QUEENSLAND*

SUPREME COURT

FINGOLD RESOURCES v. COMANOS
The Warden as Court of Chancery

The remarkable and extensive jurisdiction of Queensland Wardens' Courts — magistrates' courts in all but name — was previously considered in Volume 5 of this Bulletin at page 51. This special jurisdiction is a product of the primitive conditions and often straitened circumstances of many small-scale miners on the Victorian gold fields of the 1850s and 1860s, and a state of affairs which modern mining companies and legal representatives have been slow to reappraise.

It is not suggested that Wardens' Courts survive only in Queensland; see to the contrary, the Mining Acts of New South Wales (s. 133), Western Australia (ss 132, 134), South Australia (s. 67), Tasmania (s. 96) and the Northern Territory (s. 145). However, Victoria, their true progenitor, has abandoned her colonial offspring. In that State judges of County Court (District Court) status exercise major mining jurisdiction, while in practice minor matters are handled by the ordinary magistrates' courts: Mines Act 1958 ss 126, 186-188, 207.

Nothing in this article seeks to deny that magistrates' courts, under their normal name and style, should deal with mining matters which fall within their normal jurisdictional limits of locality, amount and remedies in the nature of money judgments. But there is no reason why a magistrate should put on a warden's hat before he deals with minor litigation of any type.

Nothing herein refers to the non-judicial functions of mining wardens — where, for example, they act as a modestly attired commission of inquiry, advising the Department upon an application for a mining lease: Mining Act 1968–1986 (Qld) s. 21(9); *R v. Mining Warden at Herberton; ex parte Le Grand* [1971] QWN 36.

The jurisdiction of Queensland Wardens' Courts was recently reconsidered by the Supreme Court in *Fingold Resources Pty Ltd v. George Comanos & Associates Pty Ltd* QLR 5 March 1988. Pursuant to Order 68 Rule 8 of the Rules of the Supreme Court (Qld) Connolly J heard an appeal from a Master of the Court. The Master had refused an application by Fingold that a writ of summons served upon it by Comanos be set aside. The basis of the application was that the Supreme Court had no jurisdiction to entertain the action, in which Comanos sought specific performance of a contract to transfer to Comanos a 14% interest in certain mining tenements. Connolly J, allowing the appeal, held that the claim did indeed belong to the jurisdiction conferred upon the Warden's Court by s. 80 of the *Mining Act*, which jurisdiction is exclusive: s. 80(4). Comanos,

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in filing suit in the Supreme Court, had made the same mistake as the plaintiff in *Murdoch v. Tonalli Silver Mining Co* (1909) 9 SR (NSW) 739; he or his advisers were too reluctant to believe that equity suits, merely because they relate to mining matters, are reduced from Supreme Court proceedings to a plaint-and-summons action before a magistrate, in a forum where local knowledge of the parties' reputation in Mines Department circles may obtrude; cf *Nickelseekers Pty Ltd v. Vance* [1985] 1 Qd R 266; 3 (1985) 4 *AMPLA Bulletin* 48.

It does not appear that the unreported decision of Master Weld in *Welsharp Group Operation Pty Ltd v. CSR Ltd* (Qld SC 13 February 1986) was cited in *Fingold*, but the latter decision impliedly approves the former. Perhaps *Welsharp* went further than *Fingold*, in that *Welsharp* did not involve two participants, or intending participants in the mining industry. One was simply a landowner seeking to enforce a compensation agreement entered into by the miner.

Section 80 of the Queensland *Mining Act* states that, subject to s. 80A, the Warden's Court has jurisdiction over 'all actions suits and proceedings arising in relation to mining or to any mining tenement'. Section 80A is a genuflection which was made in 1982 towards the normal jurisdiction of the Supreme Court. It gives (or restores to) that Court exclusive jurisdiction to determine the *validity* of mining leases and certain other mining titles. To that extent the general words at the commencement of s. 80 are to read down. But, as Connolly J pointed out, those words are not to be read down or restricted by the specific examples which are appended to s. 80(l), for they are expressed to be without prejudice to the generality of the opening sentence.

The plaintiff in *Fingold v. Comanos* tried to rescue its Supreme Court action by pointing to the fact that in 1974 three of the 'examples' attached to s. 80(1) were repealed. Those items, namely ss 80(1)(3), (f) and (h), referred to questions of partnership, questions of contribution to the management or finances of a mining project and to any claim falling within the following promiscuous list: '. . . a trust, agreement, tort, or dispute of any kind relating to any tenements, mining or prospecting or pertaining to the execution or performance of such a trust or agreement'. The latter provision was formerly s. 80(1)(h).

Connolly J was understandably at a loss to see the point of these repeals. As he pointed out they achieve precisely nothing so long as s. 80(1) consists of a general grant of jurisdiction, followed by some specific examples which avowedly do not affect the generality of the opening words. (It would be different, of course, if the jurisdiction were conferred as a list of specific powers, some of which were then deleted; cf NSW s. 133.) Possibly s. 80(1)(h) was repealed because it was too reminiscent of another late and unlamented piece of Queensland legislation which Sir Owen Dixon once described as the brainchild of one who knew little law and less equity: *Petrie v. Dwyer* (1954) 91 CLR 99, 106. The apparent absence of legal point to the 1974 amendments permits one to speculate upon the quantity and quality of recent legislative thought about the jurisdiction conferred by s. 80, unlimited as it is in amount, and uninhibited by the fact that equitable principles and equitable orders are involved. (There seems

to be some nervousness on the latter point, in that no fewer than 3 of the 5 subsections of s. 80 assert powers in equity!) Perhaps the egregious jurisdiction is dimly seen, and grimly defended as a kind of Departmental redoubt or demarcation line, with little regard to the value of an integrated court system. Section 80 does recognise that Wardens' Courts are really not equipped to put their own equitable judgments into effect, so s. 80(3) provides that, when Magistrates' Court machinery is not equal to the task, the judgement may be registered in and enforced by the Supreme Court. It is curious that, while the equitable and other expertise of the Supreme Court can play no part in the adjudication, the administrative facilities of that Court are eagerly enlisted.

In early 1987 (see 6 *AMPLA Bulletin* 14) there was some official support for merging the jurisdiction of Wardens' Courts with the regular three-tier system of State civil courts, subject to an inelegant rider, that compensation cases arising under the Mining Act be allocated to another special tribunal, the Land Court. Then there was a change of heart. On 22 August 1987 the Brisbane *Courier Mail* reported that these proposals were likely to be dropped, in response to adverse comments. A departmental spokesman wistfully observed that 'people seemed to feel that justice should be done' but the point of his remark is less than clear. This would hardly be a matter of concern if the jurisdiction in question were shifted to the normal hierarchy of Supreme, District and Magistrates' Courts.

In reality it seems that the public reaction did not refer to the proposed abolition of the anomalous *judicial* powers of wardens, but to proposals to abolish public *inquiries* into mining lease applications by the wardens. With a technical imprecision which is almost endemic to the Act the inquiry provisions speak of the 'Wardens' *Court* ... hearing and determining' the application. But a glance at ss 21(9), 21(10) and 21(1) shows that the warden does no such thing. As the Full Supreme Court pointed out 17 years ago, wardens' enquiries have nothing to do with adjudication: *R v. Mining Warden at Herberton; ex parte Le Grand* [1971] QWN 36. The judicial aspects of the legislation could easily be reformed without prejudice to the inquistorial functions. Indeed the latter could logically be extended to renewals of leases and substantial alterations to lease conditions: cf ss 26, 32A.

While it is true that Wardens' Courts survive in several other States that is not in itself sufficient for retaining them in their present form in Queensland. In the midst of a well-publicised revision of the Act, the State might join Victoria in recognising that Eureka was more than 130 years ago, and that planes, cars and sealed highways have replaced the wagon tracks of Gold Rush days. Reversion to the legal mainstream need not mean over-centralisation. Minor cases could still be heard by local magistrates sitting in Magistrates' Courts. The larger and more complex cases could go before judges of the higher courts. As Connolly J observed in *Fingold*, in cases pertaining to mining, we presently entrust to 'a not wholly suitable tribunal ... the whole of the jurisdiction [normally] exercised by superior courts of law and equity'. Further, the Queensland Act distributes jurisdiction in mining matters, according to no obvious grand plan, among Wardens' Courts, the Land Court (which hears appeals in compensation

cases), the District Court (which hears other appeals) and the Supreme Court (which deals at first instance with challenges to validity of titles and which an uncertain amount of supervisory jurisdiction under the prerogative writs).

The historical contribution made by Wardens' Courts, and the historical validity of their existence and exceptional powers are not in dispute. But today their rationale is partly sentiment, partly inertia and partly an appeal to cheap, 'practical' justice. With respect to practicality, the normal courts deal with many matters, including compensation matters, which are no less esoteric than mining cases. Not infrequently the latter are simply actions in tort contract or equity which happen to have a mining background. In mining matters, as in other litigation, expert evidence may assist the court on points of mining lore or science: cf *AEG v. Lennard Oil NL & Ors* [1986] 2 Qd R 216. And in the matter of expense, the maintenance of special tribunals outside the legal mainstream may actually increase the costs of litigation by adding mystery to work in those jurisdictions, and by confining it to a relatively closed circle of practitioners.