The Decision

Although VCAT found that the construction and operation of the proposed facility would impact visually and aurally on residents and other occupants of the Leonard's Hill area, VCAT determined that any adverse effects would fall within tolerable levels, and were insufficient to warrant withholding a planning permit from the Association. Noting that the site's topography, the orientation of relevant dwellings and the existence of vegetation went some way to mitigating the likely adverse effects of the operation of the facility,[2] VCAT provided for additional safeguards in the conditions imposed in the Association's permit.

Primary among the conditions imposed by VCAT was the undertaking of on-site and off-site landscaping and planting, designed to 'screen' the noise and sight of the facility, and therefore further mitigate the visual and aural impact of the facility on residents and other occupants of the Leonard's Hill area. Additional conditions of note included the formulation of acceptable management plans relating to the preservation of local wildlife and vegetation.

Relevantly, as VCAT noted in its reasons, one group of stakeholders in the Leonard's Hill area would be disappointed no matter what decision VCAT reached – the Association, which had invested considerable time and effort in devising and promoting the proposal, or the residents and other occupants in the area, who considered the proposed facility to be an inappropriate addition to the Leonard's Hill landscape.[3] Ultimately, the Association's interests in promoting environmentally friendly generation of energy were preferred by VCAT to the opposing views.

Going forward, decisions like that in *Perry v Hepburn Shire Council* are significant in a closely-settled State like Victoria, where environmental imperatives were seen to trump those of wholly unspoiled and uninterrupted enjoyment of land, reflecting an appropriate balance between planning objectives that reflect societal change and the NIMBY (not in my backyard) arguments of local residents. The case shows us that identification of suitable sites which naturally lend themselves to the mitigation of the adverse effects of such projects, and a willingness on the part of developers to take reasonable further steps to mitigate such effects, present as key ingredients in the advancement and exploitation of renewable energy sources.

WESTERN AUSTRALIA

TRADING INFORMATION ON SURRENDER OF TENEMENTS*

Korab Resources Ltd v Richmond [2007] WAMW 16 (Mining Warden's Court, Perth, 7 September 2007, Calder M)

Collusion – Contravention of s 69 of the Mining Act 1978 (WA) (Mining Act) – Exercise of Ministers discretion under s 111A of the Mining Act to refuse tenement applications – Where tenement holder and prospective tenement applicant entered into agreement to trade information on surrender of tenements.

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2 *Perry v Hepburn Shire Council* [2007] VCAT 1309, paragraph 21 per Senior Member Baird and Member Potts.

3 *Perry v Hepburn Shire Council* [2007] VCAT 1309, paragraph 17 per Senior Member Baird and Member Potts.

* Caitlin Nguyen, Solicitor, Christensen Vaughan. Member of the Kennedy Strang Legal Group.

Facts

ABM Resources Operations Pty Ltd (ABM) held exploration licences which ABM wished to surrender. ABM advised its tenement agent, Mr. Williamson of Central Tenement Services, of its desire to surrender. Mr. Williamson was also the tenement agent for Korab Resources Ltd (Korab). Mr Williamson was aware that Korab wished to apply for exploration licences over grounds which were subject of ABM's tenements. On becoming aware of ABM's intention to surrender its licences, Mr. Williamson informed Korab that the grounds were to become available. Mr Williamson asked whether Korab wished to apply for a tenement over the surrendered ground and suggested that a fee (Consideration Fee) be paid by Korab to ABM for the purpose of enabling ABM to recover some of its costs.

Korab agreed to the Consideration Fee and directed Mr Williamson to make an application. Mr Williamson prepared ABM's surrenders and Korab's application. Mr Williamson lodged the surrenders of ABM's exploration licences and then lodged Korab's application for exploration licences over the same grounds.

William Robert Richmond (Mr Richmond) objected to Korab's application for exploration licences. Mr Richmond applied to the Warden to recommend to the Minister to exercise his discretion under s 111A of the *Mining Act* to refuse Korab's application.

Issues

Objector's arguments

Mr Richmond claimed that the circumstances of the surrender of ABM's exploration licences, and Korab's application for exploration licences over the same grounds resulted in an arrangement of collusion that circumvented the ground turnover principle upon which s 69 of the *Mining Act* is based. Mr Richmond relied on s 69(1)(b) to support his claim. Section 69(1)(b) provides that when an exploration licence is surrendered, the land subject of that licence must not, within three months from the date of the surrender, be subject of an application for a new exploration licence by or on behalf of any person who had an interest in the surrendered licence.

Mr Richmond claimed that ABM and Korab's conduct was adverse to the public interest and should evoke the Minister's discretion under s 111A of the *Mining Act* to refuse Korab's tenement application. The conduct said to be adverse to the public interest is the collusion arising from:

- ABM providing exclusive knowledge of the surrender of its tenements to Korab so that Korab can apply for tenements over the surrendered grounds; and
- Korab agreeing to pay the Consideration Fee for ABM's lodgment of its surrender.

Mr Richmond submitted that the effect of the collusion between ABM and Korab's resulted in the exclusion of all persons other than Korab of the opportunity to make an application for the grant of a tenement over the surrendered grounds.

Mr Richmond further submitted that the agreement for Korab to pay the Consideration Fee which enabled Korab to have the exclusive opportunity to apply for the grounds being surrendered created a sufficient interest for the purpose of paragraph 69(1)(b).

Applicant's arguments

Korab conceded that there had been collusion between ABM and Korab in that ABM did provide prior knowledge of its intention to surrender to Korab with the knowledge that Korab would apply for tenements over the surrendered grounds. Korab further conceded that Mr. Williamson did seek commercial consideration on behalf of ABM for the purpose of recovering some of ABM's costs associated with holding and surrendering the relevant tenements.

Korab however submitted that collusion by itself is not prohibited by the Mining Act. Korab argued that neither prior knowledge of an impending surrender nor the mere existence of an agreement between the holder of a surrendered tenement and a subsequent applicant for a grant of tenement constitutes reasonable grounds for the Minister to refuse the subsequent tenement application. Korab argued that the type of collusion prohibited by the *Mining Act* is that which has the effect wherein the holder of the surrendered tenement would continue to have control of the new tenements and thereby retain control over, and maintain a defacto interest in, the new tenements. The legislative objectives of s 69 of the *Mining Act* are only circumvented when the ground turnover principle has been defeated due to the retained control and defacto interest of the previous tenement holder.

Korab submitted that there was no suggestion of an attempted or possible circumvention of the ground turnover principle nor was there evidence of any relationship between ABM and Korab other than that they were both clients of Mr. Williamson. Furthermore, there was no evidence or suggestion that ABM did or will exercise control over Korab or Korab's tenement (if granted).

Korab submitted that the *Mining Act* does not make an offence of providing information of a proposed surrender of tenements and that s 111A in particular, does not provide a mechanism by which the Minister or Warden can, in effect step into the shoes of the legislature and prohibit or penalise conduct that is not otherwise contrary to the *Mining Act.*

Decision

Warden's findings on facts

The Warden found that Korab did not have an interest in the surrendered tenements prior to ABM's surrender for the purpose of s 69(1)(b) of the *Mining Act*. There was no interest because prior to ABM informing Mr Williamson of its intention to surrender:

- neither Korab or any persons associated with Korab had knowledge, expectation or suspicion that ABM would surrender their tenements;
- Korab was unaware of the existence of ABM; and
- Korab had never had any dealings with ABM or any persons connected to ABM.

Furthermore, the Warden found that the agreement to pay the Consideration Fee did not create any legal or equitable interest in the surrendered tenement. The Warden held that the Consideration Fee was not consideration for the lodgment of ABM's surrender of tenements, rather it was consideration for the exclusive advantage given to Korab arising from Korab's knowledge of the precise time when the subject grounds would be forfeited.

Although Mr Richmond did not raise the point, the Warden found that Korab was not a related party for the purpose of s 69(1)(c).

Warden's legal analysis

On the above findings of fact, the Warden held that the *Mining Act* does not prohibit the holder of the tenements being surrendered (Tenement Holder) from informing anyone or any number of persons of that holder's intention to surrender their tenement. The Warden held that such notification does not defeat the ground turnover principle anticipated by s 69 of the *Mining Act*.

The Warden agreed with Korab that an applicant's prior knowledge of the surrender of a tenement, by itself, does not evoke the Minister's discretion under s 111A to refuse an application for tenements over surrendered grounds by subsequent applicants (Tenement Applicants). What does

evoke the discretion is if the collusive arrangements were intended to or had the effect of circumventing the ground turnover principle manifested in s 69 of the *Mining Act*.

The ground turnover principle is circumvented if the Tenement Holder or any of its public officers had or have control over, interest in, or rights in respect of, the Tenement Applicant or Tenement Applicant's assets. The ground turnover principle is also circumvented if the Tenement Holder will have a future role to play in what happens to the exploration licence granted to the Tenement Applicant.

In relation to Mr Richmond's claim that the exclusion of all persons other than Korab of the opportunity to apply for the surrendered ground was against public interest, the Warden held that there is nothing in the legislation that expressly or impliedly prohibits a tenement holder from informing any person at any time of an intention to surrender. There is nothing in the legislation that expressly or impliedly prohibits a tenement applicant from making an application having been told by the Tenement Holder or any other person or class of persons of the pending surrender and the precise time and date that the surrender will be lodged. The Warden stated that s 111A does not provide a mechanism by which the Minister or Warden can, in effect, step into the shoes of the legislature and prohibit or penalise conduct that is not contrary to the *Mining Act* or its underlying principles.

In relation to Mr Richmond's claim that the Korab's agreement to pay the Consideration Fee to ABM arising out of the exclusionary opportunity given to Korab was contrary to the public interest for the purpose of s 111A, the Warden held that every Tenement Holder is entitled to keep secret an intention to surrender a tenement. However there was no reason why, for commercial consideration, the Tenement Holder should not be able to disclose its intention to surrender a tenement. In fact, knowledge and information in various forms is something that is regularly bought and sold and information concerning a pending surrender is something a Tenement Holder is entitled to trade for valuable consideration. There is nothing in the legislation which makes an agreement of that nature unlawful and nothing which makes it contrary to the public interest as contemplated in s 111A.

Implications

This decision permits Tenement Holders to enter into agreements to trade information on the surrender of exploration licences for valuable consideration. For the agreements to be enforceable, care must be taken to ensure that:

- the Tenement Applicant does not have a legal or equitable interest in the exploration licence being surrendered;
- the Tenement Applicant is not related to the Tenement Holder;
- the Tenement Applicant is not controlled or influenced by the Tenement Holder; and
- the Tenement Holder does not, and will not, have control or influence over the new tenement.

There are no restrictions on the number of persons whom Tenement Holders may inform of their intention to surrender. It is open to the Tenement Holder to negotiate with one or more parties or even trade the information by way of tender wherein the information is sold to the highest bidder.