ML90081 and the application for additional surface area. Neither was there any consent by Majestic to a caveat lodged by UAL.

The Case Before the Warden's Court

UAL applied to the Warden's Court for a non-consent caveat to prevent Majestic dealing with the lease. Majestic resisted the application, claiming that UAL did not have a right or interest that could be protected by caveat. It relied primarily on the ruling in *Rural & Industries Bank of WA v Hamilton & Ors* (Warden's Court of Western Australia, December 19, 1989). The legislation under consideration in that case allowed a caveat where there was a claim to "any interest in" a mining tenement (*Mining Act* 1978 (WA), s 121). It was held that an entitlement to royalty payments was a contractual interest not a proprietary one, and did not confer an interest in the tenement. As a mere contractual right it could not be protected by caveat.

The primary submission on behalf of UAL before the Warden's Court in Queensland was that its right or interest could be protected by caveat as the Queensland legislation was broader than the WA legislation ruled on in *Rural & Industries Bank*. This was because the *Mineral Resources Act* allows a caveat where there is a claim to "any right or interest in or in respect of" a mining lease or an application for a mining lease (*MRA, s 301*).

After noting the severe consequences of a caveat, including the overriding of Ministerial power in relation to the assignment of a tenement, the Warden found that the words "or in respect of" did not alter the "net of influence" of s 301. His Worship said at p4 that "The claim must be of a legal or equitable nature and the claim must be for a "right or interest" *in the tenement*."(my emphasis). He went on to find that UAL's rights were of a contractual nature and that it did not hold any legal or equitable interest in the tenement. UAL's application for the caveat was therefore refused.

MINING PROJECTS AND "LAND RICH" STAMP DUTY*

***MIM Holdings Ltd v Commissioner of Stamp Duties* [1999] QCA 390**

(Court of Appeal, Supreme Court of Queensland, 22 July 2000)

There is no doubt that, in Queensland, a company's interest in a mining lease must be counted as land when assessing the liability of a share sale to the higher rate of "land rich" stamp duty. But how must contractual rights which "enhance" the value of a lease be accounted for?

A recently reported decision of the Queensland Court of Appeal has opened up the likely application of "land rich company" stamp duty, to companies holding mining leases and associated contractual rights for a project.

Ernest Henry Mining (EHM) held a mining lease (ML2671) for the Ernest Henry mining project. Part of the target ore body lay outside the boundaries of that lease and within the boundaries of an adjoining exploration permit held by WMC and Hunter Resources. Because of both the location of the ore body and the topography of the surface land, not all of the minerals within ML2671 could be extracted by utilising only the land covered by the lease. Accordingly, WMC and HR granted to EHM rights to use the

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surrounding land for the purpose of access and excavation, and also agreed to consent to any new mining lease application which EHM may make over their exploration permit in order to mine the deposit (in consideration for a royalty back).

The trial judge (White J) held that while these contractual rights were not part of the realty of ML2671, they nonetheless had no separate value and simply enhanced the value of the lease. Ultimately, the Court of Appeal dismissed the appeal on different grounds - but at least two members of the Court considered the issue of the mining lease and the contractual rights.

Derrington J considered the contractual rights could be described as "property" and were probably separate from the lease. However, His Honour considered that in the context of the "land rich" provisions of the *Stamp Act* the value attributable to that property should be taken into account as the resultant enhanced value of the mining lease. To this extent, His Honour agreed with the trial judge - and the lease (and property consisting of land) could be seen to have a higher value.

By comparison, Chesterman J contended that, if the contractual rights were not part of the lease, then those rights must be regarded as separate property, with a separate value. His Honour referred to a very simple but effective definition of property -

> "Property is that which belongs to a person exclusive of others, and which can be the subject of bargain and sale to another" *Potter v Commissioners of Inland Revenue* (1854) 156 ER 392, 396 per Pollock CB -

and expressed the view that the contractual rights fitted these concepts. The rights allowed EHM to do things it could not otherwise have done with respect to the property of WMC and HR. His Honour acknowledged that the mining lease and the contractual rights together have a value, and without the contractual rights the lease is less valuable. However, EHM could have sold the mining lease but could not have sold the contractual rights.

Chesterman J stated that the correct approach was not to consider the value of the "property as a whole", but to ask the question – "does the project consist of property, other than land, which has a value?" In those circumstances, His Honour found that it did consist of other property (mainly the contractual rights) which did have a value.

Of course, the comments made by each of the members of the Court of Appeal must be regarded as *obiter dicta* and so will not be binding on Queensland courts - but they have certainly opened up an issue on which current judicial opinion seems to be divided.