reversed. An equitable interest held by a purchaser will not prevail over an interest held by a valid shareholder.

Helpfully, Whelan J condensed the main principles of his decision into the following four main points:

1. A sale and transfer in contravention of pre-emption provisions in a company's constitution is not a complete nullity.
2. The purchaser under such a sale and transfer has no right as against the company.
3. Such a purchaser does have equitable proprietary rights which bind the vendor of the shares. If the vendor receives a higher purchase price as a result of compliance with the pre-emption provisions, or receives dividends, or the proceeds of a capital reduction, it is liable to account to the purchaser.
4. The purchaser's equitable proprietary rights may come into conflict with the rights of shareholders other than the vendor. In so far as such a conflict is between other shareholders wishing to enforce the rights of pre-emption and the purchaser, the equitable rights of the other shareholders will almost inevitably prevail.

Decision

Whelan J held that whilst legal title to the Shares had not passed by operation of the Deed because of the contravention of the pre-emptive rights provisions of the shareholders' agreement and constitution of AEPL, the Plaintiff did have an equitable proprietary interest in the Shares as a consequence of the assignment in the Deed. However, the relief, if any, that the Plaintiff was entitled to could not be determined until the proceedings concerning the May 2003 deed were determined. That relief would also need to reflect and take into account all of the competing claims connected with the multitude of arrangements associated with the proceedings.

WESTERN AUSTRALIA

JURISDICTION OF WARDEN TO STAY OR STRIKE OUT PLAINTS FOR FORFEITURE AND OBJECTIONS TO EXEMPTION APPLICATIONS AFTER CORPORATE TENEMENT HOLDER PLACED IN ADMINISTRATION OR LIQUIDATION[*]

Mining Act 1978 (WA) - objection to exemption application and related plaint for forfeiture when tenement holder is a company in liquidation, administration or voluntary winding up – whether leave of the Court pursuant to section 440D, 471B or 500(2) of the Corporations Act 2001 (Cth) required before the warden sitting in open court can hear the matter – stay granted in both cases for plaint proceedings but for objection in one case only

Shields Contracting Pty Ltd (In Liq) V Glintan Pty Ltd [2005] WAMW 5(Warden Calder SM, 24 June 2005)

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[*] Christopher Stevenson, Barrister, Francis Burt Chambers, Perth.

Facts

At all material times Shields Contracting Pty Ltd (In Liq) ("Shields") was in liquidation pursuant to a creditors' voluntary winding up resolution made on 30 November 2000. As part beneficial owner of E63/373 Shields lodged an application for a certificate of exemption for the tenement year ended 16 February 2004.

Glintan Pty Ltd ("Glintan") lodged an objection to the exemption application and a plaint for forfeiture of E63/373. Glintan did not seek the leave of any Court which has jurisdiction to grant leave pursuant to s 471B or s 500(2) of the *Corporations Act 2001* to lodge or proceed with the objection or plaint.

The issues

The Warden defined the issues for determination in relation to the objections to the exemption applications as follows:

(1) is the hearing by a Warden of an application for the grant of a certificate of exemption that is objected to a "proceeding" in a "court" against the company or the property of the company for purposes of s 471B of the *Corporations Act*?

(2) is such a hearing an "action or other civil proceeding" for purposes of subs. 500(2)?

(3) is the lodgement of an objection pursuant to reg 55 of the Mining Regulations 1981 ("the Regulations") against an application made by or on behalf of a company that is in liquidation for the grant of a certificate of exemption a procedure whereby the person lodging the objection "begin(s)" or "proceed(s)" with a proceeding for purposes of s 471B of the *Corporations Act*, or begins or proceeds with an "action or other civil proceeding" for purposes of subs. 500(2)?

Relevant statutory provisions

Section 440D of the *Corporations Act* provides:

> (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
>
> (a) with the administrator's written consent; or
>
> (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

Section 471B of the *Corporations Act* provides:

> While a company is being wound up in insolvency or by the court or a provisional liquidator of a company is acting, a person cannot begin or proceed with:
>
> (a) a proceeding in a court against a company or in relation to the property of the company; or
>
> (b) …
>
> except with the leave of the court and in accordance with such terms (if any) as the court imposes.

Subsection 500(2) of the *Corporations Act* says:

> After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

The Warden held these provisions "all have the effect of prohibiting, in the circumstances to which they have application, a potential or an actual party to a matter of the type that is described in each of those provisions from commencing or, having commenced, from proceeding further with, a relevant action or proceeding without leave, and that they also prohibit any court that would otherwise have the jurisdiction to do so from allowing such a matter to be commenced or to proceed further once having been commenced." [6]

The Warden found that if such a matter had been commenced in any court without the necessary leave of a Court (as defined in ss. 9 & 58AA of the *Corporations Act*), or if a matter, having been commenced without such leave (whether or not the leave was required at the time of its commencement), is sought to be continued, it could never be proper for the court, having been made aware that the defendant was under administration or being wound up, to allow the matter to proceed any further unless permitted by the *Corporations Act* or some other law.

Shield's submissions

Counsel for Shields relied on Helm v Hansley Holdings Pty Ltd (In Liq)[1] in which Kennedy J said the underlying purpose of s 471B is "… to ensure that the assets of the company in liquidation will be administered in accordance with the provision of the Companies Act and that no person would get an advantage to which, under those provisions, he is not properly entitled". On this basis Shields contended that an exemption granted under subs 102(3) of the Mining Act for the reasons set out in reg 102(2) of the Mining Regulations, namely, liquidation facilitates the proper administration by the liquidator of the assets of the company.

Counsel for Shields also relied on various authorities for the proposition that the term "proceeding" under s 471B of the *Corporations Act* has been given a broad interpretation by the courts and is not limited to actions in superior and inferior courts but extends to administrative tribunals. It was submitted that what is determinative of whether a body is a "court" for the purposes of s 471B is not the name by which the body is called but its function and purpose.

Shields also relied on the literal provisions of subs 500(2) which does not expressly refer to a "court", but instead uses the phrase "action or other civil proceeding". The consequential effect of the grant of the exemption as a complete defence to the plaint for forfeiture was relied upon on the basis that the assets of the company would thereby be protected for orderly disposition.

Glintan's submissions

The objector relied on the legislative scheme of self regulation and the administrative function of the Warden in open court as an investigatory and recommendatory role only, as opposed to being able to make "binding and final determinations between disputing parties".[2]

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1 [1999] WASCA 71.

2 *Australian Postal Commission v Dao* (1986) 6 NSWLR 497.

Counsel for Glintan submitted that subs 500(2) was the only relevant section that could apply but that on its proper construction it did not apply to an objection to an application for exemption.

Reasons for decision

The Warden's reasons are 50 pages in length and contain a full review of the legislation and cases. In arriving at his conclusion the Warden considered the nature of an exemption application and the relevant statutory provisions. He also considered the nature of an objection noting that the Wardens role is to merely provide a recommendation to the Minister, which does not in itself determine the legal rights of the parties. The Warden did not see how the hearing of an objection could have any consequences on the property of a company in the way the *Corporations Act* provisions referred to above were intended to prevent because there was already a potential that the exemption application could be refused by reason of the existence of the facts giving rise to the need for the application itself.

The Warden held that the lodgement of the objection does not commence or begin *a proceeding or action*, but instead that the procedure before the Warden began with the lodgement of the exemption application itself. The Warden noted the primary focus of the Wardens recommendation is whether the application should be allowed, not whether the objection should be upheld or dismissed. The Warden also noted the limited powers of Wardens to control proceedings before them and that costs may not be ordered in respect of an exemption hearing.

The Warden considered and contrasted the statutory provisions in the *Mining Act* in respect of plaints for forfeiture. The position depends on the type of mining tenement involved. For example, the Warden can finally determine a plaint for forfeiture of a prospecting or miscellaneous licence.

The Warden held that "*proceeding*" must be interpreted in the context of the *Corporations Act* as a whole and that its broad primary meaning is focused for the purpose of ss 440D, 471B and 500(2) by the words which precede and follow the phrase in each of the sections. The Warden found that the type of *proceeding* referred to in s 471B and ss 500(2) is an initiating or originating process, not a step which is essentially a responsive or defensive action. [98]

The Warden held that s 471B did not apply to a creditor's voluntary winding up, but that the position was governed by the operation of ss 500(2) of the *Corporations Act.* [94]

For these reasons the Warden held in relation to the exemption application proceedings (1) the "proceeding" before the Warden is the application for exemption itself and (2) an objection to exemption application is not a "proceeding" or "action" for the purposes of s 471B and ss 500(2). The 3 questions posed at the outset by the Warden and set out above were therefore each answered in the negative. That is, leave of the court is not required to lodge an objection or for the Warden to proceed to hear the exemption application.

In his reasons at [106] Warden Calder SM notes that his opinion in this regard is different to that of Warden Auty SM in *Van Blitterswyk v Sons of Gwalia ltd & Ors*[3].

As to the plaint proceedings the Warden held that s 101 (1) *Mining Act* had no application. He also held that s 101(2) is an exercise of the power given to the State Parliament by s 5F of the

3 [2005] WAMW 6 (28 February 2005); (2005) 24 ARELJ 147.

Corporations Act, but that the power has only been exercised with respect to s 471B and not subs 500(2).

The Warden considered the statutory provisions which govern the nature of plaint proceedings. He concluded that although the Warden does not have power to finally determine such proceedings in the case of tenements other than prospecting or miscellaneous licences, no distinction should be drawn, for purposes of ss. 440D, 471B and 500(2) of the *Corporations Act*, between applications for forfeiture of those types of licences and applications for forfeiture of tenements that may only be finally determined by forfeiture by the Minister.

The Warden held that a Warden sitting in open court hearing an application for forfeiture of a mining tenement is conducting the hearing of "an action or other civil proceeding" for the purpose of ss 440D, 471B and 500(2) of the *Corporations Act*. The Warden also held that a plaint is an "initiating" procedure and is "against" the company and is therefore the type of procedure subs 500(2) is aimed at. He also opined that s 5G *Corporations Act* did not operate so that subs 500(2) did not apply to a plaint for forfeiture.

In conclusion the Warden held that the hearing of a plaint for forfeiture in respect of a company that is being wound up in insolvency or by the Court or pursuant to a resolution of creditors for a voluntary winding up is a hearing before a "court" and thus an action or proceeding of the type contemplated by ss. 471B and 500(2) and that leave of a Court is required to lodge a plaint or for a plaint to proceed.

Accordingly, the Warden ordered that the plaint for forfeiture not be listed for hearing unless, pursuant subs. 500(2) of the *Corporations Act*, leave is given *nunc pro tunc* for the plaint to be lodged and heard.

Van Blitterswyk V Sons Of Gwalia Ltd& Ors [2005] WAMW 26 (Warden Auty SM, 24 August 2005)

Facts

The facts were agreed as follows

The tenement holders, Sons of Gwalia Ltd (Administrators appointed), Sons of Gwalia (Murchison) NL (Administrators appointed), Tarmoola Australia Pty Ltd (Administrators appointed) were all companies in Administration. The Administrators were appointed on 29 August 2004.

- Each of the objections and plaints of Van Blitterswyk were instigated after the companies went into Administration.
- The Administrator had not granted leave pursuant to s 440D for Objections and Plaints to proceed.
- Mr Van Blitterswyk had not made application to the Supreme or Federal Courts seeking leave pursuant to s 440D.

Party's submissions

Counsel for the tenement holders sought a stay of the plaint proceedings, an` adjournment *sine die* of the objections and a springing order to force Van Blitterswyk to seek leave of the Supreme Court to proceed with the plaints *nunc pro tunc* pursuant to s 440D of the *Corporations Act* 2001 (Cth). Van Blitterswyk opposed any stay of either proceedings but undertook to seek leave of the court *nunc pro tunc* within 21 days without a spring order being made.

Reasons for decision

The Warden noted Warden Calder's *obiter dicta* in *Shields Contracting (In Liq) v Glintan Pty Ltd* in respect to a company in liquidation as opposed to administration. After observing that the operation of s 440D in respect of plaints and objections to exemption applications "is not concluded or finalised satisfactorily" the Warden said she was content to follow her earlier reasoning in *Van Blitterswyk v Sons of Gwalia ltd & Ors*.

The Warden repeated her opinion in the earlier case that "proceedings" might be construed broadly or narrowly and be initiating, intervening or incidental stages in litigation.[4] Further, the Warden said that it is her view that the Warden sitting in open court is 'a court'.[5]

Warden Auty SM was not prepared to split the forfeiture proceedings from the exemption application proceedings given the current state of the law on the question. [13] The Warden did not consider whether she had power to make a springing order.

For these reasons the Warden made orders staying the plaints and the objections pursuant to s 440D of the *Corporations Act 2001* and directed Van Blitterswyk to apply to the Supreme Court of Western Australia for leave to proceed *nunc pro tunc* with in 21 days.

The current position in Western Australia if the tenement holder is in liquidation, administration or subject to voluntary winding up

As can be seen from the above two cases there is a difference in opinion between two Wardens as to whether an objection to an exemption application and a plaint can be heard by a Warden sitting in "open court" if the tenement holder is a corporation in liquidation, administration or subject to voluntary winding up.

On one view both proceedings must be stayed until leave is granted by a court pursuant to sections 440D, 471B and 500(2) of the *Corporations Act 2001*(whichever is applicable) for the objection and the plaint to be lodged, or for leave to proceed *nunc pro tunc* if already lodged.

The alternative view is that the Warden has the jurisdiction and power to hear the objection to the exemption application, but not the plaint proceedings unless leave of the Court is obtained or granted pursuant to the relevant section of the *Corporations Act 2001*.

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4 See Finn J in *Pasdale Pty Ltd v Concrete Constructions* (1985) 131 ALR 268, 270 and see Stroud's Judicial Dictionary 4th ed., 2124ff and *Reynolds v Panten* (1999) 23 WAR 215.

5 See Austin J in *Brian Rochford Ltd (Administrators Appointed) v Textile Clothing and Footwear Union NSW* (1998) 47 NSWLR 47) [9].

In practical terms it is unlikely to make much difference because one would have thought a person who lodges an objection to an exemption application would not seek to have the objection heard by the Warden unless and until leave of the Court had been granted to lodge or proceed with the plaint proceedings. This is because the plaint proceedings, and not the objection proceedings, are the only proceedings which have the potential to deliver any tangible benefit to the objector.

PROHIBITION ON REAPPLYING FOR A PROSPECTING LICENCE WITHIN THREE MONTHS AFTER SURRENDER, FORFEITURE OR EXPIRY[*]

Telferscot Nominees Pty Ltd v Chameleon Mining NL [2005] WAMW 30

Applications for prospecting licences – objections on grounds that applicant applying on behalf of prior owner, or that applicant had an interest in the prior tenement – sections 45(2), 95(6) and 119(2), Mining Act

Background

Mr Richmond surrendered three prospecting licences on 20 November 2003. Before surrendering the tenements, he informed his solicitor of his intention. That solicitor had an interest in a company, Telferscot Nominees Pty Ltd (**Telferscot**). On 21 November 2003 Telferscot applied for four prospecting licences over the same ground as the three surrendered prospecting licences.

Section 45(2) of the *Mining Act 1978* (WA) (**Mining Act**)prevents the previous holder of a prospecting licence from applying for a new prospecting or exploration licence, within 3 months from the date of surrender, forfeiture or expiry of the old prospecting licence. Section 45(2) of the Mining Act states:

> When a prospecting licence is surrendered, forfeited or expires the land the subject of the prospecting licence or any part thereof shall not be *marked out* or *applied for* as a prospecting licence or an exploration licence -
>
> (a) by or *on behalf of* the person who was the holder of the prospecting licence immediately prior to the date of the surrender, forfeiture or expiry;
>
> (b) by or on behalf of any person who had an *interest* in the prospecting licence immediately prior to that date; or
>
> (c) by or on behalf of any person who is related to a person referred to in paragraph (a) or (b),
>
> within a period of 3 months from and including that date.' (emphasis added)

Contentions

The objector, Chameleon Mining NL (**Objector**), argued that the applications fell foul of section 45(2) of the Mining Act for a number of reasons:

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