
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : HOLCIM (AUSTRALIA) PTY LTD v. AMG (WA) PTY LTD [2015] WAMW 9

CORAM : ZEMPILAS M

HEARD : 12 FEBRUARY 2015

DELIVERED : 13 FEBRUARY 2015

FILE NO/S : INTERLOCUTORY APPLICATION IN RELATION TO OBJECTION 444043 TO APPLICATION FOR EXEMPTION 443443 AFFECTING MINING LEASES 70/1248 and 70/1250

TENEMENT NO/S : M70/1248

BETWEEN : HOLCIM (AUSTRALIA) PTY LTD
(Applicant)

AND

AMG (WA) PTY LTD
(Respondent)

Catchwords:

INTERLOCUTORY APPLICATION – Application for Exemption – Application to amend Form 18 – New issue – Determination of issues – Defect or error

Legislation:

s. 102, s. 142, s. 162 *Mining Act* 1978 (WA)
r. 54, r. 172 *Mining Regulations* 1981 (WA)

Cases referred to:

Norwest Sand and Gravel Pty Ltd v MCC Australia Sanjin Mining Pty Ltd
(2012) WAMW 7

Re Nicholls SM; ex parte Plutonic Operations Ltd (2002) WASCA 232(S)

Result:

1. *Application for Exemption amended in terms of the amended Application attached to the Interlocutory Application dated 21 October 2014.*

Representation:

Counsel:

Applicant	:	Mr T Masson
Respondent	:	Mr T Kavenagh

Solicitors:

Applicant	:	Lawton Lawyers
Respondent	:	Hunt and Humphry

Background and Law

1. Holcim (Australia) Pty Ltd (“Holcim”) is the applicant for exemption 443443 regarding mining leases 70/1248 and 70/1250. In this interlocutory application, Holcim is applying to amend its application for exemption from expenditure (Form 18) to include a reference to s. 102(3) of the *Mining Act* 1978 (“Act”) as a ground for its application at paragraph (g) on the Form 18. The objectors, AMG (WA) Pty Ltd (“AMG”), oppose that amendment.

2. Holcim filed its Form 18 on 2 April 2014, relating to the expenditure year ending 14 February 2014. The reasons at paragraph (g) on that form are expressed as relying on s. 102(2)(b) and s. 102(2)(f). It was lodged by a solicitor at Holcim, Ms C Nolan.
3. Holcim subsequently lodged a statutory declaration of Mr C Giraud sworn 30 April 2014 as required by r. 54 of the *Mining Regulations* 1981 ("Regulations"). The statutory declaration did include a reference to s. 102(3) as a further ground for the application for exemption.
4. AMG filed its objection to the application for exemption (Form 16) on 10 April 2014, and attachment A to that document listed its bases for objection. On that same day, AMG also filed an application for forfeiture in respect of the same tenements, again relying on the failure of Holcim to meet its expenditure requirements as the basis for that application. Because AMG lodged an objection, the statutory declaration of Mr Giraud no longer formed a part of Holcim's application from that point on. Instead Holcim filed particulars of its application on 12 August 2014, which again was a document that included a reference to s. 102(3) as a reason for its application.
5. AMG filed its particulars of objection on 14 August 2014. It did not respond to, or address, the particulars raised by Holcim in respect of section 102(3). In relation to that it simply observed in those particulars that Holcim had not applied for an exemption pursuant to s. 102(3).
6. Orders were made by the warden on 19 September 2014 for lodgement and service of witness statements, books of documents and the like by the parties, and it was listed for a further mention date on 7 November 2014.
7. Holcim complied with those orders by the due date of 17 October 2014 and also lodged this interlocutory application on 21 October 2014. AMG also

complied with its orders, filing its evidence and book of documents on 31 October 2014. But for this interlocutory argument or application, on 7 November 2014 the application for exemption could have proceeded to be listed for a hearing.

8. Holcim seeks the amendment be made pursuant to either s. 142(2) or s. 142(4) of the Act, which it says allows for an amendment to be made in respect of an application for exemption by virtue of r. 172 and s. 162.
9. By a fairly circuitous route, r. 172 provides that s. 142 can apply to proceedings within Part 8 of the Regulations, defined as being proceedings under Part 4 of the Act which includes exemption proceedings. Regulation 172 was able to be made in that form by virtue of section 162.
10. Section 142(2) provides:

142. Informality and amendment

(2) No proceedings in a warden's court under this Act shall be dismissed or vitiated by any informality, but a warden's court has power at any time to amend all defects and errors in such proceedings, whether there is anything in writing to amend or not.

11. Section 142(4) provides:

(4) Upon due application in that behalf being made, all such amendments as may be necessary for determining in the existing proceedings the real question in issue between the parties thereto shall be allowed.

Holcim's case

12. Holcim relies on either or both of those subsections to give me the power to make the amendment they seek. In relation to s. 142(2) it says its failure to mention section 102(3) specifically on the Form 18 was a defect or error as mentioned in that section. Holcim describes it as an error of omission or a slip that could be rectified by the amendment sought.

13. It says the evidence of that error or slip comes by way of inference from the following evidence:
- that it was Ms Nolan who lodged the Form 18 on 2 April 2014,
 - that Mr Giraud swore the statutory declaration on 30 April 2014 which did in fact refer to s. 102(3),
 - that the particulars filed on 12 August 2014 also referred to s. 102(3), and
 - that the Form 18, where it makes reference at paragraph (g) to the type of information sought at that particular point on the form, does not include a reference to any other provision than s. 102(2).
14. Holcim submits it is open to me on the basis of that evidence to infer that the failure of Ms Nolan to specifically include s. 102(3) as a reason for their application on that form at paragraph (g) was a slip or an error of omission on her part, if indeed a specific reference to s. 102(3) is even required at that point. It says the slip can now be rectified by amendment pursuant to s. 142(2).
15. In the alternative, or in addition, it says s. 142(4) gives a warden broad discretion to make all such amendments as may be necessary for determining in the existing proceedings the real question in issue between the parties. Holcim suggests that section has been interpreted in the past as not restricted to other instances of correction or amendment within that particular provision, but to cover a broad range of situations.
16. Holcim says that to determine the real question in issue is to undertake a two-step process, which was referred to by Warden Wilson in the decision of *Norwest Sand and Gravel Pty Ltd v MCC Australia Sanjin Mining Pty Ltd* (2012) WAMW 7. It says the first question to be addressed is what the

nature of the proceedings and what is the warden being asked to determine? The second question is, by reference to the documents or pleadings, what are the issues between the parties?

17. In relation to the first question, Holcim says the nature of the proceedings in this case is important because it is a warden performing an administrative function to make a recommendation to the Minister as distinct from, for instance, an application for a prospecting or miscellaneous licence (which was the case in *Norwest Sand and Gravel Pty Ltd v MCC Australia Sanjin Mining Pty Ltd*) where the warden makes a determination to grant or not to grant. It also says it is important to note that applications pursuant to the Act are applications to the State, with objectors having a right to be heard.
18. In relation to the second question, the determination of what are the issues between the parties, Holcim says the matters they wish to raise pursuant to s. 102(3) are relevant to the real question in issue between the parties and have always been in issue by virtue of the Form 18, the statutory declaration and the particulars taken together.
19. Holcim says those issues will be relevant to the Minister in due course in any event by virtue of s. 102(3), therefore they will also be relevant to the warden in performing a filtering role, as the warden does when making recommendations to the Minister, to consider them before making that recommendation. However, Holcim maintains the Minister is not bound to consider only those matters that were aired or raised before the warden.
20. Holcim says it is appropriate for me to exercise my discretion to make the amendment because there is no prejudice to AMG that can't be remedied by providing them further time to file evidence if necessary. It says AMG have been on notice since 12 August 2014 when Holcim's particulars were

filed, that s. 102(3) was something it sought to rely on. It also says there can be no prejudice where it is a matter that is inevitably going to be raised with the Minister down the line in any event.

AMG's case

21. AMG say Holcim cannot rely on s. 142(2) or (4) if to do so would allow them to circumvent the requirement that an application for exemption be made within 12 months from the end date of the expenditure year: s. 102(1). In effect they say you cannot ride on the coat-tails of an application made within time by making an entirely new application. It submits r. 172 does not have the legislative authority or weight to allow for that to occur, but this submission obviously relies on their position that the amendment gives rise to a new issue.
22. AMG says the amendment does give rise to a new issue that does not relate to existing issues between the parties. It says that in determining what the issues are I am restricted to look at the Form 18 (as well, obviously, as the Form 16 filed by AMG).
23. AMG says I should not have regard to the statutory declaration because it forms no part of the application once the objection is lodged, nor to the particulars. AMG relies on the comments made by the Honourable Wheeler J in *Re Nicholls SM; ex parte Plutonic Operations Ltd* (2002) WASCA 232(S) as support for that proposition. Therefore, AMG says because s. 102(3) was not mentioned in the Form 18 it is a new issue and the amendment cannot be allowed under s. 142(2) or (4) because to do so would allow Holcim to avoid the requirement that they lodge an application for exemption within 12 months on that ground.

24. Even if they are wrong about that, and I do still have discretion to grant an amendment under either s. 142(2) or (4), AMG says I should not grant the amendment because:

- (i) there is no explanation for the delay in Holcim making the application to amend between 14 August 2014, when AMG's particulars of objection were filed and clearly raised that s. 102(3) had not been mentioned on the Form 18, and the date of the interlocutory application on 21 October 2014,
- (ii) there will be prejudice to AMG in allowing s. 102(3) to be raised because it will potentially cause further delay in the hearing of the exemption application, and
- (iii) it will allow something to be raised before the warden which otherwise, if it were not raised before the warden, could not be raised with the Minister, thus arguing a different interpretation of s. 102(3) in that regard.

Does amendment give rise to a new issue?

25. I first need to determine whether the amendment gives rise to a new issue, because that is relevant to whether I need to consider AMG's argument as to the effect of r. 172 in respect of s. 102(1). So what is the issue that is sought to be raised? The proposed amendment simply seeks to refer to s. 102(3) which refers to "any other reasons". In this matter there does not seem to be any dispute as to what those additional reasons are.

26. In AMG's submissions at paragraph 23(c) and (d), it alludes to the further issues that will arise as whether the development of Holcim's Jandabup project will encourage competition within the sand market in the Perth

northern corridor (“PNC”), and whether it is in the public interest to have a competitive sand market across the metropolitan area.

27. This is consistent with the particulars filed by Holcim on 12 August 2014 at paragraphs 20 and 21 that the development of the Jandabup project will encourage competition within the sand market in the PNC and that it is in the public interest to have a competitive sand market across the metropolitan area.
28. Clearly the issue sought to be raised is a consideration of public interest and competition within the sand market in the metropolitan area and the PNC in particular, and there doesn’t seem to be any disagreement between the parties as to the issue that would arise if the amendment were allowed.
29. In determining whether it is a new issue, I have to consider what materials I can have regard to in determining what the existing issues are. Holcim says that I can have regard to the Form 18, the statutory declaration and the particulars. They say that two out of three of those documents do refer to s. 102(3), therefore, this is not a new issue.
30. AMG says, on the other hand, that only the Form 18 and their corresponding Form 16 can be relied on. Again, it relies on the comments made by the Honourable Wheeler J in *Re Nicholls SM; ex parte Plutonic Operations Ltd*, that the Form 18 identifies the reasons for the application by reference to statute, and in particular to s. 102(2) and (3). AMG says Holcim is therefore bound by those reasons.
31. However, in that case the Honourable Wheeler J also foreshadowed a process in an application for exemption for further detail to be given for the reasons for the application beyond the Form 18 and it was her Honour’s view it was to that further detail that an applicant would be bound at a

hearing. I therefore do not understand her Honour to be saying that an applicant would *only* be bound by the Form 18 as to the issues in question.

32. Even if I were to accept AMG's submission on this, AMG's own Form 16 which was filed on 10 April 2014 did raise that the application was not in the public interest. Therefore, if I were to determine the issues based only on the Form 18 and Form 16, the public interest of granting the application was squarely raised on 10 April 2014 by AMG.
33. I do not agree, as suggested by counsel for AMG, that I should simply ignore that reference or that it is somehow qualified by or restricted to the grounds raised by Holcim in their Form 18. The grounds raised by Holcim on the Form 18 only referred to s. 102(2)(b) and (f), neither of which make any reference to public interest. In fact, none of the paragraphs in s. 102(2) make any reference to matters of public interest. It could only be under s. 102(3) that such a consideration arises.
34. The fact remains public interest was raised as an issue by AMG on its Form 16, so regardless of whether I have regard to the statutory declaration of Mr Giraud or the particulars filed by Holcim, on the basis of the Form 18 and Form 16 alone, the issue of the public interest of the application could not be described as a new issue.
35. In any event, I do not consider that I am restricted to look at those documents alone to determine what the issues are.
36. In my view, the nature of applications made pursuant to the Act is somewhat unique. They are prescribed by provisions within the Regulations and the Act. The Regulations prescribe the use of forms which have some aspects already pre-completed and some guidance given as to the completion of the forms for use by lay people.

37. In the case of applications for exemption, those applications must be supported by a statutory declaration which then falls away if an objection is made. They are then supported by particulars. With other applications, there are varied processes and forms depending on the type of application. It will always be a different process to determine what are the documents to which one can have regard to determine the issues between the parties. Comparisons with other jurisdictions are particularly unhelpful in this regard.
38. In the circumstances of this case, I do consider that I can have regard to the particulars filed by both parties as defining the case to which both the applicant and the objector are to be bound. They are the documents, in conjunction with the applications themselves, which define the issues between the parties. I note in this case the particulars were filed well before either party had to file evidence.
39. Without expressing a view as to the merits generally of AMG's argument about the interplay between s. 142 and r. 172, in this case I do have discretion under s. 142(2) or (4), to amend the Form 18, because the issues raised under s. 102(3) are not new issues.

Section 142(2)

40. A Form 18 application was filed by Ms Nolan, which did not mention s. 102(3) adjacent to paragraph (g). The printed part of the form does not mention, or make reference, to s. 102(3). That same application was supported initially by a statutory declaration from Mr Giraud and, later, by the particulars of the application, which both did mention that particular section.
41. That does give rise to an inference there was an error of omission by Ms Nolan in not including a reference to s. 102(3) on the Form 18.

Section 142(4)

42. In proceeding through the two-step process outlined in *Norwest Sand and Gravel Pty Ltd v MCC Australia Sanjin Mining Pty Ltd* to determine whether the amendment is necessary to determine the real question in issue between the parties, I firstly note this is an application to the State, where the warden is to hear the evidence and make a recommendation to the Minister whether to grant Holcim an exemption from expenditure requirements.
43. Secondly, the issues between the parties, on the basis of the documents referred to above, are:
- (i) whether there is a proposed mining operation or a genuine plan for future mining on the part of Holcim, and
 - (ii) whether it is in the public interest to encourage competition in the sand market in the metropolitan area and the PNC.

The proposed amendment seeks to identify those matters in paragraph (ii) as a ground for the application pursuant to s. 102(3).

44. Is that amendment necessary to determine the real question in issue between the parties? Arguably, it is already clear by virtue of the Form 18 and the particulars taken together. However, the amendment will certainly remove any doubt as to the issues and potentially, using the words of s. 142(4), “*determine*” those issues. On that basis, and also pursuant to s. 142(2), I am satisfied I have a discretion to grant the amendment.

Should the amendment be granted?

45. Whether I exercise that discretion depends on considerations of procedural fairness: is there such prejudice to AMG in allowing the amendment that would persuade me not to exercise that discretion?

46. First, I do not consider the delay between 14 August and 21 October 2014 so excessive that it alone would persuade me not to exercise my discretion.
47. Second, AMG were, or should have been aware, that public interest was a live issue from 10 April 2014 when they raised it on their Form 16. Certainly it would have been reinforced to them when they saw Holcim's particulars on 12 August 2014.
48. Third, the interlocutory application to amend was filed before AMG lodged their evidence on 31 October 2014.
49. Finally, there is no doubt it will be raised with the Minister pursuant to s. 102(3), whether it was raised before the warden or not, consistent with the clear meaning of that subsection, as well as the usual practice. Therefore, AMG will need an opportunity to address it in due course in any event.
50. Any prejudice to AMG, in needing to obtain further evidence, can be resolved by allowing it further time.
51. I am therefore satisfied it is appropriate to make the order to amend as proposed in the interlocutory application.

Orders

52. I make the following order:

1. Application for Exemption amended in terms of the amended Application attached to the Interlocutory Application dated 21 October 2014.



Warden