



IN THE PRIVY COUNCIL

No. 16 of 1973

No. 17 of 1973

No. 18 of 1973

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

No. 16 of 1973

B E T W E E N :

10 CUDGEN RUTILE (NO.2) PTY LTD. (First Plaintiff)  
QUEENSLAND TITANIUM MINES PTY. LIMITED (Second Plaintiff)

Appellants

- and -

GORDON WILLIAM WESLEY CHALK (Defendant)  
Respondent

No. 17 of 1973

A N D  
B E T W E E N:

20 CUDGEN RUTILE (NO.2) PTY. LTD. (Plaintiff)  
Appellant

- and -

GORDON WILLIAM WESLEY CHALK (Defendant)  
Respondent

No. 18 of 1973

A N D  
B E T W E E N:

30 QUEENSLAND TITANIUM MINES PTY. LIMITED (Plaintiff)  
Appellant

- and -

GORDON WILLIAM WESLEY CHALK (Defendant)  
Respondent

A. INTRODUCTION (Paragraphs 1-21)

p.57 1.18  
p.2/100 1.4  
p.3/50 1.12

1. These appeals, which have been consolidated, are brought by leave granted by the Full Court of the Supreme Court of Queensland on 18th May 1973. The Orders and Judgments appealed from, the Orders granting conditional leave to appeal and the Orders granting final leave to appeal were consecutively pronounced and made on 18th May 1973.

p.56 1.10  
p.2/59 1.19  
p.3/49 1.17

2. The appeals are from the Order and Judgment pronounced by the Full Court (constituted by Hanger C.J., Stable and Hart J.J.) on demurrer in each of three actions commenced by the Appellants or one of them in each case against the Respondent as nominal defendant appointed pursuant to the provisions of "The Claims Against Government Act, 1866". Appeals Nos. 16, 17 and 18 of 1973 relate respectively to Actions Nos. 931, 930 and 929 of 1972.

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3. In each action, a Statement of Claim (or Amended Statement of Claim) was delivered to which the Respondent demurred. Order 29 Rule 1 of the Rules of the Supreme Court provides:

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"1. Demurrer. Any party may demur to any pleading of the opposite party, or to any part of a pleading which sets up a distinct cause of action, or to any distinct and severable claim for damages, or to any claim for damages exceeding an amount named by the demurring party, or to any pleading or part of a pleading of the opposite party which sets up a distinct ground of defence, set-off, counter-claim, reply, or answer as the case may be, on the ground that the facts alleged do not show any cause of action, claim for damages, or ground of defence, set-off, counter-claim, reply or answer, as the case may be, to which effect can be given by the Court as against the party demurring."

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In each case the Full Court allowed the demurrer with costs to be taxed. Judgment for the Respondent with costs of the action (subject to an immaterial exception) was pronounced and entered in favour of the Respondent in each action. The appeals are against the said respective Orders allowing the demurrers and the said Judgments for the Respondent.

10 4. The principal questions which are involved in all appeals are upon the facts pleaded in the respective Statements of Claim:

(a) whether the Crown is contractually bound by the respective provisions of certain Authorities to Prospect granted by the Minister (or, in the case of reserves, by the Governor in Council) under "The Mining Acts 1898 to 1965" to grant the mining leases applied for respectively by the Appellants or one of them;

20 (b) whether the respective arrangements made in writing between the Under Secretary of the Department of Mines and the Appellants or one of them with respect to a grant to be made under "The Mining Acts 1898 to 1965" of an Authority to Prospect contractually binds the Crown to grant the mining leases applied for respectively by the Appellants or one of them;

30 (c) if questions (a) and (b) are resolved in favour of the Respondent whether a warranty that the Government of Queensland had and would exercise a power to grant a right to the grant of a mining lease was given to the respective Appellants and bound the Crown;

(d) whether any alleged contract or warranty was broken

40 5. Each of the said actions was commenced by the issue of a Writ of Summons on 26th June 1972. The Amended Statements of Claim in actions Nos. 931 and 930 of 1972 were delivered on 29th November 1972. Particulars of the respective Statements of Claim in these actions were given on 17th October 1972. The Statement of Claim in action No. 929 of 1972 was delivered on 30th August 1972 and certain

pp.5-16  
pp.2/5-2/16

pp.4,2/4

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pp.3/2-3/14  
p.3/14

pp.17,2/17  
3/16

particulars were given on 18th October 1972. The demurrer to each respective Statement of Claim was delivered on 12th December 1972, and the Respondent therein set out at length the respective documents referred to in the respective Statements of Claim and particulars pursuant to Order 29 Rule 6 which provides, inter alia :

"6. Demurrer to Claim Founded on Document. When the claim or defence of any party depends, or may depend, upon the construction of a written document, and the party in his pleading refers to the document but does not set it out at length, the opposite party may, in his demurrer, set out the document at length, or so much thereof as is material, and demur to the claim or defence founded upon it, in the same manner as if it had been pleaded at length by the other party." 1C

p.15 1.1  
p.9 1.11

6. By their Amended Statement of Claim in action No.931 of 1972 the Appellants claimed in the first instance specific performance of, or alternative relief founded upon, an alleged promise contained in Authorities to Prospect No. 348M. The Appellants contended that upon the facts alleged in paragraphs 1 to 27 of the Amended Statement of Claim the Government of Queensland was bound by the alleged promise to grant to them certain Special Mineral Leases applied for by them on 2nd February 1970 and numbered respectively Special Mineral Lease Applications Numbers 324, 325 and 326 Gympie District insofar as the areas the subject of the said lease applications fell within the areas the subject of the said Authorities to Prospect No.348M. The Amended Statement of Claim alleged that an Authority to Prospect in terms which included the relevant alleged promise had (instead of a renewal of an earlier Authority to Prospect for which the Appellants had applied) been offered to the Appellants by letter from the Under Secretary Department of Mines and had been accepted by the Appellants, the Appellants had 2C 3C 4C

p.9 1.24

p.6 1.12  
p.41 1.27

p.34 1.12  
p.6 1.38  
p.43 1.26 to  
p.45 1.24

paid the deposit and rental required, Authorities to Prospect Number 348M were granted to it and the Appellants duly complied with all the terms of the said Authorities to Prospect . The Amended Statement of Claim further alleged that the Mining Warden after hearing objections had reported to the Minister that each of the said leases applied for should be granted, and that the Government of Queensland refused and neglected to grant any of the said leases to the Appellants and declared and continued to declare and maintain that the Appellants were not entitled to the grant to them of the leases over the areas within the areas the subject of the said Authorities to Prospect No.348M or any of them and repudiated any obligation to grant or cause to be granted to the Appellants the said leases or any of them.

RECORD  
p.6 1.43 to  
p.7 1.13  
p.45 1.25  
p.55 1.20  
p.8 1.8  
p.10 1.23

p.11 1.1

7. By its Amended Statement of Claim in action No. 930 of 1972 the Second Appellant claimed in the first instance specific performance of, or alternative relief founded upon, an alleged promise contained in Authorities to Prospect No.363M. The Second Appellant contended that upon the facts alleged in paragraphs 1 to 26 of the Amended Statement of Claim the Government of Queensland was bound by the alleged promise to grant to it certain Special Mineral Leases applied for by it on 2nd February 1970 and numbered respectively Special Mineral Lease Applications Nos. 327, 328, 329, 330 and 331 Gympie District insofar as the areas the subject of the said lease applications fell within the areas the subject of the said Authorities to Prospect No.363M. The Amended Statement of Claim alleged that an Authority to Prospect in terms which included the relevant alleged promise had (instead of a renewal of an earlier Authority to Prospect for which the Second Appellant had applied) been offered to the Second Appellant by letter from the Under Secretary Department of Mines and had been accepted by the Second Appellant, the Second Appellant had paid the deposit and rental required, Authorities to Prospect No.363M were granted to it, and the Second Appellant duly complied with all the terms of the said Authorities to Prospect. The Amended Statement of Claim further alleged that the Mining Warden after hearing objections had reported to the Minister

p.2/15 1.20  
p.2/9 1.20

p.2/9 1.39

p.2/6 1.20

p.2/44 1.39

p.2/37 1.3  
p.2/7 1.6  
p.2/47 1.3  
p.2/7 1.17  
p.2/48 1.3  
p.2/57 1.25  
p.2/10 1.39

p.2/10 1.27

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p.2/11 1.10

that each of the said leases applied for should be granted, and that the Government of Queensland refused and neglected to grant any of the said leases to the Second Appellant and declared and continued to declare and maintain that the Second Appellant was not entitled to the grant to it of the said leases or any of them or any part of them and repudiated any obligation to grant or cause to be granted to the Second Appellant the said leases or any of them or any part of them.

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p.3/12 1.40

p.3/8 1.5

8. By its Statement of Claim in action No.929 of 1972 the First Appellant claimed in the first instance specific performance of, or alternative relief founded upon, an alleged promise contained in Authority to Prospect No.409M. The First Appellant contended that upon the facts alleged in paragraphs 1 to 26 of the Statement of Claim the Government of Queensland was bound by the alleged promise to grant to it a Special Mineral

p.3/8 1.17

Lease applied for by it on 29th January 1970 and numbered Special Mineral Lease Application No.322 Gympie District. The Statement of Claim alleged that an Authority to Prospect in terms which included the relevant alleged promise had been offered to the First Appellant by letter from the Under Secretary Department of Mines and had been accepted by the First Appellant, the First Appellant had paid the deposit and rental required, Authority to Prospect No.409M was granted to it, amendments which extended and varied the said Authority to Prospect were offered to the First Appellant by letter from the Under Secretary Department of Mines and had been accepted by the First Appellant, the Authority to Prospect was amended accordingly, and the First Appellant duly complied with all the terms of the said Authority to Prospect as so amended. The Statement of Claim further alleged that the Mining Warden after hearing objections had reported to the Minister that the lease applied for should be granted and that the Government of Queensland refused and neglected to grant the said lease to the First Appellant and declared and continued to declare and maintain that the First Appellant was not entitled to the grant to it of the said lease and repudiated any obligation to

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p.3/3 1.10

p.3/30 1.39

p.3/23 1.4

p.3/4 1.8

p.3/33 1.4

p.3/4 1.13

p.3/34 1.13

p.3/5 1.25

p.3/47 1.20

p.3/6 1.16

p.3/48 1.25

p.3/6 1.18

p.3/44 1.19

p.3/7 1.6

p.3/8 1.36

p.3/9 1.14

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grant or cause to be granted to the First Appellant the said lease.

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9. The Respondent in his respective Demurrers contended :

(a) that relief could be given against the Respondent only in respect of an obligation binding upon or a liability incurred by the Crown;

p.17 1.17  
p.2/17 1.16  
p.3/16 1.14

10 (b) that upon a true construction of the terms of the alleged promises, the Appellants (or the respective one of them) did not become entitled to the grant of any or all of the mining leases applied for;

p.18 11.7,15  
p.2/18 11.8,16  
p.3/17 11.5,17

(c) that an obligation binding upon the Crown to grant or to cause to be granted any or all of the mining leases applied for could not in law arise upon the facts pleaded in the respective statements of Claim.

p.17 1.17 to  
p.18 1.43  
p.2/17 1.16 to  
p.2/18 1.44  
p.3/16 1.14 to  
p.3/17 1.41

20 10. By their Amended Statement of Claim in action No.931 of 1972, the Appellants claimed, in the alternative to the claim referred to in paragraph 6, damages for breaches of alleged warranties which were said to be contained in certain letters passing between the Under Secretary Department of Mines and the Appellants. The warranties pleaded were:

p.15 1.24  
p.11 1.20  
p.4 1.19  
p.33 1.3 )  
p.34 1.14 )  
p.43 1.34 )  
p.44 1.30 )

30 "(i) that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted" to the Appellants an Authority to Prospect or Authorities to Prospect which would accord with a draft Authority to Prospect referred to in the Under Secretary's letter;

p.11 1.30

"(ii) that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted to" the Appellants "the right .... to have granted to them a mining lease for

p.11. 1.38

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the minerals referred to in" the said draft Authority to Prospect.

p.12 1.31

The Appellants alleged that they were entitled "to the fulfilment of the said warranties by the Government of Queensland and to the grant to" the Appellants of an Authority or Authorities to Prospect and to the grant to the Appellants of a mining lease as referred to in the alleged warranties. The Appellants claimed damages for breaches "if it be held that the Government of Queensland was not empowered as set forth" in the paragraphs of the Amended Statement of Claim pleading the alleged warranties.

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p.12 1.39

p.2/15 1.35

p.2/11 1.29

p.2/4 1.27

p.2/35 1.20

p.2/37 1.6

p.2/47 1.8

11. By its Amended Statement of Claim in action No.930 of 1972, the Second Appellant claimed, in the alternative to the claim referred to in paragraph 7, damages for breaches of alleged warranties which were said to be contained in certain letters passing between the Under Secretary Department of Mines and the Second Appellant. The warranties pleaded were :

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p.2/11 1.39

"(i) that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted" to the Second Appellant an Authority to Prospect or Authorities to Prospect which would accord with a draft Authority to Prospect referred to in the Under Secretary's letter;

p.2/12 1.1

"(ii) that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted to" the Second Appellant "the right....to have granted to it a mining lease for the minerals referred to in" the said draft Authority to Prospect.

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p.2/12 1.41

The Second Appellant alleged that it was entitled "to the fulfilment of the said warranties by the Government of Queensland and to the grant to" the Second Appellant of an Authority or Authorities to

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Prospect and to the grant to the First Appellant of a mining lease as referred to in the alleged warranties. The Second Appellant claimed damages for breaches "if it be held that the Government of Queensland was not empowered as set forth" in the paragraphs of the Amended Statement of Claim pleading the alleged warranties.

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p.2/13 1.5

12. By its Statement of Claim in action No.929 of 1972, the First Appellant claimed, in the alternative to the claim referred to in paragraph 8, damages for breaches of alleged warranties which were said to be contained in certain letters passing between the Under Secretary Department of Mines and the First Appellant. The warranties pleaded were :

p.3/13 1.11

p.3/9 1.30

p.3/15 1.20

(p.3/23 1.4

(p.3/33 1.4

(p.3/47 1.20

(p.3/48 1.25

"(i) that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted" to the First Appellant an Authority to Prospect which would accord with a draft Authority to Prospect referred to in the Under Secretary's letters;

p.3/9 1.41

"(ii) that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted to" the First Appellant "the right...to have granted to it a mining lease for the minerals referred to in" the said draft Authority to Prospect.

p.3/10 1.4

The First Appellant alleged that it was entitled "to the fulfilment of the said warranties by the Government of Queensland and to the grant to" the First Appellant of an Authority to Prospect and to the grant to the First Appellant of a mining lease as referred to in the alleged warranties. The First Appellant claimed damages for breaches "if it be held that the Government of Queensland was not empowered as set forth" in the paragraphs of the Statement of Claim pleading the alleged warranties.

p.3/10 1.44

p.3/11 11.  
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13. The Respondent in his respective Demurrers contended:

p.18 1.44

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p.2/19 1.1  
p.3/17 1.42  
p.19 1.6-p.20  
11.12,32-40  
p.2/19 1.9-  
p.2/20 11.10,  
30-38  
p.3/18 1.4-  
p.3/19 11.12,  
32-39

(a) that upon a true construction of the said letters, no warranty as alleged was given;

(b) that upon the facts pleaded in the respective Statements of Claim no warranty as alleged binding upon the Crown could in law arise.

p.15 1.30

p.14 1.5

p.13 1.8

p.14 1.2

p.14 1.17

p.14 1.23

14. By their Amended Statement of Claim in action No.931 of 1972, the Appellants claimed, in the further alternative to the claims referred to in paragraphs 6 and 10 of this Case, damages for breaches of an alleged warranty, namely "that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted to" the Appellants "the right...to have granted to them a mining lease for the minerals referred to in" Authorities to Prospect both numbered 348M. The Appellants alleged that the Governor in Council and the Minister for Mines respectively purported to grant the said Authorities to Prospect to them. The Appellants further alleged that "by the grant of the said Authorities to Prospect...the Government of Queensland warranted" as aforesaid to the Appellants. The Appellants alleged that they were entitled "to the fulfilment of the said warranties (sic) by the Government of Queensland and to the grant to" the Appellants of a mining lease as referred to in the alleged warranty. The Appellants claimed damages for breach "if it be held that the Government of Queensland was not empowered as set forth" in the paragraph of the Amended Statement of Claim pleading the alleged warranty.

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p.2/16 1.1

p.2/14 1.17

15. By its Amended Statement of Claim in action No. 930 of 1972, the Second Appellant claimed, in the further alternative to the claims referred to in paragraphs 7 and 11 of this Case, damages for breaches of an alleged warranty, namely "that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted to" the Second Appellant "the right

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RECORD

- ....to have granted to it a mining lease for the minerals referred to in" Authorities to Prospect both numbered 363M. The Second Appellant alleged that the Government in Council and the Minister for Mines and Main Roads respectively purported to grant the said Authorities to Prospect to it. The Second Appellant further alleged that "by the grant of the said Authorities to Prospect...the Government of Queensland warranted" as aforesaid to the Second Appellant. The Second Appellant alleged that it was entitled "to the fulfilment of the said warranties (sic) by the Government of Queensland and to the grant to" the Second Appellant of a mining lease as referred to in the alleged warranty. The Second Appellant claimed damages for breach "if it be held that the Government of Queensland was not empowered as set forth" in the paragraph of the Amended Statement of Claim pleading the alleged warranty.
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16. By its Statement of Claim in action No.929 of 1972 the First Appellant claimed, in the further alternative to the claims referred to in paragraphs 8 and 12 of this Case, damages for breaches of an alleged warranty, namely "that the Government of Queensland was empowered to grant or cause to be granted and would grant or cause to be granted to" the First Appellant "the right...to have granted to it a mining lease for the minerals referred to in" an Authority to Prospect No.409M. The First Appellant alleged that the Acting Minister for Mines and Main Roads purported to grant the said Authority to Prospect to it and subsequently the Minister for Mines purported to extend the term of the said Authority to Prospect. The First Appellant further alleged that "by the grant of the Authority to Prospect...and by the extension of the term thereof the Government of Queensland warranted" as aforesaid to the First Appellant. The First Appellant alleged that it was entitled "to the fulfilment of the said warranties (sic) by the Government of Queensland and to the grant to" the First Appellant of a mining lease as referred to in the alleged warranty. The First Appellant claimed damages for breach "if it be held that the Government of Queensland was not empowered as set forth" in the paragraph of the Statement of Claim pleading the alleged warranty.
- p.2/13 1.18
- p.2/14 1.15
- p.2/14 1.30
- p.2/14 1.36
- p.3/13 1.17
- p.3/12 1.13
- p.3/11 1.17
- p.3/12 1.10
- p.3/12 1.25
- p.3/12 1.31

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17. The Respondent in his respective Demurrers contended :

p.20.1.13  
p.2/20 1.11  
p.3/19 1.13

(a) that upon a true construction of the respective Authorities to Prospect, no warranty as alleged was given by the Crown, the Minister or by the Crown acting through some other officer servant or agent to the Appellants (or to the respective one of them) in the terms alleged in the paragraphs of the respective Statements of Claim which plead the alleged warranty;

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p.19.1.11-  
p.20 1.12,  
32-40  
p.2/19 1.14-  
p.2/20 11.10,  
30-38  
p.3/18 1.16-  
p.3/19 11.12,  
32-39

(b) that upon the facts pleaded in the respective Statements of Claim no warranty as alleged binding upon the Crown could in law arise.

p.14 1.41

18. By paragraph 39 of their Amended Statement of Claim in action No.931 of 1972, the Appellants alleged:

"The Government of Queensland threatens and intends to take all such steps as may be necessary to have the areas" which were both the subject of the applications for lease and subject to the Authorities to Prospect "declared to be a National Park."

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And the Appellants claimed :

p.15 1.33

"An injunction restraining the Defendant, and all other officers, servants and agents of the Government of Queensland, including the Conservator of Forests, from presenting or taking any steps to present to His Excellency the Governor in Council any proposal or recommendation that the areas" aforesaid "be declared a National Park."

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p.2/15 1.11

19. By paragraph 38 of its Amended Statement of Claim in action No.930 of 1972 the Second Appellant made a similar allegation as to the

Government's intention in relation to the area the subject of the Second Appellant's applications for leases and claimed a similar injunction limited to those areas insofar as they lay within the areas the subject of Authorities to Prospect No. 363M.

RECORD

p.2/16 1.4

10 20. By paragraph 36 of its Statement of Claim in action No. 929 of 1972, the First Appellant made a similar allegation as to the Government's intention in relation to the area the subject of the First Appellant's application for lease and claimed a similar injunction.

p.3/12 1.35

p.3/13 1.20

21. The Respondent demurred to those parts of the respective Statements of Claim set forth in paragraphs 18 to 20 of this Case upon the ground, inter alia :

20 "The Governor in Council and the officers, servants and agents of the Crown in taking any step which is necessary to have the area referred to in" the relevant respective paragraphs of the respective Statements of Claim "declared to be a National Park thereby act in accordance with the powers conferred and discretions reposed in them by statute in that behalf and the Defendant and the officers, servants and agents of the Crown including the Conservator of Forests or any of them cannot be restrained from exercising their  
30 respective discretions and powers as aforesaid in accordance with the statute law of Queensland."

p.20 1.20  
p.2/20 1.18  
p.3/19 1.20

B. THE FULL COURT'S REASONS FOR JUDGMENT  
(PARAGRAPHS 22 TO 25)

22. After argument upon the demurrers in each of the said actions, the Full Court of the Supreme Court of Queensland (Hanger C.J. Stable and Hart JJ) unanimously allowed the said demurrers and each of the said Judges published his reasons.

40 23. In his published reasons, the Chief Justice said that the Appellants' claims were, in essence,

p.2/61 1.10-  
p.2/90 1.6

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p.2/89 11.  
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p.2/89 11.  
38-42

that the Appellants had, in the respective Authorities to Prospect, contracts with the Minister for Mines to grant a lease the term of which was not specified; and that, by virtue of such contract, the Governor with the advice of the Executive Council was bound to grant the lease for the maximum period allowed by the relevant legislation. The Chief Justice doubted whether the respective Authorities to Prospect should bear the construction put upon them by the Appellants, and thought that there were strong reasons which militated against construing the Authorities to Prospect as contracts but he declined to decide either of these questions. The Chief Justice said :

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p.2/89 1.42-  
p.2/90 1.6

05.1.88.c  
05.1.88.c  
05.1.88.c

"If the document did contain the terms of a contract, if and insofar 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."

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p.2/90 1.28-  
p.2/91 1.18

p.2/91 1.12

p.2/91 1.16

24. Stable J. was of opinion that if clause 20 of the several Authorities to Prospect were construed as providing for the grant of a mining lease, yet the duration of such a lease was "a most material area of negotiation" and His Honour held that "the material before us shows that this meeting of contracting minds, this mutuality, is missing". Stable J. agreed also with the reasons expressed by Hart J.

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p.2/92 1.2-  
p.2/99 1.33

25. With reference to the clause in the respective Authorities to Prospect upon which the Appellants relied, Hart J. said :

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"Despite its language I do not think that clause 20 can be taken, at the best for the respective plaintiffs as doing anything more than expressing an intention on the part of the Crown to negotiate for a lease with them, in priority to any other person, if certain conditions are fulfilled.... the point upon which I decide the case is that the plaintiffs are claiming that there is an agreement for a lease and they have not alleged anything which determines the duration of the term. I therefore think that no valid agreement for a lease has been alleged. For this reason the demurrers must be upheld."

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C. RESPONDENT'S SUBMISSIONS  
(PARAGRAPHS 26 TO 50)

26. "The Mining Act 1898" as amended from time to time (hereinafter called the Mining Act) and "The Mining on Private Lands Acts 1909 to 1965" were in force at all material times until 1st January 1972 when "The Mining Act 1968 to 1971" (hereinafter called the new Mining Act) was proclaimed to come into operation. The new Mining Act repealed the Mining Act and "The Mining on Private Lands Acts 1909 to 1965".

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27. Land which was not "private land" as defined by Section 21A of "The Mining on Private Lands Acts 1909 to 1965" was either "Crown Land" or a "Reserve" within the meaning of those respective terms as defined in the Mining Act (section 3). The Mining Act applied to applications for mining leases over "private land" as though private land were Crown land subject to any contrary provisions in "The Mining on Private Lands Acts 1909 to 1965". The new Mining Act (sections 7, 108, 109) contained like provisions.

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28. The Minister was empowered by section 23A of the Mining Act to grant to any person an Authority to Prospect on any Crown land, and the Governor in Council was empowered by section 46 to grant a similar Authority to Prospect on land comprised in a reserve (other than a National Park within the

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RECORD

meaning of "The Forestry Acts 1959 to 1964"). The Minister or Governor in Council as the case may be was empowered to fix the area to be held, the term, rent, and the other conditions, provisions and stipulations as to labour and other matters (Mining Act, sections 23A and 46). An Authority to Prospect entitled the holder to take possession of an area and to carry on prospecting operations during the term of the Authority.

29. The Governor in Council was empowered by section 30 of the Mining Act to grant a mineral lease or (in certain cases) a special mineral lease over Crown land, and, by section 46 of the Mining Act, to grant similar leases over land comprised in a reserve (other than a National Park within the meaning of "The Forestry Acts 1959 to 1964"). A mineral lease and a special mineral lease were respective classes of a "mining lease" as defined by section 3 of the Mining Act. 10

30. Regulations were made under the Mining Act providing, inter alia, for the form of application to a mining lease and the making of the application to the mining warden (regulations 90 and 92), the marking out of land applied for (regulations 91, 93, 94) the survey of mining leases (regulation 95), the payment of rent and survey fees (regulations 96 and 97) and the making of a report by the mining warden to the Minister whether the lease should, in the warden's opinion, be granted or not (regulation 98). 20 30

31. The Appellants in the respective Statements of Claim founded the claim to the grant of a mining lease upon a provision set out in each of the Authorities to Prospect granted to the Appellants or to one of them, as the case may be. That provision (hereinafter referred to as the provision relied on) reads as follows :

p.52 1.8  
p.2/55 1.1  
p.3/40 1.41

"Right to Acquire Mining Leases:

Subject to due performance and observance of the provisions of the Acts and the terms, 40



10 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."

"The Acts" referred to are the Mining Act, and "The Mining on Private Land Acts 1906 to 1965".

32. It is submitted as a matter of construction that the provision relied on contains no promise (whether legally binding or not) that a mining lease will be granted to the holder.

20 33. If (contrary to the submission in paragraph 32) any promise be contained in the provision relied on, it is not a promise that a mining lease will be granted to the holder. Rather, the provision relied on contemplates that, if any mining lease should be granted the holder should be entitled to the grant "in priority to any other person or company". Although the provision relied on could have no contractual effect (for reasons submitted in paragraphs 34 to 36 below), if it could be so construed as to entitle the holder to priority among applicants for the grant of a mining lease, 30 the respective Statements of Claim make no allegation of breach of the provision so construed. It may be that any promise of priority among applicants for the grant of a lease is contrary to section 39(2) of the Mining Act which provides :

"Applications for mining leases by persons who have complied with the Regulations shall take priority according to the order in which they are made."

40 But if Section 39(2) avoids the provision so construed or prevents the provision from being so construed, a fortiori the provision cannot be given effect or construed so as to entitle

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the holder to the grant of a mining lease, for the grant of a mining lease to the holder would inevitably exclude the possibility of a grant to any other applicant.

34. If (contrary to the submission in paragraphs 32 and 33) the provision relied on could be so construed as to promise the holder the grant of a mining lease, such a promise is so vague that no precise meaning could be attributed to it and consequently there is no contract. The Mining Act did not cure the vagueness. It did not specify the area of a mineral lease but it provided for a maximum area of 320 acres (section 33(4)(b) and regulation 94); it provided for the yearly rent of one dollar per acre (section 33(1)); it did not specify the term of a mineral lease but it provided for a maximum term of 21 years (section 33(2)) commencing on the first day of that month which next follows the day on which the application is made to the warden (regulation 97(1)), and it further provided a covenant to carry on mining operations employing not less than one man per 10 acres or fraction of 10 acres (section 34). In the case of a special mineral lease the maximum area provision did not apply (section 33(4)(a)) and the employment of labour covenant was to be as contained in the special mineral lease. The breaches of contract alleged in the respective Statements of Claim consisted in a refusal and neglect to grant special mineral leases. It is submitted that no obligation to grant a special mineral lease could arise in the absence of an agreement in each case fixing, or conferring upon the respective applicant Appellants the right unilaterally to fix, the area of, the duration of the term of, and the terms of the employment of labour covenant to be contained in, the special mineral lease in question. The respective Statements of Claim do not allege any agreement of this kind.

35. If (contrary to the submissions in paragraphs 33 and 34), the provision relied on could be held to evince a definite meaning in promising the holder the grant of a mining lease, the promise

was invalid and unenforceable, for it was unauthorised RECORD  
by statute. The Crown had no power or capacity  
to grant, or to promise to grant, a mining lease  
otherwise than in accordance with the Mining Act.  
The Mining Act was the sole relevant statutory  
authority for the creation of mining leases  
over land, and exclusively prescribed the mode  
of creation. "Crown land" and perhaps "reserves"  
were the waste land of the Crown, the entire  
control or management of which was vested in  
the Legislature ("The Constitution Acts 1867 to  
1968", section 40) and no power to create a mining  
lease could be exercised in respect of waste land  
save in accordance with statutory authority. As  
private land stands for present purposes on the  
same footing as Crown land, the Constitution Acts  
provide an additional reason for denying to the  
Crown any non-statutory power to create a  
mining lease. The only relevant statutory power  
to grant a mining lease prior to 1st January 1972  
was the power conferred by sections 30 and 46 of  
the Mining Act, and that power was to be exercised  
according to the discretion of the Governor in  
Council. The exercise of the discretion was a  
public duty, and any contractual promise purporting  
to fetter or destroy the exercise of the discretion  
was invalid (Watson's Bay and South Shore Ferry Co.  
Ltd. v. Whitfield 27 C.L.R. 268, 277).

27 C.L.R.  
268, 277

36. If (contrary to the submissions in paragraph  
35), the Governor in Council could be bound to  
grant a mining lease by a contract entered into  
before he was required to exercise his discretion  
under section 30 or section 46 of the Mining Act,  
no contract of that kind was made by the grant of  
the respective Authorities to Prospect. Sections  
23A and 46 of the Mining Act authorised the grant  
of an Authority to Prospect subject to conditions  
provisions and stipulations but neither section  
authorised the making of a contract.

37. Nor could a grant of an Authority to Prospect  
made "consequent upon the acceptance of (an) offer"  
as alleged in the respective Statements of Claim,  
create a contractual obligation. First, the  
arrangements alleged to constitute the respective  
offers and acceptances were not and did not purport

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to be contractual; and secondly, the respective grants of Authorities to Prospect were alleged to be made in performance of an antecedent contract to make the grant in question. Each of the alleged contracts to grant an Authority to Prospect was discharged by performance.

38. If it be alleged that the respective letters written by the Under Secretary or Acting Under Secretary for Mines and referred to in the respective Statements of Claim purported to bind the Crown to a contract whereby the Appellant or Appellants in question became entitled to the grant of a mining lease, it is submitted that, as a matter of construction the respective letters contain no purported contract, and that for the reasons set forth in paragraphs 33 to 35 inclusive no contract was made or alternatively the alleged contract is invalid and unenforceable. Further, the absence of any statutory authority so to bind the Crown precludes any agreement reached by the Under Secretary or Acting Under Secretary from affecting the exercise by the Governor in Council of the discretionary power to grant a mining lease.

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39. If (contrary to the Respondent's submissions hereinbefore set forth), the Crown was, at a time prior to 1st January, 1972, obliged in contract to grant one or more of the special mineral leases applied for as alleged in the respective Statements of Claim the Crown's obligation was discharged by the repeal of the Mining Act and the coming into operation of the new Mining Act. The alleged contractual obligation was an obligation to grant the special mineral leases applied for, and after 1st January 1972 such an obligation was no longer capable of performance. A mining lease under the new Mining Act may be similar to but is not identical with a special mineral lease under the Mining Act. The power to grant a special mineral lease under the Mining Act (sections 30 and 46) has been withdrawn, and a new power (similar to but not identical with the withdrawn power) has been created (the new Mining Act, section 21). If the alleged contractual obligation is no longer

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REPORT

capable of performance by reason of the change in legislation, the alleged contractual obligation is discharged but not breached (Reilly v. The King 1934 A.C. 176, 180). The rule, applicable to contracts between subjects, applies equally to contracts with the Crown as the Executive Government (Perpetual Executors and Trustees Association of Australia Ltd. v. Federal Commissioner of Taxation 77 C.L.R. 1, 18). It is immaterial to the Crown's present alleged contractual obligation whether the refusal to grant the special mineral leases applied for occurred before or after 1st January 1972, for the Appellants respectively elected to keep the alleged contracts on foot in order specifically to enforce the alleged contractual obligation. It is not alleged that the Appellants prior to 1st January 1972 acquired any other contractual right which may have survived the repeal of the Mining Act.

1934 A.C.  
176, 180

77 C.L.R.  
1,18

20 40. The statutory rights of an applicant under the Mining Act whose application had not been granted or refused at 1st January 1972 were dealt with by the transition provisions of the new Mining Act (section 5), but the respective Statements of Claim do not allege any failure to grant mere statutory rights.

30 41. The manner of exercising the discretionary powers to grant a mining lease conferred upon the Governor in Council by the Mining Act and by the new Mining Act was not and is not to be directed by a decree of specific performance.

40 42. If for any of the reasons aforesaid, the facts alleged in the respective Statements of Claim are insufficient to found the respective decrees of specific performance the facts so alleged are likewise insufficient to found the respective claims for damages for breach of the alleged contracts of which specific performance is sought or establish the respective rights a declaration of which is claimed in each of the respective Statements of Claim.

43. The documents referred to in the respective Statements of Claim as containing the respective

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warranties alleged do not, as a matter of construction, give any warranty either as to the existence of any power in, or as to the exercise of power by, the Government of Queensland.

44. If (contrary to the submission in paragraph 43) any warranty were purportedly given as to the power to grant an Authority to Prospect and as to the exercise of that power, the warranty was upon the facts alleged in the respective Statements of Claim fulfilled by the grant of the relevant Authority to Prospect. 10

45. If (contrary to the submission in paragraph 43) any warranty were purportedly given as to the power to grant a right to have granted a mining lease (in the terms alleged in the respective Statements of Claim) and as to the exercise of that power, the alleged warranty contains the same alleged promise as the alleged contractual promise of which specific performance is sought, namely, a promise to grant a mining lease. The submissions as to the existence validity and enforceability of the alleged contractual promise of which specific performance is sought apply mutatis mutandis to the alleged warranty. 20

46. Where the Crown's power to confer rights or privileges upon a subject is limited, the limitation cannot be circumvented by a warranty that the limitation does not exist. Those who deal with the Crown are fixed with notice as to limits of the Crown's power. The Crown is obliged to act in conformity with the law which limits its powers, and it cannot promise to act contrary to law. Nor can it, by promising the law to be different from what it is, confer upon the subject a right to damages which might be met out of the Crown's public revenues. The alleged warranties as to the absence of legal limitations upon the Crown's power in relation to the grant of mining leases cannot confer any right upon the respective Appellants in excess of the rights which the Crown might confer consistently with the limitations upon its power imposed by law. 30 40

47. None of the alleged warranties as to the power of the Government of Queensland could be given by a servant of the Crown so as to bind the Crown. The authority of a Crown servant depends not upon the fact of his service but upon the lawful investing of the servant with the authority in question. A crown servant cannot be authorised to warrant contrary to law the absence of legal limitation upon the powers of the Government of Queensland. The documents emanating from servants of the Crown and alleged to contain the warranties of power referred to in the respective Statements of Claim could not bind the Crown to the warranties pleaded.

48. The facts alleged in the respective Statements of Claim show no equity to an injunction to restrain the Respondent or any officer, servant or agent of the Government of Queensland including the Conservator of Forests from presenting or taking any steps to present to the Governor in Council any proposal or recommendation that the lands which were the subject of applications for Special Mineral Leases and which were included with the areas specified in the respective Authorities to Prospect be declared a National Park. For the reasons earlier submitted, the facts alleged in the respective Statements of Claim show no legal or equitable interest or right in the respective Appellants which may be affected by the making of a declaration that the lands referred to or any of them be a National Park. The power to declare "Crown land" (as defined) as a National Park is vested in the Governor in Council and is to be exercised on the recommendation of the Conservator of Forests (sections 5 and 29 of "The Forestry Act 1959 to 1971", subsequently amended). The functions to be performed by the Conservator of Forests and by other officers, servants or agents of the Crown with respect to the declaration of Crown land (as defined) as a National Park are public functions and the performance of those functions can be neither fettered by a contract made in advance of the time when the functions fall to be discharged nor controlled by an injunction.

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49. As the facts alleged in the respective Statements of Claim do not upon the Respondent's submissions allege any obligation binding upon the Crown or any liability incurred by the Crown, the respective Statements of Claim do not show "any just claim or demand against the Government" within the meaning of that phrase in section 2 of "The Claims Against Government Act", and the facts so alleged do not show any cause of action to which effect can be given by the Court as against the Respondent.

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50. The Respondent humbly submits that the consolidated Appeals be dismissed with costs and that the respective judgments and orders of the Full Court of the Supreme Court of Queensland appealed from be affirmed for the following among other

REASONS

1. BECAUSE the facts alleged in the Statements of Claim do not show any contractual promise validly made by or enforceable against the Crown;

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2. BECAUSE the facts alleged in the Statements of Claim do not show any contractual obligation which could have survived the coming into operation of "The Mining Act 1968 to 1971" on 1st January 1972;

3. BECAUSE the facts alleged in the Statements of Claim do not show any contractual warranty as to the powers of the Government of Queensland given by, binding upon, or enforceable against, the Crown;

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4. BECAUSE the facts alleged in the Statements of Claim do not show any equity to an injunction to restrain the Respondent or any officer servant or agent of the Government of Queensland including the Conservator of Forests from performing their respective functions with respect to the declaration of any lands as a National Park; and



5. BECAUSE of the reasoning of the judgments in  
the Full Court.

RECORD

F.G. BRENNAN

T.F. SHEPHERDSON

NICHOLAS PHILLIPS

IN THE PRIVY COUNCIL    No.16 of 1973  
                                  No.17 of 1973  
                                  No.18 of 1973

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                                  O N    A P P E A L

FROM THE FULL COURT OF THE SUPREME  
COURT OF QUEENSLAND

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No.16 of 1973

B E T W E E N

CUDGEN RUTILE(NO.2) PTY. LTD.	(First Plaintiff)
QUEENSLAND TITANIUM MINES PTY. LIMITED	(Second Plaintiff)
	<u>Appellants</u>
- and -	
GORDON WILLIAM WESLEY CHALK	(Defendant) <u>Respondent</u>

AND

No.17 of 1973

B E T W E E N

CUDGEN RUTILE(NO.2) PTY. LTD.	(Plaintiff) <u>Appellant</u>
- and -	
GORDON WILLIAM WESLEY CHALK	(Defendant) <u>Respondent</u>

AND

No.18 of 1973

B E T W E E N

QUEENSLAND TITANIUM MINES PTY. LIMITED	(Plaintiff) <u>Appellant</u>
- and -	
GORDON WILLIAM WESLEY CHALK	(Defendant) <u>Respondent</u>

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CASE FOR THE RESPONDENT

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