
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : EMPIRE RESOURCES LIMITED v INFINITY
METALS PTY LTD [2019] WAMW 5

CORAM : WARDEN J O’SULLIVAN

HEARD : 23 November 2018

DELIVERED : 15 April 2019

FILE NO/S : Application for Exploration Licence 59/2306;
Objection 525948

BETWEEN : **EMPIRE RESOURCES LIMITED**
(Applicant)

AND

INFINITY METALS PTY LTD
(Objector)

Catchwords: *Exploration licence; section 58 statement; financial resources.*

Legislation:

□ *Mining Act 1978 (WA)* 57, 58 & 105A

Result:

1. *Application for Exploration Licence 59/2306 is recommended for grant.*

Representation: Counsel:

Applicant : Mr TJ Kavenagh
Objector : Mr MT Roberts

Solicitors:

Applicant : Kavenagh Legal
Objector : DLA Piper

Cases referred to:

- *Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum* [2017] WASCA 153
- *Mine Builder v Convergent Minerals Pty Ltd* [2018] WAMW 8
- *Hot Holdings v Creasy & Ors* Unreported FCt SCt of WA; del 27 September 1996; Lib No.960568A
- *Forrest & Forrest v Wilson* [2017] HCA 30
- *Mineralogy Pty Ltd v FMG Pilbara Pty Ltd* [2010] WAMW 20
- *In the Matter Of Applications For Exploration Licences By Central Pilbara Iron Ore Pty Ltd & Ors* [2012] WAMW1
- *In The Matter Of Competing Applications For Exploration Licences By Cazaly Iron Pty Ltd & Ors* [2012] WAMW 23

- *Mohammadi v Bethune* [2018] WASCA 98

Introduction

1 On 12 February 2018 Empire Resources Limited applied for E59/2306. Infinity Metals Pty Ltd objects to the application and says further that its application for E59/2328 over the same land as E59/2306 has priority because Empire's application is non-compliant. Infinity's objection gives rise to two questions:

- (1) Can the mining registrar or the warden be satisfied that Empire has the financial resources available to effectively explore the land the subject of E59/2306 as required by s57(3)?
- (2) Did Empire comply with the initial requirements in s58(1)(b) of the *Mining Act 1978 (WA)* by specifying the financial resources available as required by s58(1)(b)(iv)?

The Legislative Framework

2 Section 57(1) of the *Mining Act* gives the Minister the power to grant an exploration licence in the following terms:

"Subject to this Act the Minister may on the application of any person and after receiving a recommendation of the mining registrar or the warden in accordance with section 59, grant to that person a licence to be known as an exploration licence on such terms and conditions as the Minister may determine."

3 Under s 57(3) of the *Mining Act*:

"The mining registrar or the warden shall not recommend the grant of an exploration licence under this section unless he is satisfied that the applicant is able to effectively explore the land in respect of which the application has been made."

4 Section 58(1) of the *Mining Act* imposes various requirements for an application for an exploration licence. One of those requirements, subject to a presently immaterial exception, is that the application be accompanied by a statement specifying the following matters:

- “(i) *the proposed method of exploration of the area in respect of which the licence is sought; and*
- (ii) *the details of the programme of work proposed to be carried out in such area; and*
- (iii) *the estimated amount of money proposed to be expended on the exploration; and*
- (iv) *the technical and, subject to subsection (1aa), financial resources available to the applicant;”*

5 Section 58(1aa) provides that an applicant who is a natural person does not have to specify his or her financial resources where the application is in respect of not more than four blocks and the statement specifies that he or she intends to utilise his or her own labour to carry out the programme of work.

6 Section 58(3) states:

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

7 Where there is more than one application received for a mining tenement in relation to the same land, the applicant who first complies with the initial requirements in relation to its application has priority in accordance with s105A.

The Scheme of the Legislation

8 The principles of statutory construction were recently summarised by the Court of Appeal in *Mohammadi v Bethune*.¹ I adopt those principles without repeating them.

9 The starting point is to observe that the role of mining registrar and the warden is to assist the minister by only making a recommendation that an exploration licence be granted if satisfied that the applicant is able to effectively explore the land in respect of which the application has been made (see s57(3)).

¹ [2018] WASCA 98 at [31]-[36]

- 10 Sections 58(1) requires an applicant to provide a statement specifying various matters, including the proposed method of exploration, details of the programme of works, the estimated amount of money to be spent on exploration and the technical and financial resources available to the applicant.
- 11 Significantly, the application process for all the other mining tenements does not require the lodgement of the equivalent of a s58 statement. It may well be the case that given the amount of land capable of being tied up by an exploration licence,² the legislature determined that additional scrutiny of an applicant's ability to explore the land is required before the application is granted.
- 12 The initial requirements in relation to an application for an exploration licence are met when, inter alia, the applicant lodges a s58 statement that contains the information specified.
- 13 Whether ultimately the applicant is found to be compliant depends on whether, under s57(3), the mining registrar or the warden are satisfied that the applicant is able to effectively explore the land the subject of the application.
- 14 In *Mineralogy Pty Ltd v FMG Pilbara Pty Ltd*³ Warden Roth noted that s58(1) requires an applicant to "specify" the financial resources available. His Honour referred to the definition of specify as meaning "name expressly, mention definitely items, details or ingredients."⁴
- 15 ***In The Matter Of Applications For Exploration Licences By Central Pilbara Iron Ore Pty Ltd & Ors***⁵ (Central Pilbara) Warden Roth commented:

"[I]n the current context, the fundamental requirement is for the applicant to specify resources "available" to the applicant ...

In other words, specify the resources "capable of producing a desired result" or "within the applicants' reach" or "at the applicants' disposal"."

² See ss57(2), (2aa) & (2h) of the *Mining Act*

³ [2010] WAMW 20 at [85]

⁴ Shorter Oxford Dictionary

⁵ [2012] WAMW1 at [42]-[45]

- 16 In *Mine Builder v Convergent Minerals Pty Ltd*,⁶ I concluded that s58 calls for the provision of a statement specifying certain information. It does not require the applicant to provide evidence of the financial resources available to it.
- 17 In the event the mining registrar or warden at any time prior to making a recommendation requires further information to that provided in the s58 statement or evidence in support of the information in the s58 statement, the applicant could be required to provide that further information or evidence in accordance with s58(3).
- 18 As I pointed out in *Mine Builder* the requirement in s57(3) to furnish “such further information in relation to his application, or such evidence in support thereof” emphasises that the s58 statement calls for the provision of information not evidence. The inclusion of the words “such further information” in contradistinction to “such evidence” in s58(3) is telling. If it was intended that the s58 statement include evidence, it is reasonable to expect the words “such further evidence” to be used in s58(3).
- 19 In my view, such a construction is not only consistent with the language used but it ensures subsections s58(1) and (3) operate harmoniously.
- 20 The requirement in s58(1)(b)(iv) to “specify” the financial resources available to the applicant in preference to providing evidence may well be directed to avoiding the problem identified by Warden Wilson *In The Matter Of Competing Applications For Exploration Licences By Cazaly Iron Pty Ltd & Ors (Cazaly Iron)*:⁷

“27 Wardens are regularly presented with documents containing material that are aged by years, undated or generic, containing information that is either plentiful or brief, that lack relevance and substance but purport to be sufficient to comply with the provisions of s.58(1)(b) and, particularly s.58(1)(b)(iv) of the Act. The state of the documentation presented is such it appears that applicants consider the Warden should be required to read through the documents provided to find within the material sufficient

⁶ [2018] WAMW 8

⁷ [2012] WAMW 23 at [27]

information to satisfy him or herself of the requirements of s.58(1)(b) of the Act. Documents presented in such circumstances call upon the Warden to infer, assume or imply from the information within the documents that the provisions of s.58(1)(b) of the Act have been met. As correctly pointed out by Warden Roth in *Mineralogy Pty Ltd v FMG Pilbara Pty Ltd (supra)* at paragraphs [83] & [84] and by Warden Calder in *Jindalee Resources Ltd v Blackham Resources Ltd (supra)* it is not the role of the Warden to go behind the material to determine the adequacy or accuracy of the material presented by the Applicant in complying the provisions of s.58(1)(b) of the Act.

...

“38. Financial Statements produced in support of the financial resources available to an applicant for an exploration licence is different to that which is produced as the financial resources statement pursuant to s.58(1)(b)(iv) of the Act. Financial statements produced in support of the Statements pursuant to s.58(1)(b)(iv) of the Act should, in my opinion, be the most recently available to the applicant but if later than 6 months old an explanation explained. That is so because in a commercial sense, cycles of bank statements or requirements to lodge financial statements placed upon corporations is generally not more than 6 monthly or if that is not the normal cycle it is a cycle in which bank statements can be readily obtained from a bank or to which a corporation would normally prepare its own financial statements.

39. Financial Statements produced as the Statement of financial resources are not in compliance with s.58(1)(b)(iv) of the Act as the Warden or Mining Registrar would be required to trawl through the information and form that conclusion which is something that the warden should not do. (*Jindalee Resources Ltd v Blackham Resources Ltd (supra)*).

- 21 For present purpose it is necessary to explain the interaction between subsections 58(1)(b) and (3) in more detail.
- 22 It is an initial requirement of an application for an exploration licence that it be accompanied by a s58(1)(b) statement. So far as s58(1)(b)(iv) is concerned all that is required is a statement specifying the financial (and technical) resources available to the applicant.
- 23 If, for example, the s58 statement specifies that the applicant has available to it \$20,000 when the minimum expenditure obligation is \$30,000, the initial requirement would not have been complied with as the applicant had not specified it had sufficient financial resources available to it to effectively explore the land.

- 24 The situation is more complicated when the s58 statement specifies the financial resources available to the applicant and those resources are sufficient to meet the minimum expenditure obligation.
- 25 In this instance the mining registrar or the warden either accepts the information in the s58 statement at face value or requires the applicant to produce “such further information or such evidence” in accordance with s58(3).
- 26 Alternatively, there may be an objection putting in issue the reliability of the information in the s58 statement.
- 27 Only after the additional information or evidence is considered and/or the objection has been heard, can a determination be made as to whether the information in the s58 statement is to be accepted and the application found to be compliant.
- 28 The fact that subsequent to the lodgement of the application, circumstances may have conspired against an applicant so as to deprive it of the necessary financial resources, does not mean the initial requirements of the application were not met as at the date of lodgement. It would mean, however, that neither the mining registrar nor the warden could recommend the application be granted because they could not be satisfied that the applicant could effectively explore the land as required by s57(3).
- 29 If, however, the provision of further information or evidence reveals that the information contained in the s58 statement was inaccurate, such that it could not be said the applicant had the necessary financial resources available to it when the application was lodged, then the initial requirements of the application will not have been met when the application was lodged. This is so even if it turns out that subsequent to the lodgement of the s58 statement, the applicant is able to demonstrate that it now (as opposed to the time of lodgement) has the necessary financial resources available to effectively explore the land.

- 30 In my view, s58(3) cannot be used to retrospectively validate a s58(1)(b) statement that was inaccurate when it was lodged. Were it otherwise, s58(3) could provide a means to secure the priority of an application that did not satisfy the initial requirements as at the date it was lodged.
- 31 This would work to the disadvantage of a competitor who did not lodge its application until it could specify it had the necessary financial resources available to explore the land the subject of the application.
- 32 There is a difference between an applicant specifying the financial resources available to it as at the date of lodgement and the lodgement of an application on the assumption that at some future date the availability of some as yet unspecified and speculative financial resource will have materialised.
- 33 This is consistent with the view expressed by Warden Wilson in *Cazaly Iron*:
- "I do not consider the intention of s58(3) of the Act is a method by which documents lodged in purported compliance with s58(1)(b) of the Act can be corrected so as to regain or maintain priority with other applications that were lodged in compliance and accordance with the Act for the purposes of determining the compliance with the initial requirements of s105A or (3) of the Act."*
- 34 For the purposes of determining priority whether the failure to lodge a complaint s58 statement renders an application invalid and must be recommenced or the application is valid once a compliant s58 statement is lodged, depends on whether the Court of Appeal's decisions in *Hot Holdings v Creasy & Ors*⁸ or the High Court's decision in *Forrest & Forrest v Wilson*⁹ applies.
- 35 For present purpose it was not suggested by either party that the outcome of this case depends on which authority applies.

⁸ Unreported FCt SCt of WA; del 27 September 1996; Lib No.960568A ⁹ [2017] HCA 30

Does Empire have the financial resources available to effectively explore the land?

36 Infinity says that even if the s58 statement satisfies the initial requirements, Empire bears the onus of establishing that it has sufficient financial capacity to effectively explore the land.

37 In my view, the better question is whether Empire has sufficient financial resources available to it to effectively explore the land. This reflects the language used in s58, although for present purpose the distinction is immaterial.

38 Infinity's position is that in each of the Appendix 5B documents⁹ for the quarters ending 31 December 2017, 31 March 2018 and 30 June 2018, the cash available at the end of the period is less than the estimated cash outflow for the next quarter. This is reflected in the table below:

Appendix 5B	Cash at the end of the period	Estimated cash outflow for next quarter
31 December 2017	\$ 722,000	\$2,875,000
31 March 2018	\$ 302,000	\$4,950,000
30 June 2018	\$1,008,000	\$ 840,000

39 So far as the Appendix 5B document for the quarter ending 30 June 2018 is concerned, Infinity contends that Empire cannot rely on cash attributed to the joint venture (approx. \$470,000) as there is no evidence those funds are available to Empire for exploration on E59/2306. Infinity says the figure of \$1,008,000.00 must therefore be reduced to \$537,217.27. According to Infinity if that adjustment is made, Empire's estimated cash outflow for the next quarter (\$840,000) exceeds the cash available at the end of June quarter (\$537,217.27).

40 In summary Infinity¹⁰ asserts that the warden is being asked to draw an inference as to the health of Empire's financial position based upon historical bank account

⁹ Affidavit of David Ian Ross; sworn 9 July 2018 (First Ross Affidavit) at 11 & 32 and Affidavit of David Ian Ross; sworn 27 August 2018 at 4

¹⁰ Infinity's written submissions at [29]

records and estimates of cash inflows and outflows based upon Appendix 5B documents in circumstances where there is little material difference between cash inflows and outflows and considerable volatility between respective quarterly periods.

- 41 With respect, Infinity's argument is based on a misconception of the data in the Appendix 5B documents.
- 42 Empire's actual financial position at the end of each quarter involves a comparison of its cash inflows as against its cash outflows. For each quarter when that comparison was undertaken Empire had cash available at the end of each quarter of \$722,000, \$302,000 and \$1,008,000 respectively
- 43 Empire's financial position at the end of each quarter is not determined by comparing the cash available at the end of the quarter with the estimated cash outflows for the next quarter.
- 44 Such an approach ignores entirely any cash inflow for the next quarter. An Appendix 5B document does not include an estimate as to cash inflows for the next quarter.
- 45 In reality it is the cash available at the end of the previous quarter plus the cash inflow¹¹ during the current quarter that are to be compared to the estimated outflows for the current quarter set out in the previous quarter's Appendix 5B document (which by then have become actual cash outflows).
- 46 Only when that calculation is undertaken at the end of each quarter, is Empire's true financial position known.

¹¹ In this case the receipts from customers for each quarter were as follows: 31 December 2017 (\$3,882,000), 31 March 2018 (\$5,920,000) and 31 June 2018 (\$6,007,000)

47 In my view, Empire has not only established that it had sufficient financial resources at the time of lodgement of its application but it continues to have sufficient financial resources. As the Appendix 5B documents reveal at the end of each quarter Empire has cash available that was well in excess of the minimum expenditure commitment for the first year.¹²

48 Even if I accept Infinity's argument that the cash available to Empire as at the end of the June 2018 quarter should be reduced to \$537,217.27, that ignores the fact that the estimated cash outflow of \$840,000 relates to the next quarter and must be balanced against the cash inflow for that quarter. As I have explained Empire's true financial position is not established by comparing the cash available at the end of a period with the estimated cash outflow for the next period.

Did Empire comply with the initial requirements in s58(1)(b)i(iv)?

49 In this case the s58 statement¹⁴ lodged by Empire says:

"Empire Resources Ltd has the financial resources available to fund the exploration program in the first year of grant as evidenced by the bank statement which is attached.

As at 31 December 2017

Cash in Bank Account	\$722,000.00	"
----------------------	--------------	---

50 Infinity¹³ argues that this statement has not met the initial requirements set down in s58(1)(b)(vi) because it does not specify the financial resources available to Empire for two reasons:

- (a) the Appendix 5B document when read together with the s58(1)(b)(vi) statement at best creates uncertainty and at worst demonstrates that Empire

¹² The s58 statement specifies that the minimum expenditure on Empire's Initial program will be \$37,000 (First Ross Affidavit at DIR2) ¹⁴ First Ross Affidavit at 9

¹³ t/s Mr Roberts at 24-25

did not have the financial resources available as at the date of lodgement;
and

- (b) the date at which the cash was said to be available is not contemporaneous to the date of the application.

The Appendix 5B Document

- 51 Infinity's contention that Empire's s58 statement does not satisfy the initial requirements relies on the proposition that the 31 December 2017 Appendix 5B document reveals that Empire had \$722,000 in cash at the end of quarter with estimated cash outflow for the next quarter of \$2,875,000.
- 52 Empire argues that it did specify the financial resources available to it; that was all it was required to do. Further, it says that the Appendix 5B document annexed to the s58 statement did no more than provide confirmation that it had access to \$722,000.
- 53 In my view, Empire did specify the financial resources available to it. Moreover, as I have already explained when properly understood, the Appendix 5A document lodged at the time neither created uncertainty nor confirmed that Empire did not have sufficient financial resources available to it to effectively explore the land.

The contemporaneity of the financial information

- 54 The further issue raised by Infinity concerns the statement that Empire had cash in bank of \$722,000.00 "as at 31 December 2017."
- 55 Infinity contends that Empire's representation as to the financial resources available to it is not contemporaneous with its application lodged on 12 February 2018.

56 The question as to the currency of information concerning the financial resources said to be available to an applicant was considered by both Warden Roth *Central Pilbara*¹⁴ and Warden Wilson in *Cazaly Iron*.

57 Warden Roth said:

“The date of the statement of financial resources in compliance with s58(1)(b) of the Act should be those available to the applicant on the date the applicant is made. There is no reason why any financial reports produced by the applicant should be the most current available but not in excess of three or at most six months old.

Material produced in support of the financial resources of an applicant should in the case of financial statements be the most current financial statement available to the applicant on the provider of the further material and should be no more than 3 to 6 months old in the case of publically listed or private companies. That range of dates being a range of time in which such companies are required to either lodge or prepare financial statements. In the case of small companies or individuals the financial statements should be dated the same day as the applications.”

58 Bearing in mind that companies, particularly large companies, have money coming in and going out on a continuing basis, ascertaining the financial resources available at any given moment in time may not be easy.

59 As was identified by both Wardens Roth and Wilson in *Central Pilbara* and *Cazaly Iron* respectively, a company’s financial position is subject to reporting obligations to the ASX at regular intervals. For that reason a company may not know its net financial situation on any given day between one reporting period and another.

60 In my view, the financial statement relied upon by Empire in completing its s58 statement was sufficiently contemporaneous to the date of lodgement of the application.

Conclusion

61 Application for Exploration Licence 59/2306 is recommended for grant.

¹⁴ [2012] WAMW 1



J O'Sullivan Warden

15 April 2019