Finally, Warden Calder noted that there was no suggestion that there was a competing claim to the right to transfer the tenements arising out of any other dealing or instrument.

Warden Calder held that it is not for the Warden when deciding whether to grant or refuse consent to purport to decide whether there has been any breach of any relevant agreement connected with the dealing nor the consequences of any breach. Warden Calder pointed to subsections 103C(6) (set out below) and 103C(7) providing support for his conclusion.

> Neither the minister or an authorised officer is concerned with the effect any instrument lodged under this section may have at law other than for the purposes of this Act.

Warden Calder was of the view that the registration of a transfer or any other dealing cannot of itself mean that a legal estate or interest in a tenement passes. In particular, Warden Calder stated that subsection 103C(8) cannot and does not purport to give any legal effect or status to any document or conduct on the part of a person where no such legal status or effect otherwise arises from the agreement or conduct. Warden Calder also observed that the provisions of Part IV(a) of the Act (which includes subsection 103C(8)) are not concerned with the creation or legality of title (other than to require registration before an estate or interest may pass) nor with the resolution of contractual disputes.

In effect, Warden Calder's decision provides that the Warden acting in an administrative capacity is not an appropriate forum to dispute the legality of transfers other than in terms of compliance with the Mining Act.

IMPLIED POWER OF WARDEN TO DISMISS PLAINT FOR FORFEITURE[*]

Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd [2005] WAMW 14 (Perth Warden's Court, Warden Calder SM, 3 June 2005)

Plaint for forfeiture – Dismissal of plaint – Implied Powers of Warden – s 98 Mining Act 1978 (WA).

Facts

Plaints for forfeiture were lodged by Rivergold Exploration Pty Ltd ('Rivergold') against Exploration Licences 69/1069 and 69/1070 held by Resource Mining Corporation Ltd ('RMC').

After hearing evidence from Rivergold, and submissions from both parties, the Warden ruled that there was no case to answer and dismissed the plaints.[1] After the Warden had delivered his decision, Rivergold requested an opportunity to be heard on the following issue:

> In circumstances where a Warden has determined that a defendant to a plaint for forfeiture has no case to answer, does the Warden have the power to dismiss the plaint, or is the Warden only empowered to forward a report and recommendation to the Minister.

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[*] Mark van Brakel and Tim Masson, Clayton Utz.

[1] *Rivergold Exploration Pty ltd v Resource Mining Corporation Ltd* [2004] WAMW 17.

The Warden agreed to give both parties an opportunity to make submissions in respect of the above question.

The Mining Act

Relevantly, s 98 provides that any person may apply for forfeiture of an exploration licence or mining lease where there has been non-compliance with expenditure conditions. If the Warden finds that the tenement holder has failed to comply with the expenditure conditions, then the Warden may:

(a) recommend forfeiture;
(b) impose a penalty not exceeding $10,000 as an alternative to forfeiture; or
(c) dismiss the application.

The Warden must only make a recommendation for forfeiture when satisfied that the non-compliance is of sufficient gravity to justify forfeiture. It is then provided in s 98(6) that, after hearing the application, the Warden must forward to the Minister, a report and recommendation, if any, on the application.

Section 99 provides that, after receiving the recommendation, the Minister may:

(a) declare the tenement forfeited;
(b) impose a penalty as an alternative to forfeiture; or
(c) determine not to forfeit or impose any penalty.

The Warden noted that pursuant to s 98(4)(a) the Warden has an express power dismiss an application for forfeiture and that s 99 does not expressly provide the Minister with the same power.

Submissions by Rivergold

Rivergold submitted that:

(a) the combined effect of s 98(1), 98(6) and 99(1) is that, where the Warden does not make a finding of non-compliance with expenditure conditions, the final determination of all plaints for forfeiture is reserved exclusively for the Minister;

(b) the appropriate procedure to be followed by the Warden, is to recommend either for or against forfeiture based upon the evidence presented – this being part of the Warden's "filtering" role established by the Mining Act;

(c) the Warden in Open Court cannot usurp the Ministerial function of finally determining whether or not an Exploration Licence will be forfeited; and

(d) for a Warden to purport to dismiss a plaint, without making a recommendation to the Minister, would constitute an abdication of the recommendatory function of the Warden.

Further, Rivergold submitted that the above approach was consistent with the reasoning of the Supreme Court in *Re Warden French; Ex parte Serpentine Jarrahdale Ratepayers Association*.[2]

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2 (1994) 11 WAR 315

Submissions by RMC

RMC submitted that the Warden has an implied power to dismiss a plaint in circumstances where there has not been a finding of non-compliance with the expenditure conditions. Further, that it could be implied from the use of the word "*unless*" in s 98(5) that the Mining Act had restricted, and intended to restrict, the Warden's powers to make a recommendation – "a recommendation shall not be made under subsection (4) *unless* the warden is satisfied...". (emphasis added)

(a) In support of its submission that the Warden had an implied power to dismiss a plaint in such circumstances, RMC relied on the Supreme Court's decision in *Re Heaney; Ex parte Flint v Nexus Mineral NL* (unreported, Supreme Court of Western Australia Full Court, 26 February 1997, BC9700638) (*Re Heaney*).

Reasons for decision

The Warden considered that there was an implied power to dismiss plaints for forfeiture following a determination that there was no case to answer. He dismissed the Plaints by Rivergold.

The Warden adopted and followed the decision of Kennedy J in *Re Heaney,* noting the following comments:

> Read literally, subs (4)(a) of s 98 empowers the Warden to dismiss an application only when he finds that the licensee has failed to comply with the expenditure conditions, and there is no provision expressly empowering the Warden to dismiss an application in a case where he is not satisfied that there has been a failure to comply with those conditions. There was, however, no suggestion at the hearing before us that a Warden does not have the power to dismiss a plaint where the plaintiff fails to satisfy the onus of proof resting upon him and, clearly, such a power must exist.[3]

In the opinion of the Warden, the power to dismiss a plaint is not inconsistent with the provisions of s 98(6) or s 99 of the Mining Act. The Minister, pursuant to s 99, is not required to conduct an inquiry regarding compliance with expenditure conditions. The discretion that may be exercised by the Minister in s 99 is conditional upon a recommendation being made by the Warden. Pursuant to s 98(5) the Warden must not make a recommendation unless satisfied that the non-compliance is sufficient to justify forfeiture.

Further, the Warden was of the opinion that s 98(6) does not require a Warden to forward a report or recommendation and that the words "*if any*" in s 98(6) recognises that the Warden may not provide a report or recommendation.[4] The discretion afforded to the Minister pursuant to s 99 only arises "*after receiving the recommendation*" and a Warden cannot make a recommendation in circumstances where a determination has been made that there is no case to answer. Therefore, it must necessarily be implied that the Warden has the power to dismiss the application. Otherwise, there is no finality to the proceeding.

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3 Ibid, 3. The Warden considered this comment to be obiter.

4 The authors are of the view that the use of the words "*if any*" in s 98(6) is recognition of the prohibition in s 98(5) that the Warden "*shall not*" make a recommendation unless "*... satisfied that the non-compliance with such requirements is, in the circumstances of the case, of sufficient gravity to justify the forfeiture*.". The prohibition means that if a Warden is not "*satisfied*", he or she cannot forward a report or recommendation, hence the use of the words "*if any*" in s 98(6).

The Warden considered this view to be consistentwith the filtering role that has been identified as a purpose for which Warden's conduct proceedings in Open Court.[5] The Warden considered that there were two primary reasons for the consistency:

(a) a Warden is in a better position to determine whether or not there has been non-compliance with expenditure conditions of sufficient gravity to justify forfeiture; and

(b) a Warden should be able to bring to finality an application that has no prospect of success because of the relevant factual circumstances.

Further, the Warden considered that there was little purpose in having the power to make a ruling on a no case submission[6], or for a party to make a no case submission to the Warden, if the matter must proceed, in any event, to the Minister for final disposition. The Warden stated that a tribunal or court gives consideration to a no case submission to prevent a matter from unnecessarily proceeding with attendant cost and time consequences. No applicant should have the right to compel the continuance of an application that has no prospects of success. By way of obiter remarks, the Warden expressed the view that, for the same reasons provided above, an implied power to dismiss an application also exists in respect of s 96 of the Mining Act.

APPLICATION FOR ORDERS NISI FOR JUDICIAL REVIEW OF WARDEN'S DECISION*

Re Her Honour Warden Richardson SM; Ex Parte Precious Metals Australia Ltd [2006] WASC 192)

Judicial review – objection – exemption application – mineral claims.

This was an application by Precious Metals for judicial review of a decision by the Meekatharra Mining Warden to dismiss as incompetent objections lodged by Precious Metals to exemption applications by WMC Resources Ltd outside of the time period set by the Mining Registrars. Precious Metals applied for orders nisi for writs of prohibition, mandamus or certiorari.

Background

WMC Resources sought exemptions from labour conditions applying to 185 mineral claims granted under the repealed *Mining Act 1904* (WA) (1904 Act) and continued by virtue of the State Agreement scheduled to the *Uranium (Yeelirrie) Agreement Act 1978* (WA). Precious Metals had applied for an extension of time to lodge objections to the exemption applications under the *Mining Regulations 1925* (WA) (1925 Regulations). The Warden dismissed Precious Metals' application.[1]

Grounds for judicial review

Precious Metals sought judicial review of the Warden's decision on the following grounds:

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5 *Re French; Ex parte Serpentine-Jarrahdale Ratepayers Association* (1994) 11 WAR 315.

6 *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* (unreported, Supreme Court of Western Australia Full Court, 16 December 1988, BC8800832).

* Matt Pudovskis Lawyer Blake Dawson Waldron

1 The Warden's reasons are outlined at (2006) 25 ARELJ 127.