30/1962

IN THE PRIVY COUNCIL No. 19 of 1962

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

BETWEEN

HUGH THOMAS MILLER of Glenorchy Farmer ... ... Appellant

68261

— and —

THE MINISTER OF MINES AND THE ATTORNEY GENERAL OF NEW ZEALAND Respondents

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CASE FOR RESPONDENTS

RECORD

1. This is an appeal from a Judgment of the Court of Appeal of New Zealand (Gresson P., Cleary and McGregor JJ.) given on 6th June 1961 dismissing with costs an appeal by the present Appellant against a Judgment of the Supreme Court of New Zealand (Henry J.) given on 10th October 1958 declaring that Mineral Licence No. 1697 held by the Crown is binding upon the freehold land owned by the Appellant comprising 88 acres and 35 poles and being Section 39 Block II Dart Survey District, and that the Respondents are entitled to the privileges conferred by the said Licence. The origin of the proceedings was an action by the Appellant against the Respondents in the Warden's Court claiming a declaration that the Crown is not entitled by virtue of the said Licence to mine for scheelite upon the land. The action was removed by consent into the Supreme Court.

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p. 40
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p. 2 L.4-8
p. 3

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2. Mineral Licence No. 1697 was granted on 27th April 1916 by the Warden at Queenstown to the Glenorchy Scheelite Mining Company Limited and authorised that company to occupy the land for the purpose of mining for scheelite, tungsten, and other minerals of the tungsten class for a period of

p.87,L.10-25
p.87,L.15-16

forty-two years from the date of the grant. In 1944 the company assigned the licence to the Crown. Although the term of forty-two years expired in 1958 the Crown relies on section 97(4) of the Mining Act 1926 providing that a mining privilege held by the Crown "shall not be determinable by effluxion of time, but shall continue in force . . . until surrendered . . ." In 1949 the Appellant became the owner of the land for which a certificate of title under the Land Transfer Act had been issued in 1890

pp.95 - 6

p. 75

p.28,L.36-40

3. In the Supreme Court the Appellant contended first that the Warden's jurisdiction under the statutory provision which now appears as section 58 of the Mining Act 1926 applied only to gold. Section 58 is as follows:

> "58. Notwithstanding anything hereinbefore contained, the following special provisions shall apply in the case of all lands whatsoever in New Zealand other than Crown lands open for mining:
>
> (a) The owner of any such land, or any person with the written consent of the owner and occupier (if any), may, in the prescribed manner, apply to the Warden for any description of mining privilege authorised by this Act in the case of Crown lands in a mining district, and the Warden, in his discretion, may grant a licence for the same.
>
> (b) Every licence so granted shall be deemed to be granted and shall be held subject to this Act, and subject also to any agreement made between the grantee and the owner or occupier, in so far as such agreement is not inconsistent with this Act.
>
> (c) So long as such licence continues in force the land comprised therein shall not be resumed for mining purposes, nor shall any prospecting licence be granted in respect thereof."

Section 4 provides that, if not inconsistent with the context, mining privilege means

"any licence, right, title, or privilege relating to mining lawfully granted or acquired under this Act or any former Mining Act, and includes the specific parcel of land in respect whereof such licence, right, title, or privilege is so granted or acquired; it also includes a timber cutting right, a water right not relating to mining, and also a business, residence, or special site, but not an agricultural lease nor an occupation licence:"

4. Henry J. said that the Court was not constrained to restrict "mining privilege" in section 58 to "gold mining privilege", and there was no ground for limiting the jurisdiction under section 58 to privileges for the mining of gold. The Warden therefore had power to grant Licence 1697, and there was no question that it was properly granted. The assignment to the Crown having admittedly been duly registered, the Crown had the protection of section 97 against determination by effluxion of time. p.29 L.41-46 p.30,L.5 p.30,L.12 p.30,L.18

5. The next question was whether the certification of title under the Land Transfer Act gave the Appellant an estate free and clear of the Crown's rights under Licence 1697. A construction derogating from a grant by certificate of title would be adopted only on language that was clear and explicit. After referring to some examples Henry J. accordingly proceeded to consider the scheme of the Mining Act 1926. In general all Crown lands within any mining district are open for mining; and under section 52 lands that have been alienated from the Crown (including the Appellant's land) are liable to be resumed for mining purposes without consent unless resumption is prevented by section 58 under which land subject to a mining licence can not be resumed for mining purposes. The grant in the present case was of a mineral licence provided for in section 106 and was clearly not in a form registrable under the Land Transfer Act. Henry J. then referred to certain powers of the Warden to grant rights over private lands and to section 139 creating rights which would affect a certificate of title, whether or not noted thereon, in favour of persons lawfully engaged in mining. The Warden's jurisdiction to grant privileges therefore p.30,L.25 p.31,L.4-9 p.32,L.15 p.33,L.9 p.33,L.39 p.34,L.8 p.34,L.25 p.34,L.42 p.35,L.5

RECORD

p.36,L.17	extended to lands owned in fee simple and no distinction was made between land under the Land Transfer Act and other land. A privilege might be granted against the wish of the owner of
p.36,L.25	private land. In form it was incapable of registration. This compelled a conclusion that
p.36,L.27	the holder of a certificate of title took subject to valid grants under the Mining Acts and that registration was not necessary. 10

p.36,L.35	6. Henry J. then referred to section 44(1) and (2) providing protection for previously acquired rights. This was first enacted as section 50 in the Mining Act 1877 at which time there was in force section 46 of the Land Transfer
p.37,L.20	Act 1870, a provision substantially the same in form as at present declaring a registered proprietor's title to be paramount. Nevertheless, in each successive Mining Act since 1870 a
p.37,L.23	provision similar to the present section 44 had 20 been re-enacted and, accordingly, the Court
p.37,L.35	should not confine section 44 to a Crown grant
p.37,L.38	strictly so called or a conveyance under the Deeds Registration system. By virtue of section 12 of the Land Transfer Act 1885 all land thereafter alienated by the Crown in fee was to be the subject of a certificate of title in lieu of a grant, but this change was not intended to defeat the protective provisions of the Mining Act. The
p.38,L.6	Crown's grant of a certificate of title in the 30 present case and the subsequent transactions carrying title were fairly within the terms of section 44 and its predecessors.

p.38,L.18	7. Henry J. said that <u>Bishop v. Rowe</u> (1903) 23 N.Z.L.R.66, in which it was held that a charging order under the Destitute Persons Act 1894 was defeated by a bona fide purchaser for value who without notice obtained a transfer under the Land
p.38,L.36	Transfer Act, and <u>McConochie v. Webb</u> (1904) 24 N.Z.L.R. 229, relating to an unregistered lien, 40
p.38,L.40	both turn on different legilative provisions. He also distinguished <u>Mackenzie v. Waimumu Queen Gold-Dredging Co.</u> (1901) 21 N.Z.L.R. 231 on the ground that it dealt with a grant inter partes.

p.39,L.7	8. The Crown could rely on the Licence for it bound the plaintiff as the present registered proprietor of the fee simple. There would

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accordingly be a declaration that the Licence was binding on the Appellant's land and that Respondents were entitled to the privileges thereby conferred. — p.39,L.13

9. From the Order of Henry J. the Appellant appealed on the ground that the Order was erroneous in law and fact. The appeal was heard on 13th, 14th, 15th, 16th and 17th June 1960. Judgment was reserved and delivered on 6th June 1961 dismissing the appeal with costs. — p.41; p.73,L.6-7; p.73,L.10

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10. Gresson P. said that the facts were not in dispute and the two questions were, first, whether the mineral licence was validly granted and, second, whether if valid it can prevail against the indefeasibility of the Land Transfer title. On the first question, he was in agreement with the judgments that would follow that the grant was valid. — p.42,L.5; p.43,L.7

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11. As to the second question the Appellant's contention was that, as the licence was not notified on the title, the land was held by virtue of section 62 of the Land Transfer Act 1952 "absolutely free from all . . . . encumbrances, liens, estates, or interests whatsoever". After referring to cases in which a Land Transfer title may be subject to a statutory charge, estate or interest Gresson J. said that the licence in this case had some of the characteristics of an easement and some of a profit a prendre but the two factors which distinguish it from either are that it is defined by section 178 as a chattel interest and that it does not arise ex contractu but by statutory grant by the Warden. In its inception it was a private or personal right. If the provisions of the Land Transfer Act as to indefeasibility could not be reconciled with those of the Mining Act as to mining privileges the latter should prevail by virtue of the maxim generalia specialibus non derogant for the statutes relating to mining privileges must be regarded as specialia. The system of registering mining privileges has long been in force and the general provisions of the Land Transfer Act cannot be construed as derogating from those special provisions. The mineral licence was therefore valid and effective against the title of the Appellant. — p.43,L.13; p.44,L.18; p.44,L.21; p.44,L.30; p.44,L.45; p.45,L.3; p.45,L.42; p.46,L.8; p.46,L.19

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p.47,L.31	12. Cleary J. said that, on the face of it, section 58 certainly appeared wide enough to warrant a grant of Licence 1697 but the	
p.48,L.10	Appellant argued that it did not authorise the grant of licences to mine for minerals other than	
p.48,L.17	gold because, when first enacted by section 27 of the Mining Act Amendment Act 1896, it was confined to licences for mining for gold, and the later change in language to the present form of	10
p.48,L.19	the section involved no change in substance or meaning. Alternatively, if this change did extend the section, it extended only to authorise	
p.48,L.21	licences to mine for minerals which were expressly reserved to the Crown on the alienation of Crown land and which, like gold and silver,	
p.48,L.37	remained Crown property. In Cleary J's view neither Skeet and Dillon v. Nicholls (1911) 30 N.Z.L.R. 611 nor In re Cameron's Application	
p.48,L.39	[1958] N.Z.L.R. 225 assist on this point. Those cases were not concerned with the grant of mineral licences but with the grant of water-race	20
p.49,L.39	licences over land outside a mining district. The effect of them is that neither the Commissioner of Crown Lands under section 171 nor the Warden under section 58 may entertain an application for certain mining privileges over land outside a mining district for use in non-mining	
p.50,L.14	operations outside the district. The change from the Warden's power in section 27 of the Mining Act Amendment Act 1896 to deal with "any description of claim authorised by the principal Act" to the power in section 56 of the Mining Act 1898 to deal with "any description of mining privilege authorised by this Act" was made designedly, particularly as a definition was	30
p.50,L.19	given of "claim" and "mining privilege". After 1898 the provision was no longer restricted to mining for gold only. The contention that the present section enables only the grant of licences in respect of minerals - other than	40
p.50,L.22	gold - which have been reserved to the Crown on the alienation of land, and not in respect of minerals which have become the property of the	
p.50,L.43 p.50,L.45	owner of land on alienation by the Crown, was founded on one possible view of the policy of the legislation, namely, that it was restricted to the regulation of mining for metals and minerals	
p.50,L.47	belonging to the Crown. It was equally possible, however, that the legislation was based	50

on the view that the mining of all minerals
whatever on private land was in the public interest.
A subsidiary argument was that an owner's consent — p.51,L.27
pursuant to section 58 does not bind a subsequent
owner. Cleary J. thought that the owner's consent — p.51,L.37
is required only to the initial grant and that the
licence, once granted, is valid for its term
notwithstanding any subsequent purported withdrawal
of consent or change of ownership.

10 13.Cleary J. then referred to section 178 under — p.52,L.6
which a mining privilege is deemed a chattel — p.53,L.17
interest. Although he had considerable
reservations as to the judgment of Williams J. in
Mason v. McConnochie (1901) 19 N.Z.L.R. 638 that
this section was declaratory of what mining — p.53,L.5
privileges were, namely chattel interests in land,
and did not convert them into purely personal
chattels, he thought it safer to consider the
position of mining privileges on the basis that — p.53,L.37
20 the section had that meaning. Despite the — p.54,L.10
emphatic terms of section 62 of the Land Transfer — p.54,L.15
Act it was well settled that statutory rights,
powers and charges may prevail over the title of
the registered proprietor. Where this occurred — p.54,L.33
the fundamental reason was that priority was
required by the terms of a particular statute. In — p.54,L.42
Cleary J's view mining privileges are not subject to
the Land Transfer Act for three principal reasons.
First, they are not registrable under the Land — p.54,L.46
30 Transfer Act. The fact that mining privileges — p.55,L.6
are granted pursuant to statutory authority but
are not registrable cogently supports the view that
they were not intended to be defeated by the — p.55,L.16
indefeasibility provisions of that Act, but is not
in itself conclusive. Whether an interest — p.55,L.25
arising under a statute prevails against a
purchaser of land must depend upon the nature of
the interest and the purpose of the statute, it — p.55,L.39
being a material consideration whether the rights
40 are legal or equitable for, apart altogether from
the Land Transfer Act, equitable rights will not — p.55,L.42
prevail against a later bona fide purchaser. — p.56,L.25
Secondly, a grant of a mining privilege by a
Warden is presently operative, conferring an
immediate legal interest according to its tenor, — p.56,L.34
and it is inconsistent with the nature of the legal
interest created by such a grant that it should
require subsequent registration under the Land

	Transfer Act. The third reason is the system of registration of licences and transfers of	
p.57,L.11	licences under the Mining Act. The provisions constitute a code applicable to mining privileges to the exclusion of the Land Transfer Act. This	
p.57,L.14	is supported by the provisions in the Mining Act as to the registration of liens for wages and contract moneys, and also by the Land Charges Registration Act 1928 and its amendment	
p.58,L.9	in 1959. In Cleary J's view all mining privileges arising from grants by the Warden fell outside the operation of the Land Transfer Act, whether they were in the nature of easements or not.	10
p.60,L.4-7	14. McGregor J. said the first submission for the Appellant was that section 58 was limited to a power to grant mining privileges for mining gold or silver. After referring to sections 58, 60 and 106 and the definition of "mining privilege", "mining", and "mining	20
p.61,L.20	purposes", McGregor J. said the plain reading of section 58 was that the Legislature intended that in respect of lands alienated by the Crown the Warden be authorised to grant a mineral licence authorising the licensee to occupy such land for the purpose of mining any specified mineral other	
p.61,L.37	than gold. The section was applicable to all private lands with the written consent of the owner or occupier. The suggestion that the	
p.61,L.41	words "mining privilege" in it should be restricted to precious metals was not justified by In re Cameron's Application [1958] N.Z.L.R.	30
p.63,L.23	225. Nor could he accept the submission that the consent of the owner to the grant of a licence remains operative only so long as that owner remains in ownership. The mineral licence was	
p.63,L.26	assigned to the Crown on 28th July 1944 and, in consequence of section 97(1), continued in force until surrendered by the Minister. This may not	
p.63,L.38	have been contemplated by the owner whose consent was given to the original application, but the licence was subject to the Act and enured	40
p.63,L.44	independently of whether the original collateral agreement between owner and licensee had lapsed or been determined or avoided.	
	15. On the question whether, assuming that the mineral licence was validly granted and	
p.64,L.6	remained valid, it would override the provisions	

of the Land Transfer Act so as to bind a bona fide
purchaser for value without notice, the argument p.65,L.29
was that the mineral licence was a profit a prendre.
The mineral licence was akin to both a profit and p.66,L.18
an easement but it was something more than either.
Whatever the real nature of a mining privilege the p.66,L.44
Legislature had declared it to be a chattel
interest and it might be that an instrument
creating a chattel interest was not capable of
10 registration under the Land Transfer Act, but it p.67,L.3
was not necessary to form a view on that point.
McGregor J. referred to Barber v. Mayor of Petone p.67,L.10
(1908) 28 N.Z.L.R. 609, which seemed to be p.68,L.7
authority that if a right, even though in the
nature of an easement, arises by statutory
authority, a subsequent purchaser without notice is
bound by the earlier consent, and also to Gray v.
Urquhart (1911) 30 N.Z.L.R.303, and Hawkes Bay
River Board v. Thompson /1916/ N.Z.L.R. 1198. It
20 was sought to distinguish these cases on the
ground, amongst others, that each grant was within p.69,L.1
the exception provision of section 62(b) of the
Land Transfer Act, and that in no case have rights p.69,L.7
in the nature of profits a prendre been held to
override the Land Transfer Act, and that only p.69,L.11
statutes affecting public rights overridge the p.69,L.14
Land Transfer Act. McGregor J. did not think this
distinction sound. The present grant was made by p.69,L.16
the Warden under statutory authority; and it was
30 in the public interest that mining be developed. p.69,L.26
McConochie v. Webb (1904) 24 N.Z.L.R.229 was of no p.70,L.32
assistance because the Contractors' and Workmen's
Liens Act 1892 specifically provided that until
registration the land should not be affected by
lien. Bishop v. Rowe (1903) 23 N.Z.L.R. 68 was p.70,L.37
distinguishable as a case of a purely equitable
charge inter partes, while here there is a legal
interest created by statute. By virtue both of
the system of registration under the Mining Act p.71,L.36
40 and the fact that the present grant was made by p.71,L.38
statutory authority it followed that the mining
privilege was not defeated by the fact that it was
not registered under the Land Transfer Act. The
Appellant's claim should be rejected and the
appeal dismissed.

16. The Respondents humbly submit that the
decisions of the Court of Appeal and of the
Supreme Court of New Zealand were right and
should be affirmed, and that this Appeal should be

dismissed with costs for the following among other

REASONS

1. Mineral Licence No.1697 was duly and properly granted by the Warden pursuant to statutory authority and jurisdiction.

2. Mineral Licence No.1697 was validly assigned to the Crown and thereupon ceased to be determinable by effluxion of time and continues in force as a valid grant in favour of the Crown. 10

3. Mining privileges granted under the Mining Act are not subject to or registrable under the Land Transfer Act.

4. Mining Licence No.1697 was not capable of registration under the Land Transfer Act and is therefore not affected by any of the provisions thereof.

5. Mineral Licence No. 1697 conferred a legal interest which was immediately effective according to its tenor and which remained effective irrespective of any question of registration under the Land Transfer Act. 20

6. The Appellant as the holder of a Certificate of Title under the Land Transfer Act in respect of the land in question holds the same subject to the rights validly subsisting under Mineral Licence No. 1697.

7. And for the reasons given in the judgment in the Supreme Court and the Court of Appeal. 30

G.S. ORR

No. 19 of 1962

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CASE FOR THE RESPONDENTS

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