

JOINDER OF A THIRD PARTY IN WARDEN'S COURT PROCEEDINGS*

Newmont Duketon Pty Ltd & Ors v Angelopoulos ([2005] WAMW 1, Perth Warden's Court, Warden Calder SM, 28 January 2005)

Application for exemption – Plaintiff for forfeiture – Joinder of additional applicant and defendant – Procedural fairness.

Legislation

Mining Act 1978 (WA), s.98: Application for forfeiture on other grounds

Mining Act 1978 (WA), s.102: Exemption from expenditure conditions

Mining Regulations 1981 (WA), reg 54: Application for certificate of exemption

Mining Regulations 1981 (WA), reg 56: Determination of application

Facts

Plaints for forfeiture and objections to applications for exemptions were lodged by Mr Angelopoulos against Exploration Licences 38/1105, 38/1112-1115, 38/1176 and Mining Lease 38/303 held by Regis Resources NL.

Thereafter, Regis Resources entered into an agreement with Newmont Duketon Pty Ltd (formerly ACM Mines Pty Ltd) whereby Regis Resources transferred its 79 per cent interest in M38/303 to Newmont Duketon and gave to Newmont Duketon an 80 per cent interest in the above mentioned Exploration Licences. Therefore Regis Resources maintained a 20 per cent interest in the Exploration Licences.

Newmont Duketon then sought directions that it be joined as a defendant to each of the complaints and as applicant in each of the exemption applications.

Mr Angelopoulos opposed any such joinder.

Warden's decision

Application for joinder of applicant for exemption granted.

Application for joinder of defendant to complaints granted.

Submissions by Newmont Duketon

Counsel for Newmont Duketon submitted that:

- (a) the company had an interest in the outcome of the proceedings and therefore had a right to be heard.

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- (b) with respect to the exemption applications the company has an interest in the tenement being kept in good standing.
- (c) the outcome of the exemption applications has a significant connection to the outcome of the forfeiture proceedings.

Counsel referred to a number of authorities including the decision in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 and quoted Lord Diplock where he stated that one of the principal objects of rules which allow joinder of a party is '*to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceedings to adjudicate upon the matter in dispute in that action without his being given an opportunity to be heard*'.

Submissions by Angelopoulos

Counsel for Mr Angelopoulos submitted, in opposition to the application for joinder, that:

- (a) an order for joinder of a party was judicial in nature and that a Warden exercising administrative functions did not have the power to make an order.
- (b) Newmont Duketon did not need to be joined as the current applicant/defendant would be able to call officers of Newmont Duketon as witnesses and make submissions in support of the position of Newmont Duketon.
- (c) procedural fairness did not extend to a non-party and that there was no authority providing for a non-party to administrative proceedings to rely upon rules of procedural fairness in administrative proceedings to exercise a right to be heard.
- (d) the wording of s.102(1) of the Mining Act expressly prohibited joinder of Newmont Duketon on the basis that an application for a certificate of exemption may only be made by 'the holder' of a mining tenement and therefore Newmont Duketon was excluded as the company was not a registered holder at the relevant time.
- (e) there was no express power within the Mining Act or Mining Regulations to join a party to a plaint and that reg 48 specifically provides for a plaint to be made using the prescribed Form 33 which expressly provides for only a plaintiff and defendant to be named.

Reasons for decision

The Warden undertook an analysis of the common law relating to procedural fairness and provided a number of extracts from leading authorities.

From the decision of *Kioa v West*¹ the Warden cited the following principles:

¹ (1985) 159 CLR 550.

- (a) There is a common law duty to accord procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations subject only to a clear manifestation of a contrary statutory intention.²
- (b) Procedural fairness conveys a notion of flexibility in the obligation to adopt procedures that are appropriate and adapted to the circumstances of a particular case considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.³
- (c) When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention. The presumption may apply to powers classified as legislative or administrative as well as to powers classified as quasi-judicial.⁴

The Warden noted that there is no provision in the Mining Act that allows for a person who is not a party to an application for the grant of certificate of exemption to be joined as a party or may otherwise be heard before the Warden. However, the Warden cited a passage of Lord Diplock as adopted by the Full Court in *Homestyle v City of Belmont*⁵ which stated that the test to be applied in considering the joinder of a party is determined by answering the following question – *will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an order which may be made in the action?*

The Warden also noted the comments of Templeman J in the *Homestyle* decision that a named party may not necessarily act in a manner consistent with the interests of an unnamed third party. The Warden was of the view that, in the context of proceedings under the Mining Act, there was the potential that a named party would not have a genuine interest in advancing an argument which sought to protect the interests of a non-party.

In the opinion of the Warden, there was no express intention of the legislature in the Mining Act and Regulations that procedural fairness be displaced in respect of any proceedings conducted before the Warden in Open Court.

The Warden concluded that, in the hearing and determination of complaints and exemption applications, the rules of natural justice or procedural fairness should be applied in as broad a manner as possible.

The Warden considered that it was the practice of Warden's to conduct proceedings in a manner similar to judicial proceedings. Though acting in an administrative capacity, Wardens are nonetheless required to act in a judicial manner and generally adopt procedures which are consistent with the rules of evidence and procedural fairness.

² Ibid, at 584.

³ Ibid, at 585.

⁴ Ibid at 609.

⁵ [1999] WASCA 59.

The Warden further considered that insofar as there was a need to ensure that procedural fairness is applied to the decision making processes under the Mining Act, the legislature intended that this occur at the hearing before the Warden (the Warden having noted that there can be various stages to the decision making process depending on the nature of the matter).

In analysing the legislative scheme establishing the decision making processes of the Warden and the Minister, the Warden took into consideration the broader policy of the Mining Act. The Warden noted that the State must effectively govern the State's mineral wealth and that it was in the interest of the State that the Minister be as well informed as is reasonable and practicable to advance the interests of the State. The Warden was of the view that this would be best achieved if proceedings before the Warden are conducted with regard to a broad base of relevant information.

The Warden accepted that there may be other ways of accommodating the interests of a non-party who should be heard. However, on balance the Warden considered joinder to be appropriate (at least in this case). The Warden was of the view that joinder would 'introduce an element of orderliness and certainty into the procedure to be followed'.

EXTENSION OF TIME FOR OBJECTION TO EXEMPTION APPLICATION

Allhawk Nominees Pty Ltd v RBJ Nominees Pty Ltd; Glenorn Gold Pty Ltd v RBJ Nominees Pty Ltd* [2004] WAMW 18

Exempt from expenditure – section 102 Mining Act – extension of time – reasonable time – abust of process

Allhawk Nominees Pty Ltd as the holder of exploration licences 69/1527, 1528 and 1537 and Redstone Resources Limited (formerly known as Glenorn Gold Pty Ltd) as the registered holder of exploration licences 69/1540, 1541, 1629, 1630 and 1631 (together the Applicants) lodged exemption from expenditure applications in respect of the above tenements. Each exemption application was sought 'pursuant to sections 102(2)(g) and 102(3) of the *Mining Act 1987*'.¹ No other particulars were given.

The applications were lodged on 15 December 2003. All of the tenements were granted either on 12 January 2001 or 1 February 2001. Accordingly, the applications were lodged either 21 or 47 days prior to the end of the tenement years respectively.

* Kate Barnett and Melissa Watts, Hunt & Humphry, Project Lawyers.

¹ Section 102(2)(g) of the Mining Act provides that 'a certificate of exemption may be granted where political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to conditions set out, for the time being impracticable'. In this case, the tenements were located within an Aboriginal reserve. An access agreement between the traditional owners and the relevant holders was negotiated during the 2004 tenement year but had not been finalised.

Section 102(3) of the Mining Act provides that a certificate of exemption may be granted for any other reason not set out in s 102(2) which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemptions.