**IN THE WARDENS COURT AT LEONORA Delivered** 26.5.97.
**HELD AT PERTH**

PLAINT NO'S 56/945 - 59/945

BETWEEN

DAVID JONES ROBERTS

PLAINTIFF

- AND -

WILLIAM ROBERT RICHMOND

WARDEN D J REYNOLDS SM

## REASONS FOR DECISION

I have previously heard and determined four plaints for forfeiture of prospecting licences. All of the plaints were vigorously defended. After the hearing I delivered written reasons and ordered the forfeiture of all four prospecting licences. The question of costs was adjourned for further submissions. The defendant argued that a warden has no power to award costs in respect of an application for forfeiture of a prospecting licence. The applicant/plaintiff argued that a warden does have such power and that costs are in the discretion of the warden. I have now heard further submissions on the matter and for the following reasons I have reached the view that a warden does have power to award costs in respect of a plaint for forfeiture of a prospecting licence.

The starting point in the analysis of the relevant provisions of The Mining Act 1978 as amended ("the Act") is section 96(1). It provides as follows:

> "96. (1) The Warden may upon the application of-
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> (a) the Minister or any mining registrar or other officer of the Department authorised by the Minister in writing in that behalf: or
>
> (b) any person,
>
> made in the prescribed form and in the prescribed manner, make an order for the forfeiture of any prospecting licence or a miscellaneous licence granted or acquired under this Act or by virtue of the repealed Act."
>
> (my emphasis)

Pursuant to section 96(1) an application for forfeiture of a prospecting licence is made to "the Warden". Section 96(3) provides that "a warden" may if he thinks fit in the circumstances of the case make another order or orders as an alternative to making an order for forfeiture.

Counsel for the defendant has submitted that the provisions of section 96 of the Act set out the totality of the powers that can be exercised in respect of a plaint for forfeiture of a prospecting licence. He has further submitted that there is a distinction between "the warden" and "the warden's court" such that any discretion to award costs is limited to "the warden's court" and given that a plaint for forfeiture of a prospecting licence is heard and determined by "the Warden" and not "the warden's court", "the Warden" has no power to award costs.

The submissions take me to the provisions of section 132(1) of the Act which sets out the jurisdiction of a warden's court. It provides as follows:

"132. (1) A warden's court has jurisdiction to hear and determine all such actions, suits and other proceedings cognizable 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."

(my emphasis)

Counsel for the defendant submitted that a plaint for forfeiture of a prospecting licence is not cognizable by any court of civil jurisdiction and that therefore section 132(1) does not bring a plaint for forfeiture of a prospecting licence within the jurisdiction of a warden's court. With respect, this submission could only succeed if the words "all such actions, suits and other proceedings cognisable by any court of civil jurisdiction as arise in respect of" applied to the whole of the provisions of section 132(1). In my opinion they do not. While the words that I have emphasised form part of the provisions of section 132(1) they can be severed from the other provisions of section

132(1). In so doing the words emphasised operate independently of but cumulative to the other provisions of the section. Accordingly a warden's court jurisdiction can be construed to include "jurisdiction to hear and determine generally all rights claimed relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon the warden".

I have previously set out the provisions of section 96(1) of the Act which provide that an application for forfeiture of a prospecting licence is made to "the Warden". The words in section 132(1) as emphasised therefore bring an application to "the Warden" for forfeiture of a prospecting licence within the jurisdiction of "a warden's court". An application for forfeiture of a prospecting licence is made to "the Warden" and it is justiciable in "a warden's court". Having reached this view it follows that the provisions of section 138 on the mode of trial and the provisions of section 139 on contempt of court apply to the hearing of a plaint for forfeiture of a prospecting licence. This seems to be a sensible outcome and one intended by the legislature.

The next step in the analysis is to consider whether there is any provision in the Act which gives "the Warden" and/or "a warden's court" any power to award costs. Section 96(5) and sections 134(1) and (2) provide as follows:

> 96(5) If the applicant fails to proceed with his forfeiture application the warden may award the holder of the mining tenement such sum for costs and expenses as the warden thinks fit.

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

(a) the enforcement of contracts;

(b) the awarding of damages or compensation;

(c) the appointment of receivers;

(d) the determination of objections to applications;

(e) the determination of the area, extent, dimensions or boundaries of any mining tenement or as to the respective rights of the owner of the primary tenement and the special prospecting licence or mining lease for gold granted in relation to that tenement pursuant to section 56A, 70 or 85B;

(f) the declaration or enforcement of any trust relating to mining tenements or mining operations and the product thereof;

(g) the declaration of any partnership proved to exist between the parties entitled thereto either by sale, partition or otherwise, as may be agreed between the parties or as the warden's court, in case of dispute, may order;

(h) the dissolution of mining partnerships and the division of the property thereof between the parties entitled thereto either by sale, partition or otherwise, as may be agreed between the parties or as the warden's court, in case of dispute, may order;

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

(j) the cessation or suspension by any party of any mining operations or works in connection therewith causing or likely to cause, injury to any other party,

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) The costs of all proceedings in the warden's court under this Act shall be in the discretion of the warden and the amount thereof may be determined by the warden or taxed, as the warden may direct but an order for the payment of the costs of another person shall not be made against an applicant or a person making an objection unless the warden is satisfied that the application or objection so made was frivolous or vexatious."

(my emphasis)

While the words that I have emphasised form part of section 134(1) they can be severed from the other provisions of section 134(1). In so doing the words emphasised operate independently of but cumulative to the other provisions of the section. Accordingly "a warden's court has power to make orders generally for the determination and settlement of all actions, claims, questions and disputes properly brought before the warden's court and for awarding or apportioning costs in any such proceedings."

I have previously concluded by reference to section 132(1) that the hearing and determination of a plaint for forfeiture is justiciable in "a warden's court". It therefore follows that such a determination is a determination properly brought before the warden's court within the meaning of section 134(1) and that therefore pursuant to section 134(1) there is power to award or apportion costs in such proceedings.

Section 134(1) provides the power to award costs and section 134(2) sets out how that power is to exercised. In my opinion section 134(2) should be read disjunctively as providing that the costs of proceedings in the warden's court are in the discretion of the Warden except where an application or an objection is concerned in which case costs may only be awarded where the application or objection is frivolous or vexatious.

If a person applies to the Warden for forfeiture such a person may be described as an applicant. Indeed in parts of section 96 such a person is described as "the applicant". However, it can be noted that there is no express reference in the Act to "an application" and "an objection" in the context of forfeiture as there is say for example in the context of applications for mining tenements. Further, section 96(1) requires an application for forfeiture of a prospecting licence to be made in the prescribed form and in the prescribed manner (and so too does section 98(2) in respect of an exploration licence and a mining lease). The prescribed manner is set out in "Part VII - Legal Proceedings" in The Mining Regulations 1981 as amended ("the Regulations").

Regulations 122(1), 122(2) and 126 provide as follows:

> 122. (1) Every plaint shall be signed by the plaintiff or his solicitor and lodged with the prescribed fees at the office of the mining registrar.
>
> (2) A plaint shall not be withdrawn or proceedings stayed after a summons has been served without the written consent of the defendant or by leave of the warden.
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> 126. When the defendant intends to dispute the claim he shall lodge at the office of the mining registrar not less than 7 days before the date fixed for the hearing or at any subsequent time prior to the

hearing as the warden may allow a notice of defence in the form No. 36 in the First Schedule with the prescribed fee, and the mining registrar shall forward a copy of the notice to the plaintiff."

It can be noted that an applicant for forfeiture is referred to as "the plaintiff" and the respondent tenement holder is referred to as "the defendant".

I am therefore of the view that the reference to "an applicant or a person making an objection" in section 134(2) does not mean and include an applicant/plaintiff or respondent/defendant in proceedings for forfeiture of a mining tenement including a prospecting licence.

I do not think that the opinion that section 134(2) provides the warden with a discretion to award costs on hearing and determining a plaint for forfeiture of a prospecting licence is in any way inconsistent with the provisions of subsection (5) in section 96 of the Act. Section 96(5) only applies if an applicant/plaintiff fails to proceed. Such failure may arise from a lack of action or by a withdrawal as mentioned in Regulation 122(2). Section 96(5) has no application in the case of the Warden hearing and determining a plaint for forfeiture of a prospecting licence on its merits. Viewed in this way one of section 96(5) and 134(2) actually supplements the other. The position is the same for plaints for forfeiture of an exploration licence or a mining lease (see section 98(8)).

Counsel for the defendant also submitted that because the Warden may impose a monetary penalty as an alternative to making an order for forfeiture and award the whole or any part of the amount of any such penalty to the applicant/plaintiff any additional order for costs against a respondent/defendant would amount to a double penalty. I reject this submission and feel that I need only say that costs is a matter separate and distinct from any such monetary penalty. A monetary penalty should not be

and should not be seen to be a means of compensating an applicant/plaintiff for costs.

For all of these reasons I am of the opinion that the Warden does have power in his or her discretion to award costs on hearing and determining a plaint for forfeiture of a prospecting licence.

Counsel for the defendant has put to me that if I am of the opinion that the Warden can award costs then the defendant should not be required to pay any costs of and in connection with locating the plaintiff, his legal advisers and any witnesses in Leonora for the first day of the hearing. The defendant through his counsel says that he would have made an application to transfer the hearing to Perth but for the plaintiff telling him that he (the plaintiff) was going to live in Leonora and would be living there when the hearing commenced.

I am not prepared to discount an order for costs in favour of the applicant/plaintiff as asked by the defendant. The defendant's application was not supported by any evidence. Further, even if such statement was made by the applicant it would have been open for the defendant to thereafter satisfy himself that the applicant was not actually living in Leonora during the time leading up to the commencement of the hearing. Further again any application to transfer may not have been successful.

I am of the firm view that costs should follow the event in all of these plaints. It is open for the Warden to order that costs be taxed as the Warden may direct (see section 134(2)). Also the practice and procedure of a warden's court in plaint proceedings, which I regard as civil in nature, is the same as the practice and procedure of a Local Court established under the Local Courts Act 1904. In a Local Court it is open for a magistrate to direct that costs be taxed by the clerk of the court. The equivalent officer in the context

of the jurisdiction of a warden's court under the Act is a mining registrar. I am prepared to hear from the parties on where they want the costs taxed.

The applicant/plaintiff has sought a refresher fee pursuant to Regulation 128(3)(ii) in respect of each time counsel was required to get the matter up afresh. The hearing was not conducted on consecutive days. There were four separate occasions on which the plaints were listed for hearing and on one of them both parties agreed to an adjournment. The application is for three refresher fees. The plaints should never have been listed for only one day in the first place. The estimates of time for the hearing including those by representatives of the applicant were horribly wrong and so much so that any refresher fee would be totally inappropriate.

**ORDERS:** The defendant pay the applicant's/plaintiff's costs to be taxed by a mining registrar at a place hereafter ordered and that such costs:

(i) include the costs of and in connection with the applicant/plaintiff locating himself, his legal advisers and any witness(es) in Leonora on the first day of the hearing,

and (ii) include all costs as reserved,

and (iii) be taxed pursuant to Division 2 in the costs scale of the Local Court and on the basis that the plaints were complex.

D J Reynolds SM
Warden

Further to the Orders above, it is ordered that the costs be taxed by the Mining Registrar in Perth. 26/5/97