

LAND AND RESOURCES TRIBUNAL QUEENSLAND

CITATION: *Chongherr Investments Pty Ltd v Titan Sandstone Pty Ltd* [2007] QLRT 126

PARTIES: **Chongherr Investments Pty Ltd (Applicant) v Titan Sandstone Pty Ltd (Respondent)**

FILE NO/S: APTP170/07

PROCEEDING: Application for leave to appeal

DELIVERED ON: 10 September 2007 (Ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 10 September 2007

PRESIDING MEMBER: Koppenol P

ORDER/S: **1. Application dismissed. (at [8])**
2. Applicant to pay Respondent's costs. (at [9])

CATCHWORDS: LEAVE TO APPEAL APPLICATION – CAVEAT – SUBSTANTIVE RELIEF – effect of application in a proceeding – whether leave application competent

Land and Resources Tribunal Act 1999, ss 39, 50, 67(2)(a), (b), 70A
Mineral Resources Act 1989, ss 85, 305, 363

COUNSEL: Ms S. Moody for Applicant
Mr S. Fisher for Respondent

SOLICITORS: Hemming & Hart, for Applicant
Neumann & Turnour, for Respondent

[1] This is an application under section 67(2)(a) of the *Land and Resources Tribunal Act 1999* (LRT Act) for leave to appeal. Under that provision, leave to appeal to the President with the President's leave is required if the appeal is from the Tribunal as constituted by a presiding member (alternative), mining referee or Land Court non-presiding member.

- [2] The decision sought to be appealed against is that of Deputy President Smith of 24 August 2007. In that decision ([2007] QLRT 123), the deputy president had before him an application in a proceeding for the removal of a caveat. He declined to make the orders sought and made certain orders concerning the amendment of the caveat.
- [3] At the commencement of the hearing today, I raised with the parties the question of whether the Tribunal had jurisdiction under section 67(2)(a). My concern was that the Tribunal which heard the caveat removal application was not one which was constituted by a presiding member (alternative), mining referee or Land Court non-presiding member. Submissions were made by each party concerning that issue.
- [4] Ms Moody of Counsel endeavoured to convince me that the provisions of section 67(2)(a) applied because of section 70A of the LRT Act which provides as follows:

“70A Tribunal constituted by presiding member (alternative)

- (1) For a relevant provision, the tribunal is constituted by a presiding member (alternative) if—
- (a) the tribunal is constituted by a presiding member other than the president; and
 - (b) in giving directions for constituting the tribunal, the president was required, under schedule 1, to choose—
 - (i) either a presiding member or a mining referee; or
 - (ii) a presiding member, a mining referee or a Land Court non-presiding member.
- (2) In this section—
- relevant provision** means—
- (a) section 67(2); or
 - (b) section 69(1); or
 - (c) section 70(1).”

Ms Moody submitted that in subsection (1)(b), I as President was required to choose either a presiding member or a mining referee (paragraph (i)) or in paragraph (ii) a presiding member, a mining referee or a Land Court non-presiding member for the caveat application. It was said that the first of the alternatives (either a presiding member or a mining referee) should be read in a disjunctive way, such that if I were required under schedule 1 of the LRT Act to constitute the Tribunal by *either* a presiding member *or* a mining referee, that would be sufficient for the purposes of section 70A—and therefore the provisions of section 67(2)(a) would be satisfied. It was also submitted that the provisions of section 70A(1)(b)(ii) should be read in a disjunctive way as well. That would mean again that if I were required under schedule 1 to appoint *either* a presiding member *or* a mining referee *or* a Land Court non-presiding member to hear the caveat application, the provisions of section 70A would be satisfied, thereby activating section 67(2)(a).

- [5] The difficulty with that submission, it seems to me, is that the words “either a presiding member or a mining referee” are used in a compendious way. So for example, in schedule 1, if a proceeding is about a caveat under section 305 of the *Mineral Resources Act 1989* (MRA), the Tribunal is to be constituted by a “presiding

member or mining referee”. To then further dissect that expression, such that section 67(2)(a) would be satisfied if *either* a presiding member *or* a mining referee constituted the Tribunal, in my opinion, is erroneous. That can be demonstrated by reference to both paragraphs (i) and (ii) of section 70A(1)(b) because the words “presiding member” are referred to in both paragraphs; similarly, “mining referee” is repeated as well. That would mean, if Ms Moody’s submission were correct, that the words “presiding member” would be referred to twice, “mining referee” twice and “Land Court non-presiding member” once in the two Tribunal-constitution paragraphs. What I think section 70A(1)(b)(i) and (ii) means is that if I were required under schedule 1 to chose one of two alternatives, then the provisions of section 70A would be satisfied. Those alternatives are in the first place, a presiding member or a mining referee—and there are numerous instances in schedule 1 where that compendious expression is used; alternatively, a presiding member, a mining referee or a Land Court non-presiding member. Mr Fisher of Counsel referred me to section 85 of the MRA which is referred to in schedule 1 as requiring a hearing about compensation for a mining claim to be heard by a presiding member, a mining referee or a Land Court non-presiding member. That is a good illustration.

- [6] There is another way of looking at this which also militates against Ms Moody’s submission. There is a requirement in the LRT Act (section 39) for me as President to constitute the Tribunal for a proceeding. Section 39(1) provides that for a proceeding before the Tribunal, the Tribunal is to be constituted under the direction of the President by a single member or a panel as provided under that part. There is no similar or complementary requirement in the LRT Act for the Tribunal to be constituted under my direction, in the case in an *application in a proceeding*. The emphasis in section 39 is upon the term “proceeding”. That is consistent with the headings used in schedule 1. For example, under the heading Mineral Resources Act 1989, there are 3 aspects which are listed there: the first is “Sections conferring jurisdiction”, next “Nature of proceeding” and then “Constitution of tribunal”. Again it is nature of the *proceeding* which is consistent with the words used in section 39.
- [7] The point of this is that when Titan Sandstone’s application to start proceedings was filed in the Tribunal on 30 July 2007 and given file number MRAA 118 of 2007, that was the “proceeding” and that proceeding sought certain relief. It sought to recover sandstone which had been extracted and the delivery of certain items of plant and equipment; a claim was also made for restitution or for a declaration of a constructive or resulting trust and damages for conversion. Once that originating application was received, I proceeded to constitute the Tribunal for that matter under section 363 of the MRA pursuant to schedule 1 of the LRT Act, as a presiding member. Once the Tribunal had been constituted for that matter, *it* was the “proceeding”, in my opinion. Subsequently when Chongherr’s application for a caveat was filed, it was filed not as an originating application but in the guise of an *application in a proceeding*—namely, in MRAA 118 of 2007. As I have said, there is no statutory requirement for me to then constitute the Tribunal for such an interlocutory application. The reason for that, it seems to me is that such an application in a proceeding would be heard by the member of the Tribunal who was hearing the principal application.

- [8] In the circumstances of this case, I have formed the view that this application for leave to appeal is incompetent. That does not mean however that a dissatisfied litigant, in this case Chongherr, has no remedy. It has the remedy provided under section 67(2)(b) of the LRT Act which applies when the Tribunal is not constituted by a presiding member (alternative), mining referee or Land Court non-presiding member—namely to appeal to the Court of Appeal. In those circumstances, the application by Chongherr for leave to proceed will be dismissed.
- [9] Costs were sought by Titan. In my opinion, the point of statutory interpretation was clear but apparently had not been appreciated by the lawyers for each party until today. I have found that this application for leave is incompetent and I regard that as constituting “special circumstances” for the purposes of section 50 of the LRT Act. I will therefore order the applicant Chongherr to pay Titan’s costs of and incidental to this application on the standard basis to be agreed between the parties or as assessed by the Registrar.