
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : JOYTELL PTY LTD
(Applicant)

AND

FMG PILBARA PTY LTD
(Objector)

CORAM : WARDEN A MAUGHAN

HEARD : 3 JULY 2015

DELIVERED : 17 JULY 2015

FILE NO/S : Application for Restoration 465269 in respect of
Exploration Licence 47/1153

Catchwords: *Application for Restoration – Turns on own facts.*

Legislation:

- *Mining Act 1978*
- *Mining Regulations 1981*

Cases referred to:

- ***BRGM Nominees Pty Ltd v Christopher James Hake and Malcolm Saggars and Stephen Graham*** unreported, Kalgoorlie Warden's Court, 2006 1988

Result:

1. *Recommendation to the Honourable Minister that Exploration Licence 47/1153 be restored to Joytell Pty Ltd*

Representation:

Counsel:

Applicant	:	Mr Kavenagh
Respondent	:	No appearance

Solicitors:

Applicant	:	Hunt & Humphrey Solicitors
Respondent	:	Not applicable

Background

By application dated 27 March 2015 Joytell Pty Ltd ("Joytell") seeks restoration of Exploration Licence 47/1153.

Joytell was granted E47/1153 on 3 August 2006 and remained the holder of the tenement until forfeited, for non-payment of rent.

On 5 May 2015 FMG Pilbara Pty Ltd (FMG) lodged an objection to the restoration application. That objection was withdrawn, by consent, on 29 June 2015.

The Law

Rent is payable by the holder of a mining tenement in amounts prescribed pursuant to the regulations – s108 of the *Mining Act 1978* ("*Mining Act*").

S63A *Mining Act* provides an Exploration Licence is liable to forfeiture if, inter alia, the prescribed rent is not paid.

On 27 March 2015 the Minister for Mines and Petroleum ordered that E47/1153 be forfeited pursuant to s96A *Mining Act* for non-payment of rent for the financial year ending 2 August 2015. In that year rent was due and payable in the sum of \$32,201.40 – R109(3) and (4) of the *Mining Regulations 1981* ("the *Regulations*").

S97A of the *Mining Act* provides:

"97A. Application for restoration of mining tenement after forfeiture"

- (1) *Subject to subsection (2), where a mining tenement is forfeited under or by virtue of section 96, 96A or 97 a person who was, immediately prior to the forfeiture, the holder of the tenement concerned may apply for the mining tenement to be restored to him and the forfeiture cancelled.*
- (2) *Where the forfeiture was occasioned by non-compliance by the holder with an expenditure condition applicable to the tenement and results from an application made by a person, not being a person acting on behalf of the Department, subsection (1) does not apply.*
- (3) *An application under subsection (1) —*
 - (a) *shall be in the prescribed form and made within the prescribed time; and*

- (b) shall be lodged in the prescribed manner; and
- (c) shall be accompanied by the prescribed application fee,

and the applicant shall at the request of the warden furnish such other information, or such evidence in support thereof, as the warden may require but the warden shall not require information or evidence relating to assays or other results of any testing, sampling or other mining operations that the applicant may have carried out on the land the subject of the application.

- (4) Within 14 days after the lodging of such an application under subsection (1), the applicant shall serve such notice of the application as may be prescribed on any person who has since the forfeiture made application for a mining tenement in respect of the land or any part of the land to which the application relates and on such other persons as may be prescribed.
- (5) An application under subsection (1) shall be heard by the warden on a day appointed by him.
- (6) A person who desires to object to the granting of an application made under subsection (1) shall lodge within the prescribed time and in the prescribed manner a notice of objection and he may be heard by the warden in opposition to the granting of the application.
- (7) On the hearing of an application made under subsection (1) the warden —
 - (a) in a case to which section 96 applies, shall determine the application and make such order as he thinks fit and may —
 - (i) grant the application and restore the mining tenement to the former holder; or
 - (ii) grant the application and restore the mining tenement to the former holder subject to such further or other conditions as the warden may specify; or
 - (iii) refuse the application;

and

- (b) in any other case, shall as soon as practicable thereafter transmit to the Minister for his consideration the notes of evidence and any maps or other documents referred to therein, and his report recommending the granting or refusal of the application together with his reasons for the recommendation.
- (8) On receipt of notes of evidence and any maps or documents transmitted to him pursuant to subsection (7), the Minister may grant or refuse the application for restoration of the mining tenement, as he determines and whether the warden recommends the granting of the application or the refusal thereof, and may impose on a mining tenement so restored such further or other conditions as the Minister may specify”.

In **BRGM Nominees Pty Ltd v Christopher James Hake and Malcolm Saggors and Stephen Graham** unreported, Kalgoorlie Warden's Court, 2006 1988, Warden Reynolds stated:-

"The Act is silent on the matters to be taken into account when determining whether a mining lease should be restored or not. Not 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 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 those considerations mentioned. As a matter of general principle at the outset one of those 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. Where there is no good explanation and a gross lack of care it may be appropriate for the tenement to be restored if there are special circumstances. It may not be necessary for any special circumstances to exist where the holder is able to provide some good explanation for the non-payment of the rent or show that the non-payment was not the result of any lack of care on his part.

When determining whether special circumstances exist, the court should give consideration to the length of time that the holder had held the tenement, the expenditure incurred in any years prior to the date upon which the rent became payable, whether the holder had caused the necessary arrangements to be made for a mining operation to commence, whether the holder was actually carrying out a mining operation on the tenement, the size of any planned mining operation or existing mining operation and generally the prejudice that would be suffered by the holder if the tenement was not restored. Whether special circumstances exist or not depends of course on the facts in each particular case".

S97A(7)(b) *Mining Act* provides that on the hearing of an application for restoration and cancellation of forfeiture in respect of an Exploration Licence, the Warden shall forward a report and recommendation to the Minister for the grant or refusal of the Restoration Application.

After receiving the Warden's application, the Minister may grant or refuse a Restoration Application pursuant to 97A(8) *Mining Act*.

The Evidence

The application for Restoration is supported by an affidavit of Pnina Feldman dated 16 June 2015. Feldman is a director of Joytell.

The Explanation for Late Payment

Mr Feldman swears to the follows:

- (a) Joytell caused rent to be paid for the relevant year on or around 26 March 2015.
- (b) E47/1153 was forfeited the day after the rent was paid.
- (c) The Exploration Licence forms part of the Rocklea Iron Project in the Pilbara which is managed by Dragon Energy Limited ("Dragon"). Joytell held the view that an agreement existed between them and Dragon ("the Dragon Agreement") under which Dragon was responsible for expenditure conditions from July 2012 onwards.
- (d) The rent for E47/1153 for the relevant year was paid late due to a dispute between Joytell and Dragon relating to, inter alia, which party was responsible for payment of the rent. The issues of dispute between Joytell and Dragon, in summary, were:-
 - (i) Joytell claiming that Dragon surrender parts of a tenement adjacent to E47/1153 which it considered to be in breach of the Dragon agreement and resulting in loss of potential royalties to Joytell.
 - (ii) Joytell requested Dragon make payment of the rent for the relevant year to compensate Joytell for its surrender of parts of the tenement adjacent to E47/1153.
 - (iii) Joytell relied on the express representation of Jie Chen, the Chairman of Dragon, that it would pay the rent for the relevant year to avoid court action being commenced by Joytell in relation to the surrender of parts of the adjacent tenements.
- (e) Joytell submits that it had a reasonable expectation that Dragon would pay the rent and in reliance upon representations made by Dragon, that expectation was reasonable for the following reasons:-
 - (i) Dragon paid the rent in the sum of \$31, 383.00 for E47/1153 for the previous year, ending 2 August 2014.
 - (ii) 29 October 2013 Dragon, by its Chairman, Jie Chen, expressly represented to Joytell that Dragon would pay the rent for the

relevant year to avoid any court action in relation to the surrender of parts of the tenement adjacent to E47/1153.

- (iii) After Joytell had discovered that Dragon had not paid the rent for the relevant year, in December 2014, Ms Feldman had conversations with Dragon on 19 December 2014 and mid-January 2015 to prompt Dragon to make payment as the parties had agreed on 29 October 2013.

It is submitted on behalf of Joytell that they did not demonstrate a lack of care in attending to payment of the rent for the relevant year and previous year. After receipt of a notice issued pursuant to R15 Regulations in relation to non-payment of the rent, Joytell took appropriate steps to ensure that the rent was paid.

Special Circumstances

Feldman swears to the following:

- (a) Joytell incurred significant expenditure in relation to E47/1153 prior to the forfeit of the tenement. That substantial exploration work was carried out or caused to be carried out by Joytell in relation to E47/1153 between 2011 and 2013.
- (b) The minimum prescribed expenditure upon the tenement on E47/1153 between 2007 and 2014 was \$858,000.00. The value of expenditure to date has been \$1,403,754.00 which exceeds the aggregate minimum prescribed expenditure requirements by \$545,754.00. That E47/1153 is significantly prospective. That the results of exploration indicate that there is \$100m tonnes of mineable iron ore on E47/1153 and E47/952.
- (c) An independent technical report was undertaken in 2013. A consultant was engaged in 2014 to undertake engineering and optimisation studies and a preliminary mining plan was developed. Field mapping and rock chip sampling to the areas untested by drilling was undertaken in 2014.

In addition to the iron ore deposits, drilling had identified anomalous gold results.

- (d) The iron ore rights on E47/1153 have been assigned to Dragon and the gold rights on E47/1153 have been assigned to Queensland Bauxite.

The prejudice that will be suffered by Joytell should restoration not be granted is, it is submitted, as follows:-

- (i) It will affect the viability of the Rocklea Iron Ore Project and royalties Joytell would otherwise be entitled to receive.
- (ii) Joytell may be liable to payments sought by Dragon and by Queensland Bauxite for any adverse consequences of the forfeiture of E47/1153.
- (iii) In light of the results of exploration, substantial expenditure incurred to date by Joytell and the assignees of the iron rights and gold rights may be wasted.

In my view the uncontroverted evidence of Feldman establishes, to my satisfaction, that:-

1. The reasons for non-payment of rent in a timely manner has been explained.
2. There was no substantial lack of care on behalf of Joytell leading to the non-payment of the rent.
3. Special circumstances exist as to why the tenement ought to be restored including:-
 - (i) The prospectivity of the tenement.
 - (ii) The amount incurred on expenditure on the tenements by the applicant assignees since 2007.

For these reasons, in my view restoration ought be recommended.

Order

That restoration of Exploration Licence 47/1153 to Joytell Pty Ltd is recommended to the Honourable Minister.

A handwritten signature in black ink, appearing to be 'A Maughan', is written over a horizontal line.

Warden A Maughan

17 July 2015