

CASE NOTE

DROGEMULLER v. BREALEY AND BREALEY
SUPREME COURT OF SOUTH AUSTRALIA, FULL COURT

by Philip McNamara*

Under the *Mining Act* 1971 (SA), the Warden has the power, upon the application of any 'interested person' (that is, the holder of a miner's right), to forfeit claims (s.69) and to recommend to the Minister that leases be forfeited (s.70) if the tenement holder has committed a breach of the Act in a material respect and 'the matter is of sufficient gravity'. These provisions were the subject of the proceedings in *Drogemuller v. Brealey*¹ which was commented on in a casenote published earlier in the Bulletin². Those proceedings have since been taken on appeal to the Full Court of the Supreme Court of South Australia³.

The question contested on the appeal to the Full Court was whether the Senior Warden had been correct in deciding, as a matter of law, that an applicant for forfeiture could never show that 'the matter' was 'of sufficient gravity' where the applicant was either unwilling or unable (in fact or law) to commence mining operations on the forfeited ground after the respondent to the order for forfeiture had vacated. In the earlier appeal to Wells J., in the Land and Valuation Court, that learned judge had (overruling the Senior Warden) decided that it was open to the Warden to find 'sufficient gravity' even where the applicant for forfeiture had no intention or legal right to mine the relevant land⁴. Wells J. held that the Senior Warden, at first instance, had given excessive weight to the two related propositions, first that the forfeiture provisions of the Act existed so as to ensure that mineral deposits are not left idle, and secondly that those provisions should be applied so as to give effect to an implied statutory policy of encouraging mining. The Full Court agreed with Wells J.⁵ In the words of Legoe J., the 'relevant policy of the Act in question in these circumstances is a policy to mine legally and properly in accordance with the Act and Regulations'.⁶ In the result, the Full Court unanimously affirmed the order of Wells J. that the matter be remitted to the Warden's Court for a further hearing.

In two other important respects, however, the majority of the Full Court refused to adopt the reasoning of Wells J. In his reasons for judgment, Wells J. had stated that, in deciding whether 'the matter is of sufficient gravity' for the purposes of ss.69 and 70, the Warden's Court could properly take into account 'that the applicant (for forfeiture) to whom compensation is payable under s.9 would be injuriously affected by the proposed mining in such a way, or to such a degree, or both, that the payment of money would not adequately compensate him for the loss suffered from impairment of amenity, or the like, to be caused by the intended mining. Where such a special loss will be suffered, the matter may appear to be of sufficient gravity, where in other ordinary cases, fair compensation ought adequately to satisfy the applicant'.⁷ In the Full Court, Mitchell ACJ⁸ and White J.⁹ (Legoe J. expressing no opinion) held that compensation is not a relevant factor in the inquiry whether the 'matter is of sufficient gravity'.

Secondly, Wells J. had held that the Warden's Court had no jurisdiction to inquire into the validity of mining interests created under the *Mining Act*.¹⁰ The Full Court held that that question did not arise in the proceedings before it and no view was expressed as to the correctness of Wells J's conclusion.¹¹

FOOTNOTES

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1 (1982) 99 LSJS 298

2 1 (3) AMPLA Bulletin 52

3 (1983) 108 LSJS 48

4 (1982) 99 LSJS 298, 306

5 (1983) 108 LSJS, 52

6 *Id.*, 62

7 99 LSJS, 306

8 108 LSJS, 52

9 *Id.*, 53

10 99 LSJS, 306

11 108 LSJS, 52, 53