

WESTERN AUSTRALIA

JURISDICTION OF THE WARDEN'S COURT TO MAKE DECLARATIONS IN RELATION TO DECISIONS OF A WARDEN ACTING ADMINISTRATIVELY AND IN RELATION TO APPLICATIONS FOR TENEMENTS*

Hawks v Shadmar [2004] WASC 252 (Le Miere J, Supreme Court of Western Australia, 26 November 2004)

Mining Act – Case Stated – plaintiff seeking declaration that recommendation for forfeiture be set aside, jurisdiction of warden's court – nature of application for exploration licence – whether warden's court has implied, or incidental, power to reopen or reconsider decision of warden acting administratively.

Action

In this matter Justice Le Miere determined a case stated from Warden Calder and an originating summons.

Silver Geko Pty Ltd ("Silver Geko") held exploration licence 36/359 ("the Licence") but had gone into liquidation. Hawks issued a plaintiff claiming a declaration that he was entitled to an unencumbered transfer of the Licence.

Shadmar Pty Ltd ("Shadmar") issued a plaintiff for forfeiture of the Licence ("Plaint 9/989"). Shadmar and the liquidator of Silver Geko executed a deed pursuant to which Silver Geko would provide Shadmar with a transfer of the Licence. Shadmar received the transfer and lodged it for registration. On 3 March 2000 Warden Calder made a recommendation to the Minister that the Licence be forfeited. On 31 March 2000 a notice appeared in the Government Gazette declaring the Licence forfeited.

On 3 April 2000 Gregory Martin ("Martin") lodged an application for exploration licence 36/446 over the land formerly the subject of the Licence. Martin was an employee of Shadmar. On 10 April 2000 Western Resources lodged an application for exploration licence 36/448 over the same land. Hawks was a director of Western Resources. On 13 April 2000 Shadmar lodged an application for mining lease 36/850 over the same land.

Hawks commenced a plaintiff ("Plaint 7/012") essentially seeking declarations that the recommendation for forfeiture made by Warden Calder in Plaintiff 9/889 be set aside, the plaintiff be struck out and that he "be awarded" the Licence.

Stated Case

The Warden stated a case for the opinion of the Supreme Court as to whether the Warden had jurisdiction to hear and determine Plaintiff 7/012, power to grant the relief to Hawks and whether the Warden had power to grant the specific relief sought. Shadmar issued an originating summons in the Supreme Court seeking a number of declarations and orders relating to the application for

* Tim Kavenagh, Partner, Corser and Corser, Perth.

exploration licence 36/446 by Martin including a declaration that the warden's court did not have jurisdiction to hear and determine *Plaint 7/012*.

Hawks and Western Resources argued that *Plaint 7/012* was an action arising in respect of the matter enumerated in s 132(1)(g) of the *Mining Act* because it sought the imposition or declaration of a constructive trust.

Decision and Reasons

His Honour held that as application for exploration licence 36/446 was not a mining tenement, *Plaint 7/012* was not an action in respect of a trust relating to a mining tenement. For similar reasons, *Plaint 7/012* was not an action in respect of "generally all rights claimed in, under or in relation to any mining tenement or purported mining tenement."

Hawks and Western Resources also argued that the warden's court had an implied, or incidental, power to reopen or reconsider its decision to make declarations and recommendations made by the warden on 3 March 2000 and should do so on the grounds that the decisions were obtained by fraud and were made in the absence of Hawks.

In dismissing this argument His Honour held:

- *Plaint 7/012* invoked the jurisdiction of the warden's court, not the warden acting administratively and as the warden in *plaint 9/989* acted in an administrative capacity the warden's court had no power to reopen the decision to recommend forfeiture of the Licence
- Once the Minister had made his decision to forfeit the Licence, the warden is then *functus officio*

Accordingly, His Honour held that the warden's court did not have jurisdiction to hear *plaint 7/012*. It followed that the warden's court did not have jurisdiction to grant relief or the specific relief sought by Hawks. It also followed that *Shadmar* was entitled, on the originating summons, to a declaration that the warden's court did not have power to hear *Plaint 7/012*.

NATIVE TITLE BASED OBJECTIONS UNDER THE MINING ACT*

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants & Ors [2005] WAMW 12

Applications for miscellaneous licences – objections by native title claimants – treated as if held freehold land – s 24MD (6A) and (6B) Native Title Act – ss 28, 29(2), 30, 111A, Mining Act

Warden Calder has handed down his substantive decision on native title objections made under the *Mining Act 1978* (WA) ("Mining Act").¹

* Mark Gregory, Senior Associate, Minter Ellison, Perth.