new requirements from time to time can be achieved more flexibly and simply. It has put forward the legislation as a framework upon which a detailed system of controls can be constructed in the future.

The result is that the development of detailed controls will take some further time, so that the effect of the legislation will not be felt immediately. It seems clear, however, that one of the first areas of activity which will attract the attention of regulations will be the mining and milling of radioactive ores, and the controls outlined in this review of the Act will not therefore be long in coming into operation.

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CASENOTE

DROGEMULLER V. BREALEY & BREALEY
SUPREME COURT OF SOUTH AUSTRALIA
LAND & VALUATION DIVISION

JUDGMENT DELIVERED 5 APRIL, 1982.

*by Philip McNamara**

Appeal to the Land and Valuation Court against an Order of the Warden's Court pursuant to Section 65(3) of the *Mining Act, 1971-1981* (S.A.).

The plaintiff Drogemuller had instituted a number of proceedings in the Warden's Court against the defendants and against the Minister of Mines in relation to an extractive minerals lease granted by the Minister to the first and second defendants over an area of land (owned by the first and second defendants) close to the plaintiff's residence. In one of the actions, the plaintiff had sought a declaration of invalidity in relation to the mining lease but the present appeal was confined to the merits of the plaintiff's application under Section 70 of the Act for a recommendation by the Warden to the Minister that the extractive minerals lease be forfeited.

At first instance, the Senior Mining Warden had dismissed the plaintiff's application for a recommendation of forfeiture notwithstanding that he found that several breaches of the Mining Act and of related legislation had occurred. The ground on which the Senior Warden rejected the application was that the real purpose of the application for forfeiture was to prevent the site from being worked at all as a mining site. The plaintiff had given evidence that he did not intend himself to apply for a lease in relation to the site if the Minister acted upon any recommendation as to forfeiture which the Warden might make. [By virtue of s.75 of the Act, the defendants themselves were the only persons to whom an extractive minerals lease in relation to the defendants' parcel may lawfully have been granted.] The Senior Warden gave effect to the view that the purpose of the forfeiture provisions was to prevent the holders of mining tenements from leaving their tenement unworked and the mineral deposit unrecovered. Accordingly, the Senior Warden rejected the application for forfeiture. It was from this decision of the Senior Warden that the plaintiff appealed to the Land and Valuation Court. The principal ground of the appeal was that the Senior Warden erred in law in ruling that the proven breaches by the defendants of the Act and regulations were insufficient to justify the recommendation claimed by the plaintiff for forfeiture of the lease.

The plaintiff's appeal was allowed by Wells J who held that, while the promotion and encouragement of mining activities was a cardinal policy of the *Mining Act*, it was not the sole policy evident on the face of the legislation. His Honour held that the Senior Warden was entitled to attach 'considerable weight' to the fact that the applicant for forfeiture was either unable or not intending to apply himself for a lease of the subject land, yet His Honour held that the Senior Warden was wrong in holding that such inability or lack of intention altogether precluded an applicant in Mr Drogemuller's position from obtaining a recommendation of forfeiture. Previous decisions of His Honour, such as *Taylor and Schultz v. North Flinders Mines Ltd.* (1977) 76 L.S.J.S. 225 had emphasized the supremacy of the policy of encouraging mining over other policies manifest in the Act or in other legislation. The importance of the decision in the present appeal is that this is the first occasion on which the policy of encouraging mining has been held to be secondary to some other consideration.

For that reason alone, the decision of Wells J is extremely important in South Australia. One of the consequences of His Honour's decision in relation to Section 70 is that persons who object to the continuation of mining operations allegedly in breach of the Act will be able to obtain either an order of forfeiture under s.69 or a recommendation of forfeiture under s.70 even though the applicant has no intention himself of conducting mining operations pursuant to the privileges created by s.69(3) and s.70(3). For example, a person objecting to mining operations on environmental grounds will now have standing, on obtaining a miner's right, to seek a recommendation from the Warden that a particular mineral lease be forfeited. Of course, the ultimate decision as to whether a mining lease should be forfeited rests with the Minister.

However, the judgment on appeal is far more important for a different reason. Having disposed of the appeal in relation to the question of forfeiture, His Honour went on to consider the jurisdiction of the Warden's Court to entertain applications for a declaration that a mining tenement is invalid. The jurisdiction of the Warden in this connection is created by Section 67 of the Act which provides as follows:

> (1) The Warden's Court shall have jurisdiction to determine all suits concerning any right claimed in, under or in relation to any mining tenement or purported mining tenement . . .
>
> (2) The Warden's Court shall have jurisdiction in any matter in which it is invested with jurisdiction by regulation.

Wells J posed for himself the question, could a Warden pursuant to Section 67 entertain an application for a declaration that a mining lease was invalid on the ground that the Minister had failed to comply with a mandatory provision of Part VI of the Act (which relates to the grant of mining leases). His Honour answered this question in the negative. His Honour held that the Warden has no jurisdiction to enquire into the inherent validity of any right, permit or tenement granted or registered under the Act. His Honour based his decision on the construction of Section 67, bearing in mind "a strong presumption against attributing to Parliament an intention to exclude or erode the remedies available through the prerogative process". His Honour held that where an applicant seeks to challenge the inherent validity of a miner's right, permit or mining tenement, the applicant ought to proceed to the Supreme Court and seek a prerogative writ. His Honour further held that Regulation 106 of the mining regulations did not enlarge the jurisdiction of the Warden in this respect. Regulation 106 provides:

> 106. Where an application is made to the Warden's Court for a declaration of invalidity of a mining tenement on the ground that the tenement has not been lawfully acquired in accordance with these regulations, the declaration shall not be made unless the Court is satisfied that any breach of these regulations is a breach in a material respect and the matter is of sufficient gravity to justify the making of a declaration, but the Court may order the rectification of any non-compliance with these regulations.

His Honour held that this regulation did not confer jurisdiction on the Warden to grant a declaration of invalidity in relation to a mining tenement vitiated by reason of a failure to comply with a provision of the Act itself.

One of the practical consequences of His Honour's decision in relation to Section 67 is that all applicants for declarations of invalidity of mining tenements, be they merely mineral claims or precious stones claims, will be required to proceed in the Supreme Court for an appropriate writ or for a statutory order in the nature of a particular prerogative writ. Whether or not one accepts that the prerogative writs lie in order to control administrative decisions resulting in the creation of proprietary rights, there are real difficulties in the way of accepting His Honour's conclusion that the prerogative writs are available to control the creation of claims. Both mineral and precious stones claims are acquired in South Australia by pegging out by the miner, not by an act of grant or registration by a public officer.

Finally, His Honour's decision is of importance insofar as it interprets Section 9(1) of the *Mining Act* which provides:

> 9. (1) Subject to this section . . . [certain lands shall be exempt from mining operations in pursuance of this Act and, unless the land ceases to be so exempt, no . . . lease or licence shall authorise prospecting or mining upon that land.

Prior to the resolution of the instant appeal, Section 9(1) was interpreted to mean that no mining tenement granted in relation to exempt lands could be valid to the extent that it authorized prospecting or mining. However, Wells J held that this view was wrong and that the tenements mentioned in Section 9(1) would not be void. His Honour held that the intention of Section 9(1) was to forbid mining operations and not to invalidate tenements.

The defendants sought leave from Wells J to appeal against his decision to the Full Court. Leave was refused. An appeal against the decision of Wells J refusing leave to appeal has been lodged and it is expected that the appeal will come before the Full Court in July.

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