PLAINT FOR FORFEITURE SIGNED BY SOLE DIRECTOR OF PLAINTIFF*

MPF Exploration Pty Ltd v Horizon Mining Ltd [2004] WAMW 11 (Warden I G Brown SM, Leonora, 23 July 2004)

Plaint for forfeiture by company – Plaintiff signed by sole director of plaintiff – Application to strike out plaint dismissed.

This matter concerns the effective signing of a Plaint for Forfeiture, which was also considered in *Exmin Pty Ltd v Australian Gold Resources Ltd*[1] where the Warden struck out the plaint for forfeiture signed by the attorney appointed by a company Plaintiff and *Goldstream Minerals and Exploration Pty Ltd v Newmont Duketon Pty Ltd and Ors*[2] where the Warden dismissed an application to strike out the plaint for forfeiture signed by a barrister.

Legislation

- *Mining Act 1978* (WA), s 98(1), "any person" may apply for forfeiture;
- *Interpretation Act 1984* (WA), s 5, definition of "person" includes a company;
- *Mining Regulations 1981* (WA), reg 48, application for forfeiture to be by way of plaint per Form 33;
- *Mining Regulations*, reg 122, "Every plaint shall be signed by the plaintiff or his solicitor";
- *Mining Regulations,* Form 33, at notation (e) instructs "Signature of Plaintiff".

An application for forfeiture is heard "in open court by the warden" (*Mining Act,* s 98(3)). This is in contrast to a hearing before the Warden sitting as a Warden's Court.[3]

For proceedings before the Warden in open court there are no applicable *Rules of Court* prescribed in the mining legislation, or incorporated by reference to other legislation.

Facts

The Plaintiff was a proprietary company having one director who was also the sole shareholder, no secretary and no common seal.

The Plaint for Forfeiture was signed by the sole director. Adjacent to his signature was typed his name and "Director".

The Defendant/tenement holder applied to strike out the Plaint.

Warden's Decision

By his Decision the Warden accepted that:

(a) a company may be a Plaintiff in an application for forfeiture;

(b) a company may execute the Form 33 Plaint – in this regard the Warden:

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1 [2002] WAMW 30

2 [2004] WAMW 5

3 See *Re His Worship Calder SM: Ex parte Gardner* (1999) 20 WAR 525.

- referred to the *Rules of the Supreme Court 1971* (WA), Order 4, r 3(2), wherein proceedings by a company can only be commenced in the Supreme or District courts by a solicitor acting on behalf of the company;
- noted there is no similar provision in the *Mining Act* or *Mining Regulations* (or any incorporated legislation) applicable to the commencement of proceedings before the Warden in open court.

The Warden then considered whether the Plaintiff had properly executed the Plaint.

There is no requirement in the *Corporations Act 2001* (Cth) for a proprietary company to have a secretary (s 204A(1)). The Plaintiff had no secretary.

The *Corporations Act*, s 127(1), provides that "A company may execute a document without using a common seal if the document is signed by:

(a) a director and company secretary of the company; or

(b) for a proprietary company that has a sole director who is also the sole company secretary – that director".

In the case of the Plaintiff (having a sole director who was also the sole shareholder, but having no secretary) the Warden held: "Where that corporation does not have a company secretary it would clearly defeat the primary purpose of s 127(1) if it was held that the person who was duly appointed as the sole director could not lawfully execute documents on behalf of the company" (para 26).

The Warden noted that:

- "the alternative construction would render the sole director [where no secretary is appointed] powerless" (para 26);
- *Corporations Act*, s 198E (which provides that "the director of a proprietary company who is its only director and only shareholder may exercise all the powers of the company") supported the Warden's view.

The Warden further held that *Corporations Act*, s 127(1), *Mining Regulations*, reg 122 and Form 33, did not require the person signing the Plaint to print or type:

- the name of the individual signing the Plaint (although in this case that was done); or
- the status as sole director and/or sole secretary of the company (in this case "Director" not "sole director" had been typed adjacent to the signature).

The Warden dismissed the application to strike out the Plaint.

The effect of the Warden's Decision is that:

(a) a company may execute a Form 33 Plaint in a manner permitted by law;

(b) for a sole director/sole secretary (if any) company it is a question of fact in each case whether the signatory is the sole director/sole secretary.

However, by reason of the *Exmin Pty Ltd v Australian Gold Resources Ltd* decision, an appointed attorney may not sign on behalf of a company Plaintiff. An Order Nisi for a Writ of Certiorari has been granted by the Supreme Court of Western Australia challenging the Warden's decision in *Exmin Pty Ltd v Australian Gold Resources Ltd.*

It is suggested that the safest course at this time is for a company Plaintiff in an application for forfeiture to appoint and instruct a solicitor to sign the Form 33 Plaint, as permitted by *Mining Regulations*, reg 122(1).

MINING ACT AMENDMENT BILL 2004 (WA)[*]

The *Mining Act Amendment Bill 2004* (Bill) was given first and second readings in the Western Australian Legislative Assembly on 26 August 2004. It proposes the first major reforms of the *Mining Act 1978* since its main provisions were proclaimed in force on 1 January 1982. The need for the amendments was driven by the backlog in mining lease applications arising from the need to comply with the right to negotiate provisions of the *Native Title Act*. But it has been the occasion for other "overdue" matters to be addressed. The amendments deal with:

- reform of the right to a mining lease;
- extended terms for exploration tenements;
- introduction of retention status for exploration tenements;
- clarification of the role of the Warden and Warden's Court;
- clarification of the right to file a caveat; and
- some less significant miscellaneous matters.

Reform of the Right to a Mining Lease

It has always been anomaly that a mining lease could be obtained in Australia, and latterly only in Western Australia, without either having made a discovery or proposing mineral production. The Keating Review of the Project Development Approvals System had recommended a change.[1] The amendments propose that future applications for mining leases will require the lodgment of either:

- a mining proposal containing information as to the proposed mining operations in accordance with guidelines to be established, or
- a mineralisation report and a statement of likely future mining methods and areas.

The proposed amendments specifically require that where a mineralisation report is submitted the Minister shall refuse a grant if there is no significant mineralisation. There is no such provision respecting the consideration to be accorded a mineral proposal, nor a provision explicitly stating that conditions respecting the mining proposal may be attached to the lease.

If a mining lease granted on the basis of a mineralisation report, a mining proposal must be submitted before mining operations can be carried out. An environmental impact assessment is required when a mining proposal is submitted.

The amendments will significantly reduce the number of mining leases granted in the future in Western Australia. Mining leases will no longer be able to be held essentially for exploration or speculative purposes.

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[*] Richard Bartlett, Professor of Law, University of Western Australia.

[1] See also A Thompson, "Final Report of the Government of Western Australia Technical Taskforce on Mineral Tenements and Land Title Applications" (2002) 21 AMPLJ 53.