ASSIGNMENT OF MINING LEASE – APPROVAL BY MINISTER UNDER S300 OF THE MINERAL RESOURCES ACT 1989 (QLD) – WHETHER ASSIGNMENT 'EFFECTIVE' *

Klement v Pencoal Ltd & Ors[3]

(Supreme Court of Queensland, 23 April 1999, Derrington J)

Derrington J's judgment is perhaps a sobering reminder to the practitioner of "what could have been". A summary of the facts takes the first half of the 17 pages of the judgment, and there is little point to repetition here. It suffices to say that the dispute centred on the claim by the plaintiff, one of two assignors of a mining lease, that the other assignor (the fifth defendant) forged the plaintiff's signature on the form of transfer of the mining lease. The first defendant, Pencoal, an arm's length party, was the assignee of the mining lease. The second defendant, South Blackwater Coal Ltd, was a bona fide purchaser for value from the first defendant; and the third and fourth defendants were the officers in charge of the respective registers on which the titles to the land lease and the mining lease were recorded.

The plaintiff brought the action well after the relevant transactions had been completed and transfers registered, when it seems the fifth defendant refused to account to the plaintiff for the plaintiff's share of the proceeds of the transaction (about $500,000 plus interest was in dispute).

Derrington J disposed of the substance of the claim against the first to fourth defendants on the basis that the fifth defendant was acting within the scope of his ostensible authority, based on the rather unique circumstances of the case.

The interesting implication of this case for the practitioner in resources law centres on the position in which the first and second defendants (both mining companies and bona fide purchasers for value) would have found themselves had the plaintiff lodged a caveat and commenced his action before the Minister had approved the assignment of the mining lease under s.300 of *The Mineral Resources Act* 1989 (Qld).

Sharwood and Calvert[4] reviewed the "of no force" and equivalent provisions in Australia's onshore and offshore petroleum mining legislation some years ago, and based their review of onshore mining Acts in Queensland on the *Mining Act* 1968 and the (then proposed) *Mineral Resources Act* 1989. The *Mineral Resources Act* has since been amended, and now relevantly provides as follows:

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* Martin Klapper, Hopgood Ganim, Brisbane.

3 [1999] QSC 90.

4 Michael Sharwood and John G Calvert, *An Outline of the "Of No Force" Provisions of Mining and Petroleum Legislation in Australia*, AMPLA Bulletin Vol. 9 (4) p. 135.

> "A purported assignment, sublease or mortgage of a mining lease or an assignment of an application therefor or of any interest therein shall not be effective unless it is made and approved in accordance with this section and shall take effect on the day next following its approval by the Minister under subsection (6)."[5]

Two points may be extracted:

- Subsection 300(10) strikes at dealings and not at instruments.
- A dealing that is not approved by the Minister in accordance with this section "shall not be effective".

In what position would the first defendant (and perhaps the second defendant) have found itself had the plaintiff acted before the Minister approved the transfer of the mining lease to the first defendant?

Derrington J did not deal with s.300 of the *Mineral Resources Act*. His Honour extensively discussed issues relating to agency, estoppel and ratification, but said in respect of the second defendant (the transferee for value from the original assignee) that:

> "... the second defendant is unquestionably a purchaser for value without notice of any trust; and so would take its legal title free of it", and later "since the plaintiff is bound by his agent's action in tendering the transfer as authentic and receiving the full purchase money in exchange, the title in the property passed to Pencoal in the first instance and subsequently to its transferee, the second defendant ... if for some technical reason it were otherwise, it would be appropriate to give the first and second defendants leave instanter to amend their pleadings to include a counterclaim for an order requiring the plaintiff to execute the transfer document in favour of Pencoal without further payment, and to make an order accordingly".

It is submitted that this would not have been the case had the plaintiff acted before the Minister approved a dealing in favour of Pencoal, and consequently the purported assignment in favour of Pencoal would have been ineffective.

It is, however, unlikely that the first and second defendants would ultimately have found themselves in the same position as the unsuccessful plaintiff in *Swan Resources*[6] because, unlike s.75 of the *Petroleum Act* 1967 (WA), the *Mineral Resources Act* 1990 (Qld) strikes at dealings and not at instruments. Because Derrington J found that the plaintiff was bound by the fifth defendant's actions, the Court most likely would have found a way to protect the first and second defendants, both of whom were bona fide purchasers for value.

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5 *Mineral Resources Act* 1989 (Qld) s.300(10).

6 *Swan Resources Ltd v Southern Pacific Hotel Corporation Energy Pty Ltd* [1983] WAR 39.