

## [HIGH COURT OF AUSTRALIA.]

FORSTER . . . . . APPELLANT;  
 PETITIONER,

AND

THE CROWN . . . . . RESPONDENT.  
 RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF  
 WESTERN AUSTRALIA.

*Lease—Gold mining—Non-compliance with labour conditions—Forfeiture—Procedure—Declaration by Governor in Council—Mining Act 1904 (W.A.) (No. 15 of 1904), secs. 79, 96, 97, 99-107.*

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PERTH,

Nov. 8, 11.

Griffith C.J.  
 Barton and  
 Higgins JJ.

Sec. 96 of the *Mining Act* 1904 provides that, except in two cases—that is, where there is a breach of covenant relating to labour, or to inspection of the mine or the working thereof—notice is to be given to the lessee before forfeiture of a mining lease for a breach of covenant.

Sec. 97 enacts :—"In case any lease shall be liable to voidance, cancellation, or forfeiture for breach of covenant or otherwise, the Governor may, subject to the provisions of this Act, declare such lease void, and upon publication in the *Government Gazette* of notice of such declaration all the estate and interest in the lease of the lessee . . . shall cease and determine."

Sec. 99 provides that any miner on giving notice to the Warden that any land held under a mining lease is not being worked in accordance with the regulations, may apply for a forfeiture of the lease, and requires notice of the application to be given to the lessee, who may file an answer. Secs. 100-102 contain provisions relating to proceedings upon such application in the Warden's Court; and sec. 103 provides that after the hearing the Warden is to forward a report to the Minister with his notes of evidence and a recommendation (if any) on the case. Under sec. 104 the Governor may, if he thinks fit, declare the lease forfeited, and by sec. 105 it is provided that on such forfeiture the Governor may grant a prior right of possession to the applicant.



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Sec. 107 is as follows:—"No lease shall be forfeited on the ground that the labour conditions have not been complied with if the lessee satisfies the Warden in open Court that he has been unable to comply with such conditions in consequence of a general strike among the persons engaged in mining in the district."

There having been a breach of a covenant to perform certain labour conditions in a mining lease which was held subject to the above Act, a plaint was lodged in the Warden's Court praying for forfeiture of the lease on the ground of the failure by the lessees to comply with such conditions, but the lessees were not served with the plaint or any notice thereof. Subsequently a notice was published in the *Government Gazette* that the Governor in Council had been pleased to declare the lease "forfeited for breach of covenant and void, and to grant no prior right under sec. 105 of the Act."

*Held, per totam curiam*, that the lease was properly forfeited.

*Per Griffith C.J. and Barton J.*—The exercise of the Governor's power of forfeiture is not confined to a proceeding upon complaint under sec. 99:

Sec. 96, by implication, declares notice before forfeiture unnecessary in the case of a breach of covenant relating to labour:

Sec. 107 relates only to proceedings instituted under sec. 99, and has no application to forfeiture under the express power conferred by sec. 97:

The statement in the *Gazette* notice that a prior right was not granted under sec. 105, did not in any way affect the preceding unequivocal declaration of forfeiture and avoidance.

*Per Higgins J.*—The power of the Governor to declare a mining lease void for non-compliance with the conditions is restricted by sec. 107, as well as by sec. 96; but the lessee did not allege that she had not been able to comply with such conditions in consequence of a general strike among the persons engaged in mining in the district.

*Per Higgins J.*—By virtue of sec. 107, a lessee is entitled to demand an inquiry as to his non-compliance with the labour conditions being due to a general strike, and the Warden is under a duty to hold the inquiry.

Decision of the Full Court of Western Australia: *The Crown v. Forster*, 14 W.A.L.R., 72, affirmed.

APPEAL from the Supreme Court of Western Australia.

The appellant, Phœbe Blanche Forster, was the proprietor of a large number of shares in a gold mining lease in Western Australia, made in January 1899 under the provisions of the *Mining Act* 1895. In October 1909 a plaint was lodged in a Warden's Court against her and the other shareholders in the lease by certain persons, alleging that she and the other defendants had not for the three previous days worked or registered exempt



from work the lease, and praying that the same might be forfeited in their favour. The appellant was not served with the plaint or any notice thereof. The Governor in Council, by notice in the *Government Gazette* in June 1910, declared the lease forfeited for breach of covenant and void and that no prior right should be granted under sec. 105 of the *Mining Act* 1904. She subsequently filed a petition of right in the Supreme Court of Western Australia, setting out the facts above referred to, and claiming relief on the ground that the forfeiture was wrongful. *Parker C.J.*, who heard the petition, decided that the petitioner was entitled to a declaration that the lease was wrongly forfeited. On appeal the Full Court reversed his decision: *The Crown v. Forster* (1).

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The petitioner now appealed to the High Court from the decision of the Full Court.

*Villeneuve-Smith* and *Forster*, for the appellant. As no notice was given to the lessee of the proceedings before the Warden or of any preliminary proceedings, such proceedings were irregular and invalid; consequently, the Governor in Council was not entitled to act upon them: See secs. 96, 99-107 of the *Mining Act* 1904. Before a mining lease can be forfeited its liability to forfeiture must be determined in the manner indicated by the Act. There has been no such determination here. Sec. 97 should not be construed as unaffected by the other sections which require certain preliminary steps to be taken against, and notice to be given to, the lessee. Sec. 107 applies to the present case, and it clearly contemplates the existence of proceedings before the Warden and the lessee being afforded an opportunity of being present thereat.

The mode of forfeiture for breach of labour conditions under secs. 97 and 99 is prescribed by reg. 91 of the Regulations which were made before the passing of the Act, and adopted by sec. 4 (4).

*Dr. Stow*, Crown Solicitor for Western Australia, for the respondent. The action of the Governor was advisedly taken under sec. 97, and the words used apply to a forfeiture under



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 either sec. 97 or sec. 104. The power in sec. 105 to give a prior right to the applicant is the only additional right that section gives; and what the Governor did he could have done without sec. 105. The Governor can condone any irregularity under sec. 75. The Regulations cannot control the Act, because the section under which they are brought in provides that they are not to be construed contrary to the Act. The object of sec. 107 is not to limit the rights of the Crown at all. Sec. 104 is the proper section to read with sec. 99.

*Villeneuve-Smith*, in reply. The lease between the Governor and the lessee is stated to be made subject to the Act and Regulations, and no forfeiture can be made until Regulations have been made as to procedure for forfeiture: See sec. 306 (8).

GRIFFITH C. J. This is a petition of right asking a declaration that the forfeiture of a gold mining lease in which the appellant is entitled to 1,300 out of 8,000 shares was wrongful, with consequential relief. The lease in question, although granted prior to the passing of the *Mining Act* 1904, is held subject to the provisions of that Act. Sec. 79 of the Act provides that "Every lease shall contain and be subject to the prescribed covenants by the lessee and conditions, and particularly . . . (c) A covenant to work the land demised in accordance with the regulations, unless exemption or partial exemption is granted . . . (e) A condition for the forfeiture of the lease on commission of a breach of any of the covenants by the lessee." Sec. 96 provides that a lease shall not be forfeited for breach of any covenant not relating to labour, or to the inspection of the mine or working thereof, without previous notice to the lessee specifying the breach and requiring compliance with the covenant. There is no such provision with regard to breaches of covenants relating to labour, which would seem to imply that in that case notice is not necessary. The reason is obvious. If the law were otherwise, the regulations imposing labour conditions which require continuous working would be absolutely futile. Sec. 97 provides that "in case any lease shall be liable to voidance, cancellation, or forfeiture for breach of covenant or otherwise, the Governor may



subject to the provisions of this Act, declare such lease void," and that upon publication in the *Government Gazette* of notice of such declaration all the estate and interest of the lessee shall cease and determine, and that the production of the *Government Gazette* shall be conclusive evidence of a breach of covenant by the lessee or other cause sufficient to authorize the declaration, and that all the estate and interest of the lessee in the lease has been lawfully determined by re-entry. The Governor may, however, by subsequent notice cancel the notice of forfeiture and reinstate the lessee.

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So far, the ordinary relations of lessor and lessee are assumed to exist between the Crown and the mining lessee. The lease is liable to forfeiture for breach of covenant, as in the case of ordinary leases between subjects. In order to determine the lease for such a cause, two conditions, and two conditions only, must concur—(1) a breach of covenant and (2) an unequivocal expression of the lessor's will to take advantage of it: *Minister of Mines v. Harney* (1). But, ordinarily, no one but the Crown could take advantage of the breach of covenant (*Osborne v. Morgan* (2)), with the result that many mines might remain unworked for a long time until the fact was brought to the notice of the Government. To remedy this mischief, the Act contains a group of sections, 99 to 107, allowing the intervention of private persons with a view to the forfeiture of a mine for breach of labour conditions. Sec. 99 provides that any miner on giving notice to the Warden that a mine, held under a mining lease, is not being worked in accordance with the regulations, may apply for a forfeiture of it. Notice of the application is to be given to the lessee, who may file an answer. The application is to be heard in open Court (sec. 100), and after the hearing the Warden is to forward a report to the Minister with his notes of evidence and a recommendation, if he thinks fit to make one.

Sec. 104 provides that the Governor may, as in his discretion he thinks fit, "declare the lease forfeited," or impose a fine on the lessee, or take no action.

I pause to note that the words here used are "declare the lease forfeited," while in sec. 97 the words are that if the lease is liable

(1) (1901) A.C., 347.

(2) 13 App. Cas., 227.



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to avoidance, cancellation, or forfeiture for breach of covenant (following the terms of sec. 79) the Governor may "declare such lease void." I doubt, however, whether sec. 104 creates any new or additional power of forfeiture. It seems to me, rather, to be enacted *alio intuitu*, as an introduction to the two following sections. Sec. 105 provides that on the forfeiture of a mining lease the Governor may grant a prior right of possession to the applicant, *i.e.*, the person who gives notice under sec. 99, and may also reserve the land or direct it to be leased by auction or public tender, and may in that case make an order for the payment of the applicant's costs. Sec. 106 provides that the determination of the Governor under the two preceding sections shall be published in the *Gazette*, and that notice of it shall be posted in the Warden's office. Sec. 107 is as follows:—"No lease shall be forfeited on the ground that the labour conditions have not been complied with if the lessee satisfies the Warden in open Court that he has been unable to comply with such conditions in consequence of a general strike among the persons engaged in mining in the district."

Sec. 108 provides that where a lease is "forfeited" or "declared void" (using the words of both sec. 104 and sec. 97) certain consequences shall ensue in relief of the lessee.

In the present case a notice was published in the *Government Gazette* of 10th June 1910, that the Governor in Council had been pleased to declare the lease in question "forfeited for breach of covenant and void and to grant no prior right under sec. 105 of the Act." It will be observed that the two words used are apt to describe a forfeiture either under sec. 97 or sec. 104, and Dr. Stow suggests that they were advisedly used for that purpose.

The petitioner's counsel admitted at the trial that there was a covenant in the lease to perform certain labour conditions, and that there was a breach of such conditions. Under these circumstances it would seem, at first sight, that the forfeiture was complete, the two necessary conditions, that is, a breach of covenant and an unequivocal expression of the Governor's will, having occurred.

The petitioner's case, however, is that the forfeiture complained of was declared in the exercise of a power conferred by sec.



104 alone, and that it was ineffectual because the necessary conditions precedent had not been fulfilled. It appeared that a plaint was lodged in the Warden's Court on 21st October 1909, praying for forfeiture of the lease on the ground of failure to comply with the labour conditions for three consecutive days, but that the plaint was not served on the petitioner. It is, therefore, contended that all subsequent proceedings, so far as they depended on the plaint, were void. Assuming this to be so, the necessary consequence is that the Warden's report (if any was made to the Minister) and notes of evidence only amounted to information to the Minister of a breach of covenant which had admittedly been committed. But, if the Governor could forfeit upon the mere fact of breach, it is quite immaterial to inquire how he became aware of the fact. The statement in the *Gazette* notice that the Governor did not grant any prior right under sec. 105 certainly suggests that forfeiture followed upon proceedings taken under sec. 99. It may be that under these circumstances, if the Governor had granted a prior right to the complainants, and they, purporting to act in exercise of it, had dispossessed the petitioner and her co-lessees, an action might have been maintained against the Crown as in *Minister of Mines v. Harney* (1). But that is not this case. Actual dispossession is not alleged, or even suggested. In my opinion the statement that a prior right was not granted was, at worst, mere surplusage, and cannot control the effect of the preceding unequivocal declaration of forfeiture and avoidance.

It was suggested—somewhat faintly—that the Governor's power of forfeiture for breach of labour conditions can only be exercised upon complaint under sec. 99. Having regard to the general rule already mentioned, it would seem highly improbable that a provision conferring a new right upon private persons should have the effect of destroying what was previously the exclusive right of the Crown. Moreover, such a construction would lead to absurd consequences. The power of the Crown to forfeit abandoned leaseholds, of which there are probably many thousands in Western Australia, would be dependent upon the will of some miner. The contention is quite untenable.

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The petitioner then falls back upon sec. 107, and contends that it is an overriding section, and applies to all cases of forfeiture for breach of labour conditions. On careful examination of the section it will appear that it assumes the pendency of a proceeding before the Warden in which the lessee has been called upon to defend his possession against a claim for forfeiture. The only case in which such a proceeding is expressly provided for in the Act is that dealt with in sec. 99 and following sections.

The appellant contends, however, that the right to prove the existence of a general strike involves, by necessary implication, that every lessee is entitled to be heard in open Court before forfeiture, and that this right further implies previous notice to him, and that he must consequently in all cases be summoned before the Warden before forfeiture can be declared. In my judgment this construction is inconsistent with sec. 96, which forbids forfeiture without notice for breach of covenants not relating to labour, and by implication declares such notice unnecessary in the case of breaches of covenant which do relate to labour. Moreover, the legislature has carefully prescribed the steps to be taken upon a complaint of a miner leading to a hearing in open Court, and is absolutely silent as to the proceedings to be taken upon the suggested complaint of the Crown.

It would be strange if, while elaborate provisions are made in the first case, all the proceedings in the latter case should be left to implication and conjecture. In my judgment sec. 107 relates only to proceedings instituted under sec. 99, and has no application to forfeiture under the express power conferred by sec. 97. Possibly, indeed, a lessee who has failed to perform the labour conditions by reason of a general strike may be entitled to invoke the aid of the Warden under it in a proceeding in the nature of a *Bill quia timet*. The power of reinstatement after forfeiture confirms this view.

In my opinion, therefore, the lease was properly forfeited; but, even if it were not, the petitioner would be no further forward. On the admitted facts it was liable to forfeiture, and the Court could not, under such conditions, order the Crown to reinstate the lessee in possession. And, when a case of actual dispossession is not made, I think that a petitioner who only claims a declaration



of the invalidity of the forfeiture would have to allege, or, at any rate, prove, continuous possession and performance, or, at least, an offer of performance, of the covenants, including those as to rent and labour. Otherwise his only grievance is the publication of an invalid notice in the *Gazette*, which at most is an *injuria sine damno*. In my opinion a petition of right will not lie for such a cause.

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For these reasons I think that the appeal should be dismissed.

BARTON J. Although I have struggled against it, I have been forced to the conclusion that the lease has been properly forfeited, and for the reasons given. I have nothing to add.

HIGGINS J. I concur in the judgment of the Court, but on the sole ground that the petitioner does not allege—or pretend—that her inability to comply with the labour conditions is in consequence of a general strike among the persons engaged in mining in the district. In my opinion, the power of the Crown to declare the lease void for “breach of or non-compliance with any of the provisions” of the lease by the lessee is restricted by sec. 107, as well as by sec. 96, of the *Mining Act* 1904. The Governor in Council, acting for the Crown, has, *prima facie*, by the words of this lease, express power to “declare” the lease to be forfeited and void, and the estate of the lessee thereupon shall “cease and determine” just as in the case of any other lessor having a similar power of forfeiture. The words of the new form of lease prescribed under the *Mining Act* 1904 have to be treated as the words contained in the lease as granted, because of the provisions of sec. 4 (1); but they make, for the purpose of this case, no substantial difference. But the legislature has fettered the Governor in acting on his power. Sec. 97 of the Act is based on this clause in the lease—follows the clause for the most part even verbally; and it provides that the Governor may “*subject to the provisions of this Act*,” declare the lease void. The only provision to which Dr. Stow can satisfactorily refer as satisfying the words “subject to the provisions of the Act” is sec. 96—that a lease shall not be forfeited for breach of any covenant *not* relating to labour or to the inspection of the mine, or the working thereof, unless notice has been given to the lessee specifying the breach



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complained of and requiring him to comply with the covenant within a time limited. This provision certainly applies; but the words of sec. 97 are not "subject to the provisions of sec. 98," or "subject to the provisions hereinafter contained," but "subject to the provisions of this Act"; and if there are any provisions in the subsequent sections of the Act restraining the actions of the Governor in general terms they ought to be treated as equally applicable. Sec. 98 refers to covenants *not* relating to labour, &c. Sec. 107 refers to covenants *relating* to labour. Sec. 107 says:—"No lease shall be forfeited on the ground that the labour conditions have not been complied with if the lessee satisfies the Warden in open Court that he has been unable to comply with such conditions in consequence of a general strike among the persons engaged in mining in the district." The intervening secs. 99 to 106 seem to relate wholly to the case of a miner—the holder of a miners' right—making application for forfeiture on the ground that a mining lease is not being worked in accordance with the regulations. Then sec. 107 says: "No lease shall be forfeited"—not "no lease shall be forfeited on *any such application*"—on the ground that the labour conditions have not been complied with; and there is no reason in the nature of the case why such words as "on any such application" should be implied. Why should not the fact of a general strike exonerate the lessee from a breach of the labour conditions, whether the Governor act on his own initiative or not? If it be urged that sec. 107 does not provide any machinery for satisfying the Warden in open Court of the fact of a general strike, when the Governor proposes to declare the lease void on his own initiative, the obvious answer is that the right to an inquiry on the subject involves, by implication, a duty cast on the Warden to make it. As *Maxwell* says (*Interpretation of Statutes*, 5th ed., p. 587):—"A duty or right imposed or given to one, may also cast by implication a corresponding burthen on another, as in the case of the proviso in the Commission of the Peace, requiring the Quarter Sessions not to give judgment in cases of difficulty unless in the presence of one of the Judges of Assize; which impliedly requires the Judge to give his opinion: *Per cur.*, *R. v. Chantrell* (1)." The words of

(1) L.R. 10 Q.B., 587, at pp. 587, 588.



sec. 107 are not that the lessee is to satisfy the Warden on a *miner's application for forfeiture*, but that he is to "satisfy the Warden"; and, in my opinion, there is a correlative duty imposed on the Warden to hold the inquiry if the lessee demand it. This construction seems to reconcile both the reason of the case and the language of the sections; and it meets the difficulty with which Mr. *Villeneuve-Smith* was faced, that on his construction the Governor—the landlord—could take no proceedings for forfeiture of a lease for breach of labour covenants unless he were put in motion by a miner voluntarily applying for forfeiture. This construction reconciles also the reasoning of the Chief Justice of Western Australia and of the Judges who reversed his decision on appeal. The learned Chief Justice felt that sec. 107 must apply to the case in fairness and reason as well as on its express language; whereas the Full Court felt that the landlord's right of forfeiture must remain except so far as restricted expressly or by necessary implication. Dr. *Stow* puts it that secs. 99-107 form a little code by themselves. I should put it that secs. 99-106 form a little code by themselves as to an application made by a miner; and that sec. 107, as well as sec. 108, applies to any attempt to forfeit (or declare void) a lease, whether the initiative be taken by the Government or by a miner. This view is supported by a consideration of the analogous case of granting total or partial exemption from labour covenants; for, under secs. 91-92, the Minister is put under restrictions in the exercise of his power, and he cannot (except in a very trifling case) grant an exemption before evidence has been taken on the subject before the Warden in open Court.

In my opinion, the appeal from the Full Court should be dismissed for the reason which I have stated. I do not enter into any question as to the nature of the proceeding which has been taken, as no such question has been discussed.

*Appeal dismissed with costs.*

Solicitor, for the appellant, *W. F. Forster*, Perth.

Solicitor, for the respondent, *Dr. Stow*, Crown Solicitor for Western Australia.

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