

7. Land use planning

Site contamination will also be addressed through the land use planning process under the current Development Act 1993. When an application is made to the relevant development authority such as a local council for a sensitive land use on a site that has a history of prescribed contaminating activity having occurred, the application will need to be supported by a site contamination audit undertaken by an accredited auditor.

VICTORIA

ROYALTIES AND INJUNCTION*

Golden Sands Pty Ltd v Excel Quarries Pty Ltd (No 2) [2007] VSC 157 (7 May 2007)

Royalties – Injunction – Lower risk of injustice – Change in circumstance

Background

In 2001, Golden Sands Pty Ltd was granted the right to extract sand from and use the equipment at a quarry located at Darra in Victoria.

In November 2006, Golden Sands brought action in the Supreme Court of Victoria alleging that some of the equipment at the site was faulty and that the defendants engaged in misleading conduct and breached both express and implied warranties arising from a Royalty Agreement relating to the equipment. Golden Sands withheld royalty payments to the defendants on the basis of set-off, claiming no payment was due. The defendants counterclaimed for the royalty amounts.

At the close of the time allotted for the trial, approximately only half of the case had been argued and continuation of the trial was not going to be possible for a period of several months. In the interim, Whelan J ordered that Golden Sands not enter the site, extract any sand, or use any of the production equipment without paying the ‘minimum monthly royalty payments’ of \$41,800 from 28 December 2006 (the ‘2006 Order’).

On 15 December 2006, Golden Sands appealed the decision to the Court of Appeal. The appeal was heard on 5 March 2007 and was dismissed.

New Application by Golden Sands

On 22 March 2007, Golden Sands filed an application to have the previous order vacated or varied on the basis that Golden Sands could not meet the minimum monthly royalty payments and pay its legal costs relating to the proceedings as well.

Golden Sands also gave an undertaking to vacate the Darra site by 1 May 2007, and that they would not remove any more sand from the site as of that day. Golden Sands argued that this in itself would achieve what had been sought by the defendants in the first hearing.

Reasons for the 2006 Order

Four matters were relied upon in determining that minimum monthly royalty payments should resume:

* Peter Rawling LLB (Hons), MBA, and Grant Guenther BCom, LLB, Macpherson+Kelley Lawyers.

1. A director of Golden Sands gave evidence that Golden Sands would be selling more than 300,000 tonnes of sand per annum.
2. Golden Sands' forensic accountant more conservatively estimated sales of 234,000 tonnes per annum. This amount of sales would almost be enough to meet the minimum monthly royalty payments for a full year.
3. If the judge's decision to grant the injunction should turn out to be wrong, Golden Sands would be able to recover any amounts paid to the defendants.
4. If the judge had decided not to grant the injunction and that decision turned out to be 'wrong', the defendants had little prospect of recovering the royalty payments and would have also lost the sand which had been quarried from the Darra site over that period.

Decision

Whelan J decided to vary his order so that the royalty payments were only due from 28 December 2006 to 28 April 2007. As a preliminary point, the judge was not persuaded by the argument that Golden Sands' financial position had changed in any material manner and that it was unable to meet the minimum monthly payments and pay its legal costs. However his Honour was satisfied that one material circumstance had changed, that Golden Sands had ceased removing sand from the site and was vacating the site. The judge determined this to be significant in two respects:

1. 'It significantly alters the "lower risk of injustice" analysis. The defendants are no longer at risk that they will succeed in the action but "lose" both the royalty payments falling due and the sand extracted and removed from the ... site during the relevant period'.
2. The 2006 Order did not simply order that Golden Sands pay the minimum monthly royalty payments, it ordered that Golden Sands was not to remove any sand or use any equipment on the site without paying the minimum monthly royalty payments. Therefore, by Golden Sands vacating the site, the defendants substantially obtained the relief which they sought in the original application.

As a result, Golden Sands was able to have its interlocutory position changed from an absolute obligation to pay royalties to an interim one, followed by surrender of its access rights.

MORE NATIVE TITLE IN VICTORIA*

Lovett on behalf of the Gunditjmarra People v Victoria [2007] FCA 474 (30 March 2007)
(North J)

Native Title in Southern Australia – Consent determination – Standard of proof for claim settled by agreement – Mediation process – Rights to use and enjoy land and waters and protect places of significance – Rights to running water

On 30 March 2007 the Gunditjmarra people of south western Victoria won recognition of their traditional ownership of that area of the State. The Federal Court, sitting on country beside a volcanic crater at the Mt Eccles National Park, made a consent determination of native title over

* Peter Willis BA (Hons), LLB (Hons), Barrister, Melbourne. The author acted as junior counsel for the State of Victoria. Opinions expressed are my own.