

IN THE WARDEN'S COURT
OF NEW SOUTH WALES
AT SYDNEY
19 AUGUST 2005
J. A. BAILEY, CHIEF MINING WARDEN

2004/51

MIDCOAST LIME COMPANY PTY LTD	(Complainant)
v	
MINISTER FOR MINERAL RESOURCES	(First Defendant)
ELLIS R. WALKER	(Second Defendant)

APPEARANCES AT HEARING ON 4 JULY 2005

Mr R P L Lancaster of Counsel appears for the Complainant

Mr N Perram of Counsel with Ms Csillag of Counsel instructed by Ms J Caldwell of the Crown Solicitor's Office appears on behalf of the First Defendant.

Mr L Moore, Solicitor, instructed by Mr R Harrison, Agent, appears for and with the Second Defendant.

APPEARANCES AT HEARING ON 19 AUGUST 2005

Mr E Sharkey appears as Agent for the Complainant.

Ms J Caldwell from the Crown Solicitor's Office appears on behalf of the First Defendant.

Mr R Harrison, Agent, appears on behalf of the Second Defendant.

REASONS FOR DECISION AND ORDERS OF THE COURT

In its amended Summons of 19 April 2005, the Complainant, Midcoast Lime Company Pty Ltd, seeks the following relief from the court:

1. A declaration that the grant by the Minister for the Mineral Resources of Exploration Licence EL6278 to the Second Defendant on the 11th August 2004 was invalid and of no effect.
2. An Order setting aside the grant by the Minister for Mineral Resources of Exploration Licence EL6278 to the Second Defendant on the 11th August 2004.
3. An Order that the Minister for Mineral Resources consider and determine the Complainant's application for revocation of Exploration Licence EL5358 within 28 days from the date of this Order.
4. An Order that the Minister for Mineral Resources consider and determine the Complainant's Exploration Licence Application ELA2041 within 2 months from the date of this Order.
5. An Order that the Defendants, or alternatively the First Defendant, pay the Complainant's cost of these proceedings.

The grounds upon which those orders are sought may be summarised as follows:

1. The officer who purported to approve ELA2316 had no valid delegated power.
2. The grant of EL6278 was in fact a renewal of EL5358. Therefore the grant of EL6278 contravened the prohibition in Section 114(5) of the *Mining Act 1992*.
3. The grant of EL6278 also contravened Section 114(6) of the *Mining Act 1992*.
4. The Minister failed to have regard to relevant considerations and special circumstances when granting EL6278.
5. The application for renewal, by the Second Defendant, of EL5358 was lodged outside the time required by Section 113(2) of the *Mining Act 1992*.
6. If EL6278 was a grant pursuant to Section 22 of the *Mining Act 1992*, the Minister failed to have regard to relevant considerations.

7. The grant of EL6278 was issued contrary to Section 19 of the *Mining Act 1992*.
8. The Minister failed to deal with a request, by the Complainant, for revocation of EL5358.
9. The Minister neglected/refused or did not give proper genuine and realistic consideration to ELA2041, which was lodged by the Complainant, insofar as it relates to the area of land known as Armidale 2697”h”.

Both the First and Second Defendant have lodged grounds of defence in relation to the complaint, it is not necessary at this point of time to itemise each of those grounds of defence.

THE FACTS

No evidence was called by any of the parties, reliance was based upon the documents tendered to the Court as exhibits.

A Statement of Agreed Facts has been filed by the parties and they are:

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|----------|---|
| 26/09/96 | The second defendant lodged an Exploration Licence Application ('ELA 784') over one unit of land – Armidale Block 2697, Unit H. |
| 09/10/97 | In response to ELA 784, Exploration Licence 5358 ('EL 5358') was granted to the second defendant, to expire on 09/10/99. |
| 21/09/99 | The second defendant lodged an application for renewal of EL 5358. |
| 31/03/00 | The <i>survey (Geocentric Datum of Australia) Act 1999</i> (NSW) commenced. This Act replaced the Australian Geodetic Datum ('AGD66') with the Geocentric Datum of Australia ('GDA94'), a new mathematical model of the surface of the earth for use in computing co-ordinates of latitude and longitude and in map projections. As a consequence, EL 5358 shifted approximately 150 to 200 metres south- |

- west, to correspond with the new position of blocks and units under GDA 94.
- 23/07/01 In response to the second defendant's application for renewal, EL5358 was renewed, to expire on 08/10/02.
- 27/09/01 Lots 158, 173, 176, 177, 183 in Deposited Plan 752419 were transferred from S & J Howard to Australian Lime Company Pty Ltd and Mudgee Dolomite and Lime Pty Limited as tenants in common in equal shares.
- 29/04/02 The Minister for Mineral Resources exercised his power of delegation under S.363(1) of the Mining Act 1992 (NSW) by signing an Instrument of Delegation.
- 12/09/02 M Roche, as Director of the complainant, sent a letter to the Director General objecting to the renewal of EL 5358.
- 26/09/02 The second defendant lodged a further application for renewal of EL 5358.
- 20/12/02 The complainant lodged an Exploration Licence Application ('ELA 2041') over seven units of land – Armidale, Block 2625, Unit X and Armidale, Block 2697, Units C,D,H,J,N and O.
- 05/11/03 In response to ELA 2041, the complainant was offered an exploration licence over six units of land – Armidale, Block 2625, Unit X and Armidale, Block 2697, Units C, D, J, N and O.
- 07/11/03 In response to the second defendant's further application for renewal, the Department sent an instrument of renewal for EL 5358 to the second defendant for execution.
- 08/12/03 R Murdoch, as Managing Director of the complainant, sent a letter to the Minister for Mineral Resources requesting that EL 5358 be cancelled.

- 16/12/03 The complainant lodged a notice of intention to commence mining over 37 hectares of land, including land covered by EL 5358 prior to GDA 94, under s.8(1)(a) of the Mining Act 1992 (NSW). This was recorded as Private Mining Agreement 23 ('PMA 23').
- 30/12/03 The second defendant executed the instrument of renewal for EL 5358 sent to him by the Department on 07/11/03.
- 04/03/04 M Rangott sent a facsimile to V Henson stating that the Complainant did not wish to accept the Department's offer of an exploration licence in satisfaction of ELA 2041 due to PMA 23.
- 05/03/04 B Kitchener spoke to M Rangott, who informed him that M Rangott would organise for the complainant 'to execute a withdrawal and fax it to me'.
- 05/03/04 R Murdoch, as Director of the complainant, sent a facsimile to B Kitchener stating that the complainant did not wish to accept the Department's offer of an exploration licence in satisfaction of ELA 2041 due to PMA 23.
- 09/03/04 The Department wrote to the complainant advising it that it required security of \$10,000 before mining could occur under PMA 23.
- 23/03/04 The second defendant lodged a new Exploration Licence Application ('ELA 2316) over four units of land – Armidale, Block 2697, Units C, D,H and J.
- 11/08/04 In response to ELA 2316, Exploration Licence 6278 ('EL 6278') was granted to the second defendant, to expire on 10/08/06. EL 5358 was cancelled due to the grant of EL 6278.

RELEVANT LEGISLATION

There were many sections of the Mining Act 1992 cited in submission before the court. The more pertinent sections are set out hereunder:-

17 Minister may exclude land from application or tender

- (1) The Minister may, by order in writing, direct that any part of the land to which an application or tender relates be excluded from the application or tender.
- (2) A direction takes effect on the date on which written notice of the direction is served on the applicant or tenderer.
- (3) A tenderer affected by any such direction may amend the tender by written notice lodged with the Director-General on or before such date as may be specified in the direction.

19 Land subject to authority

- (1) An exploration licence may not be granted over any land:
 - (a) the subject of some other exploration licence that includes a group of minerals in respect of which the first mentioned exploration licence is sought, or
 - (b) the subject of a mining lease, assessment lease or mineral claim, or
 - (c) the subject of an application for an exploration licence, assessment lease, mining lease or mineral claim that was lodged before the application for the first mentioned exploration licence was lodged, otherwise than to or with the written consent of the holder of, or the applicant for, that licence, lease or claim.
- (2) A written consent given under this section is irrevocable.
- (3) If, as a result of such a consent, an exploration licence is granted over any such land, that land:
 - (a) ceases to be subject to the exploration licence, assessment lease, mining lease or mineral claim concerned, or
 - (b) is excluded from the application for the exploration licence, assessment lease, mining lease or mineral claim concerned, as the case requires.

20 Land on which private mining operations being carried on

- (1) An exploration licence may not be granted over any land:
 - (a) if mining operations for a privately owned mineral are being carried out on the land by or with the consent of the owner of the mineral, and

- (b) if the notice referred to in section 8 (1) (a) and the security referred to in section 8 (1) (b) have each been duly lodged with the Director-General, except with the written consent of the owner of the mineral.
- (2) A written consent given under this section is irrevocable.
 - (3) Any dispute as to whether or not this section applies in any particular case is to be referred to a warden for inquiry and report and is to be decided by the Director-General on the basis of the Warden's report.

22 Power of Minister in relation to applications

- (1) After considering an application for an exploration licence, the Minister:
 - (a) may grant an exploration licence to the applicant, or
 - (b) may refuse the application.
- (2) Without limiting the generality of subsection (1), an application may be refused on the ground that the applicant has been convicted of an offence against this Act or the regulations or any other offence relating to mining or minerals.
- (3) The Minister may grant a single exploration licence in respect of 2 or more applications or 2 or more exploration licences in respect of a single application.

113 Applications

- (1) The holder of an authority may, from time to time, apply for the renewal of the authority.
- (2) An application for the renewal of an exploration licence or assessment lease must be lodged with the Director-General not earlier than 2 months and not later than 1 month before the licence or lease ceases to have effect.
- (3) An application for the renewal of a mining lease must be lodged with the Director-General not earlier than 5 years and not later than 1 year (or, if the term of the mining lease is for 1 year or less, not earlier than 2 months and not later than 1 month) before the mining lease ceases to have effect.
- (4) An application for the renewal of an authority must be accompanied by the appropriate lodgment fee.
- (5) If an application for the renewal of an authority is in respect of part only of the land subject to the authority, the application must be accompanied by a description, prepared in the manner prescribed by the regulations, of the land over which renewal of the authority is sought.
- (6) An application for the renewal of an exploration licence may be made in respect of one or more parts (but not more than such number of parts as may be prescribed by the regulations) of the exploration area.
- (7) An application for the renewal of an assessment lease or a mining lease may be made in respect of the whole, or of any single part, of the assessment area or mining area.

114 Power of Minister in relation to applications

- (1) After considering an application for the renewal of an authority, the Minister:
 - (a) may renew the authority, or

- (b) may refuse the application.
- (2) Without limiting the generality of subsection (1), an application may be refused if the applicant has been convicted of an offence against this Act or the regulations or any other offence relating to mining or minerals.
- (3) The period for which an authority is renewed may not on any one occasion exceed:
 - (a) 5 years in the case of an exploration licence or assessment lease, or
 - (b) 21 years (or such longer period as the Minister may, with the concurrence of the Premier, determine) in the case of a mining lease.
- (4) On renewing an authority, the Minister may amend any of the conditions of the authority and may include further conditions in the authority.
- (5) The area of land over which an authority is renewed may differ from the area of land over which the renewal of the authority is sought, but not so as to include any land that was not subject to the authority immediately before the renewal.
- (6) The number of units over which an exploration licence may be renewed is not to exceed half the number of units over which the licence was in force when the application for the renewal was made unless the Minister is satisfied that special circumstances exist that justify the renewal of the licence over a larger number of units.
- (7) The Minister may defer dealing with an application for the renewal of a mining lease over any land if the mining lease is the subject of action being taken under Part 6 in connection with the granting of a consolidated mining lease over that land.

117 Authority to have effect until application dealt with

- (1) If an application for the renewal of an authority is not finally dealt with before the date on which the authority would otherwise cease to have effect, the authority continues to have effect, in relation only to the land to which the application relates, until the application is finally disposed of.
- (2) While an authority has effect under this section, the Minister may amend any of the conditions of the authority (other than a condition relating to royalty).
- (3) An amendment takes effect on the date on which written notice of the amendment is served on the holder of the authority or on such later date as may be specified in the notice.

125 Grounds of cancellation or operational suspension

- (1) The Minister may cancel an authority as to the whole or any part of the land to which it relates:
 - (a) if the holder of the authority requests the Minister to cancel the authority, or
 - (b) if the holder of the authority contravenes any condition of the authority or any provision of this Act or the regulations, whether or not the holder is prosecuted or convicted of any offence arising from the contravention, or
 - (c) if the holder of the authority fails to comply with the requirements of any agreement or assessment under Part 13 in relation to the payment of compensation, or

- (d) if the holder of the authority is convicted of any offence relating to mining or minerals, or
 - (e) if the land is required for a public purpose, or in good faith for the purposes for which the authority has been granted, or uses the (f) if the holder of the authority fails to use the land comprised in the authority land for a purpose other than that for which the authority has been granted.
- (2) A request referred to in subsection (1) (a):
 - (a) must be lodged with the Director-General, and
 - (b) if the application is for the cancellation of the authority as to part only of the land to which it relates—must be accompanied by a description, prepared in the manner prescribed by the regulations, of the land in respect of which the authority is to be cancelled.
 - (3) The Minister may suspend all or any specified operations under an authority until further notice if the holder of the authority contravenes:
 - (a) a requirement under this Act to pay royalty, or to give or maintain security for the performance of the holder's obligations under the authority, or
 - (b) any condition of the authority that is identified in the authority as a condition related to environmental management.

135 Waiver of minor procedural matters

- (1) The Minister may grant or renew an authority even though the applicant has failed to comply with a requirement of this Act or the regulations:
 - (a) as to the time within which anything is required to be done, or
 - (b) as to the details to be contained in any notice served, lodged or caused to be published by the applicant, or
 - (c) as to the particulars to accompany any application, or
 - (d) as to the furnishing of declarations and other information by the applicant.
- (2) This section does not authorise the Minister to grant or renew an authority in the case of an applicant who has failed to comply with such a requirement unless the Minister is satisfied that the failure is unlikely:
 - (a) to adversely affect any person's rights under this Act or the regulations, or
 - (b) to result in any person being deprived of information necessary for the effective exercise of those rights.

366 Mining divisions

- (1) The Governor may, by order published in the Gazette, constitute any land as a mining division and may, by the same or a subsequent order so published, name the division and fix its boundaries.
- (2) A mining registrar is to be appointed for each mining division constituted under this section.

The case proceeded by way of submissions from all parties, the majority of which centred around the 428 pages which formed Exhibit 1. Those pages were extracts from the Departmental files.

Ground 1 - Delegation

The first challenge to the validity of EL 6278 was a question of delegation of authority. The attack by the complainant as to delegation came in two forms. Firstly, that Mr Fallico in signing the Exploration Licence did so in his capacity as Supervisor and not in his capacity as Mining Registrar. Secondly, that if the court is of the opinion that the signing by Mr Fallico was a valid signing as the Mining Registrar, then he had no jurisdiction to sign this Exploration as he was the Mining Registrar for Cobar and not for the area over which this Exploration licence purports to exist.

In support of the first aspect of the submission Mr Lancaster referred to the case of *Re: Reference under Section 11 of Ombudsman Act 1976 for an advisory opinion; ex parte Director General of Social Services 2ALD86*. That case involved the Department of Social Security reviewing a determination not to pay benefits to an individual. A Mr Prouse investigated and determined that the person was not entitled to the benefit. Mr Prouse then sent out a letter on the 13th July 1977 advising a review of the case had been undertaken and that the decision not to grant unemployment benefits was confirmed. That letter was then signed in the name of "L.J. Daniels" and under those words were "Director General". Next to the words "L.J. Daniels" appeared the initials of Mr Prouse. Apparently L.J. Daniels took no part in the investigation at all. It appears that Mr Prouse had all the delegated powers of L.J. Daniels, so in effect if Mr Prouse had signed a letter under his own name and designation, there would have been no problems. The following passage, it was submitted, is the principle in this case:

An act done in the purported exercise of a statutory power is valid if the act falls within the statutory provision which confers the power. Prima facie an act will not fall within the statute unless it be done by the person in whom the statute reposes the power (whom I shall call "the Authority"). Validity is thus dependant upon the identity of the Authority and the doer of the act.

This passage was in fact cited with approval in 2001 in the High Court decision of *Re: Patterson ex parte Taylor (2001) 207CLR391*.

In considering the Social Security matter the court went on to say: “Mr Prouse’s power was intended to be exercised, but it was exercised in the name of Mr Daniels. The attempted exercise by a delegate of his own power miscarries when the very act of exercise purports to deny the power which gives validity to his act”.

It was ultimately determined that the letter of the 13th July 1977 was an invalid exercise of Mr Prouse’s delegated power.

The Exploration Licence, the subject of this dispute was in fact approved by Mr Fallico on the 11th August 2004. Under his signature on the approval document (which is page 388 of Exhibit 1) are the following words “Supervisor, Mineral Titles by delegation from the Minister”. Also the Exploration Licence itself which is dated the 11th August 2004 has Mr Fallico’s signature on the final page, which is page 403 of Exhibit 1, and adjacent to his signature a rubber stamp impression is as follows:

“V Fallico Supervisor, Minerals Titles, Titles Branch by delegation from the Minister.”

The instrument of delegation which appears commencing at page 141 of Exhibit 1 indicates the various individuals who have delegated authority to approve of this Exploration Licence. One of the entries of those who may approve is “Mining Registrars”. There is no delegated authority for a Supervisor, Mineral Titles to approve an Exploration Licence.

The Affidavit of Mr Vincent Fallico, which is Exhibit 3, has attached thereto a Position Description for the position of Supervisor, Mineral Titles, the position which was held at the relevant time by Mr Fallico. That Position Description which indicates, inter alia, the following: “to carry out the functions, duties and responsibilities of Mining Registrar in accordance with the *Mining Act 1992*” was submitted on behalf of the First Defendant that this position description gave the

authority for Mr Fallico to approve the Exploration Licence in his capacity as Supervisor, Mineral Titles.

With the greatest respect I cannot see how a Position Description, an unsigned document, I assumed was prepared for some administrative purpose perhaps pursuant to the *Public Sector Management Act 1988 Act* can be used to add another individual in an indirect manner to the instrument of delegation which was signed by the then Minister, The Honourable Edward Obeid. If the person holding the position of “Supervisor, Mineral Titles” was to have delegated authority to sign an Exploration Licence then that should have been inserted by the Minister and it cannot be inserted indirectly by the wording upon a Position Description.

Clearly then the Supervisor, Mineral Titles has no delegated authority to approve an Exploration Licence. It is trite to say however, that Mr Vincent Fallico in his position as a Mining Registrar would have power, delegated by the Minister, to approve an Exploration Licence.

The next matter to be considered is as to whether or not in signing this document Mr Fallico could be said to be signing it in his capacity as a Mining Registrar. In other words whether Mr Fallico was indeed granting ELA2316 in his capacity as a Mining Registrar or in his capacity as Supervisor, Mineral Titles. On the face of the record, Mr Fallico appeared to be approving that in his capacity as Supervisor, Mineral Titles. Notwithstanding the Position Description for the position of Supervisor, Mineral Titles, there is nothing on the face of the record to indicate that Mr Fallico was in fact acting in his capacity as Mining Registrar when he approved the Exploration Licence Application and when he signed the Exploration Licence.

However, the document was signed by Mr Fallico who was a Mining Registrar at the time. It is unfortunate that he has impressed a stamp bearing the words “Supervisor, Mineral Titles” under his signature. It is that stamp which has caused this aspect of the challenge to the validity of EL 6278 before the court.

Mr Perram is correct in saying that the facts in this instance can be distinguished from the Social Security case mentioned above. However, the principle in that case is

applicable. The power to grant the licence was in the Minister who validly delegated that power to Mining Registrars. Mr Fallico was a Mining Registrar at the time and he was the one who placed his signature granting the licence, on the form.

If one observes the wording typed under his signature on the document approving ELA 2316 and the wording on the stamped impression under his signature on EL 6278 they are as follows:

Supervisor, Mineral Titles

By delegation for the Minister.

Then, going to paragraph 8 of Mr Fallico's Affidavit, Exhibit 2 in the proceedings it states, inter alia:

“At the time I executed the licence, I held a delegation for the Minister to grant EL 6278 licence in my capacity as a Mining Registrar”.

It is obvious he is signing, by delegation, in his capacity as Mining Registrar.

Mr Lancaster submitted that if the court was to find that Mr Fallico was acting in the capacity of a Mining Registrar, it was in the capacity which he held which is the Mining Registrar for the Cobar Mining Division. Section 366 of the *Mining Act 1992* provides in Sub-Section 2 “A Mining Registrar is to be appointed for each Mining Division constituted under this section.”.

Page 16 of Exhibit No. 3 is a copy of a document which approves the appointment of Mr Fallico, during the relevant period, as Mining Registrar for the Cobar Mining Division.

Mr Lancaster submitted that the exploration in this particular matter was over land which was in the Coffs Harbour Mining Division and consequently Mr Fallico, if acting as Mining Registrar, was not authorised to approve matters outside of the Cobar Mining Division.

To respond to that submission one must firstly look at Section 22 of the *Mining Act 1992* and that grants a power in the Minister to grant an Exploration Licence.

Throughout the Act the authority vested in the Minister to grant certain matters under the Act is granted to the Minister for the whole of New South Wales. There is nothing in the Act to suggest that the Minister has authority to grant matters only within certain mining divisions. There is nothing in the *Mining Act 1992* which gives a Mining Registrar power to grant or renew an Exploration Licence. Any power given to a Mining Registrar is by way of delegation and as a delegate, one would be exercising any power that the Minister had in the circumstances, as the instrument of delegation places no restriction upon the delegation.

If one then looks at Section 51 of the *Mining Act 1992* it provides that an application for a mining lease must be lodged with a Mining Registrar. Section 63 of the Act provides that a Minister may grant a mining lease. Sections 113 and 114 provide that renewal of Authorities may be lodged with the Director General and subsequently the Minister may renew an Authority. An Authority includes an Exploration Licence and it is the grant and renewal of the Exploration Licence which has been delegated by the Minister to various personnel. Delegation "G" incorporates, inter alia, the Director General or the special project co-ordinator etc; none of those people have any particular connection to any particular Mining Division within the State. Also under the same category is listed Mining Registrars. It does not say a Mining Registrar for any particular Mining Division. If one looks through various sections of the *Mining Act 1992* reference is made consistently to "a Mining Registrar". It is not until Division 9 and in particular Section 178 that reference is made in Sub-Section (2)(d) "must be lodged with the Mining Registrar for the Mining Division within which the land to which it relates is situated." Throughout Part 9 generally matters may only be dealt with under that part by the Mining Registrar for the particular Mining Division which relates to the application etc. There are some exceptions, in particular Sections 195A, 203 and 210A. Consequently, it would appear from observing the Act that a Mining Registrar has general authority in respect to any matter within the State with the exception of matters concerning mineral claims. It is in that instance where only the Mining Registrar for the particular Mining Division has jurisdiction.

Following from that, and in particular the fact that the delegation comes from the Minister which delegates the Minister's power in various circumstances to Mining Registrars, then a Mining Registrar who is exercising that delegated power is

exercising the same power which would exist in the Minister in respect of that particular matter.

In relation to the approval of the Exploration Licence in this instance the Minister has the power to grant the Exploration Licence. The power to do that has been delegated to Mining Registrars. It is my opinion that any Mining Registrar within the State may exercise the power which the Minister had at that point of time; in other words any Mining Registrar may have granted Exploration Licence Application 2316. On the 11th August 2004 Mr Vince Fallico was a Mining Registrar. He had the delegated authority to grant ELA2316

Consequently, I do not find that the approval of EL 6278 is invalid due to the lack of delegated authority.

Grounds 2, 3 and 4

Concerning grounds 2,3 and 4 of the amended summons, there is an overlapping of particulars that are relied upon by the Complainant in respect of each of these grounds. I propose to generally cover those particulars now, in respect of those 3 grounds, so as not to repeat myself when discussing the individual grounds.

The common thread throughout those grounds is the allegation that the Second Defendant generally failed to comply with the Mining Act 1992 and the conditions of the license, in respect of EL 5358.

It is not disputed that the history of the Second Defendant in relation to his first exploration licence, EL 5358, was other than non-compliance with the conditions of the same and of the provisions of the Mining Act 1992.

There was no exploration conducted during the currency of the licence and no reports lodged as required. Furthermore the application for renewal which was lodged on the 21st September 1999 was in breach of Section 113(2) of the Mining Act 1992.

The application for renewal was for a number of units which exceeded half the number of units in the original licence. Consequently, it required special circumstances under the provisions of Section 114(6) of the Mining Act 1992, to justify the Minister approving the renewal. Notwithstanding these matters, special circumstances must have been established following correspondence between the Second Defendant and officers of the Department of Mineral Resources, as EL 5358 was renewed, to expire on 8 October 2002.

It is noted at this point of time that there was no competing interest in the land which was covered by EL 5358.

The Second Defendant, on the 26th September 2002, lodged a further application for renewal of EL 5358, once again, contrary to the time constraints placed upon the renewal pursuant to Section 113(2) of the Mining Act 1992. It is curious that in his submissions to the court, Mr Lancaster, on behalf of the Complainant states: "We are happy to overlook the late application". Although it appears that the time limit in Section 113 (2) of the Mining Act 1992 which is placed upon the applicant for renewal is mandatory, the Minister, under Section 135 of the Mining Act 1992 may waive minor procedural matters. A letter of explanation about the delay was forwarded by the Second Defendant (see page 172, Exhibit 1). It appears that this letter of explanation was faxed to the Department and received on 23rd September 2002 whilst the actual application for renewal and cheque was in the mail, being received at the Department on the 26th September 2002.

Once again, at this point of time, there was no competing application over the area covered by EL 5358. The only issue being raised at the time was a letter, forwarded to the Department prior to the lodging of the renewal application. The letter dated the 12th September 2002 (page 165, Exhibit 1) sent by Mr M Roche, a Director of the Complainant Company, objected to the renewal of EL 5358. In that letter, Mr Roche indicated the Complainant Company is now the owner of the land which is covered by EL 5358; that the Second Defendant has now tied up the land for three years and that only five test holes have been drilled; that the Second Defendant has entered the Complainant's land without any access agreement in place. It appears that these matters were pursued by the Department of Mineral Resources. (See page 179, 183 to 186).

Ultimately, on the 29th November 2002, renewal of EL 5358 was recommended (page 187 Exhibit 1). This renewal has never taken place.

On the 20th December 2002, the Complainant Company applied for an exploration licence (ELA 2041), covering seven units, one of which was the area then held by EL 5358, which was pending renewal, pursuant to Section 117 of the Mining Act 1992. In documentation accompanying ELA 2041, the Complainant specifically refers to EL 5358, indicating it will investigate and evaluate that area if EL 5358 is not renewed (page 192, Exhibit 1).

The “Exploration Licence Application Identification” (page 199, Exhibit 1) indicates seven units were applied for, but under the heading “Exclusions” the words EL 2538(92) are typed – handwritten figures of 5358 appear above the numbers. One assumes the reference of exclusion should read EL 5358. It then notes under the heading “area available” as “6 units”.

Page 202 of Exhibit 1 is a minute which indicates 6 units are available for EL 2041 and it lists those 6 as being Block 2625 Unit X, Block 2697, Units C, D, J, N and O. It does not include the unit which was held by EL 5358 which is Block 2697 Unit H.

It was the submission of Mr Lancaster that the Complainant was not served notice of the exclusion of the 1 unit from the application in accordance with Section 17(2) of the Mining Act 1992. In other words, the exclusion of Unit “H” from the ELA 2041 has not taken effect to date.

In response to that submission, the First Defendant submits there is no evidence that Unit “H” has been excised from the application and furthermore, that the Complainant’s argument ignores the provision of Section 19 of the Mining Act 1992, which prohibits the granting of an exploration Licence over any land inter alia, “...the subject of some other Exploration Licence....”.

The fact is, that unit “h” was not excluded from the application. What had in fact occurred was an offer being made of an exploration licence and that offer did not include area unit “h”. It would appear that this was the only way for the First

Defendant to deal with this matter at this point of time, having regard to the provisions of S.19 Mining Act 1992.

On page 274 of Exhibit 1, a request was forwarded by the Complainant, addressed to the First Defendant on the 8th December 2003, asking that EL 5358 be cancelled. The Complainant submits that the Minister should have dealt with that application. In reply, the First Defendant submitted that there is nothing in the *Mining Act 1992* that gives a right to an individual to make an application for cancellation.

This of course is correct, however a prudent approach was taken to the request of the Complainant in so far as a letter seeking an explanation to the allegations was sent to the Second Defendant on the 23rd December 2003. It is seen from page 328 of Exhibit 1 that a statement there from R. Kitchener of Titles Branch indicates that the request for cancellation should not be pursued any further. Consequently it cannot be said, as submitted by the Complainant, that the Minister had not dealt with the complaint by the Complainant concerning EL 5358.

Ground 2 - The grant of EL 6278 – a renewal of EL 5358? – breach of S114(5).

It was asserted by the Complainant that the grant of EL 6278 was in fact a renewal of EL 5358 and consequently a breach of the prohibition in Section 114(5) of the *Mining Act 1992*.

It is true that ELA 2316 was an application covering four units, one of which was at that particular time covered by EL 5358. ELA 2316, which ultimately became EL 6278, involves additional areas to that which is covered by EL 5358. Section 114 (5) of the *Mining Act 1992* provides that a renewal could not include land that was not subject to the Authority immediately before the renewal. But EL 5358 and ELA 2316 are two distinct matters. Nothing in the Act prevents any individual making an application for an exploration licence over an area which is presently the subject of another exploration licence. There is however, a prohibition of granting a licence over an area which is the subject to an existing licence with a proviso however, in accordance with Section 19 of the *Mining Act 1992*, that it may

be done so with the written consent of the holder or the applicant for that licence, lease or claim.

The Complainant relies upon pages 67, 72, 76 and 204 of Exhibit 1 to support its proposition. These pages refer to the issue of whether EL 5358 should be cancelled (as at January 2001) for non compliance of condition. With the greatest respect, it is stretching a long bow to use these documents to infer that EL 6278 was in fact a renewal of EL 5358.

I am not of the opinion that the granting of EL 6278 was in fact a renewal of EL 5358.

Ground 3 - EL 6278 invalid subject to a breach of Section 114(6)

Having regard to the fact that I have held that the grant of EL 6278 was not in fact a renewal of EL 5358, then this aspect concerning a breach of provisions of Section 114(6) of the *Mining Act 1992* will fail.

Ground 4 - Fail to consider special circumstances

Concerning Ground 4, it is alleged the Minister did not have regard to the Policy "Special Circumstances Renewal of Exploration Licences" (see p245, Exhibit 1) in reference to S.114(6) *Mining Act 1992*.

Although on the face of it, the Second Defendant did not satisfy criteria 1 to 3 set out in the policy document, the policy indicates "other extenuating factors may be taken into account".

The court does not know what was taken into account by the Minister. It does know, however, that factors concerning non compliance were known and pursued by the First Defendant before decisions were made.

I cannot uphold the submission of the Complainant that S114(6) of the *Mining Act 1992* was breached. However, this ground is contingent upon the basis that EL 6278 was in fact a renewal of EL 5358. I have determined that the grant was not a renewal.

Ground 5 - Renewal of EL 5358 lodged out of time

Although the application for renewal of EL 5358 was lodged out of time, there is a discretion pursuant to Section 135 of the *Mining Act 1992* in the Minister to waive that breach. The issue is of no concern because I have determined that the granting of EL 6278 was not a renewal of EL 5358.

Ground 6 - Relevant considerations not regarded in granting EL 6278

In relation to this ground the Complainant relies upon page 326 of Exhibit 1 which is titled "Policy: Special circumstances renewal of Exploration Licences" and also upon the aspects of the Second Defendant failing to conduct himself in a proper manner according to the Act, when previously the holder of EL 5358. In that regard the Complainant makes reference to the failure to adequately carry out prospecting, failure to pay compensation to the landholder, to have an access agreement, drilling outside the boundaries of EL 5358 and other matters.

In respect of all of those allegations that have been raised, these matters were raised with the Department and from the records it is quite apparent that they took some measures in respect of that. Notwithstanding those alleged infringements, it would appear that a decision had been made not to take any further action in relation to that and to continue on with processing the application made by the Second Defendant. It is not the role of the court at this point of time to look behind that decision that was made, however, I am satisfied that the alleged infringements were attended to by officers of the Minister and that a discretion was exercised concerning those alleged infringements.

Ground 7 - Grant of EL 6278 contrary to Section 19.

The Complainants specifically referred to Section 19 and the failure to obtain written consent prior to the granting of EL 6278. The Complainant is relying upon the lack of written consent of the holder of ELA 2041.

The issue here is as to whether or not ELA 2041 was in fact on foot at the point of time when EL 6278 was granted. The Complainant submits that ELA 2041 was still on foot at the relevant date. The First Defendant is relying upon documentation where a note is made that ELA 2041 was in fact withdrawn on the 5th March 2004.

Section 130 of the *Mining Act 1992* provides for withdrawals, it states:

130 Withdrawal of application

- (1) An application or objection in relation to the grant, renewal, transfer or cancellation of an authority may be withdrawn by means of a notice of withdrawal signed by the applicant or objector and lodged with the Director-General and ceases to have effect when the notice is lodged.
- (2) The withdrawal of an application or objection under this section is irrevocable.

There are three documents, which are specifically relied upon by the parties in respect of this ground; they are pages 311,312 and 313 of exhibit 1.

It is necessary at this point of time to outline the facts concerning this issue.

- Exploration Licence Application 2041 (ELA2041) was lodged by the Complainant on 20th December 2002, which was over an area of 7 units of land, which were: Armidale, Block 2625, Unit x, Armidale, Block 2697, units c, d, h, j, n and o.
- The Complainant expressly indicated a keenness to explore unit “h”.
- Unit “h” was in fact subject to EL5358, at that point of time held by the 2nd Defendant.
- The Complainant has previously sent a letter to the Director General objecting to the renewal of EL5358
- In response to ELA2041, the Complainant was offered, by letter dated 5 November 2003, an exploration licence over six units of land, all that was applied for with the exception of unit “h”
- On 20 February 2004, a letter was sent to the Complainant, indicating that if the offer of the 5 November 2003 was not taken up within 14 days, “action will be taken to refuse the application without further notice”.
- On 4 March 2004, the agent for the Complainant, Max Rangott, wrote in response to the letter of 20 February 2004 (page 311 exhibit 1).

- Handwritten on the bottom of page 311 is the following: *Spoke to Mr. Rangott by phone today. He will organise for the applicant to execute a withdrawal & fax it to me.* A signature then appears above the letters 5-3-04
- The Complainant sends in a letter, (page 312, exhibit 1) virtually a carbon copy of that sent by Rangott, dated 5 March 2004. The letter states, inter alia, "...this company does not wish to accept the offer...in satisfaction of our application...." And further, "The reason for not proceeding further is that we have entered into an agreement ...registered as Private Mining Agreement No.23."
- An officer of the Department prepares a document (page 313, exhibit 1) which is headed **WITHDRAWAL OF AN APPLICATION**. The document is dated 5 March 2004, indicating ELA2041 was withdrawn.

The question to be determined is whether or not the letter from the complainant company was in fact a withdrawal of ELA2041.

S.130 Mining Act 1992 provides that a withdrawal must be by way of notice signed by the applicant and lodged with the Director General. Sub-section 2 provides that such withdrawal is irrevocable.

Sub-section 2 is important in that it makes it very clear that a withdrawal is final. The significance of that is that it sheets home the necessity for any withdrawal to be clear and concise. The reason for the requirement of a written notice, signed by the applicant, is clear: it prevents any impropriety from a competing applicant purporting to withdraw the application, say by telephone.

It is important to note the Complainant did not use the word "withdraw" or any derivative of that word, in the letter of 5th March 2004. What was used was the phrase "not proceeding further".

The Shorter Oxford Dictionary defines "withdrawn", in its normal use, to mean, "to remove", "to draw back", "to take away". Whereas it defines "proceeding" as "action of going onward", "a particular action or course of action".

In its ordinary context, “withdrawn” has a more permanent connotation than “proceeding”.

However, to determine whether “not proceeding further” in the letter of 5th March 2004 meant “withdrawn” as it appears in S.130 *Mining Act 1992*, one must look at the history of the events and the context in which the letter was written, together with the meaning of S.130 within the context of the whole of the *Mining Act 1992* itself.

When applications are lodged under the *Mining Act 1992*, the general rule is that the first lodged in time has priority. However, very often certain criteria must be met before an application is filed (see for eg S.176, S177) and further, other sections provide for specific forms and specific information to be supplied with the application. Priorities may be lost if those sections are not satisfied before filing the application. Competing interests are certainly not rare and it is trite to say that often the successful applicant could be embarking upon a mining enterprise that may be worth tens of millions of dollars profit. Accordingly, it is not an unusual feature that disputes arise as to which party has priority with an application. Indeed, the Act expressly, in S.132, provides that disputes as to priority of applications are to be determined by the Minister.

Assuming that all the necessary prerequisites to filing an application are met, priority can only be lost, other than the application being dealt with and being refused, by withdrawal under the provisions of S.130.

With that in mind, having regard to the ramifications of a withdrawal, it is my opinion that any withdrawal under that Section must be unambiguous, unequivocal and unconditional.

As no witnesses were called to give evidence, the court is left with the documents tendered and any inferences that may be drawn there from. The Complainant received a letter dated 5th November 2003, offering it an exploration licence over a portion of land, which was not in full satisfaction of its application. One can infer that the unsatisfactory response to ELA 2041 turned the Complainant into negotiating

with the landholder to obtain the private mining agreement, which covered all of the area which was sought in ELA 2041.

It is not unreasonable to infer that the Complainant was aware that the filing of that agreement (PMA23) had no effect until mining commenced. That could not take effect, in so far as the Department of Mineral Resources, as it was then known as, was concerned, until the Complainant lodged a security deposit. The quantum of security had to be determined by the Director General (it was so determined on 8 March 2004). It is not an unwarranted assumption that the Complainant was keeping ELA2041 alive until PMA23 was actually operational. It is also reasonably assumed that the Complainant Company, in so far as dealing with the Department of Mineral Resources, was simply standing by, awaiting notification of the amount of security required, before proceeding further with PMA23.

There is no indication that when PMA 23 was registered, the Complainant sought to withdraw ELA2041. The only time there was any response to the Department about that application was the result of the letter of 20th February 2004. It was that letter which indicated that if the offer of the exploration licence (for 6 of the 7 units applied for in ELA2041) was not taken up within 14 days, *action will be taken to refuse the application without further notice.*

It is not unreasonable to infer that if the Complainant wanted ELA 2041 disposed of, it had to do nothing but remain quiet, then, in accordance with the letter of 20th February 2004, ELA2041 would have been refused on 5th March 2004.

But that is not what was done, the Complainant did reply to that letter. It is not unreasonable to infer that the reply was to keep the application alive and not to have it disposed of on 5th March 2004.

The First Defendant does not see it that way; Mr. Perram submitted that the Complainant did not call Mr. Rangott to deny that the conversation noted on page 311 of exhibit 1 took place. But there is no suggestion that a conversation about a withdrawal took place between Mr. Rangott and an officer of the Department. The issue here is whether the letter from the Complainant, following that conversation,

was a withdrawal under S.130 of the Act. If the First Defendant was confident that the letter was a withdrawal, then it could be asked why didn't Mr. Perram call the writer of the letter, who was sitting in court, to question him about the meaning of the letter of 5th March 2004?

As I said earlier, there is no evidence before the court other than the documents tendered; consequently the court can only rely upon those documents and any inferences that may be inferred there from.

The mere fact that the parties before the court are arguing whether or not the letter of 5th March 2005 is a withdrawal of ELA2041 under the provisions of S.130 of the *Mining Act 1992*, shows that the letter is certainly not clearly a withdrawal.

Concerning this seventh ground, on the evidence before this court, I cannot be satisfied that ELA2041 was withdrawn by the applicant, as was required by the provisions of Section 130 of the Act.

Consequently, ELA 2041 was still on foot at the time of the purported granting of EL6278. Therefore, before EL6278 could be granted, the written consent of the applicant of EL2041, that is the Complainant in these proceedings, would be required under the provisions of Section 19 of the *Mining Act 1992*.

That written consent does not exist.

Ground 8 - Failed to deal with revocation of EL 5358

On the evidence before the court, there is no doubt that the Minister did not revoke EL 5358, but it cannot be said that the Minister did fail to deal with a request by the Complainant for the revocation of EL 5358.

Ground 9 - Minister refused to consider ELA 2041 realistically

When considering ELA 2041 an offer was forwarded to the Applicant in respect of all areas applied for excluding that area at the time which was covered by EL 5358. It is clear that all units applied for were required by the Complainant when ELA 2041 was

submitted and that the Complainant was not satisfied with the exclusion of unit “H”. However, for unit “H” to be offered to the Applicant of ELA 2041, it would have been necessary to revoke or cancel EL 5358. That matter was looked at and a determination was not made to cancel or revoke EL 5358. Consequently I am of the opinion that EL 2041 was dealt with in an appropriate manner, insofar as the offer that was made to the Applicant.

Relief Sought

There were submissions put to the court in relation to the relief that is being sought in the amended Summons. Although there is no challenge to the fact that the court has jurisdiction in respect of Relief No 1, there is a challenge as to the jurisdiction of the court concerning Relief 3 and 4. Furthermore there is some reservation on the part of the First Defendant as to the jurisdiction of the court concerning Relief No. 2. Notwithstanding that, there is a concession that if the court granted Relief No. 1 as requested then accordingly Relief No. 2 would simply be a matter of course.

Mr Perram rightly pointed out that a Warden’s Court obtains its power purely within the *Mining Act 1992*, it is not a superior court and consequently cannot get powers outside of the Act. He outlined various sections of the *Mining Act 1992* which specifies the powers of a Warden’s Court, including the provisions of Section 312 and 313 which are concerned with the statutory injunctive powers of a Mining Warden. Mr Perram went on to submit that Relief Nos. 3 and 4 sought are effectively an injunction which fall outside the parameters of the jurisdiction given to a Warden’s Court pursuant to the provisions of Section 312 and 313 of the *Mining Act 1992*.

Mr Moore, in submissions on behalf of the Second Defendant, supported the submission by Mr Perram.

In response to that submission, Mr Lancaster referred to the wide jurisdiction of the Warden’s Court pursuant to Section 296 of the *Mining Act 1992*. In particular he made reference among other things to sub-paragraph (o), (p) and (r). The thrust of his submission was that if the court has power to make certain orders under those sub-sections then it follows that Relief 3 and 4 must be granted to “give teeth” to the previous orders if granted.

Injunctions, whether they be issued pursuant to the provisions of the *Mining Act 1992*, or whether they be issued following a common law action before the Supreme Court, by nature are orders which generally prohibit certain persons from performing certain acts. Relief 3 and 4 are not seeking a prohibition of matters to be done but to the contrary, are tantamount to directing the Minister to perform certain functions. The wording of those two matters is more in line with a common law writ of mandamus. If this court has any powers akin to a writ of mandamus, it must be expressly outlined in the *Mining Act 1992*. Section 203(1)(g) gives the court power in respect of the cancellation of mineral claims: It states:

A Mining Registrar may cancel a mineral claim, as to the whole or any part of the land to which it relates:

(g) if the Mining Registrar is ordered by a Warden's Court to cancel the claim.

There are other sections within the Act which gives a Warden's Court express powers to make certain orders which would facilitate, or "give teeth" to relief that may be sought in some cases. However, there is nothing I could find which would allow me to make orders of the type sought in Relief 3 and 4.

CONCLUSION

The Complainant seeks five orders from the court and to that purpose relies upon 9 grounds to establish the relief it seeks. I have found that only one of those grounds, that is Ground 7, has been established to the requisite standard. That one ground is sufficient to grant the first order sought by the Complainant.

Accordingly, I make the following order:

A DECLARATION IS MADE THAT THE GRANT BY THE MINISTER FOR MINERAL RESOURCES OF EXPLORATION LICENCE 6278 (EL6278) TO THE SECOND DEFENDANT, ELLIS R. WALKER ON THE 11TH AUGUST 2004 IS INVALID.

I will hear any submissions as to relief No. 5 sought, that is, the question of costs.

COSTS

After hearing submissions as to costs, I make the following Order:

ORDER MADE THAT THE FIRST DEFENDANT PAY THE COMPLAINANT'S COSTS IN THE AMOUNT AGREED BETWEEN THE PARTIES. IF NO AGREEMENT IS REACHED ON OR BEFORE THE 30TH SEPTEMBER 2005, SUCH COSTS MAY BE ASSESSED UNDER THE LEGAL PROFESSION ACT.

NO ORDER AS TO COSTS IN RESPECT OF THE SECOND DEFENDANT.