

30/1962

IN THE PRIVY COUNCIL

No. 19 of 1962

ON APPEAL  
FROM THE COURT OF APPEAL OF NEW ZEALAND

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
30 MAR 1963  
25 RUSSELL SQUARE  
LONDON, W.C.1.

BETWEEN  
HUGH THOMAS MILLER Appellant  
and  
THE MINISTER OF MINES AND THE  
ATTORNEY GENERAL OF NEW ZEALAND  
... Respondents

68260

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the judgment of the Court of Appeal of New Zealand dated the 6th day of June 1961 dismissing an appeal from a judgment of the Supreme Court of New Zealand given on the 10th October 1958. p.73

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2. The action out of which the appeal arises was commenced in the Warden's Court of the Otago Mining District at Cromwell and was by consent removed into the Supreme Court of New Zealand on the 9th May 1957. The Warden's Court is a special court constituted under the provisions of The Mining Act 1926 (New Zealand). p.40

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3. The appellant as Plaintiff in the action claimed that he was the registered proprietor, by virtue of a Certificate of Title under The Land Transfer Act 1915, of certain lands comprising inter alia Section 39 Block 11 Dart Survey District and that Her Majesty claimed the right to mine and to authorise persons to mine scheelite from the said Section 39 by virtue of Mineral License No.1697 issued under the provisions of The Mining Act 1908. P.1

4. The appellant claimed a declaration that Her Majesty was not entitled to mine or authorise persons to mine scheelite from the said Section 39

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p.2	by virtue of the said mineral Licence.	
p.7	5. The respondent as Defendant in the action did not contest the claim of the appellant that he was registered as the proprietor of an estate in fee simple under a Land Transfer Act Title of the land in question but asserted the right to mine and authorise persons to mine for scheelite thereon.	
p.5-7 p.75-101	6. No Statement of Defence is required to be filed by a defendant in proceeding in the Warden's Court either in that Court or upon removal into the Supreme Court. The basic facts establishing the Titles of plaintiff to his freehold and of Her Majesty to the said Mineral Licence No.1697 were agreed upon and put in evidence together with agreed copies of all relevant documents.	10
p.8 et seq p.27,L.24	7. Viva Voce evidence was also given in the Supreme Court by or on behalf of both parties relative to the knowledge of Plaintiff regarding mining activities which were being carried on on the property at the time when Plaintiff acquired a Title to it.	20
p.24,L.42	8. The following agreed questions were submitted to Mr. Justice Henry for his determination viz:	
p.25	(a) Whether Mineral Licence No.1697 is a valid licence	
p.28	(b) Assuming it be held that Mineral Licence 1697 is a valid licence whether by virtue of the provisions of The Mining Act 1908 it is fully effective and binding against the Plaintiff.	30
p.53,L.41	(c) Whether certain agreements between Plaintiff's predecessor in Title David Aitken and the Glenorchy Scheelite Mining Company Limited now vested in Her Majesty conferred any present right upon Her Majesty to mine for scheelite upon the said lands. This claim by defendant was abandoned in the Court of Appeal and calls for no further consideration.	40
	9. His Honour Mr. Justice Henry was of	

opinion that Mineral Licence 1697 was a valid licence and that the "indefeasibility" provisions of The Land Transfer Act 1915 did not entitle the Plaintiff to set up his title thereunder as free and clear of the rights now vested in Her Majesty by virtue of the said Mineral Licence.

p.30,L.11

p.38,L.14

10. On appeal to the Court of Appeal the decision of Mr. Justice Henry was upheld.

10 11. The questions with which this appeal is concerned are the same two questions.

12. The case for the appellant falls into two parts viz:

20 (a) The case based upon the provisions of The Mining Act 1908 whereunder it is claimed the Warden had no power to grant Mineral Licence 1697 with the additional argument that even if validly granted the Licence is of no avail against the subsequent transferee of the freehold unless the rights granted are registered against the freehold title.

(b) The case based upon the provisions of The Land Transfer Act 1915 whereunder it is claimed that by virtue of the provisions thereof the estate of Plaintiff as registered proprietor was paramount and the said Mineral Licence 1697 conferred no rights against the Plaintiff.

30 13. Dealing firstly with the argument under the Mining Act the factual basis is:-

(a) That at the time Mineral Licence 1697 was granted the land concerned was the fee simple of David Aitken

p.75

(b) That David Aitken signed upon the application for the Mineral Licence the words "I consent to this application".

p.84

(c) That nothing was ever registered against the title to the fee simple relative to the said Mineral Licence except:-

40 (i) Caveat No.2812 by the Glenorchy Scheelite Mining Company Limited on 12th March 1925.

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p.77

(ii) Withdrawal of Caveat No.2812 on  
13th October 1925.

14. The legal basis of the argument on behalf  
of Plaintiff under the provisions of the Mining  
Act are:-

- (a) That the Warden has no jurisdiction to grant a Mineral Licence over fee simple land under any of the provisions of The Mining Act 1908.
- (b) That proposition (a) is patently correct unless an exception is to be found in the provisions of Section 58. 10
- (c) That there is no such exception because Section 58 applies only to mining for gold and silver which are the property of Her Majesty by right of Her Prerogative and to base metals and minerals which Her Majesty owns in the lands of subjects.
- (d) That the Mining Act 1908 in so far as it deals with the disposition of metals and minerals both Royal and base is a prerogative Statute regulating and stipulating the procedure by which subjects may acquire the right to possess themselves of Her Majesty's mines (both Royal and base) and it has nothing whatever to do with the disposition of base metals and minerals owned by subjects in fee simple. 20  
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- (e) That whenever the provisions of The Mining Act infringe upon the fee simple in the ownership of subjects they do so for the sole purpose of enabling the holders of licences to whom Her Majesty has granted authority to work Her Majesty's mines (both Royal and base) to have easements to facilitate the working of their grants and in such cases provision is made for the subject whose fee simple is encumbered to have compensation. 40
- (f) If the foregoing argument is sound no

question can arise as to whether a grant of a Licence to mine under The Mining Act is required to be registered in some form or another against a freehold Title under The Land Transfer Act because the grant will deal only with Her Majesty's property and not with any part of the hereditament belonging to the subject.

10 (g) With regard to ancillary rights granted over the fee simple lands of subjects for the purpose of facilitating the working of grants of mines it is argued that such rights are of no avail against a subsequent transferee of the fee simple unless there has been an appropriate registration against the Certificate of Title and that the obiter dicta of Mr. Justice Williams in GRAY v. URQUHART 30 N.L.Z.R. 303 at P.308 to the contrary does not correctly state the law.

20 (h) That the right to register an estate or interest under the provisions of The Land Transfer Act 1915 is a separate and distinct legal "actio" from the power to register. The power of the District Land Registrar to register is controlled by the form of the document presented for registration (Section 42) and it is submitted that for this reason the Act provides for the lodging of Caveats (Sec.137) whereby a person who has a registerable right but not a document in acceptable form may lodge a caveat to protect such right. But the basis of registration is the right not the form in which the right happens for the time being to be cast. The appellant contends that every ancillary right is an easement and could be registered if it were formulated in a document which complied with Section 42. They are easements purely and simply and the most positive proof that they can be cast in a form capable of registration is supplied by the fact that both within the outside mining districts that is in fact frequently done.

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15. The factual basis on the appellant's case under the Land Transfer Act 1915 are:-

- (a) That appellant has a Certificate of Title under The Land Transfer Act which has no encumbrance lien and interest and no easement or profit a prendre in favour of Her Majesty registered against it.
- (b) That appellant became registered as proprietor of the lands comprised in the said Certificate of Title without fraud. 10

16. The legal basis of the argument on behalf of the appellant under the said Act are:-

- (a) That appellant's title is indefeasible under the provisions of Sections 38, 58, 68, 82 of The Land Transfer Act 1915 now Sections 41, 62, 75, 90 of The Land Transfer Act 1952.
- (b) That assuming Mineral License 1697 is valid the rights thereby conferred are rights which are registerable as easements and as profits a prendre even though the present document is not acceptable under Section 42 or at least such rights are susceptible of protection by lodgment of a caveat under Section 137. The onus is on the licensee to procure a document acceptable for registration or to lodge a caveat to protect his rights. 20
- (c) That nothing done or omitted by the appellant upon any acceptable construction of the evidence amounts to fraud. 30
- (d) That the appellant relies upon the interpretation of the indefeasibility provisions of The Land Transfer Act as decided by Assets Co. v. Mere Roihi (1905) A.C. 176 and contends that the decisions in Barber v. Mayor of Petone (1908) 28 N.Z.L.R. In Re a Transfer Fell to Moutere Amalgamated Fruits Lands (Limited) (1913) 33 N.Z.L.R. 401 Gray v. Urquhart (1910) 30 N.Z.L.R.303, 40

Hawkes Bay River Board v. Thompson (1916) N.Z.L.R. 1198 The King v. Waiariki District Maori Land Board (1922) N.Z.L.R. 417, and The King v. Mayor of Inglewood (1931) N.Z.L.R. 177 constitute an erosion of the principles of Assets Co. v. Mere Roihi and do not correctly state the law or alternatively the appellant contends that those decisions establish that specific statutory authority is necessary for an unregistered interest to prevail against the indefeasibility provisions.

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- (e) That as regard the holder of a clear Certificate of Title under the Land Transfer Act all unregistered rights are at the best equities only because under that Act there is only one legal estate and that is the estate appearing on the register. Any other estates if they exist at all can exist only as equities.

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17. The relevant provisions of The Land Transfer Act 1915 now quoted from The Land Transfer Act 1952, which is identical in this regard, are as follows:-

Section 41 (1) No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render any such land liable as a security for the payment of money, but, upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in the instrument shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies, set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature.

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Section 62

Notwithstanding the existence on any other person of any estate or

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interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in cases of fraud hold the same subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register constituted by the grant or Certificate of title of the land but absolutely free from all other encumbrances, liens, estates, or interest whatsoever, --- 10

(a) Except the estate or interest if a proprietor claiming the same land under a prior Certificate of Title or under a prior grant registered under the provisions of this Act; and 20

(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously included in the grant, Certificate of Title, Lease or other instrument evidencing the title of the registered proprietor by wrong descriptions of parcels or of boundaries. 30

Section 90 (1) When land under this Act, or any estate or interest therein, is intended to be transferred, or any right of way or other easement or any profit a prendre is intended to be created, the registered proprietor may execute for the purpose of registration a memorandum of transfer in Form B 40



10 in the Second Schedule hereto, which memorandum shall, for description of the land intended to be dealt with, refer to the proper folium of the register, with such further description as may be necessary, and shall contain a precise statement of the estate or interest intended to be transferred or created. No easement or profit a prendre created as aforesaid in respect of any mortgage or encumbered land shall be binding on the Mortgagee except so far as he has consented thereto.

18. Licence 1697 was granted under Section 56 of The Mining Act 1908 which is the same as Section 58 of the Mining Act 1926 and provides:-

20 Notwithstanding anything hereinbefore contained, the following special provisions shall apply in the case of all lands whatsoever in New Zealand other than Crown Lands open for Mining:-

- 30 (a) The owner of any such land, or any person with the written consent of the owner and occupier (if any), may, in the prescribed manner, apply to the Warden for any description of mining privilege authorised by this Act in the case of Crown Lands in a Mining District, and the Warden, in his discretion, may grant a licence for the same.
- (b) Every licence so granted shall be deemed to be granted and shall be held subject to this Act, and subject also to any agreement made between the grantee and the owner or occupier, in so far as such agreement is not inconsistent with this Act.
- 40 (c) So long as such licence continues in force the land comprised therein shall not be resumed for Mining purposes, nor shall any prospecting licence be granted in respect thereof.

19. Gresson P. considered that there is a

P.44,I.39-47

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- p.45,L.1-3 repugnancy between the indefeasibility provisions of the Land Transfer Act and those in the Mining Act providing for the grant of mining privileges and considered that the provisions of the Mining Act should prevail by virtue of the maxim "generalalia specialibus non derogant".
- p.52,L.3-9  
p.53,L.37-40 Cleary J., first considers the effect of Section 178 of the Mining Act as to whether the interest created by a mining licence is an interest in land or a personal chattel and proceeds upon the basis that it is an interest in land. His Honour then continues to observe that it is well settled that statutory rights may prevail over the title of a registered proprietor and concludes that mining privileges do so prevail for three main reasons. 10
- p.54,L.46-47
- p.55,L.6-14 First, His Honour considers that because mining privileges are not registerable under the Land Transfer Act but are grantees pursuant to statutory authority they are not intended to be defeated by the indefeasibility provisions of The Land Transfer Act. Secondly, His Honour considers that because the grant of a mining privilege takes immediate legal effect whereas an instrument affecting Land Transfer Land generally confers only an equitable title until it is registered it would be inconsistent for registration under the Land Transfer Act to be necessary to give the mining privilege full effect. Thirdly, His Honour considers that the provision of an independent system of registration under the Mining Act and consequent possibilities of conflict with the Land Transfer system if there were to be registration under both Acts recognises that the two systems are mutually exclusive. 20
- p.57,L.8-14 30
- p.71,L.35-40 McGregor J. considers that Section 62 of The Land Transfer Act does not protect the registered proprietor against easements existing by virtue of statutory authority. 40
20. The Land Transfer Act with certain exceptions contained therein gives a registered proprietor an indefeasible title. The appellant contends that apart from those exceptions contained in the Land Transfer Act itself the estate of a registered proprietor is affected by

10 unregistered interests only if they are created by or under the authority of statute which specifically provides for their priority. The appellant contends that the Mining Act does not specifically provide that a licence issued under Section 58 shall prevail against the estate of a registered proprietor. On the contrary by implication the Mining Act provides for a revocation of such a licence when the registered proprietor under the Land Transfer Act transfers his estate to a person other than the Licencee.

The Mining Act is generally concerned with Crown Land and makes provision to ensure that when Crown Land subject to the Mining Act is alienated there will be no conflict between mining interests and the interests of those to whom it is alienated.

"Section 41 (1)

20 The Governor-General may from time to time, by Gazette notice, declare any unalienated Crown lands within any district to be open for sale or lease, on such dates and in areas of such size and form as he determines:

Provided that all lands within sixty-six feet from the bank and along the entire course of any watercourse shall be and be deemed to be excluded from any such sale or lease:

30 Provided also that before acting under this section the Governor-General shall in each case refer the matter to the Warden for his report.

40 (2) The lands so open for sale or lease may be disposed of at the same price and subject to the same terms and conditions, or as near thereto as may be, as in the case of Crown lands of the same class not within a district; and it shall not be necessary to withdraw lands from the district for the purposes of this section.

"Section 44 (1)

No crown grant or conveyance, nor any license for a mining privilege shall have the effect

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of revoking or injuriously affecting any mining privilege or easement or tenement lawfully acquired and held under this Act or any former Mining Act, whether any reservation or exception thereof is contained in such grant, conveyance, or license or not

(2) Every such grant, conveyance or license shall be construed as if it contained an express reservation of the rights to hold, occupy, and use such mining privilege or easement or tenement with all necessary and reasonable means of access to work, cleanse, repair, and efficiently use the same. 10

(3) The provisions of this section shall be deemed to be and to have been in force within every gold-field proclaimed under the Gold Mining Districts Act 1873, from the date of the original Proclamation of such goldfield or constitution of such district; and every such grant, conveyance, or licence issued or to be issued in respect of land within any such district shall be construed accordingly. 20

p.4,L.1-12  
p.5,L.1-3

The appellant's land was the subject of the grant of a licence under Section 58 after the issue of the Certificate of Title.

The Mining Act contains no provisions applicable to lands other than Crown Lands analagous to those provisions contained in Sections 41 and 44. 30

It is contended that the intent and effect of Sections 41 and 44 by the specific provisions contained therein is to prevent, as far as lands which are Crown Lands are concerned, the indefeasibility provisions of the Land Transfer Act revoking or injuriously affecting mining privileges. In the absence of analagous provisions for land in respect of which licenses are granted under Section 58, it is submitted that there is an implied revocation of any licence when the owner transfers his title to any person other than the Licencee. 40

21. Alternatively if it be held that the transfer of his estate by the registered proprietor does not so revoke a licence under Section 58 the appellant contends that the transferee of the estate of the registered proprietor holds that estate subject only to those interests specified in Section 62 of the Land Transfer Act. The licence is in the same position as any other unregistered interest.

10 22. The appellant contends that he became the registered proprietor without notice of the interest of the respondent and that even if he had had notice the indefeasibility provisions of the Land Transfer Act would operate so that his estate would be free therefrom.

23. The applicant contends that the respondent is bound by the provisions of The Land Transfer Act.

20 24. That Gresson P. and Cleary and McGregor J.J., do not have regard to Sections 41 and 44 of The Mining Act and the absence of analagous provisions in relation to land under Section 58 and the effect thereof.

25. That Cleary and McGregor J.J., do not have regard to the requirement that specific statutory authority is necessary for interests created by or under statutory authority to prevail against the Land Transfer Act.

30 26. That in dealing with the effects of the systems of registration under the Mining Act Cleary and McGregor J.J., do not correctly interpret the provisions of Section 137 of The Land Transfer Act whereby interests unregistrable in form may be protected by caveat.

27. In the premises the appellant submits that the judgment of the Court of Appeal of the 16th November 1959 was wrong and ought to be reversed for the following amongst other

R E A S O N S

- 40 1. Because Mineral Licence 1697 is invalid  
2. Because Mineral Licence 1697 does not

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affect or bind the land of the appellant.

3. Because the Mining Act by implication provides for the revocation of a mineral licence issued under Section 58 upon transfer of the land.
4. Because the Mining Act does not specifically provide for licenses under Section 58 to prevail against the indefeasibility provisions of the Land Transfer Act.
5. Because the judgment of the Court of Appeal was wrong for the reasons set forth.

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JAS. C. PARCELL

J.H. LARSEN

No. 19 of 1962

IN THE PRIVY COUNCIL

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O N     A P P E A L  
FROM THE COURT OF APPEAL OF  
NEW ZEALAND

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B E T W E E N

HUGH THOMAS MILLER  
... .. Appellant

— and —

THE MINISTER OF MINES AND  
THE ATTORNEY GENERAL OF NEW  
ZEALAND     ... Respondents

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CASE FOR THE APPELLANT

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