[2020] WAMW 1

JURISDICTION : MINING WARDEN

LOCATION : KALGOORLIE

CITATION : JZATEKE RATCLIFFE v MARIO PERIC & ZYGMUND WOLSKI

CORAM : WARDEN B AYLING

HEARD : 20 SEPTEMBER 2019

DELIVERED : 5 FEBRUARY 2020

FILE NO/S : Applications 504575 and 504576

TENEMENT NO/S : Mining Leases 15/339 and 31/485

BETWEEN : **JZATEKE RATCLIFFE**
(Applicant)

AND

MARIO PERIC & **ZYGMUND WOLSKI**
(1ST Respondent) (2ND Respondent)

Catchwords: *Applications for forfeiture – 1st Respondent pre-deceased applications– Whether applications a nullity – Burden of proving non-compliance with expenditure*

Legislation:

- *Administration Act* 1903 (WA), ss 8, 14, 15
- *Mining Act 1978 (WA)* ss 82, 98, 100
- *Mining Regulations 1981(WA)* regs 32, 137, 138, 140, 150AA
- *Public Trustee Act 1941 (WA)* s 9

Cases referred to:

- ***Andrews v Hogan*** (1952) 86 CLR 233
- ***Berowra Holdings v Gordon*** (2006) 228 ALR 387
- ***Deveigne v Askar*** (2007) 239 ALR 370
- ***Dormer Family Trust v Baracus Pty Ltd*** [2012] WAMW 33
- ***Fargo Investments Pty Ltd v Public Trustee*** (Wardens Court 18 Nov 1999)
- ***Hart-Roach & Ors v Public Trustee & Anor*** [1998] WASCA 34
- ***Holloway v Public Trustee*** [1959] SR (NSW) 308
- ***In Re Pritchard Dec'd, Pritchard v Deacon & Ors*** [1963] Ch 502
- ***Lesley Ellen Skipp v The Public Trustee*** (Wardens Court 13 Sept 1991)
- ***Public Trustee, as Administrator of the Estate of Mary Constance Forrest & Others v Foley***, (Wardens Court, 25 Sept 1998)
- ***Re Cameron; Cameron v Public Trustee*** [1982] WAR 55
- ***Re Transfer of Land Act; ex parte Anderson*** [1911] VLR 397; (1911) 17 ALR 399.
- ***TEC Desert Pty Ltd v Commissioner of State Revenue*** [2010] HCA 49; (2010) 241 CLR 576
- ***Treby & Hull v Goldmine Pty Ltd*** [2014] WAMW 19
- ***Woodley v Woodley (No 3)*** [2015] WASC 425

Result:

1. Applications for forfeiture struck out and dismissed against the First and Second Respondents.

Representation:

Counsel:

Applicant	:	Mr T Kavenagh
1st Respondent	:	No appearance
2nd Respondent	:	Mr G Lawton

Solicitors:

Applicant	:	Kavenagh Legal
1st Respondent	:	McKenzie and McKenzie
2nd Respondent	:	Lawton Lawyers

Introduction

1. This matter concerns applications for forfeiture of two small mining tenements less than 5 hectares in area situated north of Coolgardie - one known as the Ellen Jean mine (M 15/339), and the other Nil Desperandum (M31/485).

2. One of the conditions of holding a mining lease is that money must be spent annually on work or proposals for the exploitation of mineral resources from that tenement.[1] Unless an exemption from expenditure is obtained for the period in which there is found to be a default in expenditure, the holder risks forfeiture of the tenement.[2]

3. Any person may apply for the forfeiture of an exploration licence or mining lease and prosecute an argument that the expenditure conditions are not being met by the tenement holder.[3] A successful applicant is entitled to first priority upon forfeiture to mark out or apply for that tenement themselves.[4]

4. On 13 April 2017, Miss Jzateke Ratcliffe, "the Applicant," lodged applications 504575 and 504576 for forfeiture of M 15/1339 and M 31/485 asserting expenditure conditions had not been met for the years ending 2017 and 2016 respectively. The registered tenement holder was then Mr Mario Peric, the "First Respondent". He died on 30 March 2017, roughly two weeks prior to the applications being lodged.

Process of Application

5. An application for forfeiture is made by lodging a Form 35A as prescribed in Schedule 1 of the Mining Regulations ("the Regulations").[5] The form requires the Applicant to provide the name and address of the tenement holder as respondent, details of which can be obtained by a search of the Mining Tenement

[1] Section 82(1)(c) of the *Mining Act*.
[2] Section 98 read with section 103.
[3] Section 98(1).
[4] Section 100.
[5] Regulation 140.

register kept by the Department of Mines, Industry and Regulation ("the Department").

6. Once the Form 35A is lodged, proceedings are taken to have commenced.[6] The Mining Registrar is to return copies of the application to the Applicant for service upon the respondent and any mortgagee of a tenement to which the application relates.[7] This may be done by ordinary service, which includes delivering the document, or sending it by pre-paid post to an address already provided on a document lodged in relation to proceedings, or if no address has been provided, to the person's usual or last known place of residence or principal or last known place of business.[8]

7. It is unclear how the Applicant served these applications upon the deceased First Respondent. One presumes she posted them to the PO Box address she noted next to the respondent's name on her applications. She did not lodge an affidavit of service to prove that service. A respondent has 14 days from service to lodge a Form 36 response if intending to dispute the application for forfeiture. Understandably, there was no response lodged by the First Respondent.

History

8. The matter has had a somewhat complicated history with contemporaneous applications for forfeiture having been lodged and withdrawn by other parties.

9. The following timeline of events is taken from the affidavit of Paul Anthony Mackie received in evidence as Exhibit 1 and correspondence received by the Department and lodged on the Warden's Court file. While the correspondence referred to is not part of the evidence received in this substantive hearing, there does not appear to be any contest between the parties as to the sequence of events detailed in the timeline.

[6] Regulation 137(2)(a).
[7] Regulation 138(1)(c).
[8] Regulation 150AA.

9 March 1988	Mining Lease 15/339 ("M 15/339") is granted to Mr Mario Peric and Mr Wehner in equal shares.
5 May 1989	Transfer of Wehner's interest to Peric such that Peric became sole registered tenement holder of M 15/339. Amount to be expended is $5000 annually.
27 October 2014	Mining Lease 31/485 ("M 31/485") is granted to Mr Mario Peric and he is registered as sole tenement holder.
29 September 2016	Form 5 Operations Report for M 31/485 is lodged claiming $6750 expenditure for year ending 2017.[9]
20 February 2017	Form 5 Operations Report for M 15/339 is lodged claiming $8447 expenditure for year ending 2017.[10]
17 March 2017	Alex Ioasa lodges application 502742 for forfeiture on M 31/485 alleging non-compliance for year ending 2017.[11]
30 March 2017	Mario Peric, sole registered tenement holder of M 15/339 and M 31/485, dies.
3 April 2017	Zygmund Wolski lodges application 503800 for forfeiture of M 15/339 alleging non-compliance for year ending 2017.
13 April 2017	Applicant Jzateke Ratcliffe lodges two applications for forfeiture on M 15/339 and M 31/485 (504575 and 504576 respectively) alleging non-compliance on those tenements for year ending 2017.

[9] Affidavit of Paul Anthony Mackie, Annexure PM 13.
[10] Affidavit of Paul Anthony Mackie, Annexure PM 8.
[11] Affidavit of Paul Anthony Mackie, Annexure PM 9, p 40.

13 April 2017	Wardens Court Officer returns Applications 504575 and 504576 to Applicant Ratcliffe for service upon the Respondent and advises the Respondent by letter of a first mention date of 7 July 2017.
21 April 2017	The Mining Registrar advises the Applicant Ratcliffe and the Respondent Peric by letter that the first mention date has been administratively vacated until further notice.
1 May 2017	Mrs Carmel McKenzie, of the law firm McKenzie & McKenzie, writes to the Wardens Court Officer, copying in the Applicants Ratcliffe and Ioasa, to advise that Mario Peric is deceased, she acts for his estate, and seeks a stay of the proceedings until letters of administration are granted.
6 July 2017	Mrs McKenzie lodges proposed orders consented to by Ms Ratcliffe seeking that applications 504575 and 504576 be adjourned to 6 October 2017.
26 October 2017	Peter Batur obtains letters of administration on the estate of Mario Peric.[12]
8 December 2017	Mrs McKenzie lodges Notice of Acting in relation to the estate of Mario Peric.
19 December 2017	Devolutions 52035 and 52036 of Mario Peric's interest in M 31/485 and M 15/339 respectively are registered in favour of Peter Batur.
12 January 2018	Peter Batur lodges an application seeking an extension of time to lodge an exemption from expenditure on M 31/485.
12 March 2018	Approval is given to Peter Batur for an extension of time to lodge an application for exemption on M 31/485.

[12] Affidavit of Paul Anthony Mackie, Annexure PM 19.

4 April 2018	Zygmund Wolski lodges an objection to Peter Batur's application for exemption from expenditure on M 31/485.
16 August 2018	A transfer of Peter Batur's interest in M 15/339 and M 31/485 is registered to Zygmund Wolski, and Zygmund Wolski becomes sole registered holder of both tenements.
23 August 2018	Mr Lawton writes to the Mining Registrar, copying in solicitors for the applicant Ratcliffe, Kavenagh Legal, and Mrs McKenzie, advising that his client Mr Wolski has had M 15/339 and M31/485 transferred to him, and seeking to be joined as a Respondent to Ms Ratcliffe's applications.
7 September 2018	At first mention in Warden's Court of Ms Ratcliffe's applications, Zygmund Wolski is joined as "Second Respondent" and orders are made for the filing of Reg 144 particulars by the Applicant and Respondent. On the same date, Mr Wolski withdraws his application for forfeiture 503800 on M 15/339 and Mr Ioasa withdraws his application 502742 on M 31/485. Ms Ratcliffe's applications therefore become the only current forfeiture applications on M 15/339 and M 31/485.

12. As can be seen from this timeline, the first mention date for the Ratcliffe applications was not until 7 September 2018. The Regulations require the Mining Registrar to fix a date and time for a mention hearing before the warden being not less than 45 days from the date of lodgement, unless all parties to the proceedings consent to an earlier mention date.[13]

13. While the Mining Registrar had originally noted a mention date on application 50475 as 7 July 2017, Mrs McKenzie had on 6 July 2017 lodged proposed consent

[13] Regulation 138(1)(a).

orders signed by the Applicant seeking to adjourn the mention hearing to 6 October 2017.

14. It is not apparent why there was no mention hearing listed on these applications in the period 6 October 2017 to September 2018.

Preliminary Issue

15. When the matter came on for substantive hearing on 20 September 2019, Mr Kavanagh appeared for the Applicant and Mr Lawton the Second Respondent. Mrs McKenzie did not appear for the First Respondent, but conveyed through Mr Kavanagh that she could make herself available if required by the warden.

16. At the outset and prior to the taking of evidence, Mr Lawton raised a preliminary legal issue. He queried whether the entire proceedings ought to be declared a nullity on the basis that Mr Peric was not a person at law at the time the applications were lodged, and was incapable of being sued.

17. In written submissions filed subsequent to the hearing, he cited the cases of ***Treby & Hull v Goldmine Pty Ltd*** [14] and ***Dormer Family Trust v Baracus Pty Ltd & Anor*** [15] as illustrating the proposition that applications made by or against non-parties, such as deregistered companies or trusts, are void *ab initio* and cannot be corrected as misnomers or irregularities under section 142 of the *Mining Act 1978 (WA)* ("the Act"). Mr Lawton submitted that upon the First Respondent's death and until an administrator was appointed, the First Respondent's real and personal estate vested in the Public Trustee,[16] and accordingly, the Public Trustee ought to have been named as the Respondent when the application was made.

18. The Applicant's counsel Mr Kavenagh sought to distinguish the cases of ***Treby & Hull*** and ***Dormer Family Trust*** on the basis those cases turned on their own facts – ***Treby & Hull*** related to the specific situation of deregistered companies, and ***Dormer Family Trust*** concerned a flawed application made for an

[14] [2014] WAMW 19.
[15] [2012] WAMW 33.
[16] Section 9 of the ***Public Trustee Act*** 1941 (WA).

exploration licence by a trust, and not the trustees of that trust. He submitted that nothing in the Act or Regulations precluded a person from lodging an application for forfeiture against a person registered as a tenement holder, deceased or not. Mr Kavenagh acknowledged that deregistration of a company causes the company's property to vest in ASIC, and that a deceased's property vests in the Public Trustee in the period between death and administration or probate. But, he submitted that by authority of the Supreme Court in ***Re Cameron; Cameron v Public Trustee,***[17] which distinguished the High Court decision of ***Andrews v Hogan***,[18] the Public Trustee is viewed as a "mere repository of the estate", and its capacity does not extend to appearing in and defending actions.[19] Mr Kavenagh submitted that a prospective applicant for forfeiture takes information from the Mining Tenement Register as to the proposed respondent, and is not expected to know that the respondent is deceased.

19. This preliminary legal issue raises the following questions for determination:

1. Are forfeiture applications commenced with a deceased person as respondent a nullity?
2. Is the naming of a deceased person as respondent an irregularity that is capable of being overlooked when another party is joined?
3. What is an applicant for forfeiture to do when a registered tenement holder pre-deceases their application?

The Law

The Role of the Public Trustee

20. The Public Trustee is a body corporate governed by statute holding perpetual succession and a common seal and capable of suing and being sued and of holding and disposing of real and personal property.[20] The Public Trustee is an agent of the Crown in right of the State and enjoys the status, immunities and

[17] [1982] WAR 55
[18] (1952) 86 CLR 223
[19] Citing Dixon CJ in ***Andrews v Hogan*** at p 233.
[20] Section 4(2) of the *Public Trustee* Act 1941 (WA).

privileges of the Crown.[21] Its role, as per the object of the *Public Trustee* Act 1941 (WA), is to provide services to the Western Australian community in relation to trusts, estates and related matters.[22]

21. The starting point for the distribution of a deceased estate is to look at the provisions of the *Administration Act 1903 (WA).* Upon the death of an intestate person, the real and personal estate to which the intestacy applies is vested in an administrator to be held on trust until the estate is distributed in accordance with the order prescribed by sections 14 and 15 of that Act.[23]

22. Therefore, in the current situation, upon the death of a person such as the First Respondent, their real and personal estate is vested in an administrator to be held on trust until their estate is distributed. That administrator, in the absence of anyone else, is the Public Trustee, by virtue of section 9 of the *Public Trustee Act*.

23. If no person had applied for administration or probate within 3 months of the deceased's death, or for other reasons set out in the *Public Trustee Act*, the Public Trustee could apply to the Supreme Court for an order to proceed to administer the estate as per the order set out in section 14 of the *Administration Act*.[24] In the event the intestate person had no spouse or immediate relatives upon whom their estate could be distributed, the whole of the intestate property would pass to the Crown by way of escheat.

24. There is also power for the Public Trustee to lodge an election to administer, without the need for an administration order, by publishing such election in the Government Gazette, if the gross value of the deceased's property does not exceed $50 000. Where a person dies and has left executors or administrators whose whereabouts are unknown, the Public Trustee can also apply to the Supreme Court for an ex parte order in chambers seeking the ability to exercise

[21] Section 4(3) of the *Public Trustee* Act 1941 (WA).
[22] Section 1A of *Public Trustee* Act 1941 (WA).
[23] Section 13 of the *Administration* Act 1903 (WA).
[24] Section 10 of the *Public Trustee Act 1941 (WA).*

its powers to deal with the property so that the interests of the owner or some other person are protected with respect to the property.[25]

25. The terms of section 9 of the *Public Trustee Act* allow for the real and personal estate of a deceased person to be vested in the Public Trustee until such time as an administrator or probate is granted, but no charge is leviable therefor. Its purpose is to prevent a lacuna in the chain of title between the deceased and those who may become interested in the deceased's estate, but the Public Trustee has no role in answering claims in court against the deceased's estate.[26] The Supreme Court in this State has held that section 9 of the *Public Trustee* Act does not authorise the Public Trustee to be made a party to proceedings in answer to a claim against the deceased's estate.[27] As illustrated by the provisions of the *Public Trustee Act* outlined above, the Public Trustee has capacity in certain circumstances to act as more than a "mere repository of the estate", but to do so requires an order of the Supreme Court to be able to exercise those powers. That was the view of Wallace J in ***Re: Cameron***. His Honour referred to the decision of Walsh J in ***Holloway v Public Trustee***, and noted Walsh J's view that "…it is no longer true to speak of the Public Trustee as being for all purposes 'a mere formal repository of the legal estate' or to say that beyond that 'he has no functions, no powers and no duties in respect of the estate." [28] Wallace J's point was to say that section 9 does no more than vest property in the Public Trustee for the period of time between death and probate or administration; it is not a gateway for other parties to draw in the Public Trustee to answer a claim against the estate during that period.

26. The vesting of property in the Public Trustee is thus only a temporary measure. Upon a grant of probate or administration being made, all real and personal estate of the deceased passes to and vests in the executor or administrator

[25] Sections 37A and 49 of the *Public Trustee Act* 1941 (WA).
[26] ***Hart-Roach & Ors v Public Trustee & Anor*** [1998] WASCA 34, following ***Re: Cameron***.
[27] ***Woodley v Woodley (No 3)*** [2015] WASC 425, citing ***Re Cameron; Cameron v Public Trustee*** [1982] WAR 55.
[28] ***Holloway v Public Trustee*** [1959] SR (NSW) 308 at 311.

retrospectively, as from the date of the deceased's death.[29] Therefore, the purpose of section 9 is to enable the real and personal estate to be held automatically by way of safe-keeping by the Public Trustee, until such time as there is a grant of probate or administration. That grant could be to the Public Trustee, or some other interested person, but once it is made, the title of all real and personal estate of the deceased passes to, and is vested in, the executor or administrator from the point of the deceased's death.

27. In this case, once letters of administration were granted to Peter Batur on 26 October 2017, he held all property owned by the First Respondent. He was then entitled to lodge a devolution with a copy of those letters of administration applying to be registered as a holder of the deceased's interest in those mining tenements registered in the name of the deceased.[30] Mining tenements are a form of personalty, not realty,[31] but the grant of administration covered Mr Batur's entitlement to the First Respondent's interest in those tenements.

28. Mr Batur did in fact lodge a devolution on M 15/339 and M 31/485 on 19 December 2017. From that point on, he was effectively the registered holder of those tenements and able to effect the subsequent transfer to the Second Respondent.

29. In legal argument, Mr Lawton submitted that the Public Trustee ought to have been named as respondent, while Mr Kavenagh submitted that the authority of ***Re: Cameron*** prevented that course.

30. Research of the Mining Wardens decision database reveals that the Public Trustee has been named as respondent in past applications for forfeiture. In ***Fargo Investments Pty Ltd v The Public Trustee***, the applicant company lodged three plaints for forfeiture of prospecting licences. The Public Trustee sent a letter to the Department indicating it wished to take no part in the proceedings. There was no expenditure reports filed for some time on the tenements, and no

[29] Section 8 of the *Administration Act* 1903 (WA).
[30] Regulation 102(1) of the *Mining Regulations* 1981.
[31] ***TEC Desert Pty Ltd v Commissioner of State Revenue*** [2010] HCA 49; (2010) 241 CLR 576, at [28].

response was received on the application nor any evidence raised. Warden Calder found prima facie evidence of non-compliance with expenditure conditions, and with no appearance or evidence raised from the respondent, ordered forfeiture of the tenements.[32]

31. In ***Lesley Ellen Skipp v The Public Trustee***, Ms Skipp lodged an application for forfeiture of a lease. The Public Trustee had by devolution become the registered tenement holder. Warden Thobaven determined that the Public Trustee was holding onto the lease without achieving any mining operation at all, and ordered forfeiture.[33]

32. In ***Public Trustee, as Administrator of the Estate of Mary Constance Forrest & Others v Foley***,[34] the Public Trustee was one of five applicants for a mining lease objected to by Mr Foley. The Public Trustee took no part in the proceedings and the application was pursued by the other applicants.

33. So, how are these decisions reconciled with the authority of ***Re Cameron***?

34. In each of these decisions, with the exception of ***Skipp***, the Public Trustee *appears* to have taken no active part in the proceedings before the Warden (emphasis added). In ***Fargo Investments***, there was effectively summary determination due to the Public Trustee's non-appearance.

35. In ***Skipp***, the Public Trustee had taken the step of lodging a devolution on the tenement, such that it became the registered tenement holder. Counsel appeared on behalf of the Public Trustee, but the matter was swiftly determined by Warden Thobaven on the hearing of evidence of a single witness that the tenement ought to be forfeited.

36. While the history of the Public Trustee being named as respondent in proceedings in this jurisdiction seems to suggest that it is a practical course open,

[32] Decision of Warden Calder at Perth published on 18 November 1999, Vol 14, No 10.
[33] Decision of Warden Thobaven at Coolgardie published on 13 September 1991, Vol 8 Folio 12.
[34] Decision of Warden Calder at Perth delivered on 25 September 1998, Vol 13 No 19.

an analysis of ***Re: Cameron*** and the legislative background of the *Public Trustee* and *Administration Acts* does not necessarily endorse that option.

The Law as to Nullities or Irregularities

37. The law is well-settled that where a sole defendant is dead at the commencement of a proceeding, the proceeding is a nullity, unless legislation or the rules provide otherwise.[35] The logic of that position is clear: when a person dies, they cease to exist. If the person named as defendant does not exist, then there is no defendant to answer the proceedings.

38. In ***Re Pritchard, Decd***,[36] the Chancery Division of the House of Lords was divided on the difference between a nullity and an irregularity. An originating summons had been filed in the wrong office contrary to the Rules of Court. By majority, the court found the action was a nullity, with Lord Upjohn stating that the fundamental failure to comply with the statutory requirement regarding the issuing of proceedings meant that "no proceedings have been commenced,"[37] and Danckwerts LJ stating that the originating summons had no more application to the matter than a "dog licence".[38] In dissent, Denning MR took a more practical approach, noting that despite the irregularity, the matter could be solved by way of an amendment to the originating process as to the location of the action to be commenced. His view was that the only true cases of nullity are those where a sole plaintiff or defendant is dead.[39] The majority, however, put nullities into a the following classes: (a) proceedings which ought to have been served but have never come to the notice of the defendant at all (except where there had been orders for substituted or dispensed service); (b) proceedings which have never started at all due to some fundamental defect in issuing the proceedings; and (c)

[35] ***Halsbury's Laws of Australia*** [325-1470], ***Re Pritchard Dec'd*** [1963] Ch 502 at 517. ***Deveigne & Anor v Askar*** (2007) 239 ALR 370. See also Rule 9.08(2) Supreme Court Rules 1987 (NT), rule 9.08(2) Supreme Court (General Civil Procedure) Rules 2015 (Vic), which allow for amendment of originating process to pursue a claim against a deceased estate.
[36] ***In Re Pritchard Dec'd, Pritchard v Deacon & Ors*** [1963] Ch 502.
[37] *Supra*, at 526.
[38] At 527.
[39] At 517.

proceedings which appear to be duly issued but fail to comply with some statutory requirement.[40]

39. The High Court of Australia has subsequently said that in the context of administrative decisions and "in the context of proceedings in, and acts and orders of, courts", it is not necessarily helpful to adopt a conclusion that a proceeding is a nullity if there has been a misstep in procedure, particularly in relation to a failure to comply with a statutory requirement. Once proceedings are enlivened, it will be for the court to determine whether a claim ought to be struck out or summarily dismissed for want of jurisdiction, or alternatively, pleadings amended so as to isolate the real issue in dispute between the parties.[41]

40. In the case of ***Deveigne v Askar,*** [42] the NSW Court of Appeal took up the discussion of whether proceedings commenced against a deceased defendant were void or voidable – that is, nullities, or irregularities capable of amendment. Mr Askar had lodged a statement of claim naming "Terry Deveigne" as defendant, despite the fact Mr Deveigne had died two years prior to the claim. There was no evidence that the claim had been served on anyone connected with the deceased's estate, but it had been concurrently served on NRMA Insurance.

41. The proceedings in ***Deveigne v Askar*** suffered from two fundamental defects as identified in ***Re Pritchard***: they were never served on the deceased, and they were commenced in the name of a dead person. The majority took the view that the proceedings were a true nullity, but were capable of being solved by the joinder of NRMA Insurance. McColl JA noted that the authorities concerning proceedings against deceased persons being a nullity all related to proceedings where the deceased was the sole defendant.[43]

42. In that case, the deceased Terry Deveigne was, in effect, a nominal defendant. NRMA Insurance could be joined because it had been served the originating

[40] At 524.
[41] See ***Berowra Holdings v Gordon*** (2006) 228 ALR 387 at 389, [10], citing ***Minister for Immigration v Bhardwaj*** (2002) 209 CLR 597 at 613. See also ***Stone v ACE–IRM Insurance*** [2003] QCA 218.
[42] [2007] 69 NSWLR 327
[43] *Supra*, at 371, [177].

process from the start and was, for all intents and purposes, the 'real' defendant, particularly in the special factual and legal scenario of third party motor vehicle insurance claims. It is important to note that the decision in ***Deveigne*** had come after a long and sorry history [44] of four years in which judgment had been ordered in favour of the deceased person, and NRMA was seeking to be formally joined in order to enforce a costs order against the plaintiff, because clearly, the deceased could not act as the judgment creditor. Although there was an irregularity in the naming of the deceased as defendant, there was, and had always been, a 'real' defendant in the NRMA who had been served from the start.

Application of Legal Principles to This Case

43. Turning now to the situation in this case, proceedings were ostensibly commenced when the applications for forfeiture were lodged.[45] Mr Lawton, as counsel for the Second Respondent, argues that the entire proceedings are a nullity due to the First Respondent not being a party when the proceedings were commenced. He submits the applications should be dismissed.

44. For the reasons expressed in the cases cited above, it is not the validity of the proceedings themselves that are in question, it is whether the claim brought by the applicant for forfeiture ought to proceed to substantive determination or be struck out because the applications themselves are a nullity.

45. The powers, functions and duties of a warden, and the practice and procedure of a warden's court in proceedings concerning an application for forfeiture are prescribed by the Regulations.[46] Part VIII of the Regulations outlines the procedure for proceedings before the warden in an application for forfeiture, or in proceedings where there has been an objection lodged to applications made under Part IV of the Act.

[44] As described by McColl JA at [36].
[45] Regulation 137(2)(a).
[46] Section 136(1), read with sections 162(2)(ra) and (rb) of the *Mining* Act.

46. In conducting any hearing, the warden is bound by the rules of natural justice.[47] Before taking any action which may be to the detriment of another party, the Warden must ensure that the other party has been notified of the proceedings and been given an opportunity to be heard. The purpose of regulations regarding service of an application upon the respondent and the response to be lodged by that respondent is to ensure that the party affected by an application for forfeiture - i.e. the registered tenement holder, is given an opportunity to be heard before any adverse orders are made against their interest. If service upon the registered tenement holder was unable to be proved, it would be quite unfair for an applicant for forfeiture to succeed to substantive determination of their application.

47. A tenement holder is not required to lodge a response to an application for forfeiture. The tenement holder may forego the right to be heard because of inactivity on the tenement, ineptitude, or because a surrender is being contemplated.

48. The lack of response would not prevent the matter being listed for a mention hearing. Upon the named respondent not attending the first mention hearing, the warden would then enquire whether the respondent was properly notified of the proceedings, and whether there had been proof of service. At this point, an applicant would be asked to explain how the application was delivered to, or sent by pre-paid post, to the respondent. If the respondent was not known to be deceased, and service appeared to have been effected, there is nothing in the Act or Regulations which precludes the applications from being set down for substantive determination of the forfeiture application.

49. If there was then no attendance by the respondent at the substantive hearing, there would be a default of the requirement to attend that hearing in person.[48] The warden would be entitled to proceed to summary determination of the forfeiture application.[49] While the above scenario is a hypothetical possibility, it is unlikely

[47] Regulation 154(1)(b).
[48] Regulation 156.
[49] Regulation 139(1)(b).

proceedings would get to substantive determination without someone becoming aware of the fact of a respondent having deceased. In most cases, it is likely that the applicant would become aware of the deceased's death and that this would somehow come to the attention of the Department, or the Warden, as it did in this case.

50. In my view, the terms of the Act and Regulations support an interpretation that a respondent in proceedings under Part IV of the Act is a live entity. The requirement for a party to appear at the substantive hearing in person is one example, as is the use of the word "intends" in regulation 141. A deceased person cannot form an intention, nor can they instruct a lawyer to lodge a response on their behalf or authorise some other person to do so. The Warden also retains a discretion to order a sum for costs and expenses be paid to the tenement holder or lessee if an applicant does not proceed with the forfeiture application.[50]

51. In this case, the fact of the First Respondent's death emerged on or about 1 May 2017, soon after proceedings had commenced, when a solicitor for the estate of the deceased had written to the Warden's Court Officer providing this information, and copied in the Applicant and another applicant for forfeiture, Mr Ioasa. This solicitor then obtained consent from the Applicant in July 2017 to adjourn a mention date of these applications to a date in October 2017, presumably to allow for a grant of probate or administration to be made.

52. Upon discovery of the fact of the First Respondent's death, a stumbling block had emerged for the successful progress of the Applicant's applications because the Department, (and by extension, the Warden) had become aware that the person named as a respondent in these applications did not exist, and therefore service was unable to be achieved. While the deceased's solicitor had somehow received notice of the applications and made contact with the Department and the Applicant, that solicitor would not have been in a position to advance a response to the applications without instructions.

[50] Section 98(8) *Mining* Act.

53. In my view, it should have been apparent to the Applicant at that early stage that there was a problem with her successful prosecution of those applications to substantive determination in that form. Could the Applicant have applied under section 142 of the Act to amend the name of the First Respondent to reflect the person in whom his property had vested?

54. Firstly, I have some doubt as whether section 142 should be used to completely change the identity of a party. The purpose of section 142 is to correct a misnomer or inaccurate description of any person or place or any process or document in any proceedings in a warden's court, *if the person or place is named or described therein so as to be commonly known*. (Emphasis added) The First Respondent had not just been inaccurately described, he did not exist so as to be commonly known at the time the applications were lodged, and has not done since. Put simply, there was no respondent properly named on the applications.

55. The mischief that s 142 seeks to address is an error in the naming of a person or place, whether that be the name of an applicant or respondent, or a particular place if it is clear to all concerned as to whom or to where the party is referring, but for that error or slip.

56. An application to amend the name of the First Respondent would not be to cure an error of form or description; it would be to amend the forfeiture application to reflect an entirely different person as respondent and therefore change the nature of the proceedings altogether to an application for forfeiture against an entirely new respondent. As Warden Calder pointed out in ***Exmin Pty Ltd v Australian Gold Resources Ltd***,[51] section 142(4) has no application to the matter as it pre-supposes the validity of the proceedings in which the real issue is to be determined between the parties. If the original applications are fundamentally flawed because a person is not named on them as respondent, then there is no issue already in existence between those parties to be amended. In my view, this leads to an interpretation that fresh applications ought to be substituted in the

[51] [2002] WAMW 30 at p 13.

name of the person in whom the deceased's property vests. This may lead to detriment to the applicant in terms of priority of applications, but it is a cost to be borne from bringing an originally flawed application.

57. The second and greater difficulty faced by the Applicant should she have sought to amend her application was that she was unable to name the person in whom the First Respondent's property had vested until such time as administration was granted on 26 October 2017. The Applicant would not have been expected to know when that occurred, but the devolution of both tenements to Peter Batur was registered on 19 December 2017, and therefore publicly available information on the Mining Tenement Register from that date. Due to the retrospective effect of section 8 of the *Administration* Act, from 26 October 2017 all real and personal estate of the First Respondent vested in Peter Batur from the date of the former's death. Had the Applicant become aware of the grant of administration to Mr Batur, she could have lodged an interlocutory application before the Warden seeking leave to withdraw her current applications, and disclosed an intention to lodge fresh applications against Mr Batur. Unfortunately for her however, time had moved on.

58. The Act sets out a time limitation on the ability to lodge an application for forfeiture. It needs to be lodged during the expenditure year or within 8 months of the expiry of the expenditure year to which it relates.[52] In this case, that was up until 25 June 2017 for M31/485 and 7 November 2017 for M15/339.[53] As with any statutory limitation, its purpose is to put a limit on the bringing of claims within a reasonable time. The window for an application for forfeiture in the usual course is therefore 20 months – being the 12 months of the expenditure year to which the application relates, plus a further eight months. In this case, the Applicant had 20 months between 26 October 2015 and 25 June 2017 in which to bring an application for forfeiture of M 31/485 on the First Respondent. For

[52] Section 98(2) of the *Mining Act*.
[53] Eight months beyond the expiry of the expenditure year of 26 October 2016 for M 31/485 and 8 March 2017 for M 15/339.

M15/339, the Applicant had between 8 March 2016 and 8 November 2017 in which to bring her application.

59. The devolution to Peter Batur on 19 December 2017 occurred after the expiry of the limitation period for forfeiture applications on these tenements in the 2016 and 2017 expenditure years. There was no practical ability for anyone to have lodged an application for forfeiture naming the appropriate respondent until such time as a devolution had occurred, or if by some chance, a prospective applicant had become aware of the grant of administration on 26 October 2017 – twelve days prior to the expiry of the limitation period on M 15/339. By the time the devolution was registered on 19 December 2017, the opportunity for a forfeiture application on these tenements in the 2016 and 2017 expenditure years had passed.

60. The Applicant had a reasonable time period of 20 months in which to bring her applications. She timed her run towards the end of that period, and unfortunately for her, the registered tenement holder pre-deceased her applications by a matter of some two weeks.

61. The Applicant relies upon the evidence of her father, Paul Anthony Mackie, who asserts that he inspected M 15/339 on three dates in April 2017 and M 31/485 on a single date in March 2017.[54] The Applicant's position, through her father, is that the tenements had not had activity for the past "2 to 3 years". There is nothing wrong with an applicant for forfeiture prosecuting an argument that expenditure conditions are not being fulfilled by claiming that, in their view, work has not been done for some time. But, here the Applicant arrived to assert non-compliance at a time toward the end of the opportunity to make that complaint, and unluckily for her, at a time after the registered tenement holder had deceased. There was then the added problem of there being a delay in the grant of the administration of the First Respondent's estate, which frustrated the Applicant's ability to bring fresh applications against the administrator before

[54] Affidavit of Paul Anthony Mackie, [18] and [19].

the limitation period ran out for forfeiture applications on those tenements for those years.

62. There is also a minor error on application 504576, but none of the parties seem to have noticed it or addressed it. The Applicant noted on her Form 35 that the application related to the 2017 expenditure year, when it was in fact the 2016 expenditure year with which she was concerned.[55]

63. Despite there being no specific regulation precluding a forfeiture application being made against a deceased respondent, there is clear common law authority that proceedings commenced against a sole deceased defendant are a true nullity. In my view, the proceedings are not validly commenced when made against a non-existent person because the applications themselves are invalid. There is simply no basis for the applications to proceed to a substantive hearing against a person who does not exist as there is no ability to engage that party in the proceedings. The applications as they currently stand against the First Respondent are therefore declared void, as they name a non-existent person as respondent.

64. Should the applications proceed against the Second Respondent?

65. A warden may, at any time during the proceedings, make an order that a person be joined as a party if the warden is satisfied that the person has a sufficient interest in the outcome of the proceedings.[56] As the registered tenement holder of the two leases the subject of these applications, the Second Respondent is qualified in that respect.

66. But, there is no document lodged by or evidence from the Applicant to suggest the Second Respondent was ever formally served with a copy of these applications. The Second Respondent's awareness of these proceedings appears to have been presumed because of his own involvement as an applicant for forfeiture on one of the tenements and his progress from that status to the

[55] See Mining Tenement Register Search on M 31/485, Expenditure Details for 2016 was $6500 lodged 29/9/16.
[56] Section 143 of the *Mining* Act.

registered tenement holder on both. Through his counsel, he initiated being joined as a respondent ahead of the first mention on 7 September 2018, and he has lodged a Form 36 response on 24 January 2019. While in one respect, there is an irregularity in the initial service of the applications against the Second Respondent, notification of the proceedings appears to have been rectified by the exchange of particulars, a response and proposed evidence post-joinder.

67. The greater problem lies in the joinder of the Second Respondent on 7 September 2018 upon void applications against a non-existent First Respondent. In my view, the joinder was built upon an incompetent foundation. The Second Respondent was hitched to invalid applications against the First Respondent and, at the date of joinder, the time limitation had run out on applications for forfeiture on these tenements in any event.

68. Except as expressly provided by or under the *Mining* 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 the Magistrates Court in like matters.[57]

69. The applications against the First Respondent have no reasonable prospect of success, as an order cannot be made against a non-existent person. Applications 504575 and 504576 are therefore struck out against the First Respondent without further consideration as to their merit due to the applications being declared void. As the applications against the Second Respondent were built upon the same incompetent foundation, applications 504575 and 504576 are also struck out against the Second Respondent without further consideration as to their merit.

70. With both applications struck out, the applications are therefore dismissed.

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Warden B Ayling

5 February 2020

[57] Section 134(6) of the *Mining* Act.