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Citation: **276 va 44**

*276 Va. 44, *; 662 S.E.2d 44, **;
2008 Va. LEXIS 77, ****

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LEVISA COAL COMPANY v. CONSOLIDATION COAL COMPANY

Record No. 070580

SUPREME COURT OF VIRGINIA

276 Va. 44; 662 S.E.2d 44; 2008 Va. LEXIS 77

June 6, 2008, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by [Consolidation Coal Co. v. Levisa Coal Co.](#), 173 L. Ed. 2d 1156, 2009 U.S. LEXIS 3324 (U.S., May 4, 2009)

PRIOR HISTORY: [***1]

FROM THE CIRCUIT COURT OF BUCHANAN COUNTY. Keary R. Williams, Judge.

DISPOSITION: Reversed and remanded.

Emerging Issues Analysis

Comments by Professor Kent Sinclair and Gessner H. Harrison on the Supreme Court of Virginia's Opinions in *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44 (2008), *Pocahontas Mining LLC v. CNX Gas Co.*, 276 Va. 346 (2008), and *Nextel WIP Lease Corp. v. Saunders*, 276 Va. 509 (2008).

Professor Kent Sinclair discusses the principles of lease interpretation in Virginia as well as effectively ascertaining the rights granted by a lease and the determination and resolution of lease ambiguities in light of the Supreme Court of Virginia's opinions in *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44 (2008), *Pocahontas Mining LLC v. CNX Gas Co.*, 276 Va. 346 (2008), and *Nextel WIP Lease Corp. v. Saunders*, 276 Va. 509 (2008).

CASE SUMMARY

PROCEDURAL POSTURE: Appellant coal company challenged a judgment of the Circuit Court of Buchanan County (Virginia) denying its request for injunctive relief in a dispute with appellee coal company over the use of appellant's mine for the storage of wastewater from appellee's mining operations. Appellant also sought a declaratory judgment, and the Circuit Court found appellee had the right to place any kind of storage water in appellant's mine.

OVERVIEW: In 1937 appellant's the predecessor in interest acquired by severance deed the solid mineral estate and timber rights on various parcels of land. In 1956 appellant entered into a lease with a company later acquired by appellee, allowing the lessee to mine coal. Appellee acquired the lessee in 1993, and later began discharging water into appellant's idled mine. The supreme court found that since the 1937 deed conveyed no right to use any portion of the mineral estate to support mining operations on other lands, the

1956 lease could not have granted such right to the lessee. In addition, nothing in the deed conveyed any right to use the voids, tunnels, and shafts created below the surface for any purpose other than to support the mining operations on those parcels. Accordingly, the lessee simply lacked the authority to permit appellee to store wastewater from other mining operations in the subject mine. The lessee did not stipulate for such a use of the leasehold in the 1956 lease, nor could appellant have granted such rights even if they had been sought. Thus, the circuit court erred in ruling that appellee had a right to store wastewater in the mine.

OUTCOME: The judgment was reversed and remanded. On remand, the issue before the circuit court would be whether the circumstances warranted the issuance of a permanent injunction. Appellee was to be afforded the opportunity to present evidence to support its contention that appellant had an adequate remedy at law in the form of monetary damages resulting from the inundation of the mine with wastewater from appellee's mine.


CORE TERMS: coal, lease, mineral, mining operations, injunction, deed, wastewater, mining, injunctive relief, parcels, leasehold, tunnels, shafts, conveyed, storage, surface, adequate remedy, inundation, easement, solid, declaratory judgment, river, right to use, leased premises, preliminary injunction, adjoining, trespass, continuing trespass, irreparable harm, monetary

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[Civil Procedure](#) > [Appeals](#) > [Appellate Jurisdiction](#) > [Final Judgment Rule](#) 

HN1  It is entirely proper for a party to request that a court memorialize in an order a ruling made from the bench, even when that ruling is contrary to the party's interest. [More Like This Headnote](#)

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[Contracts Law](#) > [Contract Interpretation](#) > [General Overview](#) 

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HN2  Like all leases, a mining lease is a contract and when the terms of a contract are clear and unambiguous, a court must give them their plain meaning. On appeal, the appellate court reviews a trial court's interpretation of a lease under a de novo standard. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN3  A grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal, including the shell or containing chamber, and as such owner he has the absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever, including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner. [More Like This Headnote](#)


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HN4  A deed or lease transferring a coal estate or portion thereof is the grant of an estate determinable

and when the coal is all removed the estate ends for the plain reason that the subject of it has been carried away. Thus, the space the coal occupied reverts to the grantor by operation of law. Accordingly, the right to use the tunnels and shafts extended only to the mining operations within the determinable estate, and not to the support of mining operations on other lands. If the coal owner expects more than the right to mine and remove the coal within his estate he ought to stipulate for it in the deed or lease. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5  The owner of a mine may allow the water therein to flow in natural channels and percolations into an adjoining mine, but he may not, in absence of an easement or license to do so, discharge water by means of artificial drains into such adjoining mine. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN6  The granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Real Property Law](#) > [Torts](#) > [Trespass to Real Property](#) 

[Torts](#) > [Premises Liability & Property](#) > [Trespass](#) > [Remedies](#) > [Injunctions](#) 


HN7  The principles that a court must apply in properly exercising its discretion to grant or deny a permanent injunction have been identified in prior decisions of the Supreme Court of Virginia. Under traditional equitable principles, a chancellor may enjoin a continuing trespass. However, even in a case involving a continuing trespass the guiding principle which remains constant is that the granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. Thus, in a case of a continuing trespass, if the loss entailed upon the trespasser would be excessively out of proportion to the injury suffered by the owner, or a serious detriment to the public, a court of equity might very properly deny the injunction and leave the parties to settle their differences in a court of law. The Court has also observed that unless a party is entitled to an injunction pursuant to a statute, a party must establish the traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law before a request for injunctive relief will be sustained. Clearly, if the plaintiff has no adequate remedy at law, equity will not countenance a continuing trespass merely because the trespasser, or even the public at large, will be benefited by allowing the trespass to continue. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Real Property Law](#) > [Torts](#) > [Trespass to Real Property](#) 

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HN8  When an injunction is sought to enforce a contract right concerning personal property, the plaintiff has a high burden of showing that the failure to enjoin the alleged improper action will result in irreparable harm for which the law will afford him no adequate remedy. Unless the plaintiff can demonstrate that the property it seeks to protect has some personal value of sentiment or other intangible quality that cannot be restored to him at law, or that monetary damages would

otherwise not make him whole, the court will deny the injunction because the legal remedy is sufficient. Accordingly, in such cases, the court will give due weight to the adverse effect of the injunction being granted on the defendant. By contrast, when the injunction is sought to enforce a real property right a continuing trespass may be enjoined even though each individual act of trespass is in itself trivial, or the damage is trifling, nominal, or insubstantial, and despite the fact that no single trespass causes irreparable injury. The injury is deemed irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary. [More Like This Headnote](#)

Available Briefs and Other Documents Related to this Case:

VA Supreme Court Brief(s)
Trial Transcript(s)

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JUDGES: OPINION BY JUSTICE LAWRENCE L. KOONTZ, JR. 

OPINION BY: LAWRENCE L. KOONTZ, JR. 

OPINION

[*48] [**45] Present: All the Justices

OPINION BY JUSTICE LAWRENCE L. KOONTZ, JR. 

This appeal arises from a dispute between the owner of a solid mineral estate subject to a long-term mining lease and a third party. The dispute involves the storage of wastewater from the third party's mining operations on other lands in a particular mine located within the subject leasehold but with the lessee's permission. The owner of the solid mineral estate sought an injunction and declaratory judgment to prevent the third party from using the mine, which had been idled by the lessee, as a wastewater storage pit. We consider whether the circuit court erred in adjudicating that the third party "has a right to store excess water" from its mine in the mine in question and in denying the requested injunctive relief.

BACKGROUND

In 1937, Levisa Coal Corporation, the predecessor in interest to Levisa Coal Company, the plaintiff-appellant herein, acquired by severance deed the solid mineral estate and timber rights on various parcels of land in Buchanan County ("the Buchanan [***2] County parcels").¹ The severance deed conveyed to [**46] Levisa Coal ownership of "the coal, metals and timber, together with all the rights, privileges and easements incident thereto, in, on or under" the lands described in the deed. However, the severance deed did not expressly convey to Levisa Coal the right to use any part of the estate conveyed or the attendant easements to support mining activities on other lands. By a separate and subsequent severance deed, the rights to the oil and gaseous mineral estates of the Buchanan County parcels were conveyed to another party. Levisa Coal later acquired an interest in these estates through an oil, gas and coalbed methane lease.

FOOTNOTES

¹ Because, for purposes of this appeal, there is no significant distinction between these two entities, we will refer to the owner of the solid mineral estate as "Levisa Coal" without distinction as to whether the reference is to the current owner or its predecessor in interest.

In 1956, Levisa Coal entered into a lease with Island Creek Coal Company (Island Creek Coal) granting that company "the sole and exclusive right and privilege of mining and removing all of the coal from all the seams underlying the Tiller [V]ein [***3] or seam of coal or the [*49] horizon of such seam" in and upon the Buchanan County parcels conveyed by the 1937 deed.² The 1956 lease further provided Island Creek Coal with the right "generally, to make any use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations." Among the specific uses permitted was the right to "dump water or refuse on said premises." These rights, however, were "limited to such rights as [Levisa Coal] owns and has the right to lease," and the lease did not expressly purport to convey any right to use the leasehold for the support of mining operations on other lands.

FOOTNOTES

² The "Tiller Vein" refers to a particular deep-lying coal seam that has been identified by that name in geological surveys of western Virginia for at least the last ninety years. See, e.g., H. Hinds, *The Geology and Coal Resources of Buchanan County, Virginia*, Bulletin XVIII (VA Geol. Survey 1918).

Under the 1956 lease, Levisa Coal retained certain rights to the ownership and continued use of its solid mineral estate below the Tiller Vein and to easements serving Island Creek Coal's leasehold. As relevant to this appeal, Levisa Coal [***4] retained "[t]he entire ownership and control of all the leased premises, and the coal . . . and other minerals and products therein and thereon, for all purposes (except those hereinbefore expressly set forth as leased to [Island Creek Coal])." Additional express rights reserved to Levisa Coal included "the right and privilege of draining water . . . over, across, or through the leased premises," as well as "the right and privilege of searching for oil, gas, or any other minerals or products and removing same when and wherever found." In furtherance of these rights, the lease provided that Levisa Coal could make excavations and bore "slopes, shafts, drifts, tunnels, and wells" so long as these operations did not interfere with Island Creek Coal's right under the 1956 lease to remove coal from below the Tiller Vein. Levisa Coal also retained a right of inspection within Island Creek Coal's works and mines to assure compliance with an agreed upon mining plan and calculation of royalties due under the lease and "to use freely the means of access to the said works and mines without hindrance or molestation" consistent with its rights under the 1937 deed.

The initial term of the 1956 lease [***5] was for five years with the lease automatically renewing for successive terms of twenty years so long as Island Creek Coal fulfilled its obligation to mine coal on the property and pay royalties to Levisa Coal, or in lieu thereof to make minimum payments to Levisa Coal for the lost opportunity if coal [*50] was not being mined. At issue in this appeal is a mine designated by Island Creek Coal as the "VP3 Mine," which was opened on land subject to the 1956 lease in 1968. Although Island Creek Coal suspended its mining operations at the VP3 Mine in 1998, Levisa Coal does not contend that Island Creek Coal has failed to pay royalties or fulfill its other obligations under the lease and, thus, under its terms the lease remains in force until at least 2021. Moreover, Levisa Coal, through its managing general partner John C. Irvin, conceded during the proceedings of this case that it is not presently economically feasible to resume coal mining operations at the VP3 Mine.

In 1993, CONSOL, Inc. (CONSOL), a subsidiary of CONSOL Energy, Inc., acquired Island Creek Coal and all of its assets, including the rights and obligations of the 1956 [***47] lease. CONSOL has maintained Island Creek Coal as a separate [***6] corporate entity, although Island Creek Coal no longer has any active mining operations or employees and its corporate officers are also officers or employees of CONSOL or its subsidiaries. CONSOL is also the parent company of [Consolidation Coal Company](#) (Consolidation Coal), the defendant-appellee herein. Consolidation Coal maintains a coal mining operation, designated as the "Buchanan Mine" or "Buchanan No. 1 Mine" in the vicinity of Island Creek Coal's VP3 Mine as well as other idled mines once operated by Island Creek Coal.

Excess ground water naturally flowing into any deep mine as a result of mining operations hampers extraction of coal. Mine operators routinely remove such excess water or wastewater on a daily basis. The removal of excess water in the Buchanan Mine, as well as the excess water in the VP3 Mine, was initially accomplished by pumping that water directly into the nearby Levisa River or one of its tributaries. At some point after the acquisition of Island Creek Coal by CONSOL, it became necessary for Consolidation Coal to devise an alternate drainage system for the removal of excess water naturally flowing into its Buchanan Mine and the additional

water released into [***7] that mine as a result of its continuing mining operations there. In general terms, the drainage system devised by Consolidation Coal involved pumping the excess water from the Buchanan Mine into a series of nearby idled mines once operated by Island Creek Coal which functioned as storage pits for the water until the water could be pumped into the Levisa River. Ultimately, this drainage system was designed to include the idled VP3 Mine. The rate of discharge of the wastewater into the river was to be limited from time [*51] to time so that the Levisa River could accommodate the increased water flow resulting from this discharge.

Ultimately, the chloride content of the anticipated discharged water into the Levisa River became an issue to be resolved in order for Consolidation Coal to comply with certain water standards established by the State Water Control Board and to obtain the necessary permits to allow it to continue to pump mine water into the Levisa River. Consolidation Coal applied to the Virginia Department of Mines, Minerals, and Energy (DMME) for permits to discharge wastewater from the Buchanan Mine into idled mines under Island Creek Coal's control, including the VP3 Mine, and [***8] ultimately into the Levisa River in accord with its designed drainage system.³ Subsequently, Consolidation Coal began discharging wastewater into the "Beatrice" and "VP1" mines and, when these mines could not accommodate additional water, the discharge was diverted to the VP3 Mine. The present rate of wastewater discharge from the Buchanan Mine into the VP3 Mine is nearly 2,500 gallons per minute. The VP3 Mine has a capacity to hold approximately 6.4 billion gallons of wastewater.

FOOTNOTES

³ According to statements in the record, Levisa Coal, by separate litigation, challenged the issuing of a permit by DMME to allow discharge of water into the VP3 Mine. The record does not disclose the current status or result of that litigation.

On July 10, 2006, Levisa Coal filed a complaint for injunctive relief and declaratory judgment against Consolidation Coal in the Circuit Court of Buchanan County seeking to prohibit Consolidation Coal from continuing to divert wastewater from the Buchanan Mine to the VP3 Mine. In seeking temporary and permanent injunctive relief, Levisa Coal maintained that "[t]he proposed pumping and storage of Buchanan Mine water in Levisa [Coal]'s properties will cause irreparable [***9] harm to Levisa [Coal]'s property and business interests." Specifically, Levisa Coal maintained that storing water in the VP3 Mine would result in absorption of coal bed methane gas and, with regard to the remaining coal in the property, would "vastly increase the costs that will be required in order to safely access and mine the coal in the future, effectively making it unminable." Levisa Coal further maintained that it had no adequate remedy at law to redress these alleged injuries.

Levisa Coal premised its action for declaratory judgment on the assertion that Consolidation Coal "lacks the legal right to pump and store its Buchanan Mine water in the [***48] [VP3 Mine]." It sought a declaration [*52] that Consolidation Coal "has no right to utilize Levisa [Coal]'s subject properties for temporary or permanent storage of Buchanan Mine water, and for judgment adjudicating all other issues expressly or inferentially raised."

On August 4, 2006, Consolidation Coal filed an omnibus response to the complaint, supported by an accompanying memorandum of law, asserting a demurrer, special plea in bar, answer and affirmative defenses. As relevant to this appeal, Consolidation Coal maintained that it had a legal [***10] right to discharge wastewater into the VP3 Mine because Island Creek Coal, consistent with its purported rights under the 1956 lease, had agreed to permit Consolidation Coal to discharge the water into the VP3 mine. Consolidation Coal further maintained that Levisa Coal was not entitled to seek an injunction as it was not suffering any harm from the discharge of water into Island Creek Coal's leasehold, or, in the alternative, even if Levisa Coal were being injured by that action, it had an adequate remedy at law in the form of seeking monetary damages now or in the future.

The parties engaged in a lengthy period of discovery before Levisa Coal sought a hearing to request entry of a preliminary injunction. The circuit court conducted an ore tenus hearing on the request for a preliminary injunction on November 15 and 16, 2006. At that hearing, Levisa Coal took the position that, despite any agreement between Consolidation Coal and Island Creek Coal by which Island Creek Coal would purportedly accept responsibility for the dumping of water into the VP3 Mine, "it is [Consolidation Coal Company](#) ▼that is

