VALIDITY OF DEPARTMENTAL NOTICES AND 'SPECIAL CIRCUMSTANCES' FOR RESTORATION OF TENEMENT*

Hayes Mining Pty Ltd v Tantalum Australia NL ([2006] WAMW 9, Coolgardie Warden's Court, Warden Auty SM, 3 July 2006)

Restoration – Form 5 – Objection – Forfeiture

Legislation

Mining Act 1978 (WA), s 97: Forfeiture of mining lease or general purpose lease on ground of non-payment of rent. *Mining Regulations 1981 (WA), r.85A*: Quarterly production reports. *Mining Regulations 1981 (WA), r.86AA*: Rates of royalty in respect of gold.

Facts

Tantalum Australia NL ('Tantalum') was the registered holder of mining lease 16/88 in the period 2002–2003. Pursuant to s 82(1)(e) of the Mining Act Tantalum was required to submit a Form 5 (Operations Report – Expenditure on Mining Tenement). Tantalum was required to lodge the Form 5 by no later than 16 July 2003 (being 60 days from 17 May 2003).

Tantalum failed to lodge the Form 5 within the prescribed time. By letter dated 4 August 2003 the Department advised Tantalum of the failure to lodge the Form 5 and that the Department intended to forfeit the tenement. Tantalum lodged the Form 5 on 11 August 2003 (26 days late). Rather than impose forfeiture of the tenement, the Department issued a letter dated 10 November 2003 imposing a fine in the sum of $250 pursuant to s 97(5)(a) of the Mining Act. The letter stated that the fine was to be paid within 30 days of the date of the letter (i.e. by 10 December 2003).

Tantalum received the letter on 11 November 2003. Tantalum mailed a cheque to the Department on 10 December 2003 which was received by the Department on 11 December 2003 (1 day late) and banked on 12 December 2003.

Pursuant to s 97(6), the failure to pay the fine within the stipulated time resulted in the tenement being automatically forfeited at midnight on 10 December 2003.

The Department informed Tantalum that the tenement had been forfeited on 19 March 2004. Hayes Mining Pty Ltd (**Hayes**) applied for 2 prospecting licences over the same ground on 22 March 2004. Tantalum applied for restoration of the tenement on 22 March 2004 and was granted approval for late lodgement on 29 March 2004. Hayes opposed the application for restoration.

Warden's decision

Objection upheld and the application for restoration dismissed.[1]

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* Mark van Brakel and Tim Masson, Clayton Utz

1 The Warden's terminology in her reasons for decision was that the application be "dismissed" rather than a recommendation to that effect. However, subsequent to delivery of Her Honour's reasons, the parties made further submissions on this issue which resulted in Paragraph 58 of the reasons being

Matters for determination before Warden

The following matters were in issue:

1. Whether the notice directing a fine be paid was in the proper form and properly authorised;
2. Whether the fine was paid within the appointed time frame and whether time could commence to run if the notice of advising of the fine was invalid;
3. Whether the order for forfeiture was irregular; and
4. Whether in the event of the forfeiture determination being valid, special circumstances existed to warrant the restoration of the tenement to Tantalum.

Reasons for decision

Whether the notice directing a fine be paid was in the proper form and properly authorised

Tantalum argued that the notice given by the Department was irregular as s 97(6) of the Mining Act stipulates that forfeiture will follow where the penalty is not paid within the time specified by the Minister or within 30 days of written notice being given by the Minister. Tantalum argued that the notice was issued by administrative officers of the Department and not the Minister personally. Tantalum argued that the Ministerial role was non-delegable.

Hayes argued that it is impractical and unworkable to require the Minister to personally exercise every power in the Mining Act without routinely delegating.

In concluding that there is no express requirement in the Mining Act that the Minister must personally exercise the functions outlined in s 97(6), the Warden relied on the reasoning of Sundberg J in *Margula v Minister for Environment and Others*: [2]

> ...the acts of another person which had been authorised or adopted by the decision-maker are to be attributed to the decision maker. If a responsible officer of a minister's department is acting in his capacity as such his acts are authorised by the minister and can be treated as the acts of the minister.

Whether the fine was paid within the appointed time frame and whether time could commence to run if the notice of advising of the fine was invalid

Tantalum argued that it was required to pay the fine within 30 days of receipt of the letter as this was when the written notice of the penalty was given to the applicant pursuant to s 97(6).

The Warden was satisfied that the 30 day notice period commences from the time the notice was issued. The Warden was of the view that this was the only construction that provided certainty to a process where forfeiture is deemed to have occurred.

Whether the order for forfeiture was irregular

Based on the reasoning outlined above, the Warden determined that the order for forfeiture was valid.

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amended pursuant to section 55 of the Interpretation *Act* to read "Application for Restoration is recommended refused. Grounds for Objection made out".

2 (1999) 59 ALD 740

Whether in the event of the forfeiture determination being valid, special circumstances exist to warrant the restoration of the tenement to Tantalum

The Warden referred to the reasoning of Warden Reynolds:

> The Act is silent on the matters to be taken into account when determining whether a mining lease should be restored or not. Without wishing to be exhaustive it seems to me that consideration should be given to the explanation for the non-payment of rent, the degree of the lack of care, if any, on the part of the holder in attending to the payment of the rent and the existence of any special circumstances ... In my opinion the decision whether to restore or not would involve the weighing of the considerations mentioned. As a matter of general principle at the outset none of these considerations should be given any greater priority than any other. The facts of each particular case will determine where the emphasis should be placed. Where there is no good explanation a gross lack of care and no special circumstances then restoration should be refused.[3]

Tantalum argued that the following matters, taken in combination, constituted special circumstances:

1. Tantalum endeavoured to pay the fine;
2. The fine was received 1 day late;
3. Tantalum did not know the tenement was forfeited until it was pegged for prospecting licences;
4. Tantalum had held the tenement for 10 years and spent approximately $1.8 million on or in connection with mining on the tenement; and
5. The objects of the Mining Act are likely to be met if the tenement were restored as there was a need for further rehabilitation works in respect of leaching operations on the tenement.

However, Hayes submitted, relevantly, that:

- Tantalum had no system in place to ensure that Form 5's were lodged in time and that the requirements of the Mining Act were met;
- Amounts claimed as expenditure in previous Form 5's were overstated and in the relevant Form 5 by a factor as much as 100 per cent;
- The Form 5 was submitted more than a month after it was due;
- The fine was not paid within the 30 days;
- There was an ongoing failure to lodge monthly and quarterly reports pursuant to r.85A(1a) and r.86AA of the Mining Regulations;
- Tantalum had a history of deliberately and negligently ignoring Department notices or leaving these obligations to the last days for compliance;
- Tantalum had a history of failure to comply with Mining Act obligations; and
- Environmental rehabilitation obligations do not constitute special circumstances.

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3 *BRGM Nominees Pty Ltd v Hake and others* (unreported 26 October 1988).

The Warden was satisfied that the test outlined in *BRGM*[4] is the appropriate test. The Warden was of the view that Tantalum was extremely casual in complying with the requirements of the Mining Act and showed a gross lack of care. In the circumstances the case put forward by Tantalum did not constitute special circumstances. The application for restoration was dismissed.[5]

CONTAMINATED SITES ACT TO COMMENCE ON 1 DECEMBER 2006[*]

On 1 December 2006 the much-anticipated *Contaminated Sites Act 2003* (WA) will finally come into effect. The Act will apply to all land in Western Australia and will have an impact on the mining industry in this State.

In short, the Act establishes:

- a comprehensive regime for the reporting of "known" or "suspected" contaminated sites, including imposing a statutory duty to report on certain people;
- a searchable Contaminated Sites Database maintained by the Department of Environment and Conservation (DEC); and

a system for the allocation of responsibility for remediation of contamination, based on the polluter pays principle.

The duty to report a known or suspected contaminated site (which includes the soil and underlying groundwater) on the owner of the site, the occupier of the site and the person who knows or suspects they have caused or contributed to the contamination of the site. A site is 'contaminated' under the Act where there is a 'substance present in or on that land, water or site at above background concentrations that presents, or has the potential to present, a risk of harm to human health, the environment or an environmental value'.

There are time limits for reporting a known contaminated site (within 21 days of becoming aware of the contamination) and a suspected contaminated site (as soon as it is reasonably practicable to do so). However, these time limits will not apply for the first six months of the Act's operation (ie until 1 June 2007) to allow people to report all relevant sites.

Failure to report a site when under a duty to do so attracts a fine of up to $1.25 million for corporations, plus daily penalties.

The use a of risk-based approach to determining contamination has led to some uncertainty about when a site should be reported under the Act. The DEC has released a number of guidelines (all available on the DEC website – www.dec.wa.gov.au) that are designed to assist in determining what is "known" or "suspected" contamination that should be reported and has also released a short fact sheet that addresses contamination issues that are peculiar to the mining industry. For example, a well managed tailings facility that is not discharging to the environment (or where small discharges have occurred but have been cleaned up with no residual impact on the

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4 Ibid.

5 See above n 1, in relation to the Warden's form of order.

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