

The Warden accepted that there was a satisfactory explanation for the failure to lodge a Form 5 and that there were special circumstances justifying the restoration of the Mining Lease. The Warden accepted that the minimum annual expenditure commitment had been met for the year ending 15 February 2003 and had, in fact, been met in every year since 1995. Furthermore, evidence was presented stating that a processing plant and equipment remained on the Mining Lease and Fremantle Park Homes planned to recommence work on the Mining Lease should the application be successful.

Having accepted the reasons for the failure to lodge the Form 5 within the statutory time and that special circumstances existed, the Warden recommended the restoration of the Mining Lease.

NO CASE SUBMISSION IN THE WARDEN'S COURT*

Duke v Cable & Anor ([2003] WAMW 19, Perth's Warden Court, Warden Calder, 17 October 2003)

Plaint for damage for breach of contract – Agreement not yet commenced operation – JV entity not incorporated as contract required – No case submission

This case turned on its own facts and did not involve any points of principle. However, it is an illustration of the practice of the Warden's Court when a no case submission is made by a defendant.

Facts

The case involved the interpretation of a "Joint Venture Mining Agreement" (the JVMA) between the plaintiff and the defendants. All the parties were natural persons. The plaintiff sued the defendants for damages for alleged breaches of the JVMA.

The JVMA was an agreement to incorporate a company. Clause 19 provided that the purpose and intention of the JVMA was to create a "mining partnership" under a Joint Venture Management Company and that the relationship of the parties was as shareholders. Clause 5.2 of the JVMA referred to the formation of a Mining "Joint Venture" Pty Ltd to be known as the Joint Venture. Clause 6 of the JVMA inter alia provided that the mine would be managed by the "Joint Venture" (in the form of a Pty Ltd company). The parties to the JVMA were to sit on the board of directors. "Joint Venture" was defined in the interpretation clause of the JVMA as meaning the "Management Company" established pursuant to clauses 5 and 6. Clause 5 provided that the first defendant would "be responsible for forming" the company. All other obligations were the responsibility of the company. For example, the company was to conduct the mining operations, be responsible for all mining costs, pay wages, provide accommodation and be responsible for insurance and maintenance.

The "joint venture" company was never incorporated.

The damages claimed against the defendants were in respect of alleged breaches of certain obligations in the JVMA. Those obligations were the responsibility of the company. There was also a pleaded breach of an earlier agreement between the parties. The alleged breach was the entry by the first defendant into an agreement with an "investor". The earlier agreement had come to an end prior to the entry by the first defendant into the investor agreement and prior to entry by

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the parties into the JVMA. There was an “entire agreement” clause in the JVMA (clause 22). Clause 22 also provided that any variation or modification had to be in writing. There was also a clause requiring any amendment or waiver to be in writing (clause 27).

Clause 17 of the JVMA provided that the JVMA was “subject to and shall not commence” until the JVMA had been registered against the mining lease. The JVMA was never registered.

At the end of the plaintiff’s case the defendants made a submission that they had no case to answer. Warden Calder required the defendants to elect to call no evidence and the defendants made that election. Warden Calder adopted the accepted practice in most states and courts in Australia. That is, a defendant in civil proceedings is usually required to make an election not to call evidence before a court will entertain a no case submission.¹

Conclusion

The no case submission was upheld and the plaint was dismissed. Warden Calder stated that the JVMA never became operative because a fundamental and essential part of it, namely incorporation of a joint venture company, never occurred. The agreement was incapable of being performed in the intended manner without incorporation of the company.

Warden Calder also stated that because the JVMA was not registered pursuant to the provisions of the *Mining Act*, the JVMA never began to operate.

Warden Calder stated that the entry into the agreement with the investor occurred after the earlier agreement had come to an end and therefore could not constitute a breach of that agreement. There was no direct or indirect evidence that there had been a written amendment, modification, variation or waiver of any of the terms of the JVMA. There was no provision express or implied in the JVMA which prevented the first defendant from entering into an agreement with the investor.

Warden Calder concluded that the JVMA never commenced to operate and none of the breaches of the JVMA as alleged by the plaintiff and which formed the basis of the plaintiff’s claim for damages had been proved to the required standard. There was no case for the defendants to answer and the plaint must be dismissed.

COSTS ON WITHDRAWAL OF PLAINT FOR FORFEITURE*

Bayliss v Johnson’s Well Mining NL & Ors ([2003] WAMW 23, Mining Warden’s Court, Perth 18 December 2003; Sharratt SM)

Section 98(8), Mining Act 1978 (WA) – Forfeiture of exploration licences and mining lease – Section 96(5), Mining Act 1978 (WA) – Forfeiture of prospecting licences and miscellaneous licences – Legal costs and expenses – Interpretation of the words “holder or lessee”

Facts

The plaintiff lodged seven plaints seeking forfeiture of exploration licences.

Newmont Duketon Pty Ltd was joined as a defendant on the basis that it entered into a joint-venture agreement pursuant to which it had assumed management control of the exploration licences and agreed to acquire a majority interest in the exploration licences, though it was not yet

¹ See Waight and Williams, *Evidence, Commentary and Materials* (2nd ed, 2002), pp 122-129; Roberts, *Evidence, Proof and Practice* (1998), pp 105-109.

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