IN THE WARDEN'S COURT)
HELD AT PERTH)
WESTERN AUSTRALIA)

Heard: 24 July, 1991

Delivered: 26 August, 1991

IN THE MATTER of application for Prospecting Licence No 70/930 seeking a finding whether or not an order made under Regulation 64(1) on 18.10.89 is conditional. Objection No. 132H/890 by Yardarino Mining NL to Application for Prospecting Licence No 70/930 by Simto Resources Limited.

B E T W E E N

YARDARINO MINING NL

Objector

- and -

SIMTO RESOURCES LIMITED

Applicant

Mr Lawton for Objector

Mr Holler for Applicant

REASONS FOR DECISION

WARDEN D J REYNOLDS, SM

On 24 July, 1989, Simto Resources Ltd ("Simto") purported to mark out land for a prospecting licence No 70/930 and 22 days later on 15 August, 1989 it lodged an application for such prospecting licence with the Mining Registrar. On 3 August, 1989, Yardarino Mining NL ("Yardarino") purported to mark out land for prospecting licences No/s 70/928 and 70/929 and lodged applications for such prospecting licences on 9 August, 1989. Both Simto and Yardarino lodged objections against the applications of the other and in particular Yardarino lodged its objection No 132H/890 on 8 September, 1989. The objection by Yardarino set out two grounds of objection, first, that the applicant has not marked out the

land in accordance with the provisions of the Mining Act 1978 and regulations and second, that the applicant has also not complied with regulation 64 of the Mining Act 1978 and regulations.

Regulation 64(1) of the regulations to the Mining Act provides as follows:

> "Application for a mining tenement shall be in the form No 21 in the first schedule and lodged with the Warden by being filed at the office of the Mining Registrar with the prescribed fees and rent within ten days of marking out or such further time that the Warden considers reasonable."

Given that Simto had not lodged its application until 22 days after it had purported to mark out the land in respect of its application, Simto had not complied with the 10 day period provided in regulation 64(1). It can be noted from the regulation that the period of 10 days as stated in the regulation is not inflexible. There is provision within the regulation for the Warden to provide some other time that he or she considers reasonable. The regulation does not provide whether an application seeking an extension of time within which to lodge an application beyond 10 days of marking out should be made before the expiration of the 10 day period or whether it can be made at some time after the 10 day period and after the application has been lodged. In the absence of any express intention from the regulation to the contrary, I have taken the view that it is open to an applicant to seek an extension of time pursuant to regulation 64(1) after the application has been lodged and even though the period of 10 days from marking out has expired.

Simto by letter dated 4 September, 1989 sought an extension of time in respect of the lodgement of its application for prospecting licence 70/930. On 3 October, 1989 I considered the application and required further information from Simto before making a decision whether to extend time.

Simto by a further letter dated 12 October, 1989 responded to my request for further information in respect of its application to extend time and on 18 October, 1989 I granted an extension of time pursuant to regulation 64(1). I note that I did not expressly provide in any order that the extension be to and including a particular date, however, that in my view is of no consequence as the application was made for an extension in order that the application could proceed on the basis that regulation 64(1) had been complied with and the application was granted on that basis. On 18 October, 1989 when I decided to grant the extension I made the following notation:

> "In the circumstances, given that there is no third party prejudiced by an extension, an extension is granted. The applicant should be notified that if at any stage in the future any such extension would prejudice a third party, then a decision on any application such as this may be different."

Up to and including the time that I made the decision on 18 October, 1989 I was not aware that Yardarino had lodged an objection to the application by Simto and nor was I aware that Yardarino had lodged applications for prospecting licences in respect of the same land that was the subject of the application by Simto for prospecting licence No 70/930. While the objection by Yardarino was lodged on 8 September, 1989, it seems that an officer of the Department of Mines did not place the objection on the appropriate file, that is the file in respect of prospecting licence 70/930, until about 6 December, 1989 at the earliest. If I had been aware of the existence of the objection by Yardarino then I would have required Simto to give notice to Yardarino of its application to extend time and given both parties an opportunity to call evidence and make submissions in respect of the application to extend time.

The application by Simto and the objection to it by Yardarino came before Warden Thobaven on 15 August, 1990. On that occasion counsel for Yardarino made an application to the Warden that the Warden regard the decision by me to extend on 18 October, 1989 invalid on the basis that Yardarino was never given an opportunity to be heard. It seems that at such time counsel for Simto argued that Warden Thobaven had no jurisdiction to consider such an application. After hearing submissions Warden Thobaven reserved on the application and delivered some reasons on 10 January, 1991.

At page 5 of his reasons Warden Thobaven expressed the view that the extension of time under regulation 64 was an order of the Warden and he went on to state:

> "The result of that conclusion is that an order has been made by Warden Reynolds and I have no power to interfere with the order he made. Whether or not he considers that the order he made was a conditional one, that he is prepared to reconsider, can only be ascertained by reference to him."

Warden Thobaven was prepared to adjourn the application by Simto to enable Yardarino to raise the matter with me. Upon a request by the solicitors for Yardarino to consider the matter I arranged for both parties to attend before me in open court and gave them an opportunity to make submissions. Counsel for Yardarino has argued that my decision to extend time was invalid on the basis that Yardarino was not given an opportunity to be heard. On 17 December, 1990 Simto sold all rights that it had in respect of its application to AMC. Counsel for AMC argued that I had made a decision and that I was functus officio.

In order to follow the chronology of events, below is a summary of the significant events and the relevant date of each event.

24 July, 1989	Simto pegged
3 August, 1989	Yardarino pegged
9 August, 1989	Yardarino lodged application
15 August, 1989	Simto lodged application
29 August, 1989	Simto lodged objection to Yardarino's application
8 September, 1989	Yardarino lodged objection to Simto's application
22 September, 1989	Simto applied by letter for extension of time
4 October, 1989	Mines Department's letter to Simto for more information
12 October, 1989	Letter from Simto in response
30 October, 1989	Letter containing decision on extension application
15 August, 1990	Warden Thobaven's hearing re functus officio
17 December, 1990	AMC buy application from Simto
10 January, 1991	Warden Thobaven's reasons - adjourned the application of Simto to see if Yardarino wish to raise the matter with Warden Reynolds.

In my opinion when a Warden considers whether to extend time pursuant time to regulation 64(1), the Warden is acting administratively. In an unreported decision of the Full Court of the Supreme Court of Western Australia in the case of Hayward & Saw v Vincent Nominees Pty Ltd & Nizich Appeal No 14 of 1988 delivered on 7 December, 1988, the Court upheld the decision in the first instance by the then Chief Justice, Burt CJ. The then Chief Justice considered the question whether it was open for the Minister for Mines to rescind an earlier decision made by him to refuse an application for a mining tenement and then refer the same application back to the Warden seeking a further recommendation from the Warden in respect of it. On appeal, Wallace J was one of the

majority supporting the decision of Burt CJ and in the course of his judgment he made reference to parts of the judgment of Burt CJ and these parts are set out on page 7 of the judgment of Wallace J and are as follows:

> "Judicial Review of Administrative Decisions by de Smith 4th edn. at 107 as follows:
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> > "Considerations of fairness to individuals whose interests will otherwise be directly and prejudicially affected may lead the courts to attribute binding effect to administrative acts and decisions which the competent authority wishes to repudiate or rescind. Indeed, it would seem that the legal competence of administrative bodies to rescind their decisions depends (in the absence of statutory provision for this matter) at least as much on considerations of equity and public policy as on conceptual classification."
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> The learned Judge concluded:
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> > "Adopting that approach I think that it should be held that the decision of the Minister once validly made under reg. 55(7) of the Regulations made under the Mining Act, 1904 should be regarded as being final. It is a decision which establishes whether the land is available for mining and this is a matter upon which there should, in the public interest, be certainty and finality. Those engaged in mining should know with certainty whether land is or is not available for mining and they should not be put at risk of mineral claims, the registration of which have been refused by the Minister, being brought back to life. And in the case of private land, the owner of it and the persons dealing with the owner of it should not be exposed to the risk that an application for the registration of a mineral claim made with respect to it and refused might be revived. This is a consideration which is well illustrated by the facts of this case. When the plaintiffs purchased the land and the right to take the sand from it the applications for the registrations of the mineral claims marked out by the third defendants had been refused by the Minister. The plaintiffs were, in my opinion, entitled to make their decision to buy and upon that basis and the vendor was entitled

> to sell on that basis. It would seem to me to be patently unfair that having acted upon the position as it was when they bought the land and the right to take the sand, the registration of the mineral claims which had been refused should be brought back to life to destroy, at least commercially, the subject matter of the bargain.""

It seems to me that when Burt CJ stated "the decision of the Minister validly made" he was restricting the use of the word "validly" to consideration whether the decision of the Minister was within the power of the Minister under the Mining Act and Regulations. When Burt CJ went further and said that the decision once validly made" should be regarded as being final" it seems to me that he was not saying that it should be regarded as being final simply because it was a decision made within power, but rather considered that having regard to the considerations of fairness that applied in respect of that particular case, the decision also being within power should be regarded as being final.

There are perhaps two ways in which I could proceed to determine this matter. The first is to keep within strict bounds of the submission that I am functus officio. The second would be to actually consider the application to set aside the decision to allow an extension of time and in doing so adopt the same approach as Burt CJ and consider the issue of fairness including considerations of equity and public policy. It is not necessary in my view to decide whether one approach is appropriate rather than the other because either way the conclusion is the same.

I now turn to consider the matter within the strict bounds of the submission that I am functus officio.

The application by Simto and the objection by Yardarino came before Warden Thobaven, SM on 15 August, 1990. Counsel for Yardarino argued before Warden Thobaven that he had the power

to set aside my decision to extend time to lodge the application. Counsel for Simto argued that Warden Thobaven was functus officio. It does not seem that at an early point in time it was suggested that perhaps it would be more appropriate for me to hear the application by counsel for Yardarino. It seems that counsel for the respective parties, both Yardarino and Simto, exhausted their respective submissions and the matter was then reserved by Warden Thobaven for a decision to be given. As I have already mentioned, Warden Thobaven was not prepared to set aside my decision to extend time and suggested that Yardarino may wish to refer the matter to me. In my opinion it would not be appropriate for me to consider the application by counsel for Yardarino to set aside my decision to extend because the same submission has already been made to another Warden without success. As I have said, it is not a situation where, at the outset, the matter was referred to me, but rather a situation where submissions were exhausted and then reasons were given by Warden Thobaven including an implication at least on his part that he was not prepared to set aside my decision to extend time pursuant to regulation 64(1) in favour of Simto.

If I was of the view that I was not functus officio then upon considering whether my initial decision to extend was valid and having regard to considerations of equity and public policy, I am also of the opinion that I should not set aside my earlier decision to extend time pursuant to regulation 64(1) in favour of Simto.

In my opinion my decision to extend time pursuant to regulation 64(1) in favour of Simto was a valid decision, given that specific provision is made for such a decision in regulation 64(1). The following matters would then be relevant in my view when considering matters of equity and public policy.

Some 11 months or so passed from the time when Yardarino lodged its objection to the application by Simto and until the application and objection came before Warden Thobaven on 15 August, 1990. It seems that both the application and the objection came before Warden Thobaven on his initiative. He caused a letter to be sent to each and both of the parties or their respective representatives advising them that the application and the objection were in a list of matters to be heard by him. I am mindful that there is a practice whereby the Warden causes parties to be notified when applications and/or objections are listed for mention or to be heard by the Warden. This practice is not one that operates to the exclusion of an applicant and/or objector requesting that its application and/or objection be placed in a list for mention or hearing. Within this period of about 11 months or so, there was no such request by Yardarino. In my opinion parties should pursue applications and/or objections expeditiously. It is also in the best interests of the community that this be so. It seems to me that Yardarino did not pursue its own objection in an expeditious manner.

The reference to "Warden" in regulation 64(1) is in my opinion a reference to the position itself and not to a particular individual. While I made the decision to extend time pursuant to regulation 64(1) I do not think that it was necessary for me to hear and determine the submissions that were made before Warden Thobaven on 15 August, 1990. As I have already noted, it does not seem to me from my understanding of events that the suggestion was made at an early point in time on 15 August, 1989 that perhaps it would be more appropriate for me to hear the application rather than Warden Thobaven. If I was to favourably consider the application to set my earlier decision aside then I would be ignoring the fact that the same application and submissions have already been exhaustively made to another Warden and that Warden declined to rule that my earlier decision was invalid or to set it aside.

It should be noted that Simto applied for a prospecting licence. This is of some consequence. It is necessary to physically mark out on the land the area to be applied for as a prospecting licence (see regulation 59). This is not the case for say an exploration licence. The point is that while Simto did not lodge its application within 10 days of marking out, the marking out itself was some indication to others of Simto's interest, in a general sense, in the land. Simto's application for a prospecting licence could not have come as a complete surprise.

There comes a time when a party should be entitled to consider that a decision made by a Warden in connection with its application for a mining tenement is and will be regarded as being final. In my opinion that time has already been reached in respect of my earlier decision to extend time pursuant to regulation 64(1) in favour of Simto.

In conclusion, in my opinion I am functus officio and accordingly have no jurisdiction to set aside my earlier decision to extend time pursuant to regulation 64(1) in favour of Simto. Further and in any event, it would not be appropriate having regard to considerations of equity and public policy for me to set aside my earlier decision to extend time.

D J REYNOLDS SM