

Justice Barker noted that the particular effect of such expressions depends on the particular statutory context in which they are used. His Honour considered the High Court decision in *O'Grady v Northern Queensland Co Ltd*,² which involved a determination of the extent of the jurisdiction of the Warden's Court under s 80 (1) of the *Mining Act* 1968 (Qld).

In the end, Barker J held that "there must exist a sufficient connection between a proceeding in question and the touchstones of jurisdiction set out in s 132(1) of the Mining Act...More particularly, in my view, the proceeding for a declaration cannot be characterised as one in respect of a *right* claimed in a mining tenement or purported mining tenement".

Having considered the nature of the initial forfeiture proceedings commenced by the respondent Barker J was also not persuaded that there was a "direct connection" to the declaration sought. Rather, his Honour, preferred the competing view, that the proceeding for the declaration was not one "relating to" the forfeiture application, but merely one incidentally connected to it – notwithstanding that the outcome of the declaration plaintiff might have some effect on the performance of the administrative function of the warden in open court in determining the forfeiture application – it was not sufficiently "related to" it.

On this basis Barker J characterised the declaration proceeding as one properly concerning the validity of the acts of the Department in accepting the Form 5 expenditure reports and recording them on the Register.

In summary, Barker J held that the further plaintiff proceeding was independent of the forfeiture application, and accordingly, it followed that the Warden's Court did not have jurisdiction to entertain and grant the declaration sought. For these reasons the appeal was allowed.

Finally, Barker J also held, albeit *obiter*, that on a proper construction of the Mining Act and regulations that the warden erred in finding that the Department had acted contrary to law in accepting the Form 5 expenditure reports filed out of time and in recording the details on the Register.

EXEMPTION APPLICATION AND PLAINT FOR FORFEITURE*

IPT Systems Ltd v Morellini ([2003] WAMW 5, Perth Warden's Court, Warden Calder SM, 25 July 2003)

Exemption application and plaintiff for forfeiture – Dealing with tenements – Departmental guidelines

Facts

Morellini, the plaintiff/objector, lodged plaintiff for forfeiture on 25 October 2001 seeking forfeiture of mining lease 15/621 (the "Mining Lease") registered to IPT Systems Pty Ltd ("IPT"), the defendant/applicant, for failure to comply with expenditure requirements for the year ending 19 October 2001.

IPT lodged application for exemption from expenditure 179/012 (the "Application") on 17 December 2001. The Application relied on ss 102(2)(b) (time needed to assess the resource) and 102(2)(e) (the uneconomic ground) of the *Mining Act* 1978 (WA) (the Act).

Morellini lodged objection (the "Objection") alleging that IPT:

² (1990) 169 CLR 356.

* Simon Eley, Clayton Utz.

- had more than sufficient time to evaluate work done and plan exploration;
- has not established that the tenement is uneconomic;
- has repeated the above grounds of application under s 102(3) of the Act; and
- has effectively abandoned the Mining Lease.

The Warden had previously recommended the grant of an exemption certificate in regard to the Mining Lease and dismissed a plaint for forfeiture on 9 August 2002. However, by consent, it was ordered that the order dismissing the plaint be set aside and the recommendation granting an exemption certificate be withdrawn.

At the hearing IPT filed particulars to its Application referring to:

- further time required to evaluate previous date, plan work required and raise capital;
- a dispute concerning an agreement relating to the sale of tenements including the Mining Lease;
- other circumstances and evidence such to justify the grant of an exemption certificate.

Evidence

The Managing Director of IPT gave evidence relating to the future direction of IPT and the cash reserves of IPT. It was anticipated that IPT would transfer its mining assets to Newco Mining Ltd ("Newco") pursuant to the terms of an agreement with Newco (the "Newco Agreement"). According to the MD of IPT, the transfer did not take place due to Morellini's plaint.

Apparently, the Newco Agreement placed the mining assets of IPT, including the Mining Lease, into the control of other parties. IPT attempted to terminate the Newco Agreement which was subsequently the subject of Supreme Court proceedings. Following the termination of the Newco Agreement, IPT came into possession of all the data concerning the Mining Lease and had a third party evaluate the available data. This evaluation was prepared for the Board of IPT and was not prepared solely for the purpose of selling mining tenements held by IPT.

The MD of IPT gave evidence that IPT was a "basket case" and considered that the company would not survive. The Board had resolved that IPT would become a technology company and raised \$10.7 million and that the mining assets would be dealt with in the best manner for shareholders. The MD of IPT denied that IPT had abandoned the Mining Lease despite the fact that no amount had been budgeted on the exploration or mining on any of its mining tenements.

The MD of IPT also gave evidence that the gold price would have to be significantly higher to make it economic to mine.

Two experts also gave evidence concerning studies of the Mining Lease and whether the Mining Lease was economic. One expert concluded that, in the absence of a feasibility study and until it was shown otherwise, the Mining Lease was uneconomic. The other expert gave evidence in regard to the cost analysis of developing the resource. The second expert's best and worst case scenario found that to develop the mining tenements held by IPT (including the Mining Lease) IPT would generate between \$5.5-\$6 million profit or \$1.7-\$1.9 million loss. He noted that both of these figures excluded the cost involved in developing a bore field for such a project.

The Newco Agreement

The Warden accepted the views of Scott J expressed in *IPT Systems Ltd v Quadrant Management Pty Ltd and Ors*¹ concerning the Newco Agreement. The Newco Agreement, executed about seven months into the tenement year of the Mining Lease, stated that all mining assets of IPT would be transferred to Newco NL ("Newco") which would become a wholly owned subsidiary of IPT. The effect of the Newco Agreement was that the risk of plaining of the mining tenements would pass to Newco but not in circumstances where a tenement, or tenements, were the subject of a third party claim prior to transfer. In this instance, the Mining Lease was the subject of a plaint and the transfer to Newco could not be effected until the plaint was determined. According to the terms of the Newco Agreement, IPT was to apply for an exemption from expenditure.

The Guidelines

The Warden also considered the guidelines issued by the Department of Industry and Resources concerning applications for exemption from expenditure under s 102 of the Act. The Warden's decision concerning the relevance of the guidelines is to be found in *IPT Systems Ltd v Morellini*² which is the subject of an earlier case note.

Conclusions

The Warden did not accept the evidence lead on behalf of IPT in regard to:

- (a) the intention of IPT to advance its mining tenements; and
- (b) the breakdown in the relationship between IPT and other parties concerning the mining assets of IPT, the Newco Agreement, as the sole reason for not complying with the expenditure requirements.

The Warden held that IPT had sufficient funds to meet the expenditure requirements of the Mining Lease but had made a commercial decision to not expend any of the capital raised on developing any of the mining tenements held by IPT. Further, the Warden was of the view that IPT had no contingency plan in place if the Newco Agreement was not completed or where the timetable for completion was extended. In these circumstances, IPT had an obligation to ensure that title to the Mining Lease (and other mining tenements) would not be jeopardised by the actions of IPT. This was of particular significance to the Warden as the Newco Agreement was executed with approximately five months of the tenement year of the Mining Lease remaining.

The Warden held that, given IPT's decision not to expend money on the Mining Lease, it could not be expected that IPT required time to evaluate the work performed on the Mining Lease or to plan future exploration or mining or raise capital. In these circumstances, the Warden was of the view that IPT never had any genuine intention of evaluating the work done on the Mining Lease with a view to develop or continue exploration work on the Mining Lease. Accordingly, the Warden held that a certificate of exemption could not be granted under s 102(2)(b) of the Act.

The Warden did not consider that IPT had presented sufficient evidence to satisfy him that the Mining Lease was uneconomic. The Warden was of the view that IPT had the burden of proof in establishing that the Mining Lease was uneconomic during the tenement year but may expected to become economic at some time in the future. In this regard, the experts did no more than invite

¹ (2002) WASC 216.

² [2003] WAMW 3.

the Minister to assume that the Mining Lease was uneconomic or, in the absence of evidence, to say that it has not been shown to be an economic resource. The Warden considered that to grant an exemption on this ground, IPT would have to provide clear evidence demonstrating the economics of the Mining Lease. The evidence presented to support this ground was speculative and the Warden did not conclude that an exemption under s 102(2)(e) of the Act ought be granted.

Given his conclusions regarding the conduct and attitude of IPT in relation to the Mining Lease, the Warden did not give detailed consideration to the guidelines. However, the Warden did suggest that the guidelines may be inadequate concerning the requirements under s 102(2)(b) of the Act.

The Warden made a recommendation that, based on blatant disregard of IPT concerning its expenditure obligations and the importance of mining leases under the Act:

- (a) the Minister refuse to grant an exemption certificate under ss 102(2)(b), 102(2)(e) or 102(3) of the Act; and
- (b) in such circumstances, the non-compliance is of sufficient gravity to justify forfeiture.

The Warden considered that the objects and aims of the Act, in respect of expenditure requirements, as described by Rowland J in *Nova Resources NL v French*³ were completely ignored, and intentionally so, by IPT.

STATE TAX REFORMS IN WESTERN AUSTRALIA*

Significant changes have been made and are proposed to State taxes in Western Australia as a result of the State Government's implementation of the recommendations set out in its *Review of State Business Tax*.

While the full suite of proposed changes were intended to have taken effect from 1 July 2003, delays to the passing of key legislation have resulted in only a number of the changes being implemented from this date. Legislation to enact the remainder of the reforms is yet to be passed by the Upper House of State Parliament and it is not clear when its passage and proclamation will take place.

Reforms Implemented from 1 July 2003

The reforms that have taken effect from 1 July 2003 provide for amendments to the *Stamp Act* 1921 (WA)¹ (Stamp Act) and the implementation of the *Taxation Administration Act* 2003 (WA)² from 1 July 2003. These changes have had the effects set out below.

Stamp Duty Rate Changes

Stamp duty rates on conveyances of property have been increased by up to 15% so that the maximum rate (applying to amounts over \$500,000) is now 6.3%. In addition, stamp duty payable on certain policies of insurance (general insurance and motor vehicle third party) has been increased to 10% (from 8%) of the value of the premium.

³ (1995) WAR 50.

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¹ *Business Tax Review (Taxing) Act* 2003 (WA), *Business Tax Review (Assessment) Act* 2003 (WA) and *Stamp Amendment (Budget) Act* 2003 (WA).

² *Taxation Administration Act* 2003 (WA) and *Stamp Amendment Act* 2003 (WA) and *Taxation Administration (Consequential Provisions) Act* 2002 (WA).