Privy Council Appeal No. 19 *of* 1962

Hugh Thomas Miller – – – – – – – *Appellant*

v.

The Minister of Mines and The Attorney General of New Zealand – – – – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH NOVEMBER, 1962

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD EVERSHED.
LORD JENKINS.
LORD GUEST.
LORD DEVLIN.
[*Delivered by* LORD GUEST]

This case was tried in the Supreme Court of New Zealand by Henry, J. upon an agreed statement of facts and folio of documents. Verbal evidence was called, but this has no bearing upon the case as now before the Board. The agreed statement of facts is fully set out in the judgment of Henry, J. and it is only necessary to record the salient facts.

The land with which the case is concerned was in 1890 the subject of a Crown Grant to Kate Mason under the provisions of the Land Transfer Act. There was no reservation of minerals to the Crown under the Grant. The lands comprised in the Certificate of Title were in 1893 transferred to David Aitken. By agreement, dated 29th January, 1916 David Aitken assigned to the Glenorchy Scheelite Mining Company Limited the whole of the minerals and mineral rights in and upon the land. This agreement expired on 29th January, 1958. On 27th April, 1916, the Company obtained from the Warden of the Otago Mining District of Queenstown the grant of a mineral licence No. 1697 under section 102 of the Mining Act, 1908, for scheelite, tungsten and other minerals of the tungsten class to last for a period of forty-two years. David Aitken consented to the application for this licence. On 28th July, 1944, the Company assigned to His Majesty the King all its rights under the 1916 agreement and by a separate deed its rights and obligations under the Mineral Licence No. 1697. This latter deed was registered in the Office of the Mining Registrar of the Warden's Court at Queenstown on 12th August, 1944. The plaintiff, Thomas Hugh Miller, is the successor in title to the lands over which the mineral licence was granted in virtue of a Certificate of Title registered on 14th October, 1949. There is no reference in the Certificate of Title to any rights of the Crown over the lands.

In 1957 the plaintiff claimed a declaration in the Supreme Court of New Zealand that Her Majesty the Queen was not entitled by virtue of the mineral licence No. 1697 to mine for scheelite on the plaintiff's property. Henry, J. refused to grant the declaration and in fact made a counter declaration that the licence No. 1697 was binding on the plaintiff's land and that the defendants were entitled to their rights thereunder. The Court of Appeal of New Zealand dismissed an appeal by the plaintiff. The plaintiff is appellant to the Board against this decision.

The first question is whether the Warden had jurisdiction to grant a licence for minerals other than gold. The appellant contended that the Warden only had jurisdiction to grant a licence in respect of gold. The proceedings in relation to licence No. 1697 took place under the provisions of the Mining Act, 1908. But as the relative provisions of the 1908 Act are in substantially similar terms to the provisions of the Mining Act, 1926, it will be convenient throughout to refer to the provisions of the latter Act.

Section 58 of the 1926 Act is in the following terms:

> " 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 ".

By section 106 it is provided that the Warden may grant mineral licences authorising the licensee to occupy any Crown land within or outside a mining district for the purpose of mining for any specified metal or mineral other than gold.

" Mining privilege " is defined in section 4, if not inconsistent with the context, to mean " any licence, right, title or privilege relating to mining lawfully granted or acquired under this Act or any former Mining Act . . .". In the same section " mining " is similarly defined to mean " mining operations ", and " mining operations " are in turn defined as " mining for gold or any other metal or mineral ". The reference in para. (*a*) of section 58, already quoted, to " any description of mining privilege authorised by this Act in the case of Crown lands in a mining district " anticipates section 106 of the Act which provides that " . . . the Warden may grant mineral licences authorising the licensees to occupy any Crown land within . . . a mining district for the purpose of mining for any specified metal or mineral other than gold ". Notwithstanding these statutory references and the clear contemplation, upon the face of them, of the power of the Warden to grant licences to mine minerals other than gold, it was argued for the appellant that having regard to the previous history of the mining legislation in New Zealand any interpretation of section 58 which extended its operation beyond gold mining was inconsistent with such history and with the general provision and intention of the Act. There is indeed no doubt that under the Mining Act of 1891, " mining claims " were confined to land taken up or occupied for the purpose of mining gold (see section 4) with which that Act was primarily concerned. Section 27 of the 1896 Act (the predecessor of section 56 of the 1908 Act and section 58 of the 1926 Act) similarly gave to the Warden jurisdiction to grant in the case of lands other than Crown lands any description of " claim " authorised by the 1891 Act, that is a " claim " for mining for gold. But when the Mining Act, 1898 came to be passed the limitation of the scope of the legislation to " claims " (a word related exclusively to gold mining) was by the express terms of the statute enlarged so as to comprehend, in addition to the subject-matter of " claims " also " mining privileges " of far wider kinds. Section 56 of the 1898 Act was in all relevant respects in the same terms as its successors section 56 of the 1908 Act and section 58 of the 1926 Act and the relevant definitions of the 1898 and 1908 Acts corresponded with those already quoted from the Act of 1926.

Similarly section 90 of the 1898 Act opened with language later represented by the opening of section 102 of the 1908 Act and section 106 of the 1926 Act. However restricted therefore was or may have been the meaning and scope given to mining " claims " in the earlier legislation, their Lordships have, like the Judges in the Courts below, felt that sense and effect of the 1898 and 1908 Acts (and so of the 1926 Act) inescapably comprehends mining operations not limited to gold mining and that the Warden under these later Acts has been entitled to grant a mining privilege for metal or minerals other than gold; and therefore that, in spite of the forceful argument of the appellant's Counsel, the suggestion that the Warden's jurisdiction has been and still is limited to license to mine for gold cannot be sustained.

The second argument for the appellant was that assuming the licence No. 1697 was validly granted, the provisions of the Land Transfer Act, 1952 entitled the appellant as the holder of a Certificate of Title, which contained no notice of the interest created by the licence, to the land free of any mining interest. It was argued that under section 62 of the Land Transfer Act, 1952, the estate of the registered proprietor was paramount and that the appellant held the land subject to the interests notified on the register, but absolutely free from all other encumbrances or interests whatsoever. As neither the agreement of 1916 nor the licence No. 1697 nor the assignation to the Crown appeared on the register, these documents, it was argued, were ineffectual to preserve the right of the Crown to the mining interest. In their Lordships' opinion the question now before them depends on whether the mining privilege was a registrable interest under the Land Transfer Act. If it was, then, as it was not registered, the title of the registered proprietor would under section 62 be paramount. But if the mining privilege was not a registrable interest, then the question would arise whether the grant was independent of the provisions of the Land Transfer Act and would be a burden on the title of the registered proprietor.

Under section 42 of the Land Transfer Act informal instruments are not registrable. The appropriate document for the transfer of land, easements or any *profit à prendre* is provided by section 90 to be a form of a memorandum of transfer in form B of the Schedule. This form shows clearly that the document envisaged is *inter partes* and that a grant of a mining privilege by the Warden under the Mining Act would not be registrable under the Land Transfer Act. The appellant sought to argue that the caveat provisions contained in sections 136–148 of the Land Transfer Act provided a method whereby the licence could be registered. It is no doubt true that a person claiming to be entitled to any land or any interest in land by virtue of an unregistered instrument would be entitled to lodge a caveat under section 137. But the appellant's argument breaks down when the subsequent effect of a caveat is considered. The caveat lapses under section 145 fourteen days after notice to the caveator and the registered proprietor can under section 143 apply for removal of the caveat. It was suggested for the appellant that the Court would have power under one or other of these sections to order the registered proprietor to execute a document in a form which would be appropriate for registration. Their Lordships were not referred to any case in which the Court had exercised such jurisdiction and they do not consider that any such jurisdiction has been conferred by these sections. The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming right under an unregistered instrument to regularise the position by registering the instrument. The caveat procedure is inapt for the purpose of securing the registration of the mining licence. If anything was said by Salmond, J. in *Wellington City Corporation v. Public Trustee* (1921) 40 N.Z.L.R. 423 at pp. 434–435, or by Cooper J. in *Bishop v. Rowe* (1904) 23 N.Z.L.R. 66 at p. 73 contrary to this view their Lordships would disagree with the opinions there expressed. They consider that the correct view of the use of caveat procedure was expressed by Stout, C. J. in *Staples Co. v. Corby and District Land Registrar* (1901) 19 N.Z.L.R. 517 at p. 537.

The Mining Act, 1926, provides its own separate and independent code for the registration of mining licences. They are granted by the Warden under section 58 and registered under section 180. A transfer of a mining

privilege must be registered under section 179 and the effect of registration is provided for under section 185. If the licence is not registrable under the Land Transfer Act and the indefeasability provisions of that Act are to override the grant, the licence would be of no value to the licensee except as against the original owner of the lands. Upon a transfer of the land the successor would be entitled in virtue of the provisions of the Land Transfer Act to determine the mining privilege. Their Lordships do not consider that this can have been the intention of the legislature in enacting the compendious code for mining privileges in the Mining Act which are to exist for at least 42 years.

Their Lordships were referred to cases in New Zealand where statutory rights over land were held to exist despite the fact that they did not appear on the register. It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is proper implication from the terms of the relative statute. One example may be given *Barber v. Mayor of Petone* (1909) 28 N.Z.L.R. 609 where a registered proprietor gave permission to a Municipal Corporation to use the land for any purpose for which they might require it. The Corporation laid water pipes on the land. After a transfer of the land to the plaintiff the Corporation were held entitled to enter the land under section 291 of the Municipal Corporations Act, 1900 for the purpose of repairing the pipes and that right notwithstanding the provisions of the Land Transfer Act ran with the land. Reference may also be made to the observations of Williams, J. in *Gray v. Urquhart* (1911) 30 N.Z.L.R. 303 at p. 308, and of Skerrett, C. J. in *Carpet Import Co. Ltd. v. Beath & Co. Ltd.* (1927) 46 N.Z.L.R. 37 at p. 59.

Their Lordships consider that the correct result was reached by Henry, J. and the Court of Appeal.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs.

(86647) Wt. 8004/82 90 12/62 Hw.

In the Privy Council

HUGH THOMAS MILLER

v.

THE MINISTER OF MINES AND THE ATTORNEY GENERAL OF NEW ZEALAND

DELIVERED BY
LORD GUEST

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