[2004] WAMW 12

JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	OPEN COURT
LOCATION	**:**	PERTH
CITATION	**:**	WESTOVER HOLDINGS PTY LTD -v- BHP BILLITON MINERALS PTY LTD & ORS [2004] WAMW 12
CORAM	**:**	CALDER SM
HEARD	**:**	9 JULY 2004
DELIVERED	**:**	6 AUGUST 2004
FILE NO/S	**:**	PLAINT 1/034
TENEMENT NO/S	**:**	E45/2278
BETWEEN	**:**	WESTOVER HOLDINGS PTY LTD **(**Plaintiff) AND BHP BILLITON MINERALS PTY LTD, CI MINERALS AUSTRALIA PTY LTD and MITSUI IRON ORE CORPORATION PTY LTD (Defendants)

Catchwords:

EXPLORATION LICENCE – nature of – interest in land

MINING TENEMENT - nature of – interest in land

NUISANCE – plaint for - jurisdiction of Warden's Court

PLAINT – for nuisance – jurisdiction of Warden's Court

PLAINT – for trespass – Warden's Court PRACTICE AND PROCEDURE – strike out application – claim of plaintiff

PRACTICE AND PROCEDURE – Local Court procedure – striking out of plaintiff's claim

PRACTICE AND PROCEDURE – Supreme Court rules – striking out of plaintiff's claim

TRESPASS - plaint for - jurisdiction of Warden's Court

WARDEN'S COURT – jurisdiction – plaint for nuisance

WARDEN'S COURT – jurisdiction – plaint for trespass

WARDEN'S COURT – powers – striking out – plaintiff's claim

Legislation:

Local Court Rules
Mining Act 1978 (WA), s 132, s 134
Supreme Court Rules, O.20, R 19

Result: *Strike out application refused.*

Representation:

Counsel:

Plaintiff	:	Mr T J Kavenagh
Defendants	:	Mr B D Luscombe

Solicitors:

Plaintiff	:	Corser & Corser
Defendants	:	Mallesons Stephen Jaques

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

Bowen v Stratigraphic Explorations Pty Ltd and Kay [1971] WAR 119
Bond Corporation Holdings Limited (1990) 1 WAR 465
Cowell v Rosehill Racecourse Co Ltd (1937) 56 CLR 605
Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2001] WASC 87
Green v Daly [2002] WADC 109
Hunter v Canary Wharf Ltd [1997] AC 655
Kimberley Downs Pty Ltd v Western Australia (1986), unreported; Library No 644
Malone v Laskey (1907) 2 KB 141
Oldham v Lawson (No 1) [1976] VR 654
Re Toohey (Aboriginal Lands Commissioner); Ex parte Menelling Station Pty Ltd (1983) 57 ALJR 59
Simpson v Knowles [1974] VR 190
Sorna Pty Ltd v Flint [2000] WASC 563
Stowe & Ors v Mineral Holdings (Australia) Pty Ltd [1975] Tas SR 49

Case(s) also cited:

National Provincial Bank Ltd v Ainsworth [1965] AC 1175

THE PROCEEDINGS

The Plaint

1 Westover Holdings Pty Ltd ("the Plaintiff") by way of plaint claims that BHP Minerals Pty Ltd, CI Minerals Australia Pty Ltd and Mitsui Iron Ore Corporation Pty Ltd ("the Defendants") have, without due authority, deposited or caused to be deposited mining material ("the material") on Exploration Licence 45/2278 ("E45/2278") held by the plaintiff . The plaintiff seeks on order of the Warden's Court that the defendants remove the material from E45/2278.

2 This is an action commenced in the Warden's Court whereby the plaintiff relies upon the provisions of s.132 of the Mining Act 1978 (WA) ("the Act") pursuant to which the Warden is empowered to exercise a judicial function.

3 The amended particulars of claim assert that the defendants are the registered holders of a mineral lease which adjoins E45/2278 and that on an unknown date before the grant of E45/2278 the defendants deposited the material on the land the subject of the plaintiff's exploration licence. It is claimed that the plaintiff, by the presence of the material is prevented from obtaining access to the natural surface of the land covered by its tenement and that it cannot conduct thereon activities such as sampling, drilling or other authorised activities. The presence of the material and the refusal of the defendants to remove it as requested is said to constitute a trespass. Its interference with the plaintiff's occupation and possession of the land the subject of E45/2278 is said to constitute a nuisance.

4 The remedies sought by the plaint are a declaration that the defendants had no entitlement to deposit the material on the exploration licence, an injunction requiring the defendants to remove it and such other relief as the Court deems appropriate.

The Defence

5 By their particulars of defence the defendants admit that the plaintiff has rights as the holder of E45/2278. They deny that the plaintiff is or has been, as claimed in the particulars of claim, the legal occupier and in possession of the land conferred by the exploration licence. It is also denied that the plaintiff occupies the land for purposes of the exploration licence. It is denied that the defendants deposited the material in question. It is denied that there is trespass

or nuisance as alleged. It is not admitted that the plaintiff has requested the defendants to remove the material or that the defendants have refused to do so.

The Strike Out Application

The defendant seeks an order that the plaint be struck out. Essentially, the basis of the application in respect of the claim of trespass is that the plaintiff is not in exclusive possession of the subject land and that the exploration licence constitutes a bare licence only which confers no interest in the subject land which cannot therefore support a claim for trespass. It is also said that there is no necessary allegation of negligence or intentional act on the part of the defendants.

Concerning the claim of nuisance, it is said that there can be no such claim because there is no exclusive possession of the land the subject of the tenement. As a threshold defence, however, it is said that the Warden's Court does not have jurisdiction to deal with tortious claims of nuisance.

Submissions On Behalf Of BHP

8 In his written submissions in support of the application to strike out the plaint, Mr Luscombe addressed first the issue of trespass. His starting point is that the plaintiff, as the holder of the exploration licence, is not thereby in exclusive possession of the land the subject of the licence. It is submitted that what the provisions of s 66 of the Act do is to grant to the holder of such a licence rights to explore and to excavate and extract and remove limited quantities of minerals and that the exploration licence confers on the holder merely a bare licence but confers on the holder no interest in land. He draws support for that proposition from commentary in Mining Law in Australia, 3rd ed, Michael Hunt, (at 5.16) where it is said:

> "*The author suggests that an exploration licence cannot be characterised as a leasehold interest in land as it does not have the necessary element of exclusive possession. Like a prospecting licence, discussed earlier in this book, it is not clear whether an exploration licence amounts to an interest in land as a licence coupled with a grant or merely a bare licence which confers no interest in land. For purposes of this discussion it would seem no different from the tenement known as a prospecting area under the old Act which was held by Wickham J in Bowen v Stratigraphic Explorations Pty Ltd and*

> *Kay [1971] WAR 119 to be a bare licence and not a licence coupled with a grant.*"

9 Reference is then made by counsel to ***Simpson v Knowles*** [1974] VR 190 in support of the proposition that a bare licensee cannot prosecute an action in trespass. It is submitted that a statutory licence grants no propriety rights in the licensee under Australian law and support for that proposition is said to come from ***Cowell v Rosehill Racecourse Co Ltd*** (1937) 56 CLR 605, together with commentary by G C McKenzie (1994), "Exploration; Trespass and Disclosure", Ampla Yearbook, 1994 at p 315, 349. A quotation from the latter source is provided, namely:

> "*Mining and petroleum tenements which confer rights to prospect or explore are in the nature of licences. These tenements either do not confer property in the severed minerals or petroleum in the tenement holder or restrict the quantities of minerals or petroleum entitled to be extracted and recovered.*
>
> *Because these tenements do not confer special rights to exclusive possession they cannot be regarded as leases under common law. Similarly because limited rights to extraction and recovery of minerals are granted or property in the minerals or petroleum extracted and recovered do not vest in the tenement holder, these tenements do not constitute profits à prendre.*
>
> *A statutory licence grants no proprietary rights in the licensee under Australian law.*"

10 Counsel also submitted that the decision in ***Finesky Holdings Pty Ltd v Minister for Transport for Western Australia*** [2001] WASC 87, is distinguishable because that case concerned encroachment on to a mining sublease.

11 As to nuisance, Mr Luscombe submitted that a bare licensee cannot prosecute an action in nuisance. In support of that proposition he relied upon commentary in Davies (1999) “Torts”; Third Edition (at 261):

> "*In Hargrave v Goldman (1963) 110 CLR 40 at 49* [sic 59], *Windeyer J defined a private nuisance as 'an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it'. The tort of private nuisance is intimately connected to the ownership of private property. Without some kind of property right in or over the*

> *land affected by the interference, the plaintiff cannot sue, in most cases at least.*
>
> *The great case of St Helens Smelting Co v Tipping [1865] 11 HL Cas 642; 11 ER 1483 established that there are two ways in which a private nuisance can occur, which the law treats differently:*
>
> *(i) By interference with the use and enjoyment of property rights; and*
>
> *(ii) By material damage to property.*"

12 Davies is further quoted (at 267) as follows:

> "*The mere fact that the plaintiff has suffered loss or inconvenience in the use of his or her property is not sufficient in itself to give rise to an action in private nuisance. The loss or inconvenience suffered by the plaintiff must arise from interference with recognised property rights.*"

13 Counsel also quotes from Fleming, J G (1998), "The Law of Torts"; Ninth Edition (464 - 465):

> "*The gist of private nuisance is interference with an occupier's interest in the beneficial use of his land. The action is thus complimentary to trespass which protects the related interest in exclusive possession … The harms against which protection is afforded by either action usually differ somewhat in character, in that trespass applies only to physical intrusions by tangible objects, be they persons or things, whereas nuisance extends also to invasions by noise, smell, vibrations and even high-frequency interference with television screens. Again, trespass postulates that the defendant's conduct consists in a physical act done directly unto the plaintiff's land; whereas a nuisance must (at least according to the traditional view) be caused by something taking place outside the land affected. The distinction, however elusive and unattractive to the modern mind, is still attended with practical significance; for the one, there is liability without actual harm, for the other, damage is essential; every trespassory intrusion is tortious unless privileged, while a nuisance is never actionable unless it is unreasonable.*"

14 It is further submitted by Mr Luscombe that, in any event, the *Mining Act* does not confer jurisdiction on the Warden to determine actions based on the tort of nuisance. Finally, it is alleged in the written submissions that even if the plaintiff as the holder of an exploration licence is capable of prosecuting actions in trespass or nuisance, the activities which the plaintiff alleges are prevented by reason of the alleged torts do not relate to the mining material or activities around the area of the mining material. It is said that proper particulars of the exploration tasks that it is prevented from undertaking have not been provided by the plaintiff. At the hearing of the application to strike out Mr Luscombe said that he relied upon the provisions of s 134(3)(a) of the *Mining Act* as giving to the Warden power to strike out the action. He said that if the *Local Court Rules* apply to the proceedings, then, because a strike-out application is available in the Local Court, it is also available before the Warden sitting in the Warden's Court in a judicial proceedings.

15 In any event, it is submitted by Mr Luscombe, the provisions of s 134(5) of the *Mining Act* give to the Warden power to strike out an action, the power being the same as that vested in the Supreme Court pursuant to the provisions of O 20 of the *Supreme Court Rules*.

16 Mr Luscombe said that no lease is created by an exploration licence and that if an exploration licence is a statutory licence, then the holder of such a licence cannot prosecute an action for nuisance. He conceded that the situation is less clear concerning actions for trespass but said that even if an action for trespass can be maintained, it may only be prosecuted by the holder to the extent that it affects the land the subject of the exploration licence. In that regard, he drew my attention to the head-note in the ***Finesky*** decision and submitted that the comments therein at par 56 relied upon by the plaintiff had no relevance to an exploration licence.

17 It was further submitted that if the plaintiff was allowed to proceed, then account would need to be taken of the proposition that, at most, the plaintiff could only prosecute its action in the context of what it is allowed to do pursuant to the exploration licence. It was noted that there had been no attempt by the plaintiff to set out what it was that the presence of the material on the tenement prevented the plaintiff from doing but that, in any event, in the context of an exploration licence, it was submitted that there was no way that the plaintiff would be able to show that it could not explore because of what was on the land.

SUBMISSIONS ON BEHALF OF WESTOVER

18 Mr Kavenagh, for the plaintiff, submits that the practice and procedure of the Warden's Court, exercising its judicial function, is governed by the *Local*

Court Act 1904 by virtue of the provisions of s 134(6) of the *Mining Act*. He noted that there is no provision in the *Local Court Act* or the *Local Court Rules* which enables a strike-out application of the type now before me to be entertained by the Warden's Court because, just as a Magistrate has no jurisdiction to strike out an action in the Local Court, a Warden has no jurisdiction to strike out a plaint in the Warden's Court.

19 In the alternative, Mr Kavenagh submits that if the Warden does have powers similar to those given to the Supreme Court by O 20 r 19 of the *Supreme Court Rules*, then the principles expressed by Master Staples in ***Kimberley Downs Pty Ltd v Western Australia (1986)***, unreported; Library No 644 are relevant and must be taken into account.

20 Concerning the issue of whether an exploration licence is a bare licence and that, therefore, the holder of such a licence cannot sue in trespass, counsel made reference to the judgment of Wilson J in ***Re Toohey (Aboriginal Land Commissioner); Ex parte Menelling Station Pty Ltd*** (1983) 57 ALJR 59 at 68. It is submitted by Mr Kavenagh that an exploration licence is not a mere bare licence and that it is a licence coupled with a grant of rights which include the right to transfer (s 64 *Mining Act*), the right to take material from the land (s 66(c)), the right to take and divert water (s 66), the right to apply for and have granted a mining lease (s 67). He also notes that an exploration licence may be forfeited for breach of conditions (s 98). It is submitted that accordingly, the nature of an exploration licence is that it is an interest in land which allows the holder to sue in trespass or, alternatively, it is granted with such rights and obligations that enable the holder thereof to sue in trespass. In that regard he relies upon the comments of his Honour Murray J in ***Sorna Pty Ltd v Flint*** [2000] WASC 563 at 571. He also relies upon what was said by Roberts-Smith J in ***Finesky Holdings*** (*supra*) at pars 155 to 159. Concerning the jurisdiction of the Warden's Court, Mr Kavenagh submits that the provisions of s 132(1)(j) of the *Mining Act* give to the Court the necessary jurisdiction to determine an action in trespass. It is said, further, that a claim in nuisance is a claim based upon an injury to a "right" claimed under or in relation to a mining tenement, those words being drawn from the provisions of s 132(1).

21 In oral submissions made before me Mr Kavenagh submitted that s 134(3)(a) of the *Mining Act* only deals with the striking out of parties, not the striking out of actions. As he points out, the chamber summons does not seek that the plaintiff be struck out as a party. He then submitted that, because of s 134(6) of the *Mining Act*, the *Local Court Rules* applied and that there is no provision therein for a defendant to make application to strike out a plaintiff's action. He submits that one of the reasons for that is that, whereas in the Supreme and District Courts there is provision in the *Supreme Court Rules* for

such a procedure, those are courts of pleadings; the Local Court is not a court of pleadings. It is for that reason, he says, that in the Local Court a defendant cannot apply to strike out an action and a defendant cannot obtain summary judgment against a plaintiff. He did not concede that the provisions of s 134(5) of the *Mining Act* give to a Warden exercising judicial powers the power to strike out a plaint. He argues, however, that if the provisions of O 20 r 19 of the *Supreme Court Rules* do apply, then, in accordance with the principles set out in ***Kimberley Downs*** (*supra*), all that the plaintiff need do is establish that it has an arguable case on a serious question to be tried in order to overcome the strike-out application.

22 In conclusion, Mr Kavenagh submitted that one practical matter that must be taken into account is that consideration should be given to the question which is properly to be asked, namely, what is the practical effect of a Warden sitting in the Warden's Court not being able to prevent or provide a remedy against any person coming on to land the subject of a mining tenement and adversely affecting the right of the tenement holder to carry out mining operations on that land. He said that he was unable to think of any other cause of action apart from trespass or nuisance which may be available to the plaintiff. In particular, he said that he did not think that it would be open to the plaintiff in a case such as the present to rely on an action for negligence because of the necessity to prove the relevant intention on the part of the defendant.

LEGISLATION

The *Mining Act*

S.132 *"(1) A warden's court has jurisdiction to hear and determine all such actions, suits and other proceedings cognisable by any court of civil jurisdiction as arise in respect of -*

(a) the area, dimensions, or boundaries of mining tenements;

(b) the title to, and ownership or possession of, mining tenements or mining products;

(c) water to be used for mining and any questions or disputes relating thereto;

(d) trespass or encroachment upon, or injuries to, mining tenements;

(e) specific performance of contracts relating to mining tenements or mining;

(f) transfers and other dispositions of, and charges upon, mining tenements;

(g) trusts relating to mining tenements or mining;

(h) partnerships relating to mining tenements or mining, the existence, formation, and dissolution thereof, the taking of accounts connected therewith, the contribution of the partners as between themselves and the determination of all questions arising between the partners;

(i) contribution by or between persons holding joint or several interests in mining tenements towards rent or other expenses in relation thereto;

(j) encroachment or trespass upon, or injury to, land by reason of mining, whether the land is held under this Act or otherwise;

(k) encroachments upon, injuries to, and matters affecting roads, tramways, railroads or other property of whatever kind constructed, held or occupied under this Act;

(l) the partition, sale, disposal, or division of any mining property, or the proceeds thereof, held by 2 or more persons having conflicting interests therein,

and generally all rights claimed in, under or in relation to any mining tenement or purported mining tenement, or relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon either the warden's court or the warden.

(2) Every warden's court has jurisdiction throughout the State but all proceedings under this Act in respect of, or in relation to, any mining tenement shall be brought in the

warden's court for the mineral field or the district thereof assigned to the court and in which the mining tenement is.

S.134 "*(1) A warden's court has power to make orders on all matters within its jurisdiction, for -*

(a) not relevant*;*

(b) the awarding of damages or compensation;

(c)-(j) not relevant*;*

and generally for the determination and settlement of all actions, claims, questions and disputes properly brought before the warden's court, and for the enforcement and carrying out of any order previously made, and for awarding or apportioning costs in any such proceedings.

(2) not relevant.

(3) A warden's court at any stage of any proceedings pending therein may, of its own motion, or on the application of any party to those proceedings, order -

(a) the adding, joining, substituting, or striking out of any party in, to, for or from those proceedings;

(b)-(f) not relevant*;*

(g) that any person shall do, or refrain from doing, as the case may require, any such act or thing upon or in relation to any mining tenement or property the subject matter of any proceeding as the court thinks fit;

(h)-(k) not relevant*;*

and any such order may be made upon such terms or conditions as to costs, compensation, security or otherwise, as the court thinks fit.

(4) Without affecting the exercise by the court of its other powers, the power conferred by subsection (3)(g) may be exercised by the court of its own motion or on the application of any person prior to the commencement of

an action or other proceeding in the court, if the court is satisfied that the applicant has sufficient grounds for making the application.

(5) Subject to this Act and without affecting the jurisdiction of a warden's court, a warden's court or the warden, as the case may require, has and may exercise in relation to all matters relating to any civil proceeding under this Act the like powers and authorities as are conferred upon the Supreme Court or a Judge thereof.

(6) In all respects, except as expressly provided by or under this Act, the practice and procedure of a warden's court as a court of civil jurisdiction shall be the same as the practice and procedure of a Local Court established under the Local Courts Act 1904, in like matters."

Local Courts Act & Rules

23 There is no express provision in either the Local Courts Act 1904 (WA) or the Local Court Rules that enables a defendant to make application to strike out a defence or even to make application for summary judgement against a plaintiff. There is, however, some authority for the proposition that where an action amounts to an abuse of process all courts have an inherent power to strike out any process. In ***Bond Corporation Holdings Limited (1990) 1 WAR 465***, Ipp J said (478):

"*In fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397 Woodward J, when dealing with the considerations applicable to the award of solicitor client costs said that such an award would be considered:*

"whenever is appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law."

In my view, with respect, those remarks apply, also, to considerations applicable to the determination of whether an abuse of the process of the court has been committed."

24 In ***Green v Daly*** [2002] WADC 109, Jenkins D C J was required to decide whether or not a magistrate in the exercise the jurisdictions of the Local Court had power to dismiss an action for want of prosecution. Her Honour said (par. 8) "*The Local Courts Act 1904 contains no express reference to the ability of the Court to dismiss an action for want of prosecution*".

25 Jenkins D C J referred to the decision of the High Court in Pelechowski v Registrar (1999) 73 ALJR 687 and then said (par. 15):

> "*In the vase of **Pelechowski** the majority of the High Court considered that the existence of the powers which an inferior Court must process by way of necessary implication were not those that were "essential" but rather those that were "reasonably required*". ".

26 Her Honour then (par. 17) concluded that there was room for the implication of a discretionary" power to dismiss an action for want of prosecution. She said that there is a general principle that any court may dismiss on stay proceedings that are oppressive, vexatious or an abuse of process.

27 She said that such an implied power was reasonably required for the exercise of the jurisdiction of the court to hear and determine matters before it. Her Honour also said that the provisions of the Local Courts Act did not by any express or mandatory terms deprive the court of the implied power of the court to dismiss an action for want of prosecution so as to avoid an abuse of process of the Court.

28 It is arguable that, as a power that it "reasonably required", for the exercise of its jurisdiction and powers to hear and determine actions commenced in that Court, the local court would have the implied jurisdiction or the implied power to strike out an action which was an abuse of process or which, as Ipp J said in ***Bond*** (**supra**) had been commenced where the plaintiff "*properly advised should have known that he had no chance of success*".

Supreme Court Rules

29 Order 20 of the *Rules of the Supreme Court* deals with pleadings both as to their nature and content. Rule 19 is concerned with the striking out of pleadings and endorsements. It says that the Court may at any stage of the proceedings order that any pleading or endorsement of any writ in an action be struck out on the ground, *inter alia*, that it discloses no reasonable cause of action and, further, that the Court may order that the action be stayed or dismissed or judgment

entered accordingly, as the case may be. Rule 19 says that no evidence is admissible on an application to strike out where the ground for striking out is that no reasonable cause of action is disclosed by the pleading or the endorsement. In his commentary in "Civil Procedure Western Australia - Supreme Court" Seaman QC (20.19.3) says that a party who has pleaded to a defective pleading may nevertheless make an application to strike it out. Concerning a strike-out application based on there being no reasonable cause of action, Seaman QC says that the principles to be applied in considering an application on such a ground were summarised in ***Kimberly Downs*** (*supra*) and then sets out the six principles which were articulated by Master Staples in that case and upon which the plaintiff in the case before me relies.

CASES AND TEXTS REFERRED TO BY THE PARTIES

Mining Law in Australia; Michael Hunt, 3rd Edition

30 Mr Luscombe relied upon the following comment by Mr Hunt in support of his submission that an exploration licence is a bare licence which confers no interest in the land the subject of the tenement. Mr Hunt said (5.16):

> *"The author suggests that an exploration licence cannot be characterised as a leasehold interest in land as it does not have the necessary element of exclusive possession. Like a prospecting licence, discussed earlier in this book, it is not clear whether an exploration licence amounts to an interest in land as a licence coupled with a grant or merely a bare licence which confers no interest in land. For purposes of this discussion it would seem no different from the tenement known as a prospecting area under the old Act which was held by Wickham J in Bowen v Stratigraphic Explorations Pty Ltd and Kay [1971] WAR 119 to be a bare licence and not a licence coupled with a grant."*

31 Earlier (4.15) Mr Hunt had said in respect of prospecting licences:

> "*The author suggests that a prospecting licence cannot be characterised as a leasehold interest as it does not have the necessary element of exclusive possession. It would seem to be more than a bare licence because it confers not only a right of entry for prospecting purposes but also a right to extract and remove a quantity or ore, albeit limited: s48(c).*

> *It has been held that a prospecting licence is at law a licence conferring an interest in land being a licence coupled with a grant, or a profit a prendre; Stow v Mineral Holdings (Aust) Pty Ltd [1975] Tas SR 25 at 49. However, under the Western Australian Mining Act 1904 (now repealed) the tenement then known as a prospecting area was held to be a bare licence; Bowen v Stratigraphic Explorations Pty Ltd [1971] WAR 119.*"

32 The author also said (7.15) in respect of mining leases:

> *"A mining lease can probably be characterised as a lease at common law. It seems to have the essential requirement of exclusive possession with a certain area and a certairi term. The lessee is entitled to exclusive use of the land for mining purposes: Mining Act s85(3)."*

Bowen v Stratagraphic Explorations Pty Ltd (supra)

33 This was a case where his Honour Wickham J was dealing with an issue concerning the powers of the Warden under the *Mining Act 1904* to make a recommendation to the Minister upon an application for a prospecting area for coal. The issue before his Honour was whether or not the Warden was authorised or empowered to deal with and hear such applications or to make recommendations to the Minister. Objection had been taken to the Warden doing those things. The applicant before the Supreme Court argued that the land in question was not open to mining at the time when the application for the prospecting area was made. His Honour ruled that the Warden did have power to hear the application and to make recommendations. In his reasons for decision Wickham J gave some consideration to the nature of a prospecting area and to the question of what, if any, rights in the land the subject of it attached to a prospecting area. His Honour reviewed the history of mining legislation in WA up to the time of passage of the *Mining Act 1904* and until 1970.

34 His Honour noted (126, line 41) that a miner's right entitled a miner to either take possession of, mine and occupy Crown land for mining purposes or to take possession of and occupy Crown land as an authorised holding. His Honour noted that there were three categories of such possession and occupation, namely, (i) a mining lease, (ii) a claim, being a portion of land occupied for mining purposes which included prospecting and (iii) licences of various sorts which included the right to areas of various sorts which were termed an "authorised holding". His Honour noted that pursuant to regulations made in respect of prospecting areas up to 50 tons of mineralised earth could be removed without permission. His Honour said that that yielded the result that

the prospecting area "… *was now not only held for mining purposes within the definition but was also a licence coupled with a grant*." His Honour later said (p 127, line 16):

> "*In passing, it is to be observed that the permit to enter upon private land is a permit to enter and is a bare licence to be distinguished from the prospecting claim or area. By s.130 of the Act it is for sampling only and this is distinguished from the right actually to mine given by s.134. Regulations 104 and 108 are consistent with this, although again an erroneous verbal distinction between a prospecting area and a claim appears in the latter regulations.*"

35 Line 26:

> *The Mining Act … and the regulations made thereunder still reflect the same concepts and the regulations have faithfully perpetuated the same error of making a distinction between a claim and a prospecting area so as to invite the reader to believe that a prospecting area is not a claim and does not carry as an incident of the right to occupy the land for mining purposes and to 'mine' thereon, but 'mining' or 'to mine' is defined as: 'all modes of prospecting and mining for and obtaining gold or minerals.'*
>
> *It follows … that an application for a prospecting area is an application for a claim and when accompanied by an application for an authority under reg 91 it may lead to an authority to mine from the Governor under s.30.*"

36 In a review of the legislation that preceded the *Mining Act 1904*, his Honour Wickham J (p 123, line 57) made reference to the *Mineral Lands Act 1892 (WA)* which, as his Honour said, dealt with minerals other than gold on Crown land. It was during his commentary on Pt VI of that Act, which was a Part dealing with licences and leases for coal mining, that his Honour said:

> "*In particular, provision was made for an application for a licence to occupy Crown lands 'for the purpose of searching for coal thereon' and in this context the word 'prospecting' is used for the first time. It is apparent that the licence granted was a bare licence to enter, search and dig and was not a licence coupled with a grant although a licensee could apply for a lease.*
>
> *The regulations throw some light on the way in which words are being used. 'Prospecting' is defined as 'searching for any*

> *deposit of mineral previously unworked'. This is consistent with the bare statutory licence which could be obtained in that respect in regard to coal, and 'prospecting area' is defined as the area of land which any prospector should be entitled to mark off and take possession of to search for mineral therein.*"

37 His Honour thereafter went on to note that it was provided under the Regulations for that Act that no prospecting area or any share or interest therein was transferable. He then noted that provision was made for "reward claims and/or for a reward lease" in the event of mineral being found. He then said:

> "*Here there is a clear distinction between a prospecting area which is a bare licence to search only and is not transferable, and a claim which is defined in the Act in much the same way as it is now as:*
>
> *'the portion of Crown land which any person … [has] lawfully taken possession of and occupy for mining purposes …'".*

38 His Honour went on to say that a prospecting area was not land occupied for mining purposes within the meaning of the verb 'to mine' as defined:

> "*… because 'to mine' involved obtaining mineral from the earth and by implication the passing of the property in the mineral to the miner. Consistently, reg 18 provided that no holder of the prospecting area should remove any earth or ore containing mineral from such area without permission except that he could supply samples of earth or ore for the purposes of analysis.*"

39 In the light of the abovementioned excerpts from the decision of Wickham J in ***Bowen's*** case, it does not appear that his Honour did in fact say that a prospecting area under the 1904 Act was a bare licence and was not a licence coupled with a grant. He was referring to a licence that could be issued under the *Mineral lands Act* when he spoke of a "bare licence" not being coupled to a grant.

Australian Mining and Petroleum Laws; Forbes & Lang, 2nd Edition

28 At par 835 the authors said:

> "*The true nature of an exploration licence depends not only on the terms of the relevant legislation, but also on the terms and conditions imposed on the licensee under the licence. Usually*

> *such a licence does not confer the right of exclusive possession over a specified area of land and merely confers a right of entry, with the restricted entitlement to possess and explore over the licence area.*"

40 The authors went on to refer to the decision in the Tasmanian Supreme Court of Green CJ in ***Stowe & Ors v Mineral Holdings (Australia) Pty Ltd*** [1975] Tas SR 49 at 49 to 50 where his Honour said that a bare licence to go upon land does not pass any property. It only makes it lawful to do that which would otherwise constitute a trespass and would be unlawful and that a bare licence to go on land should be distinguished from a licence coupled with a grant in the nature of a profit à prendre. Further, in the same paragraph the authors made reference to the decision of Wickham J in ***Bowen v Stratigraphic Explorations*** (*supra*) and, in particular, to what was said by his Honour Wickham J at page 124 concerning a licence under the legislation there being discussed to occupy Crown lands for the purpose of searching for coal wherein his Honour had referred to such a licence as being a bare licence to enter, search and dig and as not constituting a licence coupled with a grant.

41 In concluding par 835, Forbes and Lang said:

> "*It appears that each of the several licences considered in this Chapter can only be characterised accurately as statutory interests, conferring rights and obligations defined in the mining legislation. Tested according to the concepts of the general law, none of them appears to be analogous to a leasehold interest [995]; they range between bare licences and licences coupled with a grant, some entitling the holder to engage a in limited form of commercial mining, but the majority of tenures entitle their holders to engage only in prospecting or exploration and to remove limited quantity of soil and/or minerals for testing purposes.*"

42 At the commencement of par 835 Forbes and Lang had said:

> "*No attempt is made to characterise each tenure considered in this Chapter according to concepts of the general law, but some brief general observations might help to elucidate the nature of these tenures.*"

43 Mr Luscombe referred to the decisions of ***Oldham v Lawson (No 1)*** [1976] VR 654, ***Malone v Laskey*** (1907) 2 KB 141 and ***Hunter v Canary Wharf Ltd*** [1997] AC 655 as authority for the submission that a person who occupies property as a mere licensee may not bring an action for nuisance. I understood

that Mr Kavenagh did not dispute that statement of principle. He submitted however, that the holder of an exploration licence was not a mere licensee in the sense of holding nothing more than a bare licence in respect of the land the subject of the tenement. In ***Oldham's*** case an action for nuisance failed where a husband and wife resided in a house which was owned by the wife and where the husband was therefore a licensee only and the rights which attached to such licence of the husband could not be regarded as conferring on him a "right of occupation in the proper sense of the term" (657). In ***Malone's*** case the defendants owned a house and were sued by the plaintiff on the ground of nuisance arising from injuries which she had sustained when a structure on the premises fell upon her and injured her. The defendants had let the house to a tenant who subsequently sublet it to a company whose manager resided on the premises with his wife who was the plaintiff. It was held in the Court of Appeal that the plaintiff had no cause of action on the ground of nuisance because she had no interest in the premises or right of occupation in the proper sense of the term. That was held to be so even though the plaintiff's husband and his family (including his wife - the plaintiff) apparently had exclusive use of the premises where the injury was sustained.

***Hunter v Canary Wharf Ltd* (*supra*)**

44 In this decision of the House of Lords it was re-affirmed that an action in private nuisance could only be brought in respect of acts directed against the plaintiff's enjoyment of the plaintiff's rights over the land so that, generally, only a person with an interest in the land could sue (see head note 2). Each of their Lordships expressly rejected the statement by Pill LJ in the Court of Appeal, with which Waite and Neill LJJ had agreed, namely, (675):

> "*A substantial link between the person enjoying the use and the land on which he or she is enjoying it is essential but … occupation of the property, as a home, does confer upon the occupant a capacity to sue in private nuisance.*
>
> *There has been a trend in the law to give additional protection to occupiers in some circumstances. Given that trend and the basis of the law of nuisance in this context, it is no longer tenable to limit the sufficiency of that link by reference to proprietary or possessory interest in land. I regard satisfying the test of occupation of property as a home provides a sufficient link with the property to enable the occupier to sue in private nuisance. It is an application in present-day conditions of the essential character of the test as contemplated by Lord Wright.*"

Simpson v Knowles (supra)

45 This was a case where a person was charged with an offence of wilfully trespassing contrary to the provisions of the *Summary Offences Act 1996* (Vic). A permit and a licence had been granted under the provisions of the *Pipelines Act 1967* to two companies to own and use a pipeline and to construct and operate the pipeline on Crown lands. A firm which had been contracted to do the work had erected a fence along part of the route of the pipeline which passed through a public park. The defendant had entered the area enclosed by the fence and refused to leave when told to do so by the construction firm. His Honour Norris J held that the defendant, as a member of the public, had access as of right to the whole of the parkland except to the extent that the right had been lawfully restricted. It was held that the authority which had been given to the two companies and to the construction firm to construct the pipeline did not restrict that right of access of the defendant even though, by construction of the fence, there had been assertion of a right by the companies and the construction firm to exclusively occupy the land. Their conduct in so asserting an exclusive right to occupy was insufficient to support an action of trespass against the defendant. Norris J said, in describing the Order in Council whereby the Governor pursuant to the *Pipelines Act* had authorised the construction of the pipeline through the park (195, line 12):

> "*While the words 'licence' or 'license' were not used as they could have been, this Order in Council does, I think, amount to a licence but no more. It grants the companies the rights for the specified purpose to go up on the land and use it, but being the grant of a licence only it merely renders lawful conduct which otherwise would be unlawful. It certainly gives no right to such exclusive possession as would be necessary to enable the grantees to sue for trespass. A lessee can of course if in possession sue for trespass, but the owner of an easement cannot … A licensee has no right to sue a third person for disturbance of his right …*".

46 At line 33:

> "*… But 'the mere de facto and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves and is therefore sufficient to support an action of trespass against such persons'; Salmond on Torts, 15th. ed., p.59. Or, as is put in Halsbury, 3rd. ed., vol.38, at p.743; 'any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is*

> *sufficient to support an action of trespass against a wrongdoer.'"*

47 Norris J went on to say (195, line 23):

> *"In the present case, Australian Pipelines Constructions having enclosed the route of the pipeline through the Mordialloc foreshore with a fence were asserting a right to occupy it to the exclusion of others. If the defendants had no right to go upon it - if, as appears to have been the position of the defendant in Moore v Robb, they had no right to go upon Crown land in question, then Australian Pipelines Constructions might have maintained trespass against them irrespective of whether or not Australian Pipelines Constructions' possession was de facto or de jure. But the defendants as members of the public had access as of right to the whole of the Mordialloc foreshore except to the extent that that right had been lawfully restricted.*
>
> *In the present case, the Pipelines Act 1967 and, in particular, the Order in Council made pursuant to s.20 did not restrict that right and it was not suggested by counsel for the informant that for present purposes public access was otherwise restricted. I must therefore conclude that neither of the defendants … trespassed on that part of the Mordialloc foreshore referred to …."*

48 It seems to me that Norris J was saying, in effect, in this case that if the defendants had had no right at all to go to the park, their actions would have constituted a trespass as against the pipeline construction companies because the latter had possession of the land even though it was a mere *de facto* possession.

38 ***Re Toohey; Ex parte Meneling Station Pty Ltd (1983) 57 ALJR.***

49 This is a case which called for a consideration by the High Court of whether or not a grazing licence issued under the *Crown Lands Act* (NT) conferred an estate or interest in the land the subject of the licence. Four of the five Judges sitting on the bench held that a grazing licence did not confer any such estate or interest. Mr Kavenagh, however, relied upon comments made by Wilson J in particular (68) in support of his argument that an exploration licence was not a mere licence and was a licence coupled with a grant.

50 The nature of grazing licences and the context in which the power was vested in the Minister to grant such licences was considered by the Court. The power to grant a grazing licence was discretionary and it allowed the holder to

graze stock on any Crown lands which were not held under a lease or licence granted under the *Crown Lands Act* or upon lands which were otherwise reserved. A monthly fee was payable; there was a condition prescribing a maximum number and type of stock which could be pastured on the land; other conditions which the Minister thought necessary or desirable could be imposed; licences ceased to be in force on 30 June each year but could be renewed at the Minister's discretion for a further 12-month period; failure to comply with a condition could lead to forfeiture; a licence could be cancelled upon the Minister giving three months' notice in writing of his intention to do so; a grazing licence could be surrendered.

51 The significance of those features of a grazing licence was that the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) required the Aboriginal Lands Commissioner to give consideration to a claim made under that Act by the Northern Land Council and, in the course of so doing, the Commissioner was required to give consideration to the issue of whether or not the land the subject of the claim was unalienated Crown land. Section 3(1) of the *Aboriginal Lands Right Act* defined "unalienated Crown land" as meaning "Crown land in which no other person (other than the Crown) has an estate or interest".

52 Mason J (64) said:

> "*There is no question that the phrase 'estate or interest' in s.3(1) of the Act has, in its ordinary and natural usage a proprietary connotation. See Stowe v Mineral Holdings (Aust) Pty Ltd (1977) 51 ALJR 672 at 679 … No-one who has a merely personal right in relation to land can be said to have an 'estate or interest' in that land. Here the natural and ordinary meaning of the expression is reinforced by the circumstance that it is a constituent element in the definition of 'unalienated Crown land'. The definition gives emphasis to the notion that Crown land remains unalienated unless and until the Crown grants to another some proprietary interest in the land.*
>
> *In National Provincial Bank Ltd v Ainsworth [1965] AC 1175, at pp.1247-1248, Lord Wilberforce said:*
>
> > *'Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'*

In my opinion, the rights of the holder of a grazing licence created under the Crown Lands Act falls short in two respects of the concept of property or proprietary rights expressed by Lord Wilberforce. Regulation 71 (Minister's power to forfeit a grazing licence where the licensee fails to comply with a condition of the licence after having been given notice to do so) and reg.71B (the right of a licensee to surrender his licence) are not inconsistent with the notion that a grazing licensee holds an interest in land. But reg 71A represents a substantial obstacle to the applicant's case. That regulation enables the Minister to cancel a licence, the only pre-condition being that he give three months' notice in writing of his intention to do so. No default on the part of the licensee is necessary. The regulations suggest that the licensee has no interest in the land at all. The future of his right to graze stock is, by virtue of the Minister's power to cancel, absolutely in the hands of the Minister and beyond his own control. A right terminable in the manner permitted by reg.71A lacks that degree of permanence of which his Lordship spoke.

Assignability is not in all circumstances an essential characteristic of a right of property. By statute some forms of property are expressed to be inalienable. Nonetheless, it is generally correct to say, as Lord Wilberforce said, that a proprietary right must be 'capable in its nature of assumption by third parties'. …

There is nothing in the Crown Lands Act to indicate that a grazing licence is assignable. In fact, all indications are to the contrary. There is provision in s.26 for the transfer of a lease granted under that Act, but no corresponding provision in relation to grazing licences. Moreover, the regulations, to the extent that they deal with applications for licences, do not seem to leave much room for assignability. Regulation 65, which vests in the Minister the discretion to grant or refuse applications for grazing licences, is couched in the widest terms. Regulation 66(d) enables him to impose any conditions that he thinks necessary or desirable on a licence. When the regulations so carefully placed with the Minister the discretion to grant applications it is difficult to conclude that it was intended that successful applicants could later, completely outside the control of the Minister, assign the licence.

> *Section 107A gives further emphasis to the personal nature of the right conferred by the grant of a grazing licence. That section provides that a licensee must apply for permission if he wishes to make or erect improvements on the land. This is a very strong indication that property in the land remains in the Crown and does not pass to the licensee.*"

53 Later Mason J, having referred to a provision of the *Local Government Act 1890* (Vic) which concerned grazing licences under that Act where the land the subject of the licence could be alienated or reserved by the Crown at any time, said that such a condition in the Victorian Act:

> *"… is akin to reg.71A in the present case, the similarity being that it tends to undermine the permanence and stability of the licensee's right.*"

54 His Honour later said in Re Toohey (65):

> "*Much argument was directed to the significance of exclusive possession in the characterisation of grazing licences. Ultimately, however, I do not think that it is an issue which takes the applicant's very far, even if it be the case that exclusive possession is very often a characteristic of a proprietary right. The applicant's contend that the grazing licensee is given exclusive possession of the interest granted in the sense that a grazing licence cannot be granted to another which would interfere with the exercise of the original licence. Even if the applicant's are correct in submitting that more than one grazing licence cannot be granted over the same land at the same time because Crown land over which there is a grazing licence is 'held under a … licence' within s.107 of the Crown Lands Act, I do not think that it follows that a grazing licence confers on the licensee a right to exclusive possession. There terms and conditions of the licence do not suggest that it confers such a right.*
>
> *My conclusion is that the intention evinced by the Crown Lands Act and the Crown Lands Regulations is that all that should pass to the grazing licensee is a personal right and no right of a proprietary nature. I say this notwithstanding the similarity between the rights conferred by a grazing licence and the classical definition of a profit à prendre:*

> *'… A profit à prendre confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some of its natural produce, or the animals ferae naturae existing upon it …' (Alfred F Beckett Ltd v Lyons [1967] 1 Ch 449, at p.482 per Wynn LJ).*
>
> *The grazing licence is the creature of statute forming part of a special statutory regime governing Crown land. It has to be characterised in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have in the creation of particular interests by the common law owner of the land.*
>
> *It follows that the Commissioner was correct in concluding that the land the subject of grazing licences in the area claimed is 'unalienated Crown land'*".

55 In ***Re Toohey*** Murphy J, while otherwise agreeing "*generally*" with the conclusions and reasons of Wilson J said (65):

> "*An estate or interest within the meaning of the Aboriginal Land Rights (Northern Territory) Act … refers to something much more substantial than the grazing licences authorised by the Crown Lands Act 1931 (N.T.), which are not assignable and are relatively ephemeral. It is immaterial whether in another context a grazing licence would be a profit à prendre.*"

56 Wilson J said (68):

> "*It is unnecessary to engage in lengthy consideration of the rights which have been found to constitute a profit à prendre. It is a right to enter another's land to take some portion of the soil or of its natural produce. The grant may confer an exclusive right, or it may be a right enjoyed in common with others. It may be granted either in perpetuity or for a fixed term and presumably it may by agreement be terminable on specified notice … The right of pasture may be the subject of a profit à prendre; the taking and carrying away is effected by means of the mouths and stomachs of the cattle in question … Profits are classed as incorporeal hereditaments and may be assigned. They may properly be described as interests in land.*
>
> *A mere licence is clearly distinguishable from a profit à prendre. 'A dispensation or licence properly passeth no*

interest, nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful' … It is a personal privilege conferring no interest in the land. It is not transferable nor can it be granted in perpetuity. It is generally revocable and merely excuses a trespass until it is revoked: Halsbury, vol.14, par.252.

The right which is under consideration here is statutory creation. It is more than a mere licence. The answer to the problem must be found in the view taken of the totality of the legal rights conferred by the statute set against the question, not whether a grazing licence confers a right corresponding to the common law category of a profit à prendre, but whether it is 'an estate or interest in land' within the meaning of that term in the Act.

I find the resolution of the issue more than ordinarily difficult. On the one hand, the licence confers a right on the licensee to graze a specified number of and type of stock on the land and this necessarily implies a right to remove certain of the natural produce of the land. The fact that it does not confer an exclusive right to possession of the land, essential as that is to distinguish a tenancy from a licence (cf. Radaich v Smith (1959) 101 CLR 209), is not essential in the case of a licence of this kind. The concept of forfeiture for breach of conditions of the licence is language appropriate to an interest in land. The right of the licensee, with the permission of the Minister, to erect improvements on the land and to be secured in compensation for their valuation on termination of the licence emphasises its significance yet without making a decisive contribution to the question whether it confers an estate or interest in land. Again, the grant of a licence for a period not exceeding one year is equivocal. All these features are consistent with a conclusion that a grazing licence confers an interest in the land.

On the other hand in my view there are powerful considerations that tend to a contrary conclusion. The Crown Lands Act draws a clear distinction between estates in fee simple, leases and easements, all of which are estates or interests in land, and licences. Again, a licence is subject to cancellation unilaterally by the Minister on three months' notice. Irrevocability is an important feature of an estate or interest in land …

> *The discretion in the Minister in the present case to terminate the licence unilaterally and more or less summarily, without compensation (save as to improvements erected with the permission of the Minister), tends strongly to deny to the licence the character of an interest in land. Furthermore, the Crown Lands Act does not contemplate, in my opinion, any assignment of the licence. It remains personal to the grantee of the licence. I say this because there is no mention of transferability in that Act or the regulations. Leases are transferable, but only with the permission of the Minister. It would be extraordinary if the legislation placed such a control on the assignment of leases while allowing grazing licences to be freely transferable without permission or even notice to the Minister.*
>
> *After weighing up these considerations I have come to the conclusion that a grazing licence does not confer an estate or interest in land within the meaning of the Act.*"

57 Brennan J (73) held, for the reasons stated by Mason, that a grazing licence did not confer a proprietary interest.

***Finesky Holdings Pty Ltd v Minister for Transport for Western Australia* [2001] WASC 87**

58 Mr Kavenagh relied upon comments made by Roberts-Smith J at pars 154 to 159. As Mr Luscombe, counsel for the defendant, said, it must be borne in mind that this is a case which conferred a sublease of a mining lease and a mining lease confers rights upon the holder thereof which are of a type not conferred on the holder of a prospecting licence. In considering the plaintiff's claim in trespass in ***Finesky's*** case, Roberts-Smith J said (pars 156 to 160):

> "*It is common ground that put at its highest the plaintiff's interest under the sublease is a profit à prendre, that is to say, 'the right to take some product of the land or part of the soil from the land of another' …*
>
> *I think it clear, however, that the sublease does give an interest in the land. As Murray J pointed out in Sorna Pty Ltd v Flint (supra), at 571, whatever the form of a mining tenement under the Mining Act it 'includes the specified piece of land in respect of which the mining tenement is so granted or required [sic acquired]' (s 8(1)). A mining tenement is a right to exclusive possession of land for mining purposes; see s 7 Property Law*

> *Act 1969 (WA); s 85(2) and s 85(3) of the Mining Act; Adamson v Hayes (1972 to 1973) 130 CLR 276.*
>
> *Every unlawful entry by a person on land in the possession of another is an actionable trespass whether or not damage is shown … A person having the right of possession of land acquires possession of it in law by entry. When that occurs possession relates back to the time at which the right of entry accrued and action may be taken for a trespass committed before the entry, the trespasser becoming a wrongdoer by relation back: 'Halsbury's Laws of Australia', Vol 26, [415 to 510] and cases there cited.*
>
> *The plaintiff accordingly acquired possession of the subleased land on 20 January 1997 and that related back to 9 December 1996. Given the defendant admits the encroachment and my finding that the plaintiff was entitled to exclusive possession for mining purposes, the plaintiff must be entitled to damages in trespass.*"

59 In the case of ***Sorna v Flint [2000]WASC 22*** Murray J said:

> *"Without going in detail to the relevant provisions of the Mining Act it is clear that title to the ground the subject of a mining tenement is rooted in the grant made in accordance with the statutory procedures:* ***Hot Holdings Pty Ltd v Creasy*** *(1995) 185 CLR 149. By definition, in s 8(1), a mining tenement may take various forms depending upon the form of the grant under the Act, but whatever form it takes the tenement "includes the specified piece of land in respect of which the mining tenement is so granted or required". The tenement itself is of course a form of property and by the Act s 119(1), subject to the Act, it may be sold, encumbered, transmitted or otherwise disposed of, such a disposition carrying with it the interest in the land which the tenement represents. But by s 119(2):*
>
> > *"A legal or equitable interest in or affecting a mining tenement is not capable of being created, assigned, affected or dealt with, whether directly or indirectly, except by an instrument in writing and signed by the person creating, assigning or otherwise dealing with the interest."*

Although the case of ***Finesky*** (supra) was concerned with a sub-lease over a mining lease, it appears that His Honour Roberts- Smith J was, in that passage in his decision where he referred to what had been said by Murray J in ***Sorna,*** referring generally to mining tenements granted under the Act and not distinguishing mining leases. Murray J did not qualify in any way, in particular by reference to tenement type, his description of the effect of the grant of and the characteristics of a mining tenement. The tenements the subject of the proceedings before the Full Court in ***Sorna*** were several prospecting licences and an exploration licence. Ipp J said, at the beginning of his reasons, that, except as to the application of s 119(2) of the *Mining Act (WA)* and s 34 of the *Property Law Act (WA)*, he agreed with the reasons of Murray J. What Ipp J said in respect of s 119 and s 34 does not appear to conflict with the abovementioned comment made by Murray J concerning the nature of mining tenements. The third member of the Court, Templeman J, did not adopt those comments made by Murray J concerning the nature of mining tenements but said nothing that is inconsistent with them.

CONCLUSIONS

60 In my opinion the provisions of s 132(1) of the *Mining Act* confer jurisdiction upon a Warden's Court to hear and determine actions of both trespass and nuisance in respect of mining tenements. The subsection provides that a Warden's Court has jurisdiction in respect of, "… *generally all rights claimed in, under or in relation to any mining tenement* …". That jurisdiction is conferred in the context of the subsection which also confers jurisdiction on the Court to hear and determine actions cognisable by any court of civil jurisdiction as arise in respect of, *inter alia,* title to and ownership or possession of mining tenements (s 132(1)(b)), "*trespass or encroachment upon, or injuries to, mining tenements*" (s 132(1)(d)), "*encroachment or trespass upon, or injury to, land by reason of mining, whether the land is held under this Act or otherwise*" (s 132(1)(j)).

61 Section 134 of the Act says that the Warden's Court has power to make orders on all matters within its jurisdiction, *inter alia*, for, "*generally … the determination … of all actions, claims, questions and disputes properly brought before the Warden's Court* …". Subsection (3) says that a Warden's Court at any stage of any proceedings may, on the application of any party to those proceedings, order:

> "*(a) The adding, joining, substituting, or striking out of any party in, to, for or from those proceedings*."

62 In my opinion, par (a) of subs (3) does not confer upon the Warden a power to strike out an action. Its purpose is to ensure that only those persons who should be a party to an action become or remain parties. It is a provision which is intended to facilitate, insofar as it may do so, the final determination as between those who may have a sufficient relevant interest in issues to be litigated. It is intended to avoid numerous actions between different parties over the same issues and also to ensure that persons who have no sufficient legitimate interest in the proceedings do not become or remain parties thereto. It is not aimed at the resolution of such fundamental issues as whether or not there is a cause of action at law or whether or not the Warden's Court has jurisdiction to deal with the subject matter of an action that has been commenced.

63 In my opinion, s 134(5) gives to a Warden, exercising the jurisdiction of the Warden's Court, the power to strike an action which has been commenced in the Warden's Court where the basis of the application to strike out is that the Court has no jurisdiction to hear and determine the action. That is a power which is given to the Supreme Court by the provisions of O 20 of the *Supreme Court Rules*. I consider that it is not necessary to have recourse to the practice and procedure of the Local Court pursuant to the provisions of s 134(6) of the *Mining Act*, nor to the provisions of s 136 of the *Mining Act*.

64 I am of the opinion that the grant of an exploration licence confers upon the holder of the tenement more than a bare licence. I consider that it is a licence which confers on the holder an interest in the land the subject of the licence such as means it should not be characterised as a bare licence. Taking into account the authorities to which I have made reference, it seems to me that it is unnecessary to try and characterise the interest in land as being one which constitutes a licence coupled with a grant or a profit à prendre or is analogous to a profit à prendre or is one which confers a proprietary interest in the land although the latter is unlikely. There are a number of provisions in the *Mining Act* which, standing alone, could be taken as being indicators that the grant of an exploration licence does not confer any interest in land. For example, s 20A empower a mining Registrar or the holder of a prescribed office in the Department to issue to a natural person who is the holder of a miner's right under s 20 of the Act a permit to prospect for minerals on Crown land that is the subject of an exploration licence. Section 20C of the Act says that the holder of a permit issued under s 20A cannot bring an action in tort against a holder of an exploration licence for injury, loss or damage suffered by the holder of the permit as a result of the condition of the land the subject of the permit or anything that the holder of the exploration licence has done on the land the subject of the permit pursuant to the authority of the exploration licence. Section 20C(2) provides, however, that the holder of a s 20A permit is not prevented from bringing an action in tort against the holder of the underlying

exploration licence if the thing done by the exploration licence holder was done with the deliberate intent of causing injury, loss or damage to the permit holder or done with reckless disregard for the presence of the holder of the permit on the land the subject of the permit. It is, in my opinion, noteworthy that there is no limitation mentioned in s 20C of the type of tortious action that can be brought and, in particular, no express exclusion of the torts of trespass and nuisance.

65 The power of the Registrar or the Minister to grant over land the subject of an exploration licence a special gold prospecting licence is also a provision which, on its own, could be taken as an indication that no interest in land the subject of an exploration licence is conferred upon the holder of such a licence. That is because, firstly, the holder of the special prospecting licence has a right to do things on that land, namely, "mining" (as defined in s 8(1)), which other persons may not do because the land the subject of the exploration licence is otherwise not land that is open for mining. The holder of an exploration licence that is the subject of a special prospecting licence issued pursuant to s 70 could not prevent the holder of the special prospecting licence from entering and remaining on the subject land, nor from mining in accordance with the conditions of the special prospecting licence. It should be noted, however, that the Warden may refuse the application for the grant of the special prospecting licence for the reason that prospecting for gold on the subject land would result in undue detriment to the exploration being carried on by the holder of the underlying exploration licence (s 70(5)). It should also be noted that upon the surrender, forfeiture or expiry of the special prospecting licence such licence ceases and the land which was the subject of it reverts to the holder of the underlying exploration licence and becomes part of that exploration licence (s 70(6a)). A special prospecting licence may be granted for a period as short as three months or for any period which is a multiple of three months, but may not be granted for a period of more than four years, whereas the initial period for which an exploration licence is granted, subject to the compulsory surrender provisions, is five years which may be extended for a maximum of a further five years (s 61, s 70(6aa)). The compulsory surrender provisions of s 65 of the Act are also capable of being taken as indicators that no interest in the land of a type sufficient to support an action for trespass or nuisance is conferred upon the holder of an exploration licence. If the holder does not comply with the compulsory surrender requirements in the prescribed manner and within the prescribed time, then (s 65(4)) the whole of the land the subject of the exploration licence is thereupon surrendered and the exploration licence ceases to apply to the whole of the land. That is not a matter in respect of which the Minister has any discretion. It is the choice of the tenement holder only as to

which part (but not as to the proportion) of the land the subject of the exploration licence that will be retained and what part will be surrendered.

66 It may also be said that the limitation imposed by s 64 of the Act upon the transfer or other dealing with an exploration licence during the first term of the year, except with the prior written consent of the Minister or of an authorised officer or except in specified circumstances, is something which suggests that an interest in land sufficient to support actions in trespass or nuisance is not conferred upon the holder.

67 It is also appropriate to take into account the comparison which may be drawn between those provisions which set out the rights of a holder of an exploration licence and those provisions of the Act which set out the rights of the holder of the mining lease. Section 85(1) of the Act expressly says the holder of a mining lease may take and remove from the subject land any minerals and dispose of them and do all acts and things that are necessary to effectually carry out mining operations in, on or under the land. Subsection (2) says:

> "*The lessee of a mining lease is …*
>
> *(a) entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes; and*
>
> *(b) owns all minerals lawfully mined from the land under the mining lease.*"

68 Subsection 85(3) says that the rights conferred by s 85 are "… *exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted*". The provisions of s 66 and other sections which set out the rights of a holder of an exploration licence do not contain provisions the equivalent of those in s 85 to which I have just referred.

69 Section 112 of the Act provides that exploration licences are subject to a reservation in favour of the Crown, and any person authorised thereby, of the right to enter and remove rock, sand, gravel, etcetera, for use for any public purpose. That is something which could be said to be inconsistent with a right of exclusive possession or inconsistent with an exploration licence conferring an interest in land.

70 The abovementioned provisions of the Act must be considered in the context of the whole Act and must be considered in the context, in particular, of other provisions which are consistent with a sufficient interest in the subject land

being conferred upon the holder of an exploration licence to support a tortious action for trespass or nuisance.

71 The provisions of s 18 and s 27 of the Act create a limited element of exclusive rights in the holder in respect of the land the subject of the licence. Section 18 says, in effect, that Crown land that is the subject of a mining tenement is not open for mining and therefore, in effect, that, subject to other provisions of the Act may not be marked out in connection with an application for a mining tenement, may not be the subject of the exercise of prospecting rights which attach to a miner's right (subject to s20A) and may not be the subject of an application for a mining tenement. In respect of private land, s 27, similarly, says, in effect, that, subject to other provisions of the Act, private land in respect of which a mining tenement has already been granted may not be the subject of an application for another mining tenement. Consistently with those two sections, s 155 of the Act makes it an offence for any person to carry out mining on any land unless that person is duly authorised under the *Mining Act* or any other Act to do so and there is a significant maximum penalty of $100,000 with a continuing daily penalty of $10,000 which may be imposed for a breach of that prohibition. Pursuant to s 156(1) of the Act it is an offence to take or remove from the mining tenement of any other person any mineral or other mining product (which is defined in s 8(1) as meaning any material won from land by mining) without the authority of that other person. It is also an offence under s 157 of the Act for any person, without lawful excuse, to obstruct or hinder the holder of a mining tenement in the reasonable execution of any right conferred on him thereby.

72 The provisions which I have just mentioned are consistent with the notion that the grant of a prospecting licence brings with it some degree of exclusivity in relation to activities which may be carried out on the land and in relation to rights which, both present and in the future, by the tenement holder but which may not be exercised by any other person.

73 Section 61 of the Act, which says that an exploration licence, shall, subject to the Act, remain in force for five years, has the effect that, provided the licence does not become liable through default of the holder to forfeiture, and subject to the compulsory surrender conditions, it has a life term which is not subject to being lessened at the discretion of the Minister. That distinguishes it, for example, from the grazing licence which was considered by the High Court in ***Re Toohey*** (*supra*). The word "shall" in s 61(1) is significant in that context. It can be compared to the position under the *Crown Lands Act (NT)* which was considered by the High Court in ***Re Toohey*** (*supra*) where a grazing licence, although granted for a finite period, could be cancelled unilaterally by the Minister upon three months' notice and without default on the part of the licence

holder. The provisions of s 63A whereby an exploration licence is liable to forfeiture if specified statutory requirements are not complied with or if the holder is convicted of an offence under the *Mining Act*, while they may be consistent with there not being an interest in land conferred upon the tenement holder, are, nevertheless, in a very broad sense, similar to the forfeiture provisions of the *Crown Lands Act* in respect of grazing licences which forfeiture condition, together with the right to surrender the grazing licence, were said by Mason J in ***Re Toohey*** to be not inconsistent with the notion that the grazing licensee held an interest in the subject land. In the case of an exploration licence holder, although a tenement is liable to forfeiture, as set out in s 63A, the reasons for which forfeiture may occur are essentially matters within the control of the tenement holder. It is thus the case that where there is default on the part of the tenement holder which is not otherwise excused by the Act (for example, by the granting of a certificate of exemption), it is only that default which can enliven the liability to forfeiture. In ***Re Toohey*** Mason J, with whom Brennan J expressly agreed, and Wilson J, with whom Murphy J agreed, all said, in effect, that the unqualified right of the Minister to cancel the grazing licence without any default by the holder was, an important and strong indicator that no interest in the subject land was conferred upon the holder of a grazing licence.

74 Section 66 of the Act authorises the holder of an exploration licence, subject to the Act and to any conditions which attach to the licence, to enter the subject land with employees, vehicles, machinery and equipment for exploration purposes, to disturb the surface of the land by digging pits, trenches and holes and sinking bores and tunnels, to extract and remove up to 1000 tonnes (and more if the Minister approves) of earth, mineral-bearing substances, etc. The licensee may also take and divert water which is in or flows through the subject land.

75 Section 67 of the Act contains what are, in my opinion, provisions that are of significance in the resolution of the issues now before me. It provides that the holder of an exploration licence has, subject to the Act, "… *the right to apply for, and subject to section 75(9) to have granted pursuant to section 75(7)* …" a mining lease or general-purpose lease in respect of the land the subject of the exploration licence. Section 67(3) says that if an application has been made under subs (1) and the holder of the exploration licence transfers the licence, then the application continues in the name of the transferee of the licence as if the transferee were the applicant or one of the applicants, as the case requires. The right of the holder of an exploration licence to transfer the licence comes from s 119 of the Act which says that subject to the Act a mining tenement may be sold, encumbered, transmitted, seized under a warrant or writ of execution or otherwise disposed of. In ***Re Toohey*** (*supra*) Mason J, as I have previously

mentioned, after having said (64) that no-one who has a merely personal right in relation to land can be said to have an "estate or interest in that land" quoted from the judgment of Lord Wilberforce in ***National Provincial Bank Ltd v Ainsworth*** (*supra*) where his Lordship said:

> "*Before a right or an interest can be admitted into the category or property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.*"

76 Mason J went on to say (64) that assignability is not in all circumstances an essential characteristic of a right of property but that it is generally correct to say, as Lord Wilberforce said, that a proprietary right must be capable of assumption by third parties. Under the *Mining Act* not only are the rights of the holder of an exploration licence and the land to which it relates definable and identifiable by third parties, but, the "mining tenement" (as defined in s 8(1)), is capable of assumption by third parties and it has some degree of permanence or stability, its future existence and the future rights of the holder not being absolutely in the hands of the Minister and beyond the control of the tenement holder. Even in the case of compulsory surrender under s65, it is the holder and not the Minister or anyone else, who decides what part of the land the subject of the licence will be surrendered.

77 In ***Re Toohey*** (*supra*) Mason J also commented (65) to the effect that even if it is the case that exclusive possession is very often a characteristic of a proprietary right, it is not necessarily determinative of whether or not an interest in land is conferred. It should be noted, bearing in mind the provisions of the Act to which I have made reference whereby, with certain exceptions, no other mining tenement may be applied for or granted over land which is already the subject of a mining tenement and whereby certain offences are created by the legislation for unlawful mining, etc, that Mason J also said in ***Re Toohey*** (65) that even if it was the case that more than one grazing licence could not be granted over the same land at the same time, he did not think that it followed that a grazing licence conferred a right to exclusive possession. That was, however, he said, because the terms and conditions of grazing licences did not suggest that it conferred such a right.

78 In my opinion, the cases of ***Cowell v Rosehill Racecourse*** (*supra*) and ***Hunter v Canary Wharf*** (*supra*) and ***Malone v Laskey*** (*supra*) which were relied upon by Mr Luscombe were cases where the factual and legal connection between the plaintiffs and the land the subject of the action was of a significantly different nature to the factual and legal connection between the

holder of an exploration licence under the *Mining Act* and the land the subject of the licence.

79 What the defendant in this matter is, in effect, inviting me to do is to strike out the plaintiff's statement of claim which is the equivalent of pleadings in the Supreme Court and to then dismiss the action in a manner analogous to the powers to do so which are set out in O 20 r 19 of the *Rules of the Supreme Court*. In ***Kimberley Downs*** (supra), which is referred to by Seaman QC in his commentary upon the *Supreme Court Rules*, in a case where there are substantial matters of law to be decided, Master Staples said:

80 "*The defendants' principal complaint was the para. 10 of the statement of claim did not disclose a reasonable cause of action; but it was also contended that sub-para. (b) was embarrassing for lack of particularity and should be struck out for that reason.*

The principles to be applied in considering an application under 0.20 r.19(1)(a) to strike out a statement of claim as not disclosing a reasonable cause of action are well-settled: I think that they may be summarised as follows:

(1) The rule is intended to apply only to cases which are really not arguable and not to cases where under the previous practice demurrer would have been the proper course: Packard v Transport Trading and Agency Co Ltd (1912) 17 W.A.L.R. 191 per Burnside J. at P. 195.

(2) On the application, not only must all the facts alleged in the statement of claim be accepted as true, but it must be taken for granted that on all other points the pleading is unassailable; Niven v Grant (1903) 29 V.L.R. 102 per Holroyd J. at P.106.

(3) Great care must be exercised to ensure that a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal; General Steel Industries Inc. v Commissioner for Railways N.S.W. (1964) 112 C.L.R. 125 per Barwick C.J. at P130.

(4) But the rule should not be reserved for those cases where argument is unnecessary to show the futility of the plaintiff's claim. Argument, even extensive argument, may be necessary to demonstrate that the plaintiff's case is so clearly untenable that it cannot possibly succeed. ibid:

> *(5) As a general rule, a plaintiff is "entitled … as of right to have his case heard, to have the facts found and then to argue the question of law as it arises before the trial judge upon the facts as found. It is only in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff that the pleading should be struck out: Dalgety Australia Ltd. v Rubin Full Court 24 August 1984, Library 5485, per Burt C.J.*
>
> *(6) a court at first instance should be careful not to risk stifling the development of the law by summarily rejecting a claim where there is a reasonable possibility that, as the law develops, it will be found that a cause of action will lie: Hospitals Contribution Fund of Australia v Hunt (1982-1983) 44 A.L.R 365 PER Master Allen."*

81 Even if I had not been of the opinion that the grant of an exploration licence confers an interest in the subject land I would not have struck out the claim of the plaintiff. The law in relation to the question of whether or not an exploration licence is a bare licence or whether it confers upon the holder such rights or such an interest in the land the subject of the licence as to enable the holder to bring a tortious action of trespass or one of nuisance would be open to argument. In my opinion, it would not have been appropriate, given the lack of direct authority upon the matter and given the importance of the *prima facie* right of a party to present its case and its arguments to a court in the context of a full hearing as to both the law and the facts, to have ruled that this matter should not proceed to trial and, accordingly, I would have refused the application to strike out the action.

82 The application to strike out the plaint is refused. Insofar as the defendant sought, during the course of the hearing, in lieu of the striking out of the plaint, the striking out of the plaintiff as a party, such application is also refused.