IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

FRIDAY 13 DECEMBER 2002

CASE NO. 2002/39

SANDLOFT PTY LTD **(Applicant)**

v.

RANDOLPH JACK GOURLEY MARTIN **(Respondent)**

SECTION 312 - INJUNCTION

APPEARANCES AT HEARING:

Applicant: Mr W Alstergren of Counsel, instructed by Mr D Bartram, Solicitor of Weatherly & Bartram

Respondent: Mr L Moore, Solicitor of Evans & Englert

Matter heard at Finley on 9th December 2002

DECISION

HANDED DOWN IN ABSENCE OF PARTIES

The applicant company, the landholder of the property upon which is situated mining lease 1519, seeks an injunction under the provisions of S.312 Mining Act 1992. The terms sought in the injunction, if granted, would effectively prevent the lease holder, Randolph Martin, from not only mining but even encroaching upon the area subject to the lease. In addition, the applicant is seeking a declaration that:

1. The dimension stone located within the lease is privately owned by the complainant
2. Pursuant to Division 2 Part 14 Mining Act 1992, the complainant is able to set its own royalty rate in respect to the dimension stone located within the lease
3. In default of agreement between the complainant and the defendant regarding the royalty rate in respect to the said dimension stone, the defendant is not permitted to mine the said dimension stone within the Lease

From discussions between the parties prior to the commencement of the case, the Respondent leaseholder conceded that the dimension stone was a privately owned mineral. Having regard to that concession and to the fact that the injunction was being sought upon the grounds that mining should not take place unless an agreement is in place concerning royalties, the case proceeded without evidence and upon submissions from the legal representatives as to the interpretation of the Mining Act 1992 in respect of royalty.

THE RELEVANT LAW

Division 2 of Part 14 of the Mining Act 1992 provides:

Division 2 --- Privately owned minerals

284. Liability to pay royalty

(1) The holder of a mining lease is liable to pay royalty to the Minister on privately owned minerals recovered from the land as if those minerals were publicly owned minerals

(2) If royalty (including any interest on royalty) is paid to or recovered by the Minister in respect of a privately owned mineral, the Minister is to pay:

(a) seven-eighths of the amount so paid or recovered to the owner of the mineral, and

(b) one-eighth of the amount so paid or recovered to the Treasurer for payment into the Consolidated Fund

285 Rate of royalty

Royalty is payable under this Division:

(a) except as provided by paragraph (b) --- at the base rate prescribed under section 283(1)(a) in respect of the mineral concerned, or

(b) in the case of mineral other than coal --- at such other rate as may be agreed on between the holder of the mineral claim or authority concerned and the owner of the mineral.

It should be noted that Division 1 of Part 14 of the Act, refers to "**Publicly owned minerals"**

SUBMISSIONS OF PARTIES

It was submitted on behalf of the landholder that a number of possible interpretations may be placed upon section 285. Firstly, 285(a) applies to coal and 285(b) applies to minerals other than coal. Further, 285(a) applies to minerals which are publicly owned whereas S.285(b) applies to privately owned mineral. Mr. Alstergren further submitted that if it were interpreted that failing an agreement under S.285(b) then 285(a) comes into place, it would make a nonsense of the section. He submitted that a holder of a lease need never come to an agreement and consequently would need to pay the prescribed rate; which is, he said, not the purpose of the Act.

The rationale Mr. Alstergren submitted, is that the government sets a royalty rate for publicly owned minerals and not for privately owned minerals.

Clearly this matter hinges upon the interpretation of the Mining Act 1992, in particular Section 285. In this regard, Mr. Alstergren referred to the High Court decision of *Wade v. New South Wales Rutile Mining Co. Pty. Ltd. & Ors [1969]121CLR 177.* In that case, consideration was being given to the meaning of section 70D of the Mining Act 1906. Barwick CJ said at p181:

"..the fundamental principle that if Parliament intends to derogate from the common law right of the citizen it should make its law in that respect plain is pertinent to the question whether any such implication should be sought to be made. The courts are not entitled, and ought not, to eke out a derogation of such private rights by implications not rendered necessary by the words used by Parliament but merely considered to be consistent with the policy which the courts conclude or suppose the Parliament to have intended to implement. Consequently, I feel bound to give S70D its literal operation."

Mr. Moore, on behalf of the claim holder, submits that to suggest S.285 is to be interpreted as meaning the base royalty rate applies to coal and other privately owned minerals have a royalty rate as agreed between the parties, would result in no mining taking place if there is no agreement. This would lead to a manifest absurdity.

He submits that if this interpretation is placed upon the section, the owner of the minerals could frustrate the whole process of granting a lease by simply refusing to agree upon a royalty rate at the end of the process.

Mr. Moore outlined a number of reasons as to why this interpretation of the section is wrong:

1. it ignores the presence of the word "or" in subclause (a), where "or" is disjunctive, not conjunctive.. There are two distinctive ways of fixing the royalty rate, one or the other.
2. if 285(a) only referred to coal, why are the words "in respect of the mineral concerned" appearing in the subclause?
3. it ignores the phrase "such other rate". If this construction is to be placed upon the section, the phrase would read "at the agreed rate", the words "such other rate" would be otiose.
4. it requires the word "may" in subclause (b) to be construed as "shall" - making it mandatory for the holder of the Mining Lease to reach an agreement.
5. It wrongly assumes no mining can take place unless an agreement as to royalty is in place. There is nothing in the Act on which this assumption can be based.

In his submissions, Mr. Moore outlined that a right to mine is given by the granting of the Mining Lease. It is not a right conferred or withheld by a private individual, even the owner of the mineral. He made reference to Sections 11, 73 and 265(4) of the Mining Act 1992.

Section 11 provides that once a mineral is extracted from the ground, it becomes the property of the lease holder. Section 73 outlines a lease holders rights - nothing in that section prevents a holder from mining if no royalty rate agreement is in place. Section 265(4) prohibits mining until an agreement or assessment of compensation is made. There is no similar provision in the Act in respect of royalty rates.

INTERPRETATION OF STATUTES

Courts are consistently being called upon to interpret Statutes. In *Maunsell v. Olins [1975] AC 373 at 291* Lord Simon of Glaisdale, when considering the meaning of the word "premises" in the British Rent Act 1968, said:

> "Statutory language, like all language, is capable of an almost infinite gradation of 'register' – i.e. it will be used at the semantic level appropriate to the subject matter and to the audience addressed....It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give to it the primary meaning which is appropriate in that register...In other words statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances".

Numerous decisions have been made concerning cases where the ordinary meaning of words do not identify the meaning which Parliament intended. In *Sarasvati v. The Queen (1990-1991)172CLR 1 at 21*, the court indicated that in circumstances where the literal or grammatical meaning does not give effect to the purpose of a Statue, it cannot prevail. It went on to say:

> "It must give way to the construction which will promote the underlying purpose or object of an Act".

Those words find statutory support in *Section 33 Interpretation Act 1987*, which states:

> "In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object."

PAYMENT OF ROYALTIES

The liability to pay royalties does not arise until minerals are recovered from the land and the royalties are payable to the Minister (S284). So it is a debt to the crown, it is not a private debt. The Minister, once he has received a royalty, has an obligation to pay out a sum to the owner of a mineral which is privately owned.

The purpose of the payment of royalties is to compensate the owner of the mineral for the removal of it from his ownership. The Regulations provide for a specific sum which applies to certain minerals. This sum is payable to the Crown and is retained by the Crown in respect of publicly owned minerals. One must accept that this is a sum which the Crown deems to be adequate for the removal of the mineral (belonging to the Crown) from the soil.

Clearly the sum set by the Regulations has no bearing upon the actual value of the mineral - it recognises the huge expense of the leaseholder in exploring, extracting and processing the mineral concerned.

No doubt, in enacting Section 285, Parliament recognises that the owner of a private mineral might wish to negotiate a different rate than that regulated for the Crown. However, in doing this, the question is whether it was the intention of Parliament to allow the owner of the mineral to specify an exorbitant rate of royalty, thus holding the lease holder to ransom over royalty. If that was Parliaments intention, then surely it would have expressly inserted in the Act the fact that no mining shall take place until an agreement as to the royalty rate is reached.

GRANTING OF MINING LEASES

The granting of a mining lease is not a simple process. Various provisions of the Act allow the rights of the landholder to be considered, such as inquiries and /or investigations as to objections lodged, either by a mining warden or by the Director General of the Department of Agriculture. Obligations of the applicant have to be addressed, such as environmental matters. These processes are time consuming and often expensive to the applicant. Development consent has to be applied for and granted before a mining lease will be granted. This process itself may be complicated, time consuming and expensive for the applicant. Once the lease is granted, it is necessary for the holder to negotiate with the landholder concerning compensation. The Act expressly prohibits mining until that matter is resolved. If no agreement as to compensation is reached, the matter may be resolved before a warden's court.

Nothing in the Act expressly prohibits mining if no agreement as to royalty rate is reached. There is no express provision in the Act for a warden's court to assess a royalty rate for privately owned minerals if no agreement is reached.

It would appear to be abhorrent that an Act of Parliament would require an applicant to put so much effort into obtaining a mining lease, only to be ultimately frustrated in exercising rights under the lease by a land holder who is wanting to put his own royalty rates upon the mineral.

CONCLUSION:

I cannot accept the submission on behalf of the landholder that S.285 of the Mining Act is to be interpreted in such a manner that no mining is to commence pursuant to the rights given under Mining Lease 1519 until an agreement is reached with the landholder concerning royalty rates.

If no agreement is reached, the amount of royalty payable by the leaseholder is that prescribed by the Regulations and is payable to the Crown upon the extraction of the dimension stone.

DETERMINATION:

Concerning the declarations sought by the complainant, I make the following declaration:

The dimension stone located within the Lease is privately owned by the complainant

I decline to make declaration 2 and 3 as sought by the complainant.

That being so, having regard to the basis upon which the injunction under s.312 was being sought, I decline to issue an injunction.