JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	WARDEN'S COURT
LOCATION	**:**	PERTH
CITATION	**:**	KALLENIA MINES PTY LTD -v- RUANE [2003] WAMW 10
CORAM	**:**	CALDER SM
HEARD	**:**	20 FEBRUARY 2003, 27 JUNE 2003
DELIVERED	**:**	4 SEPTEMBER 2003
FILE NO/S	**:**	PLAINT FOR DECLARATION
TENEMENT NO/S	**:**	E80/2350
BETWEEN	**:**	KALLENIA MINES PTY LTD **(**Plaintiff) AND MICHAEL RUANE (Defendant)

Catchwords:

AGREEMENT - For Trust - Future Property
APPLICATION - For tenement - Agreement to hold on trust - Tenement not yet granted
FUTURE PROPERTY - Trust for - Mining tenement applied for but not yet granted
FUTURE PROPERTY - Mining tenement applied for but not yet granted - Trust for
TENEMENT - Trust for - Tenement applied for but not yet granted

TRUST - Creation of - Future property - Mining tenement applied for but not yet granted
TRUST - Termination of

Legislation:

Property Law Act 1969, s 9

Result:

Plaint dismissed

Representation:

Counsel:

Plaintiff	:	Mr G H Lawton
Defendant	:	Mr A J Goldfinch

Solicitors:

Plaintiff	:	Lawton Gillon
Defendant	:	Goldfinch & Co

Case(s) referred to in judgment(s):

Hot Holdings Pty Ltd v Creasy (1996) 134 ALR 469
Re Ellenborough (1903) 1 CH 697

Case(s) also cited:

nil

THE PROCEEDINGS

The Plaint

1 The nature of the claim of the plaintiff in this matter is expressed in the plaint as:

> "The Defendant has breached his duty to the Plaintiff as trustee of Exploration Licence 80/2350 by surrendering that tenement."

2 The nature of relief sought is as follows:

> "1. A declaration that the Defendant's action in withdrawing Application for Exploration Licence 80/2350 on 17 May 2001 was improper and a breach of trust;
>
> 2. An account of what is due to the Plaintiff for such loss;
>
> 3. Payment by the Defendant to the Plaintiff of the amount found due;
>
> 4. All such further and other accounts inquiries, directions and relief as shall be just;
>
> 5. Costs on an indemnity basis."

3 Particulars of claim were subsequently filed and served. In summary, the claim is particularised as follows. In July 1997 the plaintiff, Kallenia Mines Pty Ltd ("Kallenia"), through its director, William Robert Richmond ("Richmond"), and the defendant, Michael Ruane ("Ruane"), entered into an oral agreement whereby the defendant was to make an application for the grant of a mining tenement, that the plaintiff, would pay the costs associated with the making of the application and that the defendant would hold the tenement, if and when granted, on trust for the plaintiff. It is said that, pursuant to that agreement, Ruane lodged application for exploration licence 80/2350, that the application was subsequently recommended for approval but that Ruane subsequently, and before grant, withdrew the application without the consent of Kallenia. It is alleged that Ruane, as trustee of the exploration licence application, breached his fiduciary obligation to the plaintiff. The plaintiff seeks a declaration that Ruane's action in withdrawing the application was improper and in breach of the trust. Kallenia seeks an account of what is

due to it as a consequence thereof and payment by Ruane to it of any such amount found due. The plaintiff also seeks such further and other accounts inquiries, directions and relief as shall be just. Costs are sought on an indemnity basis.

4 The plaintiff says that the terms of the oral agreement were recorded in a deed of trust signed by the defendant and dated 15 February 2000.

The Defence

5 The defendant says that if any trust was created by the alleged oral agreement (which is denied), the defendant was a holder of a 10 per cent interest in any trust property. He admits that he lodged exploration licence application 80/2350 but does not admit that it was done pursuant to the alleged agreement.

6 It is contended by the defendant that the oral agreement referred to in the particulars of claim purports to create a trust and accordingly purports to create an equitable interest in or affecting a mining tenement. The provisions of s 119(2) of the *Mining Act 1978* (WA) ("the Act") are then referred to. It is then said that, because of s 119(2), no trust or other equitable interest was or was capable of being created by the oral agreement. (During closing addresses Mr Goldfinch said, however, that the defendant no longer relied upon s 119.) It is admitted in the defence, however, that Ruane signed a deed of trust dated 15 February 2000, but it is not admitted that the terms of the oral agreement were recorded in that deed.

7 The defendant concedes that in September 1997 the application for the exploration licence was recommended by the registrar for approval by the Minister and that in May 2001 the defendant lodged a withdrawal of the application. As to the allegation in the particulars of claim that the withdrawal was made and lodged without Kallenia's consent, it is said by the defendant that in March 2000, at a meeting between Ruane and Richmond acting on behalf of Kallenia, it was agreed that the withdrawal would be lodged by Richmond immediately and that such an agreement was confirmed by subsequent letter signed by both Ruane and Richmond. It is then said that Richmond, having been given an executed withdrawal by Ruane, did not lodge the application for withdrawal and that Ruane therefore lodged a withdrawal in May 2001.

8 The defendant denies that he was a trustee of the exploration licence application, says that the plaintiff has not identified what the fiduciary

obligation is that is said to be owed to the plaintiff or how it could arise or how it has been breached. The defendant otherwise denies owing any fiduciary obligation to the plaintiff or any breach of any such obligation.

9 A number of further or alternative defences are then pleaded. It is said that because the alleged oral agreement was an agreement to hold future property on trust and because the future property never came into existence, the trust never came into existence. It is said that even if the trust did come into existence, it was dissolved by the agreement of the parties reached in March 2000 whereby the application for the exploration licence was to be withdraw. Alternatively, it is said that the plaintiff and defendant as beneficiaries or the plaintiff as a beneficiary terminated the alleged trust and that the defendant was discharged as trustee thereof.

10 It is also asserted by the defendant that the plaintiff, by it's conduct arising out of the meeting in March 2000, disentitled itself to any equitable relief. It is further said that the failure of Kallenia to lodge the withdrawal of the exploration licence application, as had been agreed in March 2000, was a breach of that agreement, that the withdrawal of it by Ruane was not a breach of any trust or fiduciary duty because he was carrying out the contractual obligation of the plaintiff owed to the defendant which the plaintiff had refused to meet. It is further said that the agreement of March 2000 having been breached by Kallenia, the defendant was duty-bound to mitigate any damages which he may suffer and that the lodging by him of the withdrawal mitigated his own damages and prevented any loss being suffered or any obligations being incurred by him. Finally, it is said that no relief should be granted to the plaintiff because it would enable the plaintiff to take advantage of its own wrong.

THE EVIDENCE

On Behalf of the Plaintiff

11 Mr Richmond was the first witness called by the plaintiff. He is and was at all material times the sole director of Kallenia. He has known Mr Ruane since about 1992. He said that in 1997, at Richmond's request, Ruane agreed to make an application for the grant of an exploration licence over ground in which Richmond, as a director of Kallenia, had an interest. The reason that he asked Ruane to make the application in Ruane's name was that Richmond believed that any application made in his name or in the name of Kallenia for the grant of a mining tenement would attract objections merely as a consequence of having been made in

the name of either himself or Kallenia. Richmond said that it was agreed between himself and Ruane that if a tenement was granted, Ruane would hold it on trust for both Kallenia and Ruane; Ruane having a 10 per cent beneficial interest and Kallenia having a 90 per cent beneficial interest. He said that it was agreed that, on behalf of Kallenia, Richmond was to pay all fees charged by the Mines Department for lodgment of the application. Richmond gave evidence about having received from Ruane copies of documents, being forms prescribed for purposes of the Mining Act 1978 (WA) ("the Act") and the Mining Regulations 1981("the Regulations") which had all been signed by Ruane in connection with the application for the exploration licence. Those documents were a withdrawal form showing Ruane as being the applicant in respect of E80/2350 and describing the interest being transferred as "Exploration Licence 80/2350", a surrender form showing the details of the mining tenement as "Exploration Licence 80/2350" and showing the holder as being Ruane. Each of those three documents had been signed by a witness. The documents were produced in evidence. The documents had only been signed by Ruane and the witnesses thereto. Both Richmond and Ruane (when he gave evidence later) were uncertain and unclear as to precisely when those documents had been given to Richmond. I perceived the evidence of both of them, however, as being to the effect that it was the intention of both Richmond and Ruane that, by the giving of those documents to Richmond, the future control of the application for the grant of the tenement and of any tenement granted as a consequence of the application having been made would pass to, and remain with, Richmond.

12 It was common ground that at the time when application E80/2350 was lodged by Ruane, namely, 8 August 1997, nothing which had passed between Richmond and Ruane had been reduced to writing. That remained the situation for some time thereafter.

13 Richmond said in evidence that he and Ruane had been involved in a number of other joint undertakings over a number of years. He said that he also held a number of tenements in respect of which Ruane had no interest. Those tenements included a group which he referred to as the "Duketon" tenements. He said that in mid-1999 Ruane had made a proposal to him concerning ground, which included the Duketon tenements. At that time, Richmond said, those tenements were due to be, as he put it, "transferred" to mining leases. He said that Ruane had agreed to pay to Millward Surveys the amount charged by Millwards to mark out the mining leases, which were to be applied for. I assume that the process that Richmond was referring to is that of the exercise by a tenement

holder of the exclusive right to apply to the Minister to convert tenements held by the applicant into mining leases. The cost of the surveys, it was common ground, was $2850. It was also common ground that Ruane had paid that amount to Millwards for those surveys.

14 Initially, Richmond said in his evidence that Ruane had not asked him for a refund of the $2850. He later said that Ruane had asked for it on a couple of occasions and Richmond agreed that, in a letter dated 16 March, Ruane had asked Richmond to pay the amount to him. He said, however, that Ruane had never "made an issue" of repayment. He said that he had told Ruane that it was his intention to withdraw the applications for conversion which had been made in respect of the Duketon tenements and that when the Mines Department refunded the application and other fees which had been paid when those applications were made, he would then repay Ruane, out of that refund, the amount of $2850 which Ruane had paid to Millwards. He later said in evidence that it was in June 2001 that the Mines Department had refunded the application fees for the Duketon conversion applications to him. He said that he had lodged a withdrawal of those conversion applications in March 2001. His evidence was that between March and June 2001, while he was awaiting receipt from the Department of the moneys in respect of the Duketon applications, he tried unsuccessfully to make telephone contact with Ruane.

15 In the course of giving his evidence Richmond produced a document, which expressly purports to be a deed of trust. He said that he had prepared the document, that he had signed it on behalf of Kallenia, that he had had it stamped and that it was he who had placed the date of 15 February 2000 on it. It had been stamped in May 2001. He said during his evidence, in effect, that Ruane had signed the deed of trust upon Richmond's insistence. He said that he believed that the form of surrender and the form of transfer to which I have previously made reference were then signed by Ruane and given to Richmond. Evidence was also given by Richmond about what I consider to be two significant documents. Those two documents are a letter dated 16 March 2000 from Ruane to Richmond ("the first letter") and a letter dated 27 March 2000 from Ruane to Richmond ("the second letter"). Richmond conceded that he had received both letters from Ruane. The first letter begins by making reference to "recent discussions". It then outlines Ruane's *"understanding of arrangements previously agreed to between us …"* and between Richmond and Welcome Stranger Mining Co NL ("WSM"), a company of which Ruane was a director. The letter makes reference to several mining tenements in Western Australia and to a prospecting permit in New

Zealand held in the names of Kallenia and Ruane. The letter refers to exploration licence 46/452 which, it is said therein, had been applied for by Tyson Resources Ltd, a company controlled by Ruane, after WSM had surrendered the ground, which had previously been covered by exploration licence 46/370. The letter acknowledges a prior entitlement on the part of Richmond to royalty payments in respect of ore mined from E46/370. It acknowledges that WSM had not advised Richmond of its intention to surrender the ground the subject of E46/370. It then states the Ruane is prepared to honour the royalty agreement, despite the surrender and the subsequent grant of E46/452, and to make the agreed royalty payments to Richmond.

16 The first letter also contains reference to a prospecting licence application (P46/1270) in the Nullagine district and states that the application is registered in the name of Kallenia, that the application is still pending and that *"Beneficial interests are 50 per cent W Richmond, 50 per cent M Ruane"*. There is then reference, in par 5, to E80/2350. It is there said:

> *"This tenement [application] has been made in the name of M Ruane but is beneficially owned in the proportions WRR 90 per cent, MR 10 per cent."*

17 There then follows reference to prospecting permit 39/192 in New Zealand said, in par 6, to be held in the names of Kallenia and Ruane with respective interests being *"50:50"*.

18 The concluding paragraph of the first letter requests Richmond to confirm the details previously mentioned in the letter and to advise of his intention in respect of the tenements. It then says:

> *"I do not wish to continue carrying all costs associated with these tenements and suggest we rationalise our joint holdings.*
>
> *I would also appreciate if you could refund the $2850 paid by me to Millward Surveys on your behalf in November 1999. Please advise at your earliest convenience."*

19 It was also common ground that Richmond and Ruane met on 25 March 2000 and that they had discussions, *inter alia*, concerning all of the matters raised by Ruane in the first letter. During cross-examination Richmond agreed that the first letter was an accurate outline of the joint interests of Richmond and Ruane as at the date of the letter. Following the meeting between the two men on 25 March 2000, Ruane sent the

second letter. The letter begins by making reference to the first letter and to the meeting of 25 March. It says that Ruane wishes to confirm the arrangements outlined at the meeting of 25 March 2000. Reference is then made to E46/452, to P46/1270, to application E80/2350 (under the heading "Louisa Downs") and to the New Zealand prospecting permit. In respect of E46/452 it is stated that the royalty arrangement remains as outlined in the first letter. Concerning P46/1270, it is said that Kallenia will transfer the tenement to Ruane or his nominee for $1. It is further said that if Ruane wishes to drop the tenement, Richmond will be advised in advance or can accept a transfer back from Ruane at a nominal cost. In the third paragraph, under the heading "Louisa Downs" it is said:

> *"MR will execute a withdrawal of the Application for this tenement. WRR may repeg and acquire this ground with no obligation to MR."*

20 In par 5 it is said:

> *"WRR will lodge the withdrawal of application for E80/2350 as in (3) immediately. DME Application fees in respect of E80/2350 will be refunded to MR. Upon receipt MR will deduct the $2850 owing from WRR (Millward Surveys) and forward the balance to WRR."*

21 There is also reference (par 4) to the New Zealand prospecting permit. It is said that Ruane is to execute a withdrawal of the application for the tenement or to execute a transfer of his 50 per cent interest to Richmond at no cost. The letter concludes by asking Richmond to confirm the arrangements by signing an attached copy and returning it at his earliest convenience. The letter is signed by Ruane. Underneath the words "acknowledged and accepted" appears the signature of Richmond. Richmond conceded that it was his signature on the second letter and that he had returned the signed copy to Ruane.

22 In connection with the second letter, Richmond said, during cross-examination, that on 27 March 2000, the date of the second letter, there had been a separation of the joint interests of Ruane, on the one hand, and himself and Kallenia, on the other. He agreed that, in accordance with the second letter, Kallenia had transferred P46/1270 to Tyson Resources Ltd, a company controlled by Ruane. A search of that tenement which was produced in evidence shows that the transfer was registered on 4 January 2001. As to par 4 of the second letter, concerning the prospecting permit in New Zealand, Richmond agreed that what was

proposed in the second letter had in fact occurred. A copy letter was introduced into evidence concerning that matter. It was a letter from a tenement consultant based in New Zealand who wrote to the Secretary of Commerce in Wellington stating that the prospecting permit application had been made in the names of Kallenia and Ruane and that the applicant sought to amend the application by removing Ruane's name from it. The letter said that the proposed applicant would then be Kallenia. The letter is dated 22 May 2000. It was signed by Ruane and also by Richmond for Kallenia.

23 In respect of the actions contemplated in the second letter concerning application E80/2350, Richmond conceded that Ruane had executed a withdrawal of the application and given it to Richmond. He said that, despite it being said in par 5 of the second letter that he was to lodge the withdrawal of application E80/2350 "immediately", he was entitled to refrain from lodging the withdrawal until a later time when it suited him to do so. I understood his evidence to be to the effect that he did not want the ground the subject of the application to be applied for by any person or entity other than either himself or Kallenia but that were he to have lodged the withdrawal immediately after 27 March 2000, neither he nor Kallenia had the financial resources to make application for the grant of another tenement over the same ground. He said that he considered that it was an unworkable proposition for him to immediately lodge the withdrawal. He said that he considered that the ground the subject of application E80/2350 was valuable, that there was *"no way I would let this go"* and that, in effect, he needed time to arrange for a joint-venture partner with adequate funds to meet the financial commitments of a new tenement. He said that three other companies expressing an interest in the ground covered by E80/2350 had approached him. He also said that he had intended to travel to the United Kingdom and the United States in order to raise capital.

24 It was the evidence of Richmond that he had not lodged the withdrawal immediately because Ruane had agreed that the application could proceed to grant in Ruane's name and that the tenement could then be transferred, at the discretion and at the direction of Richmond, to Richmond or Kallenia or anyone else nominated by Richmond. He said that is why Ruane gave the signed transfer to him.

25 It is revealed in a search of E80/2350 which was tendered in evidence by Richmond that withdrawal 29/001 of the application was lodged on 17 May 2001. Richmond said that he was given no prior warning by Ruane that Ruane was going to lodge the withdrawal.

26 The plaintiff next called Mr Ian MacPherson to give evidence. MacPherson is a director of Adasam Pty Ltd. He said that an application for exploration licence 80/2775 had been lodged in the name of Adasam by Mr Sanders, the next witness whom the defendant called. He said that at the material time Sanders was a director of a company called Navigator Resources Ltd, which company was a client of MacPherson's. He said that Sanders had informed him the ground covered by application E80/2775 had become available and that Navigator Resources wanted to obtain a tenement over that ground. He said that Sanders told him that, because Navigator was in the process of preparing a prospectus for an initial public offering in Navigator, in respect of which MacPherson was working with Sanders, for "corporate and housekeeping reasons" Navigator could not at that stage apply for and be granted a new tenement. He said that Sanders prepared application E80/2775 in the name of Adasam, that MacPherson signed it and that Sanders arranged for lodgment of the application. He said that the aim of the exercise was that at some stage Navigator would acquire the new tenement. At the time, MacPherson was also a director of Navigator.

27 MacPherson said that the initial public offer in Navigator failed and that, as an alternative, Golden Valley Mines Ltd was approached and, ultimately, Navigator became a wholly owned subsidiary of Golden Valley Mines.

28 On 28 June 2002 MacPherson caused a withdrawal of application E80/2775 to be lodged. To that time no tenement had been granted. By that time, however, Navigator had made an application for a mining tenement over ground identical to application E80/2775.

29 MacPherson said that Adasam had not made any payments of any sort to Ruane or anyone associated with Ruane for the right to apply for the ground, which had previously been the subject of E80/2350. The tenement that had been applied for by Navigator was subsequently acquired by Golden Valley Mines Ltd.

30 The plaintiff's next witness was Thomas Sanders. He is a director of Navigator Resources. He prepared application for exploration licence 80/2936 which was lodged in the name of Navigator Resources Ltd on 5 April 2002. The withdrawal of application 80/2775 was not lodged until 28 June 20002. Sanders confirmed that he had assisted MacPherson in the lodgment of application 80/2775 in the name of Adasam. He said that he had suggested to MacPherson that the ground covered by 80/2275 was good ground, that he had prepared the

application, that MacPherson had signed it and that Sanders had forwarded it to the registry for lodgment. Sanders said that he had been watching the ground for years and that on an occasion when he had visited Ruane in the course of endeavouring to raise capital to assist with the pending float of Navigator, he had asked Ruane what he was doing with that ground. He said that Ruane told him that he had surrendered it or withdrawn it - he was unsure of exactly what Ruane had said - about a month prior to the meeting. He agreed that application E80/2775 may have been forwarded to the registry on the same day as the meeting had taken place or, perhaps, the next day.

31 Sanders said that he had not entered into any arrangement with Ruane, either on his own behalf or on behalf of Navigator or anyone else for Ruane or anyone else to receive a benefit for Ruane having provided the information to him about the availability of the ground. He said that Ruane had not told him that Ruane was holding the ground for someone else.

32 Sanders also said that, for corporate housekeeping reasons, Navigator did not want the new tenement in the Navigator portfolio. He said that Adasam had paid the fees when the application was lodged but that it had, in effect, been later reimbursed by Navigator.

On Behalf of the Defendant

33 Ruane said that during that period of several years he and Richmond had quite often been involved together in and discussed tenements and other mining matters. Ruane said that in 1997 Richmond had asked him if he would make an application for an exploration licence in Ruane's name. Ruane said that he agreed to do that in return for a 10 per cent interest in any tenement that was granted. He said that he later signed the deed, which was produced in evidence. He said that he thought that he had signed it around the time of his lodging application E80/2350, but, he said, it was undated when he signed it. He said that he also gave to Richmond a signed withdrawal form, a signed surrender form and a signed transfer form in respect of E80/2350. He said those documents had all been given to Richmond before Ruane had lodged application E80/2350. He later, however, identified the signature of the witness on the transfer and the surrender documents as being that of his secretary who had in fact not been working with him at the time when the application was lodged which was 8 August 1997. Those two documents, he said, had been signed at the same time. He then said that in 1997 he would have given to Richmond the withdrawal form and one of the

transfer forms and that he would have later given the two forms which were witnessed by the secretary, namely, another transfer and the surrender, to Richmond.

34 Ruane said that at the end of 1999 Richmond had asked him to send money to Millward Surveys to pay fees related to an application to re-peg the Duketon tenements, which were controlled by Richmond. He said that he agreed to do that as a favour for Richmond. He said there was no joint venture and that he had no interest at all in the ground covered by the Duketon tenements.

35 In relation to the letter which he sent to Richmond dated 16 March 2000, (" the first letter"), Ruane said that it arose out of a decision which he had made that it was time for he and Richmond to go their separate ways. He said that they met on 25 March 2000 and that the second letter (dated 27 March 2000) set out what had been discussed and agreed at the meeting of 25 March. He said that he had agreed with Richmond that if he (Ruane) obtained P46/1270 and the $2850 which was owed to him, then Richmond could have all of the other tenements and applications mentioned in the second letter. He said that item 1 concerning royalties connected with E46/452, item 2 concerning P46/1270, item 3 concerning his execution of a withdrawal of application E80/2350 and item 4 concerning a transfer of Ruane's interest in the New Zealand prospecting permit to Richmond, were all done in accordance with their agreement. Concerning the lodgment by Richmond of the withdrawal of E80/2350, Ruane said that from 27 March Richmond had been ringing him concerning the matters mentioned in the second letter and that, when he had spoken to Richmond, Ruane had inquired of Richmond when the withdrawal or surrender of application E80/2350 would be lodged and when the $2850 owing to him would be paid to Ruane. He said that Richmond proffered various excuses as to why there had been no lodgment of the withdrawal and why there had been no repayment of the $2850. Ruane said that, eventually, Richmond said that he was not going to pay the $2850 to Ruane because, in effect, during their past relationship Richmond had done many things for Ruane and not been paid for them and that, therefore, it was his intention to "contra" the $2850 against the value of what he said he had done for Ruane. Ruane said that he finally ran out of patience and lodged a withdrawal of application E80/2350. He subsequently received a refund of all of the fees paid upon lodgment, out of which he retained $2850 for himself and the balance of which he forwarded to Ruane's solicitors. He said that there had never been any arrangement or agreement between himself and Richmond or Kallenia whereby he would have to wait until a withdrawal of the conversion

applications for the Duketon tenements had been lodged by Richmond and lodgement funds returned to Richmond.

36 During cross-examination, Ruane said that, although Richmond had said that Ruane could have 10 per cent interest in any tenement granted as a consequence of the lodgment of application E80/2350, it did not worry Ruane whether he was entitled to 10 per cent or to nothing. He conceded that, in respect of the issue arising out of the Nullagine royalty arrangements concerning E46/452 and E46/370 referred to in the first and second letters, at the material time he was a full-time director of Welcome Stranger and that he would have known of the surrender of E46/370 and he agreed that Richmond should have been informed, prior to surrender, of the proposal to surrender.

37 Concerning the lodgment by Ruane of the withdrawal of application E80/2350, Ruane said during cross-examination that he had told Richmond on numerous occasions that if Richmond did not lodge the withdrawal which Ruane had given him, then Ruane would lodge one himself. He said that after Richmond had told Ruane that he would not pay him the $2850, Ruane posted the withdrawal of the application to the Kununurra registry knowing that Richmond did not want him to do that.

SUBMISSIONS

On Behalf of the Defendant

38 Mr Goldfinch submitted on the behalf of the defendant that the deed of trust purported to create a trust for future property, namely, a mining tenement yet to be granted, and that it is clear that, at law, there cannot be a trust for future property. He accepted, however, that equity does recognise that such arrangements may have a future consequence in that if the subject future property does in fact come into existence, then, if the settlor has received valuable consideration, the settlor will be found to hold the property on trust for the beneficiaries (see 48 Halsburys Laws of England 4th ed 2000). He argued that in this case there was no consideration received for the creation of the trust of future property by the settlor. He said that any 10 per cent interest which Ruane may have become entitled to if a mining tenement had been granted was not a present consideration as it could only pass to Ruane if and when the tenement was granted in the future. In any event, he noted, there was no mention in the purported deed of trust of any entitlement at all on the part of Ruane to any share in the future tenement. That is correct. Ruane is

only described as a trustee in the document. The sole beneficiary is named as Kallenia. The beneficiary is also shown as being entitled to 100 shares. In the context, the reference to "100 shares" can be taken as meaning 100 out of 100 shares in the tenement.

39 In any event, it is said, because no mining tenement was ever granted as a consequence of the application, the proposed future property the subject of the purported trust never came into existence so that no trust could or did come into existence. That is to say, there was never any property in respect of which it could be said equity treated Ruane, as trustee, as holding it on trust for either Kallenia alone or for Kallenia and Ruane together as beneficiaries.

40 It was submitted by the defendant that, even if a trust had been created by the deed of trust, it was brought to an end by the agreement, which was reduced to writing in the second letter. Paragraph 5 of that letter expressly says that Richmond is to lodge a withdrawal of application E80/2350 immediately. It is said that there was an enforceable agreement entered into between Ruane and Richmond, with Richmond acting both on his own behalf and on behalf of Kallenia, whereby consideration passed. The consideration, it is said, consisted of each party being granted rights by the other and incurring obligations to the other.

41 Concerning the purported deed of trust document itself, Mr Goldfinch argued that the document had not become a deed because it did not comply with the provisions of s 9. It says that every deed is to be signed by the party to be bound by it and attested by at least one witness not being a party to the deed. It is said that the document in question, while it bears the signature of Ruane as trustee, bears no attestation of that signature. It is said that the signature of Richmond was not placed on the document for purposes of attestation. It is submitted that, for some reason, Richmond caused the seal of Kallenia to be affixed to the document and that he signed merely as a person authorising the affixing of the seal rather than as a person witnessing Ruane's signature.

On Behalf of the Plaintiff

42 Mr Lawton submitted that the plaintiff had complied with the provisions of s 9 of the *Property Law Act*. He said that in the letter of 16 March 2000 ("the first letter") previously referred to Ruane had acknowledged, in effect, that a trust had come into existence and that the "*… tenement (application) … is beneficially owned in the proportions*

WRR 90 per cent, MR 10 per cent". Counsel also submitted that the parties to the deed of trust were not the same as the two parties who had signed the second letter. He said that the parties to the deed of trust were Kallenia and Ruane, whereas the parties to the second letter were Ruane and Richmond. He further submitted that any agreement contained within the second letter was not an agreement between the trust and either Ruane or Kallenia. It was submitted that, even if the second letter did have the effect argued for by Mr Goldfinch, the arrangements set out therein were not complied with. He said that there was never meant to be any "immediate" withdrawal of application E80/2350 which was in fact not done until many months later.

43 Mr Lawton argued that the deed of trust was not about a trust of future property. He said that the immediate effect of the lodgment of the application for the exploration licence was that a present right in priority in favour of the trust came into existence. That, he said, differs from mere expectation of the type considered in, for example, ***Re Ellenborough*** (1903) 1 CH 697, a case referred to by Mr Goldfinch. It was argued that by lodging a withdrawal of application E80/2350 without the knowledge or consent of the beneficiary to the trust, Kallenia, Ruane had acted contrary to the duty that he owed as trustee to the beneficiary of the trust, Kallenia.

44 In respect of the lodgment by Ruane of the withdrawal of application E80/2350, Mr Lawton said that the evidence of Ruane in respect of the lodgment of withdrawal supported the evidence of Richmond which had been to the effect that although the word "immediately" was used in par 5 of the second letter, it had never been the intention of either himself or Ruane that the withdrawal had to be lodged straightaway and that that was why Richmond had not lodged it immediately after signing the second letter.

45 In relation to the issue of damages, Mr Lawton submitted that compensation is the appropriate remedy, that it was embraced by the claim and that it was appropriate that, following any decision on liability, damages in the form of compensation be assessed at a later time. For that reason, he said, it was inappropriate to bring any evidence as to the quantum of any such compensation. In any event, he said that the Warden's Court is not a court of pleading and that it was, therefore, not fatal to a claim for compensation that it had not been expressly or precisely pleaded.

CONCLUSIONS

The "Deed of Trust"

46 I am of the opinion that the deed of trust purported to create a trust of future property and that, as such, did not have the effect contended for by Mr Lawton. I do not accept that the "right in priority" which attaches to an application for the grant of a tenement is anything more than an "expectancy" of future property. As is noted in "Mining Law in Western Australia" by Michael Hunt (3rd ed, par 4.11), the High Court in ***Hot Holdings Pty Ltd v Creasy*** (1996) 134 ALR 469 has construed the provisions of s 105A(1) of the Act whereby the "right in priority" is given to an applicant who has complied with the initial requirement, as being "*… a right of priority to consideration of the application rather than a right to grant …*". I consider that to mean nothing more than a present right to be the first to have considered an application, which may, if the application is successful, result in the granting of future rights in what, in the context, could be described as nothing more than future property. If the application for the tenement had not been withdrawn by the lodgment by Ruane of the withdrawal, then, if the tenement had subsequently been granted by the Minister, it may well have been the case that equity would have treated Ruane as holding the tenement on trust for the named beneficiary, Kallenia. There was, in my opinion, no valuable consideration which at any time was received by Ruane for his having entered into the oral agreement which formed the basis of the deed of trust, or for his having signed the document as trustee or for his having thereby purported to take on and fulfil all of his duties and obligations as a trustee.

47 I find that the second letter which was signed by both Ruane and Richmond on 27 March 2000 expressed a unanimous intention on the part of Ruane and Richmond and Kallenia to sever all ties which existed between Ruane, on the one hand, and Richmond and Kallenia, on the other, and that that intention extended to the relationship which existed between those three parties arising out of the initial oral agreement concerning application E80/2350 and which arose out of the subsequent signing of the purported deed of trust. As with all matters in respect of which I was informed during the course of evidence concerning the relationships between Ruane (in his capacity as an individual, as a director of the companies which were mentioned and as a signatory to the purported deed of trust and as a purported trustee) and Richmond (in his capacity as an individual and as a director of Kallenia) and Kallenia, there was very little legal or practical formality and there was a considerable

blurring and overlapping of the roles which all of those parties played at different times and in connection with different things. That is what occurred, I find, in relation to the first letter and the second letter. I am satisfied that as at the time of writing of both of those letters by Ruane, both Ruane and Richmond, acting in all of the capacities that I have mentioned above, believed that there was a valid deed of trust in respect of application E80/2350 and I find that it was their intention that Ruane and Richmond and Kallenia all be bound by the contents of the second letter in all of their respective capacities. That is entirely consistent with the general falling-out that had occurred between Ruane and Richmond up to that point of time in respect of their business and personal relationships. Given that it was, as at 27 March 2000, the belief and understanding of both Ruane and Richmond and also of Kallenia that there was a valid deed of trust in existence at that date, I find that it was in the minds of and was the intention of all of those parties in all of the respective capacities which I have previously mentioned that the trust be brought to an end. I find that it was the intention of all of them that application for E80/2350would not proceed to grant and that, accordingly, any rights, including any "rights in priority", which had become or may in the future have become vested in the trust or the trustee or any beneficiary would, by their agreement, be given up or otherwise abandoned by the withdrawal. Once the withdrawal was lodged, no future property could ever come into existence in respect of which it could be said that equity would treat such property as being held by Ruane as trustee on trust for the beneficiary. In any event, I find that no valuable consideration ever passed to Ruane for the purported creation of the trust with him as trustee.

48 I find that the second letter did express the entire terms of an agreement entered into between Ruane and Richmond and Kallenia in all of their respective capacities, which I have mentioned above. For purposes of the agreement valuable consideration passed between all of those parties. Each of the parties had rights conferred upon it and relinquished rights and each of the parties undertook and was relieved from obligations. All of those rights and obligations so undertaken were enforceable. In relation to the use of the word "immediately" in par 5 of the second letter, I find that, as at 27 March 2000, it was the intention of all parties to the agreement that as soon as Ruane had executed and delivered to Richmond a withdrawal of application E80/2350 Richmond was to cause the withdrawal to be lodged at the registry.

49 I consider that, at the very least, it was the intention of the parties that there be no significant delay in the execution and delivery by Ruane of the withdrawal and in the lodgment or forwarding for lodgment of that

document by Richmond. It was certainly not, as I find subsequently happened, the mutual intention of or even within the mutual contemplation of the parties that, once he had received it from Ruane, Richmond could fail to, or decline to, bring about lodgment of the withdrawal for the reason that he was unable to raise what he considered to be sufficient capital as would enable and justify him making application over the same ground covered by application E80/2350 for the grant of another tenement or even to introduce joint-venture capital in respect of E80/2350. To that extent Richmond, in his capacity as a director of Kallenia, was in breach of the agreement contained in the second letter concerning the withdrawal of application E80/2350. I find that during the period between 27 March 2000 – the date of the second letter – and the date of lodgement of the withdrawal Richmond decided that he would not pay the amount of $2850 to Ruane and he told Ruane that he had so decided. I find that Ruane never agreed to any variation to the terms set out in the second letter concerning repayment of the amount of $2850, which was owed to him. He always wanted repayment. He never agreed that it could be set off against any other amount said by Richmond to be owed to Richmond by Ruane.

50 To the extent that he failed or refused to bring about lodgment of the withdrawal, Richmond, as the agent of and as a director of Kallenia, breached the agreement set out in the second letter and, in that respect, Ruane was entitled to treat that conduct as amounting to a repudiation of that part of the agreement. Similarly, when Richmond told Ruane that Ruane was not going to receive payment of the $2850, there was repudiation by Richmond of that part of the agreement. In my opinion, Ruane, on the basis of the conduct of Richmond, was entitled to take the action that he did, namely, to complete another withdrawal application and to lodge it with the consequence that the application came to an end, the application fees were returned to him as the applicant and from the refunded fees he deducted the amount of $2850 which I find was owing to him by Richmond. I find that by not lodging the withdrawal for several months Ruane was not thereby waiving any of his rights under the agreement nor accepting any other variation to the terms of the agreement except to allow Richmond more time than had been agreed to lodge the withdrawal. Finally, he simply decided that the only reasonable means of concluding the performance of the agreement was to lodge a withdrawal himself. By then it was clear that Richmond and Kallenia had no intention of completing performance.

51 In the circumstances, I find that as at the date of lodgment by Ruane of the withdrawal of application E80/2350 there was no trust in existence.

Any trust which may have previously existed had been terminated, if not immediately upon execution of the agreement constituted by the second letter, then upon the lodgment by Ruane of the withdrawal of application E80/2350. The conduct of Richmond on behalf of Kallenia was sufficient to bring the trust to an end and to discharge Ruane as trustee. By signing the withdrawal and giving it to Richmond, Ruane had done all that he could do and all that he was required to do in order to comply with the terms of par 5 of the agreement of 27 March 2000. Pursuant to the agreement contained in the second letter, lodgement of a withdrawal of the application was what Kallenia agreed would happen immediately after receipt of a signed withdrawal from Ruane following execution of the agreement on 27 March 2000. In all of the circumstances, it did not really matter who actually lodged a withdrawal. Once a withdrawal form was duly executed by Ruane as the applicant for the tenement and delivered to Richmond, lodgement was a mere formality. The intention of the parties in providing for Ruane to sign and deliver the withdrawal was to give control of the lodgement of the withdrawal of the application for the tenement to Richmond. That control did not, however, include any discretion on the part of Richmond as to whether or not there would be any postponement of lodgement beyond what was reasonable and necessary to comply with the agreement and lodge it "immediately". It did not include any right on the part of Richmond to in any way vary the terms of the agreement. When Richmond failed to lodge the withdrawal, the most practical and reasonable solution in the circumstances was for Ruane to do it himself. The end result of that was the same as if Richmond had lodged it. The only difference between what happened and what should have happened under the agreement was that it should have been through Richmond that the agreed lodgement was effected. It was not an essential element of the agreement that it be Richmond who caused a withdrawal to be lodged. It was not an essential element that Ruane not lodge a withdrawal. The essential element in that regard was that a withdrawal be lodged thus bringing the tenement application and the deed and purported trust to an end.

52 For all of the above reasons the claim of the plaintiff fails. The plaint is dismissed.