PARTIES:	WALTER EDWARD CASEY (First Appellant) AND: GEOFFREY EDWARD CASEY (AS EXECUTOR OF THE WILL OF THE LATE CORAL ELIZABETH CASEY (Second Appellant) AND: GEOFFREY EDWARD CASEY (Third Appellant) V: THE MINISTER FOR MINES AND ENERGY (First Respondent) AND: THE NORTHERN TERRITORY OF AUSTRALIA (Second Respondent)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPELLATE
FILE NO:	LA9 of 1997 (9713832)
DELIVERED:	11 FEBRUARY 1998
HEARING DATES:	19 NOVEMBER 1997
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Mining Warden – Appeal – jurisdiction – "shall" – powers of mining warden – effect of failure to lodge a notice of defence

Appeal – contract – exploration licenses – existence of any contractual rights

Legislation

Mining Act (NT) 1980
s23(e) – s60 – s54 (8) – s145(e) – s146(2)(e) – Reg 40

REPRESENTATION:

Counsel:

Appellant:	The appellants appeared in person
Respondent:	Ms J Kelly

Solicitors:

Appellant:	Unrepresented
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	MIL970024
Number of pages:	9

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. LA9 of 1997 (9713832)

BETWEEN:

WALTER EDWARD CASEY
(First Appellant)

AND:

GEOFFREY EDWARD CASEY (AS EXECUTOR OF THE WILL OF THE LATE CORAL ELIZABETH CASEY
(Second Appellant)

AND:

GEOFFREY EDWARD CASEY
(Third Appellant)

V

THE MINISTER FOR MINES AND ENERGY
(First Respondent)

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
(Second Respondent)

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 11 February 1998)

MILDREN J: This is an appeal under s159 of the *Mining Act* from a decision of the Warden's Court.

In 1986, the Minister granted to CSR Limited exploration licence 4744 (EL4744), pursuant to s16 of the *Mining Act*. In 1988 EL4744 was transferred to the appellants. On 28 August 1991, the Minister cancelled EL4744 in purported compliance with s171 of the Act. Subsequently an application was made by the appellants for the granting of mineral leases over portions of the former EL4744. It is not clear to me what procedure the appellants adopted to make these applications. It would appear that the application was made to the Minister as envisaged by s54 of the Act. It would appear that there was no hearing by a warden as envisaged by s58(1) presumably because no objections were lodged: ss s58(8); in any event I was not told of any hearing, and the appellants did not know (and probably could not be expected to know) whether or not a warden made a report to the Minister pursuant to s59 recommending either the grant or refusal of the leases.

In any event, the Minister refused the appellants' applications and the appellants brought proceedings by way of plaint in the Warden's Court in which they sought to challenge the Minister's refusal to grant the leases, and to seek financial compensation. It is unnecessary, for the purposes of this appeal, to consider the convoluted history of this matter in any further detail.

Ultimately, the respondents by a preliminary motion sought to strike out all but one of the paragraphs in the plaint on the basis that the Court had no jurisdiction to entertain them or because they were vexations. At this stage

the respondents had not filed a notice of defence to the plaint. After hearing the parties, the learned Warden, Mr Cavenagh S.M., struck out those paragraphs.

The appellants appeal to this Court as follows:

"The appellant appeals from the decision of the mining warden in as much as he found:

1. he had the power to allow the defendant to not comply with Regulation 40 of the *NT Mining Act* which requires a defendant to lodge a defence with the Mining Registrar, and

2. he found that no contract existed between the appellants and the respondents as a result of the grant of Exploration Licences upon which Mineral Lease applications were subsiquently [sic] made.

Grounds:

1. Regulation 40 of the NT Mining Act states:

NOTICE OF DEFENCE

Where a defendant or respondent intends to dispute a claim, he shall lodge with the mining registrar a notice of defence in accordance with Form 11.

No such notice was registered with the Mining Registrar and the Mining Warden said he had the authority to dispence [sic] with that requirement.

2. The mining warden has misinterperated [sic] the NT Mining Act and the information supplied to him.

ORDER SOUGHT:

1. Judgment be entered in favour of the Appellants and the Court award that which was requested of the Mining Warden in the points 2. To 8. Inclusive of the original Plaint No. D6488 lodged with the Mining Warden's Court Darwin, N.T.

2. Find that a contract did exist between the Appellants and the Respondents as a result of the grant of Exploration Licences and the Court award that which was requested of the Mining Warden in the points 2. to 8. inclusive of the original Plaint No. D6488 lodged with the Mining Warden's Court Darwin, N.T."

The appellants submitted that to permit the respondents "to proceed without having lodged a Notice of Defence in accordance with Regulation 40, (being part of Section 192 of the *Mining Act*) is in effect sanctioning the abandonment of the *NT Mining Act*".

Regulation 40 of the *Mining Regulations* provides:

"40. NOTICE OF DEFENCE

Where a defendant or respondent intends to dispute a claim, he shall lodge with the mining registrar a notice of defence in accordance with Form 11."

The appellants contended that the use of the word "shall" was mandatory, the warden had no power to dispense with the filing of a notice of defence, that it followed that the warden could not at that stage entertain the respondent's application, and the failure to lodge a notice of defence amounted to an acknowledgment of the appellant's claim entitling them to judgment.

Counsel for the respondents, Ms Kelly submitted, and correctly so, that the Warden did not in fact dispense with compliance with Regulation 40. A preliminary application to strike out a plaint or particular paragraphs in a

plaint may be made at any time and is usually made prior to a notice of defence being filed. This was the course of the proceedings in this case, so that the time for the respondents to comply with Regulation 40 and file a notice of defence had not yet arisen.

The power of the warden to hear a summary application of this nature is to be found in ss 146(2)(e), 149, 152 and 155 of the Act, which confer wide powers on a warden dealing with matters of practice and procedure. Ss 146(2)(e) specifically empowers a warden to "do whatever is necessary for the purpose of effectively disposing of the matter before him according to the merits of the case," and, as if this were not enough, s155 confers upon the warden "all the powers of the Supreme Court or a judge". There is no doubt that this Court could entertain this type of application at any time, whether or not a defence has been filed: see for example O23 of the *Supreme Court Rules.*

That is sufficient to dispose of the appellants' first ground of appeal, but as the appellants are unrepresented I will deal with other matters specifically relied upon. The first is a submission that without a notice of defence, a plaintiff could be "ambushed" by a defendant. It is clear that the appellants did not complain to the warden that they did not know the case they had to meet. The respondents offered to file a notice of defence if this was necessary, but this offer was not taken up. Further, the respondents had filed and served affidavits upon which they intended to rely setting out the factual matters upon which they intended to rely. The only additional material the appellants may have received had a formal notice of defence been filed is a

plea to the general effect that the matters alleged in the amended plaint were bad in law, for various reasons. The appellants had the opportunity to meet the case against them. Indeed the appellants do not submit otherwise; their submission is that without a notice of defence, "the situation of 'trial by ambush' *could* exist."

The second matter is that Regulation 40 does not purport to restrict the wide general powers of a warden or of the Warden's Court granted by the Act in matters of practice and procedure. Indeed, the Administrator has no power to make a regulation which is inconsistent with the provisions of the Act.

The third matter is that even if a notice of defence should have been filed, the failure to file the notice does not vitiate the proceedings (s149) and in any event, the failure to file a notice of defence does not entitle the appellants to what is, in effect, a default judgment. The Act makes no specific provision for this; and therefore, it must be concluded that, before being entitled to relief, the appellants would still have to have proved their claims.

As to the second ground of appeal the learned Warden did not in fact conclude that a contract did not exist between the parties but rather that he had no jurisdiction to entertain the complaint in paragraph "C" of the plaint. The appellants contended that s145(e) was the relevant provision conferring jurisdiction. S145(e) provides:

"145 JURISDICTION

A warden's court has jurisdiction to hear and determine actions, suits and other proceedings cognizable by a court of civil jurisdiction concerning - ...

(e) the specific performance of contracts relating to exploration licences, exploration retention licences or mining tenements;"

The appellants contend their exploration licences gave them a contractual or quasi-contractual right to obtain mineral leases, pursuant to s23(e) of the *Mining Act*:

S23(e) provides:

"23. POWER OF LICENSEE

An exploration licence authorises the holder thereof, subject to the law in force in the Territory, and in accordance with the conditions to which the licence is subject -

(e) subject to Parts V, VI and VII, to obtain an exploration retention licence, mineral lease or mineral claim in respect of the licence area or any part of it."

The appellants submitted that "obtain" means to "acquire", "have granted" or "get"; and that therefore they had the right to have mineral leases granted to them unless there were valid objections to the grants or "environmental considerations which cannot be accommodated by special conditions being imposed", neither of which existed in this case.

S23(e) is subject to Parts V, VI and VII of the *Mining Act* which relevantly contains s60 which provides:

> *"Division 2 - Grant of Mineral Lease*
>
> 60. GRANT OF LEASE
>
> (1) Subject to this Act, after considering the recommendation under section 59 of the warden, the Minister may, in his discretion, grant an applicant, for such term, not exceeding 25 years calculated from the first day of January preceding that grant, as the Minister thinks fit, a mineral lease -"

Therefore the appellants' right to obtain mineral leases upon application is subject to the Minister's discretion to grant such an application. The extent of this discretion is unnecessary to decide.

While the owner of an exploration licence must have some rights in that capacity, (e.g. the right in certain circumstances to the grant of an exploration retention licence (ss s38(1) and s41(1)) which in turn may lead to a right to compensation if an application for a mineral lease is refused by the Minister (s65(1))), the right of the holder of an exploration licence to obtain a mineral lease is not an unfettered right to be granted a lease or leases but is, subject to the Minister's discretion. It may well be that if the Minister exercises his discretion improperly, that could be reviewed by this Court by proceedings in the nature of prerogative relief, but the Warden's Court has no jurisdiction to grant relief of that kind, which is peculiarly the province of the superior courts. In any event, there is no claim in the plaint of this kind; the complaint is, as stated above, that the appellants had a contractual or quasi-contractual right to the grant of their leases. Even if their rights are contractual, which I

doubt, the rights in the form and under the circumstances which they assert do not exist.

Ground 2 of the appeal must also be dismissed.

The appeal is therefore dismissed with costs.