JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CORAM	:	Warden K Tavener
HEARD	:	1st August 2104 and 7th August 2014
DELIVERED	:	18th September 2014
FILE NO/S	:	Interlocutory Application for Permanent Stay Application for Forfeiture in respect of Exploration Licence E47/1797
BETWEEN	:	**DONALD KIMBERLEY NORTH** Applicant and **LEGEND MINING LTD** First Respondent and **KML NO 2 PTY LTD** Second Respondent

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Catchwords:

Interlocutory Application - Forfeiture – Permanent Stay

Result:

Interlocutory application dismissed.

Case(s) referred to in judgment(s):
WMC Resources v Ajax Mining Nominees [2001] WAMW 13
Commercial Properties Pty Ltd v Italo Nominees Pty Ltd unreported, Sup Ct WA, F. Ct 18/12/1988; Lib 7427
Craig v Spargos Exploration NL Warden's Court Leonora; 22 Dec.1986, Vol.2, Fol.23

Representation:

Counsel:

Applicant:	Mr T. Kavenagh
First and Second Respondent:	Mr A. Jones

Solicitors:

Applicant:	Hunt & Hunt
First and Second Respondent:	DLA Piper

Interlocutory Application

1. This interlocutory application arose after the Applicant was successful in establishing the Respondents had failed to comply with expenditure conditions on mining lease E47/179.
2. It was noted, on the 7th August 2014, the first respondent has no interest in the outcome of these proceedings, save that it holds shares in the parent company of the second respondent. The second respondent has a beneficial ownership of the tenement and management control of the tenement.
3. Formal authorisation to conduct activities, by the Respondents, on the subject tenement is contingent on formal approval by the board of Ngarluma Aboriginal Corporation.
4. The Interlocutory Application sought the following orders:
    a. Application for Forfeiture KR020/123, in respect of E47/1797, be summarily dismissed.
    b. Alternative to (a), Application for Forfeiture KR020/123 in respect of E471797 be permanently stayed.
    c. Applicant pays the First and second Respondents' cost to be taxed if not agreed.

Submissions

5. At a late stage in the proceedings, after the hearing, the Respondents raised the issue of illegal mining by the Applicant. It was said Mr North and his associates acted inappropriately or contrary to law. That is, the Applicant conducted unlawful exploration on the subject tenement and had used information from that activity in its application. Mr North acquired both information as to the prospectivity of the ground and the lack of ground disturbing activity undertaken by the Respondents.
6. It was submitted the Applicant is seeking to obtain an advantage from his unlawful activities. Under the Mining Regulations the Warden Court must ensure proceedings are managed, administered, and controlled in a manner that furthers the policies and objectives of the Act. It was acknowledged this issue should have been raised at the original hearing as the respondents were aware, or became aware, of the applicant's conduct.
7. During the hearing, the evidence was Mr North and his associates did not obtain authorisation from the Respondents, nor sought a permit under the Mining Act, to enter onto the subject tenement. Prior to the hearing there was no notice that such evidence was going to be led; it arose in cross-examination.
8. Reference was made to the evidence in the original hearing in which Mr North, and associates, testified they had travelled off-road on the tenement and had used a metal detector; in effect, prospected for minerals, without the requisite authority. It was

submitted such activities constituted exploration without authority, or unlawful mining.

9. The Respondents submitted members of the public have no right to go onto Crown land; to do so without authority is a trespass. However, people can observe the tenement from adjacent land, on which they are entitled to go. They can also use public rights of way and public roads to access the land; to some extent that is what Mr North and Mr Sheridan did. They could have entered onto the tenement with a right granted by the Crown.
10. The Respondent highlighted such evidence as Mr North having travelled off-road quite often on the subject tenement and had spent several hours looking at some metal detecting (not further qualified). There was evidence of looking at historical sites and samples. Mr Sheridan had also driven over the land, looked at samples and historical sites.
11. It was said this matter, firstly, went beyond the issue of illegally-obtained evidence, which should have been raised at the hearing. Further, based on his unlawful exploration, the Applicant had identified the tenement as being a good prospect. Consequently, the information so acquired was tarnished for the purposes of these proceedings.
12. Secondly, the Applicant had used information obtained at the hearing to establish the respondents had not undertaken any ground-disturbing work; it was non-contentious that there was no such work. It is for the Applicant to establish non-compliance, and the only evidence led by the applicant came from the unlawful exploration. If they led no evidence, the Respondents could have made a no case submission, potentially leading to the dismissal of the application on the basis of no evidence. The evidence obtained by the Applicant evidence was crucial and these proceedings were said to be tainted by the conduct of the applicant.
13. The law and the courts have an obligation to ensure that a party does not procure a benefit from unlawful activity. The Respondent accepted such an approach required a finding the Applicant had conducted unauthorised activities on the subject tenement, amounting to an offence (or offences) under the Mining Act. The respondents sought summary dismissal or a permanent stay.
14. The Applicant submitted it would be only a rare case where an application for forfeiture would be summarily dismissed in circumstances where the application is made almost 20 months after the application for forfeiture was made, after the application has been part heard over two days, and after the respondents have filed three further affidavits of over 1500 pages, and where the application is filed and served the afternoon before the hearing was set to resume.
15. The Warden has to determine whether there is a real question to be tried. The question as to whether Mr North has conducted

any unlawful activities is not a question that can be determined on an interlocutory application particularly when Mr North was cross-examined and this proposition was not put to him; the alleged unlawful mining came up in the cross-examination of Mr Sheridan. The information was elicited by the Respondents' former counsel. Further, two rocks being picked up by an associated, which was the basis of an allegation of unlawful mining, was not put to Mr North and so it would be unfair for this application to succeed on the basis of that evidence.

16. Warden Calder in *WMC Resources v Ajax Mining Nominees* [2001] WAMW 13, at paragraph 6, said,

> *Of more significance, however, I consider that it is, prima facie, not the role of the Minister in considering an application for exemption to look at what may happen to the ground the subject of the mining tenement in respect of which the exemption certificate is sought if the Minister does decide at some future time that the tenement should be forfeited. In my opinion, the only time when the Minister may properly consider what may subsequently happen to the ground which is the subject of a tenement is if and when an application is made by some person for forfeiture.*
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> *If an application is made for the grant of a tenement over forfeited ground, it is then open to the Minister to give consideration to the merits, financial or otherwise, of that particular applicant.*

17. The Applicant submitted the activities of the applicant are irrelevant to an application for forfeiture. An application for forfeiture focuses on the non-compliance by the tenement-holder and whether that non-compliance is of sufficient gravity to justify forfeiture. Anyone can apply for a miscellaneous licence if it is forfeited.
18. The Applicant submitted the jealous neighbour principle is enshrined in the Act; therefore any restriction on the ability to do anything must be read down to allow people to look at tenements and determine whether work has been done on the ground. And, certainly, they have to do that to be able to get over the hurdle of the onus of proof when commencing an application for forfeiture. That is the principle on which the actors operated since the case of Craig v Spargos Exploration which led to the plaint for forfeiture.
19. The Respondent submitted they were not seeking an order for summary judgment, but rather a permanent stay. Effectively, a dismissal of the matter in the exercise of general powers to control the proceedings before the Warden, which can be exercised at any time.

20. The Respondent submitted the correct approach was to review actions of Mr North and consider whether he should be permitted to prosecute these proceeding.
21. The jealous neighbour principle does not permit the legislation to be read down so that while it might be otherwise unlawful, actions become lawful. Legislation cannot confer a right to do something where there is no express right. There was express authorisation, under the Act, that Mr North could have obtained.

Findings

22. At this stage of the proceeding, on the adduced material, there is a real question to be answered. Summary dismissal cannot be granted in such circumstances, effectively on a retrospective basis.
23. A Warden may have the power to grant a permanent stay, in the exercise of general powers to control the proceedings. Such a power, generally, must be used sparingly such as when there has been a serious abuse of process.
24. An improper act can sometimes afford evidence of an improper purpose; the purpose here, however, is to seek forfeiture of a tenement. The issue raised, rather, is that the Applicant's improper behaviour requires a permanent stay to be ordered.
25. There is allegation that Mr North, and his associates, was involved in unlawful mining and a finding to that effect should be made against him. The allegation is focussed on the manner in which the applicant acquired information, rather than an improper purpose. Overall, there is insufficient evidence on that issue.
26. Mr North was not cross-examined about unlawful mining. The manner in which information was obtained to support the application was not challenged, as to its admissibility, at the hearing. It cannot be conclusively determined that unlawful mining occurred when there has been a limited investigation of this collateral issue, during a forfeiture application. The proper course would have been to raise an objection, at the hearing.
27. The jealous neighbour principle does not permit people to act unlawfully. However, to make an adverse finding requires the alleged perpetrator to be afforded proper legal process. Without such a finding, an abuse of process cannot be established. The behaviour can be placed before the Minister for consideration as part of the decision-making process.

Decision

28. The Interlocutory application is dismissed.