁶ cf *Re Adroma Pty Limited* [1987] 2 Qd R 134; *Re Bruynius* [1995] 1 Qd R 492.

- [31] The proposed assignment from Gympie Eldorado No. 1 to Gympie Eldorado No. 2 was placed on the register on 15 June 2005. A caveat was lodged by D'Aguilar Gold on 14 December 2005 pursuant to s 152(1) of the *MR Act*. By s 151(1), a person who claims a "right or interest" in or in respect of an exploration permit may by caveat, inter alia, forbid the approval of any assignment of an exploration permit. Such a caveat does not apply to an assignment, where the application for approval of the assignment was lodged with the Minister before the lodgement of the caveat. A caveat is limited in time and this caveat, as extended by the Land and Resources Tribunal,²⁷ lapsed on 13 June 2006.
- [32] In spite of negotiations which were conducted between Gympie Eldorado No. 2 and D'Aguilar Gold, no agreement was entered into between them and they have no contractual relationship. Hence, D'Aguilar Gold applied for the orders as to its interest in the EPM and its priority sought in the three declarations.
- [33] However, in my view, it follows from the analysis of the *MR Act* that D'Aguilar Gold is not entitled to any of the declaratory relief sought. Section 158 of the *MR Act* did not give its "agreement, arrangement, other dealing or interest" priority over an application to assign an EPM or the assignment of an EPM. As the priority position is comprehensively covered by statute it is unnecessary to determine what the priority position would be at common law or in equity if it were not covered by statute. D'Aguilar Gold is left with its contractual remedies against Gympie Eldorado No. 1. Gympie Eldorado No. 2 was not bound by the agreement made between Gympie Eldorado No. 1 and D'Aguilar Gold as if it had been a party to that agreement. D'Aguilar Gold has not acquired an equitable interest in or portion of EPM 6031 and Gympie Eldorado No. 2 does not hold its interest in any of the sub-blocks within EPM 6031 on trust for D'Aguilar Gold.
- [34] The application must be dismissed.

²⁷ *D'Aguilar Gold Ltd v Gympie Eldorado Mining Pty Ltd* [2006] QLRT 10.