MINING LITIGATION IN QUEENSLAND: CHOOSING THE RIGHT COURT*

by Roger Forbes**

Those in the mining industry in Queensland and their lawyers have often viewed the Mining Wardens Court[1] with a degree of suspicion — and not only because they tend to sit in places beyond the reach of commercial airlines and first class hotels. There has been a realisation that, in cases where a genuine dispute exists, the proceedings before the Warden are merely an expensive preliminary to an appeal to a more "civilised" jurisdiction. The Supreme Court itself has remarked that the Wardens Court is "not a wholly suitable tribunal" to be armed with such a broad jurisdiction and that the exclusive nature of its jurisdiction is "an anomalous situation".[2]

At one time it appeared that the Wardens would lose their judicial functions as part of the yet to be completed revision of the Queensland mining legislation.[3] However, the most recent indications emanating from the Mines Department are that, so far as the Wardens Court is concerned, little will change.[4]

Nevertheless, a number of recent cases suggest that, in certain circumstances, it may be possible and even necessary for litigants to resort directly to the Supreme Court. It is the purpose of this article to suggest that the recent judicial pronouncements have created rather than resolved the uncertainty surrounding the definition of the Wardens Court's exclusive jurisdiction. Even apart from the uncertainty, these decisions have created curious anomalies and make nigh impossible the task of professional advisors when selecting the forum in which to commence proceedings.

The Mining Wardens Court, as it exists today in Queensland, is the product of a long and rather colourful history. Its origin lies in a flurry of Victorian legislation passed in the 1850s[5] initially designed to bring order

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** The author is indebted to Dr. J. R. Forbes for his valuable assistance.

1. This article does not examine the ministeral or administrative functions of the Wardens but, rather, their judicial functions. The distinction is sometimes hard to discern e.g. See *Mining Act 1968* ss. 43AA and 43 BA; s. 21(9) as interpreted in *R v. Mining Wardens at Herberton Ex Parte Le Grant* [1971] QWN 36.
2. *George Comanos & Associates Pty. Ltd. v. Fingold Resources Pty. Ltd. (No. 1)* [1988] 2 Qd.R. 631 at 634 per Connolly J.
3. See Alfredson, *Policy Objectives of Mining Legislation and the Queensland Review*, [1987] *AMPLA Yearbook* 54; Forbes, *Revision of Queensland Act; Wardens to Go?*, (1987) 6(1) *AMPLA Bulletin* 14. For criticism of the present position see who Forbes, *So Many 'Hats': A Warden's Lot Is Not a Happy One*, (1984) 3 *AMPLA Bulletin* 48; Forbes, *Is Your Warden's Court Really Necessary?*, (1985) 4 *AMPLA Bulletin* 51.
4. Paper delivered by Assistant Director-General of Mines, Norgold '88 Conference.
5. 15 Vict No. 15, 17 Vict No. 1, 17 Vict No. 4, 18 Vict No. 37, 21 Vict No. 32. For a brief sketch of the origins of Australian Mining Law and the Wardens' Court see O'Hare, *A History of Mining Law in Australia* (1971) 45 *Australian Law Journal* 281.

to the goldfields at Ballarat and subsequently, to deal with the disorder that those fledgling legislative attempts had themselves inspired. They were and still are intended to be local, on the spot arbiters of disputes concerning miners and those affected by mining activities.[6] Their jurisdiction was usually defined by reference to geographical limitations.[7]

The Queensland Legislature entered the field in 1874 and enacted the *Gold Fields Act* soon to be joined by the *Mineral Lands Act 1882*. The former Act established the Wardens Court and it defined its jurisdiction, without elaboration, as follows:

> ". . . to hear and to determine all actions, suits, claims, demands, disputes and questions which may arise in relation to mining."[8]

The Act did not purport to make the jurisdiction of the Wardens Court exclusive.[9]

These early Acts were consolidated in the *Mining Act 1898*. Section 103, clearly based upon the earlier Act, defined the jurisdiction of the Wardens Court in terms which could scarcely have been much wider:

> . . . jurisdiction to hear and determine all actions, suits, claims, demands, disputes and questions which may arise in relation to the mining, or in any way relating to any mining tenement whether the mine in respect of which the dispute arises is held under the Act or any other Act, and in relation to any breach of this Act . . . and such other jurisdiction as is provided by this Act . . .

It might be said that this section created two limbs of jurisdiction:

1. "Actions . . . which may arise in relation to mining . . .";
2. "Actions . . . in any way relating to any mining tenement . . .".

Arguably the second limb was broader as the grant of jurisdiction was not qualified by the need for the proceeding to "arise" in relation to a mining tenement but needed only relate to a mining tenement. The more recent cases which seek to define the jurisdiction of the Mining Wardens Court have fastened upon the word "arising".

The Courts were seldom required to mark the limits of the sweeping terms of s. 103 or its predecessors. The earliest reference to the question is in *South New Zealand Mining Co. and Others v. Bullen.*[10] The decision is direct authority for the proposition that the jurisdiction of the Wardens Court under the 1874 Act did not extend to suits brought to recover shares forfeited by a mining company. However, there is some indication[11] that the Court may have been willing to restrict the jurisdiction of the Wardens Court to cases concerning the physical dealing with mining tenements. The point was left open.

6. *Pacminex v. Australian (Nephrite) Jade Mines Pty. Ltd.* [1974] 7 S.A.S.R. 401 per Wells J at 415.
7. *Mining Act 1968* s. 81.
8. s. 31.
9. See *Lee Gow v. Williams* (1985) 6 QLJ 232.
10. (1881) 1 QLJ 50.
11. At 51 to 52 per Lilley J in argument.

A case falling in the same category is that of *Elmslie v. Mackay*[12] where it was decided that the Wardens Court had no jurisdiction to hear a claim by a liquidator of a mining company to recover calls from shareholders.

It is not difficult to rationalise these two decisions. Both disputes had merely an incidental connection with mining and mining tenements and the substantive disputes concerned points of company law or insolvency. The companies in question could equally have been involved in the fishing industry without affecting the nature of the dispute.

However, it is interesting to note that the 1988 Act[13] expressly recognised that the jurisdiction of the court embraced power to make orders in disputes concerning mining partnerships which did not necessarily have any direct link to the mining conducted by or mining tenement held by that partnership. Further, when the 1898 Act was replaced by the Mining Act 1968, one of the exclusive grants of jurisdiction to the Wardens Court was to hear a broad range of disputes relating to the formation or dissolution of partnerships for the purposes of mining or prospecting and any other dispute touching the partnership or between partners many of which could have little to do with mining as such. Thus it would seem that the vehicle selected to conduct the prospecting or mining could determine which Court was empowered to hear such cases.

Lee Gow v. Williams[14] has sometimes been cited as a case concerned with defining the subject matter of the Mining Wardens Court jurisdiction. However, the case is really only authority for the point that, under the 1874 Act, the Small Debts Court had concurrent jurisdiction to hear claims for the recovery of purchase moneys owing pursuant to a contract of sale of a dwelling situated upon a goldfield site. In fact, the case did not concern Section 31 of the Act which defined the subject matter of the Court's jurisdiction but rather it turned upon Section 32 held to create merely a geographical limitation upon jurisdiction. This case is thus of little assistance.

In *Byrne v. McNamara Ex Parte Byrne*[15] the question of Jurisdiction arose in a somewhat unusual context. A police constable, while on duty, discovered an ingot of gold upon the surface of a privately owned drive-in theatre. Proceedings were commenced under Section 39 of the Justices Act in the Court of Petty Sessions to determine into whose possession it should be delivered.

The question of the jurisdiction of the Wardens Court entered debate as somewhat of an afterthought. Without the aid of submissions from Counsel and having decided that the point did not arise on the record, Wanstall J[16] indicated, without giving reasons, that in his view

12. (1890) B.C.R., 5th March 1980.
13. s. 132: See *George v. Jepsen Ex Parte Jepsen* [1945] 51 St.R.Qd. 118. See also *Mining Act 1968* s. 80(1)(e) now repealed and *Mining Regulations 1979* regs. 14 and 15.
14. Ibid.
15. [1961] Qd.R. 204.
16. Ibid at 209.

nothing in the *Mining Act* ousted the jurisdiction of the Court of Petty Sessions under s. 39.

The 1898 Act was superseded by the Mining Act 1968. As enacted, s. 80 defined the subject matter of the jurisdiction of the Wardens Court as follows:

(1) A Wardens Court shall have jurisdiction to hear and determine all actions, suits and proceedings arising in relation to mining or to any mining tenement.

Without limiting the generality of the foregoing jurisdiction of a Wardens Court such Court shall have jurisdiction to hear and determine actions, suits and proceedings with respect to the following matters:

(a) the right to possession of or other interest or share in and the ownership of mining tenements and the products of mining;
(b) the area, dimensions and boundaries of mining tenements;
(c) any encroachment or trespass upon or interference with or injury to any mining tenement or the buildings, plant, machinery or equipment thereon;
(d) any demand for debt or damages arising out of or made in respect of —
    (i) the carrying on of mining or prospecting or
    (ii) any agreement relating to mining or prospecting:
(e) any question relating to the formation or dissolution of a partnership for the purpose of mining or prospecting and any other matter pertaining to such a partnership and all questions touching the partnership arising between the members of such a partnership;
(f) any question concerning the working or management of a mining tenement including a demand in relation to contribution to calls or in relation to the expenses of working or mining a mining tenement;
(g) any matter arising between miners in relation to mining on Crown land, reserves, or private land or arising between miners and the owners or occupiers of Crown land, reserves, or private land;
(h) any matter pertaining to a trust, agreement tort, or dispute or any kind relating to mining tenements, mining or prospecting or pertaining to the execution or performance of such a trust or agreement;
(i) any application required by this Act or any other Act relating to mining to be made to the Wardens Court.

. . .

(4) With respect to matters within its jurisdiction, the jurisdiction of the Wardens Court shall be exclusive . . ."

Section 80 declares that the Wardens Court shall exercise jurisdiction to hear and determine claims and interests of an equitable nature and to grant equitable remedies.[17] It should be noted that

17. sub-s. 80(1), (2) and (3).

additional grants of jurisdiction are contained in other parts of the Mining Act[18] and in other Acts.[19]

It will be observed that the opening words of the second paragraph of ss. 80(1) make it clear that the enumerated instances of jurisdiction, in the lettered sub-paragraphs, do not confine the general words of the first paragraph of that sub-section.

Strangely, it was not until the passage of sub-section 80(4) that the Wardens Court jurisdiction became exclusive of the jurisdiction of other Courts. While one can understand the reasons for creating, in 1874, the opportunity to bring a mining dispute before a cheap, local court, it is not apparent why it was necessary, in 1968, to make a reference to such court compulsory.

As with the 1898 Act, it would appear that the 1968 Act creates two separate though related limbs of jurisdiction:

1. "Actions . . . arising in relation to mining . . ."; and
2. "Actions . . . arising in relation to any mining tenement".

In contrast to the 1898 Act the two limbs appear, by their wording, to be of similar breadth.[20]

It is important to observe that s. 80 has subsequently been amended. Perhaps the most significant amendment was in 1974[21] when sub-paragraphs (e), (f) and (h) of ss. 80(1) were repealed. In 1982[22] the Wardens Court lost its exclusive jurisdiction to hear and determine challenges to the validity of mining claims, leases and authorities to prospect. This jurisdiction was conferred upon the Supreme Court.[23]

Thus we arrive at the first of the line of recent cases in which the Supreme Court has been forced, for the first time, to embark upon an analysis of the scope of the exclusive jurisdiction of the Wardens Court.

The first in the line is *Welsharp Group Operation Pty. Ltd. v. C.S.R. Limited*[24] decided in early 1986. Master Weld, after referring to ss. 80(1)(d), came to the unremarkable conclusion that the plaintiff had to seek damages for the breach of a compensation agreement entered under the *Petroleum Act 1923–1985* in the Wardens Court.

George Comanos & Associates Pty. Ltd. v. Fingold Resources Pty. Ltd. (No. 1)[25] concerned an action for specific performance of an agreement to assign an interest in certain mining tenements. Having noted the operative words in the first paragraph of sub-section 80(1), Connolly J had no hesitation, though some regret, in deciding that the case before him fell squarely within those words. As the case was a clear one, no

18. ss. 43BA, 43IA, 48, 57, 99 and 129.
19. Petroleum Act 1923–1982. ss. 1, 24, 26, 43, 60 and 61.
20. However, see Thomas J in *Central Queensland Speleological Society Incorporated v. Central Queensland Cement Limited*, Unreported, Full Court Queensland, 7th March, 1989 ("The Bat Case") who considered that the second limb might be broader.
21. Act No. 49 of 1974 s. 27.
22. Act No. 23 of 1982 ss. 45 and 46.
23. *Mining Act 1968* s. 80A.
24. Unreported Supreme Court of Queensland, Master Weld, 13th February, 1986.
25. Ibid.

close analysis of the operative words of Section 80 was embarked upon.

He held, that the 1974 amendments, which deleted the sub-paragraphs referred to above, had been of no effect. The fact that the case would formerly have fallen within the repealed sub-paragraph (h) could not override the unqualified effect of the words in the first paragraph of ss. 80(1) One is left to ponder the purpose of the 1974 amendments.

The decision in *Comanos* was confirmed by the Full Court in the substantially similar case of *Graham v. Suimin Co. (Australia) Pty. Ltd.*[26] concerning an application for summary judgement under O 18A for specific performance of a contract for the sale of a mining lease. Again, the Court clearly identified the case as turning upon the operative words in the first paragraph of ss. 80(1). The lettered sub-paragraphs which refer to specific heads of jurisdiction were described as "surplusage" and, indeed, the 1974 repeal of sub-paragraphs (e), (f) and (h) was referred to as "repeal of surplusage" and of no effect. Again, the Court considered it unnecessary in the circumstances to embark upon a close analysis of the operative words of ss. 80(1).

The Supreme Court, having twice rebuffed plaintiffs, one could have been forgiven for thinking that mining litigants would continue to find the door of the Supreme Court barred to them. The Court had, with no little reluctance and a commendable absence of judicial parochialism, concluded that the opening words of ss. 80(1) meant just what they said and that, if a case arose "in relation to mining or mining tenements", the Wardens Court was the compulsory forum. What is more, they reached this conclusion in the face of the well recognised principle that enactments which oust the jurisdiction of superior courts are to be construed strictly.[27]

Since both cases concerned specific performance of contracts for the acquisition of interests in mining tenements, it appeared that a case would fall within the operative words of ss. 80(1) if it involved the enforcement of rights arising under contracts concerning mining or mining tenements. Such jurisdiction would compliment the express grant of jurisdiction in sub-paragraph (d)(ii) to hear claims for damages for the breach of such contracts. But did it embrace all contracts which had some relationship to mining or mining tenements and did it embrace all the rights and obligations arising under such contracts? Was the jurisdiction of the Wardens Court limited to those cases, where the contractual or personal rights, sought to be enforced, were accompanied by or gave rise to a proprietary interest in a mining tenement? What of a case where the action was for the price of mining equipment sold and delivered to a mining company for the purpose of its mining activities? Does such an action "arise in relation to mining" or constitute a "demand for debt or damages arising out of . . . any agreement relating to mining . . ."? Did a

26. [1989] 1 QD.R. 291.
27. E.g. See *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260.

plaintiff who had suffered personal injuries on a mining site need to bring proceedings in the Mining Wardens Court?

The retreat from the wider view of s. 80 began in March this year with *Central Queensland Speleological Society Incorporation v. Central Queensland Cement Pty. Ltd.* ("The Bat Case").[28] The society sought an interlocutory injunction to restrain the company from engaging in mining related activity around Speaking Tube Cave in alleged contravention of the Fauna Conservation Act 1974–1984. The company argued (inter alia) that the society had come to the wrong Court — that the case concerned an attempt to stop the company from mining and that the Wardens Court, in its equitable jurisdiction, was well equipped to adjudicate on the matter.

Thomas J begins by noting that the words of ss. 80(1) "are extremely wide" and remarks that, at first glance, the case would certainly seem to fall within their scope. He prefaces his analysis is of sub-section 80(1) with the proposition that one should be slow to interpret a provision so as to oust the jurisdiction of the superior courts and he refers to the absurdity of concluding that all personal injuries actions arising out of mining should fall within the sub-section. He reads down the scope of the section by adopting a narrow interpretation of the word "arising".

> It is not enough that the case has something to do with mining or even that a reduction of mining activity may be the inevitable consequence of granting the relief sought in the action. Before "proceedings arising in relation to mining" are to be conferred upon a Mining Warden (with the consequence that his jurisdiction is exclusive) the action, suit or proceeding will need to arise directly in relation to mining as such. An indirect connection will not suffice. The direct and immediate object of this suit is to restrain an apprehended breach under the Fauna Conservation Act. The effect of the suit upon mining activity is legally incidental.[29]

However, he appears to suggest[30] that the second limb of ss. 80(1), concerning proceedings arising in relation to any mining tenement, may not be so easily restricted so that legislative intervention is, in his view, necessary to revest jurisdiction in the Supreme Court. It seems that he felt constrained by the results in *Comanos* and *Suimin* to draw this distinction between the two limbs.

De Jersey J concurred with Thomas J's analysis of ss. 80(1) and his conclusion on the facts. Derrington J found more difficulty reaching the same factual conclusion however, he appeared to adopt the same analysis of ss. 80(1).

How then can a case in which a plaintiff seeks to stop a mining company from mining not fall within ss. 80(1)? It seems that the correct approach is to look not at the nature or effect of the order sought, but at the legal and factual issues raised by the action. We have seen that, in the early cases, it was held that the Wardens Court did not have jurisdiction to hear disputes concerning the internal administration of companies even though those companies were involved in mining and even though a particular order might affect the company's activities or the distribution

28. Ibid.
29. Ibid. at 6.
30. Ibid. at 6 to 7.

of the proceeds of its mining. The Bat Case concerned alleged disturbances or destruction of wildlife contrary to the *Fauna Protection Act*. It was purely incidental that the disturbance complained of resulted from mining activities. It would be unfortunate if the Supreme Court lacked jurisdiction in this case when it would clearly have jurisdiction to grant an injunction to restrain a farmer or a construction company from disturbing the bats.

However, the logic applied by the Full Court in The Bat Case can be questioned. The Mining Wardens Court has long had jurisdiction to hear matters with a mere incidental connection with mining or mining tenements.[31] When they were enacted, the lettered sub-paragraphs of ss. 80(1) vested the Court with jurisdiction to hear a range of disputes with a purely incidental connection with mining. Some are not qualified by the word "arising" which was seized upon by the Full Court on the basis of their restrictive reading of the sub-section. Sub-paragraph (d) appears to give the Court jurisdiction to hear claims based on contracts where the issues raised will have little to do with the mining itself. Sub-paragraph (e), as has already been noted, gave the Court jurisdiction to resolve partnership disputes, the subject of which may have had nothing whatsoever to do with the mining activity conducted by the partnership. Again, sub-paragraph (h), which gave the Court jurisdiction to hear any matter pertaining to a trust, agreement, tort, or dispute of any kind relating to mining tenements, mining or prospecting or pertaining to the execution or performance of such a trust or agreement was capable of embracing disputes with a merely peripheral association with mining and mining tenements.

If it were the case that all of the lettered sub-paragraphs in ss. 80(1) contained grants of jurisdiction that went beyond a narrow definition of the phrase "arising in relation to mining or to any mining tenement" then it might be possible to argue that the presence of those sub-paragraphs supported that narrow view of the phrase and that the Legislature thought it necessary to extend the Court's jurisdiction by way of specific grants. However, not all the lettered sub-paragraphs do go beyond the primary grant of jurisdiction in the first paragraph of the section.[32] The most sensible conclusion, it is submitted, is that the sub-paragraphs were inserted as examples of matters falling within the primary grant of jurisdiction. They are aids to fixing the breadth of the primary grant. Since those instances include matters with a merely indirect nexus to mining and mining tenements, so too must the primary grant.

As has been noted, sub-paragraphs (e), (f) and (h) have been repealed. The Courts have considered this repeal to be of no effect. They have said that the words contained in the lettered sub-paragraphs cannot confine the broad terms of the first paragraph of ss. 80(1). However, if the interpretation of the operative words of ss. 80(1) adopted by the Full Court in The Bat Case is correct, then the lettered sub-paragraphs containing

31. E.g. *Gold Fields Act 1874*, s. 32, *Mining Act 1898*, s. 132.
32. s. 80(1)(a), (b), (c), (g) and (i) relate to matters clearly within the operative words in the first paragraph. Even sub-paragraphs (d), (e), (f) and (h) embrace matters within the primary grant of jurisdiction.

specific grants of jurisdiction go beyond the operative words and extend rather than confine the Court's jurisdiction. Thus, the repeal in 1974 of sub-paragraphs (e), (f) and (h) will be seen to have narrowed the scope of the Court's jurisdiction.

The repeal of sub-paragraphs (e), (f) and (h) will also have narrowed the scope of the section upon the alternative analysis suggested above. By removing these instances of jurisdiction the scope of the primary grant will be constructed.

However, and on either analysis, this still leaves open the possibility that sub-paragraph (d), which survives the 1974 amendments, will bring within the jurisdiction of the Wardens Court cases which would not fall within a narrow reading of the operative words of ss. 80(1).

A differently constituted Full Court delivered judgment in *O'Grady v. The North Queensland Cement Company Limited*[33] three days after judgment was handed down in The Bat Case. The consideration of the jurisdictional question appears virtually as a postscript to the judgments as the point came to the Court's attention only after the appeal had been argued. The court makes no reference to The Bat Case.

The plaintiff alleged breaches of the terms of a joint venture agreement relating to the working of a mining lease. The alleged breaches concerned a failure by the defendant to constitute a joint venture committee, and to conduct an audit of the mining venture, and to prepare and submit a feasibility report or preliminary budget. The defendant counterclaimed seeking a declaration that the plaintiffs purported rescission was invalid and a partial decree of specific performance requiring the plaintiff to designate representatives to the Joint Venture Committee.

Demack J, with whom the other members of the Full Court agreed, adopted a strict construction of ss. 80(1) which ousted the jurisdiction of the Supreme Court. He embarked upon a textual analysis of the Acts of 1874, 1898 and 1968. He noted that the operative words conferring jurisdiction in the 1874 and 1898 Acts were introduced by the expression "which may arise". The operative words in the 1968 Act are introduced by the expression "arising". In his view the alteration was intended to have significance and the deletion of the word "may" was intended to narrow the scope of the following words. He concluded that "the ascertained or asserted facts must necessarily relate to mining or to a mining tenement".[34]

Greater clarity is lent to his conclusion when one looks at the actual decision in the case. The Court concluded that it did not have jurisdiction to hear the claim brought by the plaintiff. The claim necessarily related to both mining and to a mining tenement. The breaches of agreement alleged referred to ground works and testing on the mining site. The relief sought was a reconveyance of the lease or the appointment of trustees for sale. By contrast, the Court concluded that it did have jurisdiction to hear the counterclaim. The issues raised and relief sought by the counterclaim did

33. Unreported, Full Court of Queensland, 10th March, 1989.
34. Ibid. at 16.

not have a sufficiently direct nexus to mining or mining tenements. The counterclaim simply concerned personal obligations under a contract.

Clearly something is wrong when two closely related disputes concerning the same contract have to be litigated separately in two radically different courts. The risk of inconsistent results is apparent.

It is submitted, with respect, that the distinction drawn by the Full Court is both lacking in clarity and illusory. It has already been argued that the operative words of ss. 80(1) should be read with the lettered sub-paragraphs which, when enacted and even subsequent to the 1974 amendments, clearly embrace claims bearing no direct relationship to mining.

Even if the test of "degree of relationship" is valid, it will be readily appreciated, bearing in mind the result in O'Grady's case, that its application will involve a high degree of subjective evaluation. Both the claim and counterclaim in that case involved allegations of breach of personal covenants contained in the joint venture agreement. The only distinction that the Court was able to draw was that, in the case of the claim, the covenant in question actually involved the performance of mining related activity whereas, in the case of the counterclaim, the covenant related more directly to the administration of the joint venture vehicle which would engage in the mining activity. Further, the Court was able to point to the fact that, in the case of the claim, the relief sought was an order for reconveyance or the appointment of trustees for sale of an interest in the mining tenement itself.

With respect, reference to the nature of the relief sought should not affect the result in view of the analysis adopted in The Bat Case where the Court concluded that the fact that the injunction sought would stop mining activity itself did not bring the case within sub-section 80(1). Further, the question whether the case falls within the Mining Wardens jurisdiction should not turn upon the ability of parties to carefully frame the relief claimed.

In any case, paragraph (d) of ss. 80(1) gives the Wardens Court jurisdiction in claims for debt or damages based on agreements relating to mining or prospecting.[35] The joint venture agreement clearly related to mining and prospecting. Presumably, an action for damages based upon a breach of that agreement would fall within the Wardens Court jurisdiction. How then can it be that the Wardens Court, which is vested with equitable jurisdiction, can hear a claim for damages for such a breach but not a claim for specific performance of the same obligation. Such fine distinctions can only lead to expensive and frustrating mistakes when parties choose their forum.

Where a claim concerns rights and obligations under a joint venture agreement, the result of the cases appears to be that the Wardens Court has jurisdiction where the claim is for:

1. specific performance of only where the relevant obligation is to transfer or re-transfer an interest in the mining tenement or authority to prospect; and

35. See *Welsharp Group Operation Pty. Ltd. v. C.S.R. Limited* ibid.

2. damages for the breach of any covenant.

It does not have jurisdiction to hear a claim for specific performance of any other obligation.

Two subsequent decisions of the Mining Wardens Court at Brisbane are testimony to the fact that the definition of jurisdiction of the Wardens Court remains obscure.

In *Strategic Resources Exploration Limited v. Nede Pty. Ltd. and others*[36] the plaintiff sought an injunction restraining the defendant from assigning its interest in an authority to prospect in alleged breach of a joint venture agreement. The Warden held that the dispute concerned the agreement rather than the A to P underlying it. Apparently there is some distinction between an action for specific performance[37] or reconveyance[38] of a mining tenement and one for an injunction restraining a conveyance.

The absurdity of the present position was highlighted in *Pacific Gold Mines N.L. v. North Queensland Resources N.L.*[39] where both parties agreed to and made submissions in support of the Wardens Court's jurisdiction and the Warden declined jurisdiction of his own motion. The plaintiff sought damages for the breach of a joint venture agreement or, in the alternative, damages for the breach of a warranty. The claim related to the defendant's alleged failure to contribute 500,000 grams of gold to the joint venture and to contribute towards the cost of processing plant owned by the plaintiff. The defendant counterclaimed (presumably for damages) for certain costs associated with the joint venture.

Relying upon *Suimin* and *Conamos*, and without reference to *O'Grady*, the Warden concluded that he lacked jurisdiction. In his view, the critical factor was that neither the claim nor the counterclaim concerned a right, title, interest or ownership of a mining tenement and the products of mining. He rejected the application of ss. 80(1)(d) on the basis that the dispute concerned processing and not "mining or prospecting". It is submitted that this overlooks sub-paragraph (d)(ii) under which the claim itself need not relate to mining or prospecting: only the agreement must so relate. Perhaps the whole agreement was restricted to processing.

If the only problem was that the recent cases created an uncertain test of the Wardens Court's jurisdiction then time and the accumulation of authority might resolve the difficulty.[40] However, it is submitted that the problem is compounded by the fact that the test proposed, even apart from its lack of clarity, leads to profoundly unsatisfactory results. Parallel litigation concerning the same subject matter might be necessary to resolve all questions in dispute between joint venturers. The only cure is legislation. It appears that, despite the broad-ranging review of the mining legislation, this has been put in the "too hard basket".

36. Unreported, Mining Wardens Court, Brisbane, 17th March, 1989.
37. *Comanos* and *Suimin*.
38. *O'Grady*.
39. Unreported, Wardens Court, Brisbane, 30th April, 1989.
40. The lack of any formal reporting of Wardens Court decisions would no doubt hinder the process.

POSTSCRIPT

Since this article was written Mr. Justice de Jersey has delivered two judgments of significance. He appears to take a more robust and practical view of the Warden's jurisdiction.

In *Gaza Grazing Pty. Ltd. v. Ampol Exploration Limited*, the plaintiffs, leaving no stone unturned, brought a number of claims. They sought damages for negligence or, in the alternative, as compensation pursuant to the Petroleum Act for loss suffered as a result of mis-mothering of their lambs allegedly caused by the defendant's prospecting activities. They also brought alternative claims for damages for breach of an agreement of compromise their compensation claim and damages, both at common law and under the Trade Practices Act, 1974 (Cth) for fraudulent, negligent or misleading and deceptive misrepresentations which induced them to enter into the compromise agreement.

Clearly, the plaintiff's claim for compensation under the Petroleum Act fell within the exclusive jurisdiction of the Wardens Court. However, what is significant, is that His Honour held that the alternative claims for damages for negligence, breach of the compromise agreement and the allegedly fraudulent, negligent or misleading and deceptive misrepresentations also fell within the Wardens exclusive jurisdiction. In his view, these claims were so closely and intimately connected with the compensation claim that all matters should be tried together by the Warden.

In addition, he accepted the submission that the claim for damages for negligently causing the lambs to mis-mother fell within s. 80(1)(i) and the claim for damages for breach of the compensation agreement fell within s. 80(1)(ii).

In his view, all claims fell within the general opening words of s. 80(1). He appeared to use sub-paragraph (d) as a guide to the interpretation of the general words in accordance with the approach suggested above. However, whether His Honour's reasoning can be reconciled with that of the Full Court in *O'Grady's* case, which he did not cite, is doubtful.

His Honour also dealt with an ingenious argument based on the recently enacted cross vesting legislation. It was submitted that since the defendant was a New South Wales company with a registered office in that state, the Supreme Court of New South Wales would have jurisdiction to hear the matter, that court not being subject to the exclusive jurisdiction of any Wardens Court. It follows, it was submitted, that the cross vesting legislation invested the Queensland Supreme Court with all jurisdiction enjoyed by the New South Wales Supreme Court and thus empowered it to hear the case. This would effectively short circuit the exclusive grant of jurisdiction in the Mining Act.

His Honour rejected these submissions and held that the general provisions of the cross vesting legislation could not override the specific grant of exclusive jurisdiction contained in the *Mining Act.*

The second case to come before de Jersey J was *Pacific Gold Mines NL v. North Queensland Resources NL* which is discussed above. The

author has not had access to written reasons for judgment but it can be reported that His Honour granted a mandamus order compelling the Warden to hear the case. If this decision is correct, then it ought to follow that the Strategic Resources case should also be heard by the Warden.

It remains to be seen whether these two decisions will be subjected to, and survive, scrutiny by the Full Court.