
JURISDICTION : MINING WARDEN

TITLE OF COURT : OPEN COURT

LOCATION : PERTH

CITATION : BALDE EXPLORATION CONSULTANTS PTY LTD
(Plaintiff)

AND

CABLE SANDS (W.A.) PTY LTD
(Defendant)

CORAM : WARDEN TAVENER

HEARD : 2 DECEMBER 2013

DELIVERED : 14 FEBRUARY 2014

FILE NO/S : PLAINT 429028

AFFECTING EXPLORATION LICENCE 70/1512

Catchwords:

Exploration Licences – Summary Judgement

Legislation:

Mining Act 1978 (WA) (Act) Sections: 8, 29 (1), 37, 38, 48 (c), 66 (b), 134(5)&(6), 136, 146

Mining Regulations 1981 (Regulations). Regulations: 8

Transfer of Land Act 1893 (WA)

Limitation Act 1935

The Limitation Act 2005

Mining on Private Property Act 1898

Result:

Application Granted – Plaint Dismissed

Representation:

Counsel:

Plaintiff : In Person
First Defendant : Mr T. Kavenagh

Solicitors:

Applicant : In Person
First Defendant : Hunt & Humphry

Case(s) referred to in judgment(s):

Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204;

Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd [2004] WAMW 12;

TEC Desert Pty Ltd v Commissioner of State Revenue [2010] HCA 49;

Payne v Dwyer [2013] WASC 271;

Commissioner of State Taxation v Balcatta Nominees Pty Ltd (1981) WAR 7;

Worsley Timber Pty Ltd v State of Western Australia (1974) WAR 115;

Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177;

Commissioner of Stamp Duties (NSW) v Henry (1963) 114 CLR 322;

Sirr v Dwyer (1984) WAR 326

The Plaintiff

1. On 14 August 2013 Balde Exploration Consultants Pty Ltd (Balde) commenced proceedings by plaint in the Perth Warden's Court against Cable Sands (W.A.) Pty Ltd (Cable Sands) claiming "Trespassing and illegally mining of mineral sand on E70/1512" and sought "Compensation for damages". Balde is the registered holder of the Exploration Licence.
2. Balde's main contentions, confirmed in the hearing, were that the matter should be referred to the Supreme Court and section 37 had been activated by the granting of an Exploration Licence over the specific land.

Summary Judgment in the Warden's Court

3. The Plaintiff commenced under Part VIII of the *Mining Act 1978* (WA) (Act), with the applicable regulations being Part VII of the *Mining Regulations 1981* (Regulations).
4. Neither the Act nor the Regulations provide that the Warden's Court has power to summarily dismiss a plaint. However, section 134(5) of the Act provides:

Subject to this Act and without affecting the jurisdiction of a warden's court, a warden's court has and may exercise in relation to all matters relating to any civil proceeding under this Act the like powers and authorities as are conferred upon the Supreme Court.

5. In *Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd*¹ Warden Calder concluded section 134(5) gave a warden's court power to strike out an action because that was a power given to the Supreme Court by Order 20 of the *Rules of the Supreme Court 1971* (WA). Warden Calder said²:

In my opinion, s134(5) gives to a Warden, exercising the jurisdiction of the Warden's Court, the power to strike (out) an action which has been commenced in the Warden's Court where the basis of the application to strike out is that the Court has no jurisdiction to hear and determine the action. That is a power which is given to the Supreme Court by the provisions of O 20 of the Supreme Court Rules. I consider it is not necessary to have recourse to the practice and procedure

¹ [2004] WAMW 12

² [2004] WAMW 12, at para [63]

of the Local Court pursuant to the provisions of s134 (6) of the Mining Act, nor to the provisions of s 136 of the Mining Act.

6. By analogy, the Warden has the power to summarily dismiss an action, as that power is available to the Supreme Court, under Order 16 of the *Rules of the Supreme Court 1971* (WA) [Rules}.

Summary Judgment Applications – Legal Principles

7. In *Apache Energy Ltd v Alcoa of Australia* [No 2] [2013] WASCA 213, Buss JA stated, as to the applicable principles for an application under Order 16 Rule 1(1)³:

On an application by a defendant for summary dismissal of the plaintiff’s claim, the defendant must demonstrate that, on the material before the court, the action should not be permitted to go to trial in the ordinary way because it is apparent that the action will fail.

Summary Judgment Application - Considerations

The Claim – possession

8. The Balde’s claim is expressed as the “Trespassing and illegally mining of mineral sand on E70/1512”. The claim is for trespass against the “heavy mineral sands” mined by Cable Sands; mining tenements under the Act are personal property.⁴ A plaintiff in an action for trespass to chattels must prove that at the time of the trespass the plaintiff was in actual possession or constructive possession of the chattel⁵. Balde’s entitlement can only have commenced when the Exploration Licence was granted; that is, from the 23 September 2010.
9. It is alleged that the trespass is a continuing trespass. A continuing trespass is a trespass for which the cause of action is renewed on each day that the wrong is not remedied. As Balde has only been in possession since 23 September 2010, the action for trespass in respect of the period of time prior to 23 September 2010 must fail.
10. Balde’s claim appears to relate to the mining of two mining deposits. It is alleged that Cable Sands mined an area “north-east of the cemetery at the Vasse Road near Busselton, in between 9th May

³ *Apache Energy Ltd v Alcoa of Australia* [No 2] [2013] WASCA 213. at [86]

⁴ *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49 at [28]-[36]

⁵ *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, per Starke J at 221, per Dixon J at 224, per McTiernan J at 234 and Williams J at 242

1994 and December 1999”. Both parties accept it is land described by Cable Sands as the Busselton Deposit (Busselton Deposit). As Balde was not in possession of the heavy mineral sands within the Busselton Deposit at the time it was mined, the claim in respect of the Busselton Deposit must fail.

Ownership of the mineral sands - introduction

11. The principle reason why Balde’s claim fails is that Cable Sands is the owner of, and entitled to mine, the mineral sands. The grant of the Exploration Licence to Balde did not grant Balde possession of, or the right to explore for (or mine), the mineral sands.
12. In addition to the Busselton Deposit, Balde’s claim alleges Cable Sands is mining “the area of Wonnerup South Quarry east of Busselton”, or the Wonnerup Deposit.

Ownership of the Mineral Sands – Busselton Deposit

13. The Busselton Deposit is within a number of lots held under the *Transfer of Land Act 1893* (WA). Searches of the land titles trace the land ownership back to the original Crown grants of the land:
 - a. Sussex Location 1 to John Garrett Bussel, Charles Bussel, Joseph Vernon Bussel and Alfred Rickmore Bussel on 16 November 1841; and
 - b. Sussex Location 2 to James Chapman and Henry Chapman on 16 November 1841.
14. The only minerals reserved to the Crown by those grants were gold, silver and other precious metals. Thus all other minerals became the property of the grantees.
15. There are five mined lots:
 - a. Part of Sussex Location 2 marked on the Diagram as “Pt 2 Owner: Cable Sands Pty Ltd”;
 - b. Lot 5 marked on the Diagram as “Lot 5 Owner: Cable Sands Pty Ltd”;
 - c. Busselton Meats land marked on the Diagram as “Busselton Meats”;
 - d. Lot 11 marked on the Diagram as “Lot 11 Owner: R.Einscourt”;
 - e. Lot 16 marked on the Diagram as “Lot 16 Owner: R Agincourt”;
 - f. Lot 18 marked on the Diagram as “Lot 18 Owner: J.T. B. Stoate”;
16. A summary of the searches relating to each of abovementioned lots establish that:
 - a. In relation to Part of Sussex Location 2 marked on the Diagram, on 28 July 1978 Cable Sands Pty Ltd was registered as

- proprietor of the land – there had been no reservation of the rights to minerals granted by the Crown on 16 November 1841 by any previous registered proprietor such that Cable Sands Pty Ltd was the owner of all minerals other than gold, silver and other precious metals from 28 July 1978.
- b. In relation to Lot 5 marked on the Diagram, on 28 July 1978 Cable Sands Pty Ltd was registered as proprietor of the land – there had been no reservation of the rights to minerals granted by the Crown on 16 November 1841 by any previous registered proprietor such that Cable Sands Pty Ltd was the owner of all minerals other than gold, silver and other precious metals from 28 July 1978.
 - c. In relation to the Busselton Meats land on 22 November 1973 Busselton Meats Pty Ltd (Busselton Meats) was registered as proprietor of the land –there had been no reservation of the rights to minerals granted by the Crown on 16 November 1841 by any previous registered proprietor such that Busselton Meats was the owner of all minerals other than gold, silver and other precious metals from 22 November 1973.
 - d. In relation to Lot 11 marked, on 29 August 1972 Reinscourt Grazing Co. Pty Ltd (Reinscourt) was registered as proprietor of the land – there had been no reservation of the rights to minerals granted by the Crown on 16 November 1841 by any previous registered proprietor such that Reinscourt was the owner of all minerals other than gold, silver and other precious metals from 29 August 1972.
 - e. In relation to Lot 16 marked on the Diagram, on 29 August 1972 Reinscourt was registered as proprietor of the land – there had been no reservation of the rights to minerals granted by the Crown on 16 November 1841 by any previous registered proprietor such that Reinscourt was the owner of all minerals other than gold, silver and other precious metals from 29 August 1972.
 - f. In relation to Lot 18 marked on the Diagram, on 29 March 1967 John Thorne Stoate and Betty Stoate (Stoates) were registered as proprietors of the land – there had been no reservation of the rights to minerals granted by the Crown on 16 November 1841 by any previous registered proprietor such that the Stoates were the owners of all minerals other than gold, silver and other precious metals from 29 March 1967.

By a deed dated 16 December 1987, Cable Sands Pty Ltd sold the land to Reinscourt and Calusa Nominees Pty Ltd (Calusa), and amongst other actions, granted to Cable Sands the sole and exclusive right to prospect and mine some of the land and remove minerals therefrom for a period of 15 years from 18 December 1987 (and hence ending on 17 December 2002).

The deed defined the land the subject of the transfer and grant as the “Yellow Land”.

17. By a deed dated 15 April 1993 Busselton Meats, Reinscourt, Calusa and the Stoates extended the scope of the yellow land to include the land defined as the “Additional Area”.
18. By virtue of:
 - i. The original Crown grants;
 - ii. The transfers of titles from the original grantees; and
 - iii. The deeds,Cable Sands took a transfer of, and hence possession of, and obtained the right to mine the Mined Lots and remove minerals.

Ownership of the Mineral Sands – Wonnerup Deposit

19. The Wonnerup Deposit is part of Lot 100. This land is more particularly described as being Lot 100 on Deposited Plan 65306 being the whole of the land comprised in Certificate of Title Volume 2731 Folio 156 (Lot 100).
20. Searches of the land titles in relation to Lot 100 trace the land ownership back to the original Crown grant of the land (as part of Sussex Location 7) to George Leake on 15 March 1842. The only minerals reserved to the Crown by that grant were gold, silver and other precious metals. Thus all other minerals became the property of the grantee, George Leake.
21. Searches of various titles relating to Lot 100 establish that Cable Sands was registered as proprietor of Lot 100 on 4 September 2009 – there has been no reservation of the rights granted by the Crown on 15 March 1842 by any previous registered proprietor such that Cable Sands is the owner of all minerals other than gold, silver and other precious metals.

Ownership of the Mineral Sands - Analysis

22. In the Busselton Deposit and the Wonnerup Deposits, the Crown owns the gold, silver and other precious metals and the owner of the land owns all other minerals.
23. At common law the owner has the right to mine his own land for his own minerals⁶. At common law the owner may grant a licence to

⁶ *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, per Windeyer J at 185 and Owen J at 202-203 and at 204

enter the land and search for and take minerals. The grant is in the nature of a *profit a prendre*⁷.

24. Section 29 (1), within Division 3 of Part III of the Act, provides that “a mining tenement may be applied for in respect of any private land” and as such is “open for mining”. Private land is defined in section 8 of the Act to include any land that has been alienated from the Crown for any estate of freehold.

25. However, with regard to of private land, section 8 states:

“ ... *but –*
(a) in relation to mining for minerals other than gold, silver and precious metals, for the purposes of Division 3 of Part III, does not include land alienated before 1 January 1899, except as provided in that Division...”

26. This means the land is not open for mining under the Act and an application for a mining tenement cannot be made in respect of land alienated before 1 January 1899 other than in respect of gold, silver and other precious metals. This includes Sussex Location 7 (and hence Lot 100) and Sussex Locations 1 and 2 (and hence the Mined Lots) and so an application for a mining tenement in respect of Lot 100 and the Mined Lots is not allowed other than a mining tenement in respect of gold, silver and other precious metals.

27. The Crown had divested its ownership of minerals other than gold, silver and other precious metals and the private landowner owns such minerals. This is also consistent with sections 37 and 38 of the Act that enable any private land alienated before 1 January 1899 to be brought within the operation of Division 3 of the Act. Section 37 allows any person, such as Balde, to make an application to bring the right to explore and mine minerals other than gold, silver and other precious metals under Division 3 of the Act such that a mining tenement may be granted in respect thereof. In the event that an application is made under section 37, section 38 allows the owner of the private land, such as Cable Sands, to make an application to bring the right to explore and mine minerals other than gold, silver and other precious metals under Division 3 of the Act such that a mining tenement may be then granted.

28. A grant in terms purporting to confer greater rights than those authorised is inoperative⁸. It follows that the grant of the Exploration Licence is a grant that only authorises exploration for gold, silver and

⁷ *Commissioner of Stamp Duties (NSW) v Henry* (1963) 114 CLR 322 and *Commissioner of State Taxation v Balcatta Nominees Pty Ltd* (1981) WAR 7, per Brinsden J at 10.

⁸ *Worsley Timber Pty Ltd v State of Western Australia* (1974) WAR 115

other precious metals and any grant purporting to authorise the exploration for any other minerals is inoperative.

29. It follows that the minerals within Lot 100, and the Mined Lots, are owned by Cable Sands. Such minerals could never have been the subject of the grant of the Exploration Licence. Consequently Balde could never have obtained actual or constructive possession of minerals other than gold silver and other precious metals. It follows that Balde's claim for damages for trespass must fail.

Ownership of mined minerals generally

30. Assuming that Cable Sands is liable to Balde because Cable Sands has mined mineral sands from the Exploration Licence, Balde is nevertheless not entitled to the proceeds of the sale of the minerals mined. This is because ownership of minerals only passes to a tenement holder when he mines the minerals. In *Sirr v Dwyer* (1984) WAR 326, Dwyer had issued a plaint in the warden's court and obtained an order that Sirr pay to Dwyer a sum equal to the value of gold taken by Sirr from Dwyer's prospecting licence. An appeal to the Supreme Court of Western Australia was allowed and the judgment obtained in the warden's court set aside, Wallace J holding at page 328:

“ It seems to me that [Dwyer's] so-called title to the mineral products under s48(c) does not arise unless the holder of that licence extracted and removed from the land the subject thereof for treatment and sale as his property a prescribed amount.”

31. Section 66(b) of the Act confers identical rights on the holder of an Exploration Licence as section 48(c) confers upon the holder of a prospecting licence. Accordingly, Balde obtains no title to any minerals within the land the subject of the Exploration Licence until he mines the minerals. In this matter Balde has not mined the minerals and accordingly Balde obtained no interest in any minerals mined by Cable Sands and is not entitled to any compensation or damages in respect thereof.

Limitation Acts

32. There is also a restriction on recovery under the Plaint based on the *Limitation Act 1935*. The *Limitation Act 2005* came into effect on 15 November 2005. It applies to causes of action that arose on or after that date. The *Limitation Act 1935* applies to causes of action that arose prior to that date.
33. Section 13 of the *Limitation Act 2005* provides that an action on any cause of action cannot be commenced if 6 years have elapsed

since the cause of action accrued. Section 38 of the *Limitation Act 1935* is to a similar effect.

34. In respect of the alleged acts of trespass occurring before 15 November 2005, by virtue of section 38 of the *Limitation Act 1935* no action can be commenced, maintained or succeed in respect of the alleged acts of trespass that occurred 6 years before the commencement of the Plaintiff, namely 14 August 2007. That is, no action can be commenced, maintained or succeed in respect of alleged acts of trespass that occurred prior to 14 August 2001.

35. The Plaintiff alleges that the Busselton Deposit was mined between 9 May 1994 and December 1999 that is, before 14 August 2001. That is, it is alleged that the trespass occurred before 14 August 2001. The action based on the mining of the Mined Lots is barred by section 38 of the *Limitation Act 1935* it being in respect of a cause of action that arose more than 6 years before the commencement of the plaintiff.

Applications for Exploration Licences

36. Balde asserted the grant of Exploration Licence 70/694 to Renison Limited on 27 March 1990 brought the area within Division 3 Part III of the Act in accordance with section 37(3)(a) of the Act. Balde also asserted that on the application for the Exploration Licence in 1994 the private land owners had the opportunity to apply for a mining tenement that would have been granted to them in preference to the applicants for the Exploration Licence. He further stated that the grant of Exploration Licence 70/694 to Renison Limited brought the area within Division 3 Part III of the Act.

37. These assertions are fundamentally misconceived because neither the application by Renison Limited for Exploration Licence 70/694 nor the application by Balde for the Exploration Licence were an application under section 37(a) but, like any other application for an Exploration Licence, were applications under section 58 of the Act.

38. There is no evidence that any application has been made pursuant to section 37(3) of the Act (using the procedure set out in regulation 8 of the Regulations) to bring the land the subject of Lots 100 and the Mined Lots within Division 3 Part III of the Act.

Mining on Private Property Act 1898

39. Balde raised the issue of the *Mining on Private Property Act 1898*; that Act only applies to the 'Hampton Lands Estate' near Norseman.

Incorrect exercise of power

40. Balde made a number of unsupported assertions, including that certain persons have acted in bad faith and dishonestly. Its submissions were, generally, based on a misunderstanding of the law.

Referral to the Supreme Court

41. A Warden may reserve any question of law for the opinion of the Supreme Court, pursuant to section 146 of the Act. Balde has not articulated what question of law is to be reserved for the opinion of the Supreme Court.

Finding

42. the Plaintiff is dismissed as:
- a. Balde has never been in possession of the heavy mineral sands such as to found a claim in trespass. Cable Sands at all times has been lawfully entitled to mine the heavy mineral sands.
 - b. Balde has never mined the heavy mineral sands and has never obtained title to them such that it can establish a loss.
 - c. In respect of the mining of the Busselton Deposit, the claim is barred by the *Limitation Act 1935*.
43. Cost to defendant, taxed if not agreed.

