Privy Council Appeal Nos. 16, 17 and 18 of 1973

Cudgen Rutile (No. 2) Pty. Ltd. and Another – – *Appellants*

v.

Gordon William Wesley Chalk (and Consolidated Appeals) – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER 1974

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD WILBERFORCE]

These are three consolidated appeals (Nos. 16, 17 and 18 of 1973) from a judgment of the Full Court of the Supreme Court of Queensland pronounced on demurrers to three actions brought by the appellants, or one of them, against the respondent. He is a nominal defendant appointed to represent the Government of Queensland pursuant to the Claims Against Government Act. The actions (Nos. 931, 930 and 929 of 1972) asserted claims against the Government which, though differing in some details, depended for their validity upon identical considerations of law. There were separate pleadings and separate demurrers, but the Full Court, in allowing the demurrers, gave a single judgment. Their Lordships will deal with the appeals as one, referring to the appellants in the three actions without distinction as "the appellants". They will refer similarly without distinction to the different parcels of land involved in each action as "the lands" or "the reserves" as the case may be. Where it is necessary to refer specifically to any document or fact, their Lordships will take, as typical, those arising in Appeal No. 16 (action 931), the assumption being, unless otherwise stated, that a legally similar situation exists in the other appeals.

The proceedings being by way of demurrer, it is necessary to assume that the facts are as stated in the Statement of Claim. By way of background it may be said that the appellants are companies incorporated in Queensland which carry on the business of mineral sand mining. About 100–150 miles north of Brisbane there is a large coastal dune area commonly known as Cooloola where minerals such as rutile, zircon, ilmenite and monazite were thought to exist and which the appellants

desired to exploit, if that was commercially possible. All these minerals were the property of the Crown: the lands themselves were mainly Crown Lands except for some areas which were Reserves. There were also some private lands but nothing turns upon any difference between these and Crown lands.

It was alleged in the Statement of Claim (Appeal No. 16) that on 27th June 1966 the appellants (plaintiffs) were the holders of an Authority to Prospect (No. 270M) granted under section 23A of the Mining Acts 1898 to 1955 by the Minister for Mines, in respect of an area of about 18 square miles. They were entitled to a renewal of this for one year from 1st July 1966. On 27th June 1966 they applied by letter to the Minister for a renewal and in reply received a letter, dated 6th July 1966, from the Under-Secretary for Mines stating that he was authorised to offer them a new Authority to Prospect, in the form of a draft enclosed, over the same area of about 18 square miles. The appellants duly accepted this offer, and accordingly two Authorities to Prospect were issued. These were:

(i) an Authority dated 4th August 1966 by the Governor in Council (under s.46 of the Mining Acts) in respect of so much of the area as consisted of " reserves ";

(ii) an Authority dated 15th September 1966 by the Minister for Mines under s.23A of the Mining Acts of so much of the area in question as consisted of " Crown land " and under s.12A (2) of the Mining on Private Land Acts 1909 to 1965 of so much of the area in question as consisted of " private land ".

The latter Authority was scheduled to the Demurrer (Schedule F). The former Authority is added at the end of the Schedule and adopts with one variation the terms of the Authority granted by the Minister. It is clear, and not disputed, that in general, so far as is relevant to the present appeals, the same statutory provisions and legal incidents apply to each category of land, Crown, private and reserve. (No authority to prospect as regards reserves was granted by the Governor in Council with respect to land dealt with in Appeal No. 18.) In certain events a separate argument might have had to be considered as to the reserve land, namely as to the respective powers of the Governor in Council and the Minister, but in view of the conclusions hereafter reached by their Lordships this does not now arise for consideration. The main terms of the Authority to Prospect of 15th September 1966 were as follows:

1. Its duration was four years from 1st July 1966.

2. During that period the appellants had the right to prospect the subject land for the purpose of determining the existence, or otherwise, of minerals other than coal, mineral oil and petroleum.

3. The appellants had to make a deposit and pay an annual rental.

4. The appellants agreed to make a minimum annual expenditure. This was specified as $25,000 for the first year and $30,000 a year thereafter.

5. Clause 20 was in the following terms:

" Right to Acquire Mining Leases: Subject to due performance and observance of the provisions of the Acts and the terms, conditions, provisions and stipulations of this Authority to Prospect on the part of the Holder to be performed or observed, the Holder shall be entitled at any time and from time to time during the said period to apply for and have granted to him in priority to any other person or company, a mining lease for the minerals specified in clause 5 hereof under the Acts over any part of the lands comprised within this Authority to Prospect."

Consequent on the Authorities to Prospect, the appellants carried out extensive prospecting operations in the course of which they incurred considerable expense and discovered and proved the existence of large deposits of rutile and zircon and deposits of other minerals of commercial value. On 2nd February 1970 they applied, within the terms of the Authorities, for Special Mineral Leases in respect of such minerals over three areas of 4,760 acres, 1,060 acres and 930 acres. None of these included any private land nor was any private land applied for in the applications with which Appeals Nos. 17 and 18 were concerned.

In accordance with the Mining Acts and Regulations, these applications were heard by the Mining Warden in hearings lasting several days. The Mining Warden reported that the leases applied for should be granted. The appellants alleged that they had complied in all respects with the terms of the Authorities to Prospect and done all other things necessary to entitle them to the grant of the Leases, but that the Government refused to grant them any such leases and denied that it had any obligation to do so.

The appellants thereupon instituted these proceedings in the Supreme Court of Queensland claiming (*inter alia*) specific performance of the contract which they alleged existed to grant them the leases, or alternatively damages (as regards Appeal No. 16 $12,972,742·00) in respect of expenses wasted and loss of future profits. There were other claims for a declaration, an injunction and in respect of alleged breach of warranty of authority: the latter claim was not canvassed in the appeal.

Upon this the defendant entered a Demurrer. A number of grounds of demurrer were stated. Of these the following should be quoted as being those most material:

> " 7. Upon a true construction of the Authorities to Prospect numbered 348M and in particular of that term alleged in paragraph 19 of the Statement of Claim, the Plaintiffs are not, in the events alleged in the Statement of Claim, entitled to the grant to them of any or all of the special mineral leases applied for by them, nor is the Governor in Council or the Crown acting otherwise through some officer, servant or agent, obliged to grant or to cause to be granted to the Plaintiffs any or all of the special mineral leases applied for;
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> " 8. If, upon a true construction of the said Authorities to Prospect numbered 348M, any provision thereof purports to entitle the Plaintiffs to the grant of a special mineral lease or to oblige the Governor in Council or the Crown acting otherwise through some officer, servant or agent to grant or to cause to be granted to the Plaintiffs any such leases as aforesaid, the said term is void and of no effect for that neither the Mining Acts nor any other Act of the Legislature of Queensland authorise or permit the inclusion in an Authority to Prospect of a term which would oblige the Governor in Council or the Crown acting otherwise through some officer, servant or agent, in the events pleaded, to grant or to cause to be granted a special mineral lease over the area comprised in the Authority to Prospect or any part thereof;
>
> " 9. The letter referred to in paragraph 28 of the Statement of Claim does not constitute and is not capable of constituting an agreement between the Plaintiffs and the Crown, and upon the true construction of the said letter, no warranty was given by the Crown to the Plaintiffs either in the terms alleged in sub-paragraph (*a*) of paragraph 28 of the Statement of Claim or at all; ".

(The Grounds of Demurrer in Actions 930 and 929 were in all material respects the same.)

On these demurrers coming before the Full Court, the three learned judges who heard them were agreed in holding that the Statement(s) of Claim were demurrable. The essence of the judgment of Hanger C.J. was given in the following paragraph:

> "If the document did contain the terms of a contract, if and in so far as it purported to bind the Crown, the Minister for Mines had no authority to make it; it purported to place a fetter upon the authority of the Governor in Council; and in any case, the terms of the suggested contract are too vague and uncertain to be enforceable either by way of specific performance of the 'promises' contained in it or by way of damages; further, it does not appear against whom it could be enforced—certainly not against the Governor in Council. On these grounds, the demurrers should be allowed."

Stable J. and Hart J. based their decision on the narrower ground that clause 20 of the Authority to Prospect, if providing for the grant of a mineral lease, did not specify the term of the lease to be granted and as this was an essential term, there was no valid or enforceable agreement for a lease on which the appellants could sue.

Their Lordships will first consider the question whether there was any power for the Minister, in the Authority to Prospect, and in particular in the terms of clause 20 above quoted, to agree to grant mineral leases to the appellants. They will assume, without deciding, for the purpose of this argument that clause 20 did purport to contain such an agreement. The question as stated raises issues of law as to the power to contract for the disposal, by lease, of land of the Crown.

As a starting point, their Lordships accept as fully established the proposition that, in Queensland, as in other States of the Commonwealth of Australia, the Crown cannot contract for the disposal of any interest in Crown Lands unless under and in accordance with power to that effect conferred by statute. In Queensland the legal basis for this power, and for the limitations upon it, is to be found in the Constitution Act of 1867, of which s.30 provides for the making of laws regulating the sale, letting, disposal and occupation of the waste lands of the Crown, and s.40 vests the management and control of the waste lands of the Crown in the Legislature.

Numerous pronouncements in the Courts in Australia have given effect to this principle. Thus in *O'Keefe v. Williams* (1907) 5 C.L.R.217 Griffith C.J. said:

> "I entirely agree with the Supreme Court [of New South Wales] in the proposition that no Minister of the Crown has any authority to enter into any agreement for the disposition of an interest of the Crown in Crown lands which is not authorized by the law" (*loc. cit.* p.225).

In *State of New South Wales v. Bardolph* (1934–5) 52 C.L.R. 455 Rich J. said:

> "When the administration of particular functions of Government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the statute contemplates" (*loc. cit.* p.496).

—see also *Williams v. Attorney-General for New South Wales* (1913) 16 C.L.R.404; *Lukey v. Sydney Harbour Trust* (1902) 2 S.R.(N.S.W.) Eq. 152. A recent affirmation of this is to be seen in the judgment of Jackson C.J in *J. D. and Wm. G. Nicholas and Others v. State of Western Australia and Others* (1972) W.A.R.168.

It follows as a logical consequence that when a statute, regulating the disposal of Crown lands, or of an interest in them, prescribes a mode of exercise of the statutory power, that mode must be followed and observed: and if it contemplates the making of decisions, or the use of discretions, at particular stages of the statutory process, those decisions must be made, and discretions used, at the stages laid down. From this in turn it must follow that the freedom of the Minister or Officer of the Crown responsible for implementing the statute to make his decisions, or use his discretions, cannot validly be fettered by anticipatory action; and if the Minister or Officer purports to do this, by contractually fettering himself in advance, his action in doing so exceeds his statutory powers. A clear statement of this is to be found in the judgment of the High Court (Isaacs, Gavan, Duffy and Rich JJ.) in *Watson's Bay and South Shore Ferry Co. v. Whitfeld* (1919) 27 C.L.R. 268. The Minister for Lands having entered into an agreement with the appellant that, after a contemplated revocation of the dedication of certain land as a public park, the land should be offered for sale by public auction, the agreement was held invalid. The Court said:

> " First, taken as a whole it was an attempt to fetter in advance the discretion and the public duty of the Minister of Lands for the time being. The very ground of the claim is that the Minister was bound by the contract to exercise his statutory power, not as the expediency of doing so presented itself to him at the moment of exercise, but as predetermined by the contract. It was put that his discretion was exercised at the time of making and by the act of making the contract. But the answer to that is that on the true construction of the Act and, particularly in this connection, of section 63, that is not a mode of exercising his discretion that comes within his authority. The contract was not the completed exercise of discretion, as in the cases cited of private trustees, but it was an anticipatory fetter on the future exercise of discretion and public action. That discretion might, if unfettered, lead the Minister to retain the land as Crown land, and so change his intention, however and whenever previously formed, of selling the land by auction. That agreement is impossible to support " (*loc. cit.* p.277).

This rule is particularly applicable as regards the grant of mining leases, as to which Ministers are given wide powers coupled with discretions to be exercised in the public interest. An interesting and early example of the recognition by the Courts of the importance of not interfering with the Minister's freedom to decide is *Hitchins v. The Queen* (1867) W.W. & A'B (Eq.) 133, which dealt with the Minister's power to fix the term of the lease—a matter very relevant to the instant cases. Molesworth J. held that this power was intended to be discretionary, not obligatory—" there is every reason for the power given being discretionary . . . that discretion is not to be exercised without a great deal of pains and forethought, and opportunity to persons coming forward to object " (*loc. cit.* p.139).

In the light of this principle, it is now necessary to consider what power the Minister, or the Governor in Council, had to enter into a contract binding the Government of Queensland to grant the special mineral leases applied for. Their Lordships deal first with those provisions contained in the Mining Acts which relate directly to the granting of leases. The governing section is s.30. This applies to Crown Lands—defined as not including reserves: a power to grant a mining lease over a reserve is conferred by s.46. S.30 provides that the Governor [in Council] may, subject to the provisions of the Act and the Regulations, grant to any person a mineral lease of any Crown lands. In cases where the Minister is satisfied that by reason of the nature of the occurrence of any minerals . . . the mining operations on the land will be difficult and costly, a special mineral lease may be granted.

By s.33 (4)(*a*) the area of a special mineral lease shall be such as the Governor in any case considers proper. By s.33 (2) the term of a mineral lease (which includes a special mineral lease) shall not exceed 21 years. By s.34 (1) (5) the Governor in Council must determine the conditions as to the employment of labour and as to the working (as determined by the Governor in Council to be proper) to be observed by the lessee. By the Regulations, after application has been made for a mineral lease, the fact must be advertised (Reg.91 (5)): this is in fact the first opportunity given to the public to express objections, and it arises after the application has been made. Thereafter, the Warden, in the Warden's Court, must hear any objection (Reg.98). He must report to the Minister whether the lease should in his opinion be granted (*ibid.*), and must forward all evidence in favour of granting the lease or in support of any objections. It follows that the Minister must consider the report and the evidence adduced before the Warden's Court, and decide, without being bound by the Warden's recommendations, whether the application should be granted.

This chain of necessary steps to be taken, of satisfaction to be achieved, of decisions to be made, of discretions to be exercised, is thus a long one, and it is clear, in their Lordships' opinion, that any attempt by the Minister to bind himself in advance, before the occasion for taking the statutory steps, making the statutory decisions or exercising the statutory discretions arose, to grant a special mineral lease, would be completely outside the Minister's statutory powers.

In September 1966, when the alleged contract to grant a lease was made, no obligation to grant a lease could be entered into except subject to the requirements of the Act and Regulations. Thereafter, the Minister had to decide whether he was satisfied that the case was one for a special mineral lease, over what area the special mineral lease should be granted, what the term should be, and whether, in the light of objections and the evidence given before the Warden, the public interest required that the application be refused. No contract could fetter his duty to consider all these matters. No purported agreement could give rise to any contractual obligation enforceable in the Courts.

The appellant relied, as authority to the contrary, *i.e.* that an agreement by a State government to grant a mining lease could give rise to a contract for breach of which damages could be awarded, upon the decision of this Board in *Minister of Mines v. Harney and Others* [1901] A.C.347—an appeal from the Supreme Court of Western Australia. This appears to be a decision that, after an application had been made for a mining lease, which had been approved by the Governor in Council, cancellation of the lease, or agreement, was *ultra vires*, and damages could be granted in respect of it. Their Lordships have consulted the Appeal Book in the case and the judgments appealed from, and it appears therefrom, if indeed this does not already appear from the report of the appeal to the Board, that the whole case turned upon a question of dates. The issue was, in fact, whether the effective date of forfeiture of Ramsden's leases was, as the respondents contended, the date on which notice of the Government's decision to forfeit was communicated to him, or whether the effective date was that on which the decision was transmitted to the Warden. The former date was held to be correct, and on this basis it was not disputed that the respondents' applications for leases were in order or that, this being so, the Governor had no power to cancel the leases. No question as to the validity or effect of the respondents' application for leases arose or was considered: the respondents were treated throughout as having valid leases which the Governor had no power to cancel, subject only to the question of dates above referred to. It is thus of no relevance to the issues now before the Board.

The appellants further argued that, admitting that certain of the elements needed for an effective mineral lease remained to be fixed at some time after September 1966, these elements could be fixed by the Court: therefore, they contended, the action should be allowed to proceed to trial, so that they could prove by evidence what the right course would be. Thus, they submitted, the Court might well be able to find that the case was one for a Special Mineral Lease on the basis of evidence as to the general practice in the area: it could also decide, they submitted, as to the appropriate area to be leased and as to the term of the lease on the basis of evidence as to the quantity of minerals proved and the time needed to extract them.

But, apart from the fact that other discretions would still remain to be exercised by the Minister, their Lordships cannot accept that the matters referred to could be established by evidence, or could be matters justiciable by the Courts. To hold that they were would be to require the Court to exercise what are essentially functions of Government. The only standard which the Court could apply, in fixing these undetermined matters, would be the standard of what appears reasonable, that is to the Court. But it is the Minister, or the Governor in Council, whose judgment as to what is reasonable is required by statute. The judgment of the Court is not and cannot be a substitute for the latter (*cf. Kofi Sunkersette Obu v. A. Strauss & Co. Ltd.* [1951] A.C.243, 250; *Placer Development Ltd. v. The Commonwealth* (1969) 121 C.L.R.353, 372).

A further argument, against a conclusion that a valid and enforceable contract was constituted by the Authority to Prospect of 15th September 1966, was put by Counsel for the respondent: this was that a number of essential terms, namely the character of the lease, the areas to be included, and the term, were not fixed by the Authority to Prospect but were left to be determined by the Minister. Where this situation exists, it was said, there is no effective contract, or to use a phrase of Sir F. Pollock, a contract which is illusory. Examples of the judicial use of this concept are the judgment of Cussen J. in *Beattie v. Fine* (1925) V.L.R. 363, 369 and the judgment of Windeyer J. in *Placer Development Ltd. v. The Commonwealth* (*u.s.*). Their Lordships consider that, in modern times, the Courts are readier to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found (*cf. Hillas & Co. Limited v. Arcos Ltd.* (1932) 147 L.T. 503; *Sweet & Maxwell Ltd. v. Universal News Services Ltd.* [1964] 2 Q.B.699; *Godecke v. Kirwan* (1973) 47 A.L.J.R.543.

Further, if the contract is one made with a public body, with a duty to act and decide according to a recognisable principle, the Court may be willing to find an obligation which requires that body to reach a decision, in accordance with that principle, as to a matter left to its decision in the contract itself, and so find an enforceable contract where one might not be found as between private parties. (*Cf. Placer Development Ltd. v. The Commonwealth of Australia* (*u.s.*) in which the High Court was divided as to whether that was such a case.)

But in the present case the area of discretion left to be exercised by the Minister, related as it was to important considerations of public interest, was greater than could be filled in by the Court, even taking the broader approach favoured by the judgments of Menzies and Windeyer JJ. in the *Placer* case (*u.s.*): and this is essentially for the same reasons as have already been stated on the issue of power. In their Lordships' opinion the contention now under discussion represents another facet, or alternative way of putting the previous argument. The Minister could not by

anticipation fetter his statutory duty to decide upon a number of essential terms—this leads to a conclusion in terms of lack of power. Since these terms remained to be fixed by him in his discretion, there could be no binding contract, at least until he did so—this leads to a conclusion in terms of an " illusory " contract. The two contentions interlock, one with the other: each reinforces the conclusion to which their Lordships are driven that the Statement of Claim alleges no contract which can be enforced.

The second contention in support of a binding contract was based upon the terms of s.23A of the Act. This section, which was introduced in 1930, is in the following terms:

> " 23A. (1) Prospecting. Any person may apply to the Minister for an authority to prospect on any Crown lands, and the Minister may grant such authority. The area to be held under such authority, the term, rent, and the conditions, provisions, and stipulations as to labour and other matters shall be fixed by the Minister. Failure to comply with any conditions, provisions, and stipulations so fixed shall render the authority liable to be cancelled by the Minister.
>
> (2) Such authority shall entitle the holder to take possession of the area on payment in advance of the rent fixed as aforesaid, and survey fee if necessary, and to carry on prospecting operations during the term of such authority.
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> (3) Report of discovery. On discovery of gold or other minerals, the holder of the authority shall report, within fourteen days from the date of such discovery, to the nearest warden, who shall thereupon report to the Minister on the nature of the discovery. The Minister may thereupon call upon the holder of the authority to apply for a lease of the land or such part thereof as he may deem advisable or to continue prospecting operations."

It is made applicable to reserves by s.46 (2).

There is no doubt that the Authority to Prospect of 15th September 1966 was granted purportedly under this section. But in their Lordships' opinion this does not advance the appellants' case. What the Authority did was to entitle the appellant companies to take possession of the lands to which it related and to prospect, in accordance with the terms of the authority, in so far as the latter was in conformity with the terms of the section. What it could not do was to confer upon the Minister a power to grant a lease, if that power was not conferred by the relevant section as to leases—*i.e.* by s.30.

From the terms of s.23A, read together with s.30, and from the terms of the Authority itself, it is clear that a mineral lease is something quite different from an authority to prospect; indeed the appellant companies would not be asking for leases if it were not. Section 23A gives no power to grant leases or to agree to grant leases. The only reference in it to leases is in sub-section 3 which enables the Minister to call upon the authority holder to apply for a lease. There is nothing which operates in the other direction—so as to entitle the authority holder to call on the Minister to grant a lease. Any purported agreement by the Minister to do so falls right outside the ambit of s.23A.

For the reasons above stated which accord generally with the broader approach of Hanger C.J. their Lordships are of opinion that the demurrers are well founded, and that the appeals fail.

Various alternative or cumulative arguments were submitted by the respondent—in particular that the supersession from 1st January 1972 of the Mining Acts 1898–1967 by a new Mining Act made it impossible for any agreement under the former Acts to be given effect to. In the view their Lordships have taken, no decision on this point is necessary, nor, in their Lordships' opinion, advisable.

Their Lordships will humbly advise Her Majesty that the appeals be dismissed. The appellants must pay the costs of the appeals.

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LORD WILBERFORCE

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