

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : 2016 WAMW 18

CORAM : WARDEN A MAUGHAN

HEARD : 23 August 2016

DELIVERED : 2 September 2016

FILE NO/S : Applications for Exemption 476314

TENEMENT NO/S : Mining Tenements M59/402, M59/403, M59/404

BETWEEN : EXTENSION HILL PTY LTD
(Applicant)

AND

JOHN CALIGARI
(Objector)

Representation:

Counsel:

Applicant : Mr A Jones
: Mr E J Dalitz

Objector : Self

Solicitors:

Applicant : DLA Piper Australia

Objector : Self

Catchwords: Application for exemption from expenditure conditions, s102(2)(h) Mining Act 1978 (WA) – turns on own facts.

Legislation:

- *Mining Act 1978 (WA)*
- *Mining Regulations (WA) 1981*

Cases referred to:

- *Blackfin Pty Ltd v Minerology Pty Ltd* [2013] WAMW 19
- *GMK Exploration Pty Ltd v Morgan* [2016] WAMW 14
- *Mawson West Limited v Saruman Holdings Pty Ltd* [2010] WAMW 10
- *Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd and Anor* 34 WAR 403, Pullin JA, at [21] and [22]
- *General Gold Resources NL v Exmin Pty Ltd* [2002] WAMW 18 at [92] - [93]
- *Re Warden French; ex parte Serpentine-Jarrahdale Ratepayers Association* (1994) 11 WAR 315 at p. 317, line 12
- *Great Boulder Mines v Bailey*, unreported, Perth Warden's Court, 24 March 2000, per Warden Calder at p. 12
- *WMC Resources Ltd v Ajax Mining Nominees Pty Ltd* [2001] WAMW 13 per Warden Calder at [44], [48] and [55]
- *Mawson West Limited v Saruman Holdings Pty Ltd* [2010] WAMW 10

Result:

1. *Application for exemption recommended to Minister.*

REASONS FOR DECISION

- 1 On 22 October 2015 Extension Hill Pty Ltd (Extension Hill) applied for a Certificate exempting M59/402, M59/403, and M59/404 (the tenements) from their prescribed expenditure conditions for the reporting year ending 24 August 2015 (reporting year) pursuant to;
 - a. S102(2)(b) of the *Mining Act 1978 (WA)*;
 - b. S102(2)(h) of the *Mining Act 1978 (WA)*.
- 2 On 23 November 2015 Mr John Caligari lodged an objection to the Application for Exemption.
- 3 The Application for Exemption proceeded to a hearing before me in the Perth Wardens Court on 23 August 2015 at which time I reserved recommendation. These are my reasons for making a recommendation to the Minister.
- 4 At the outset of the hearing the applicant, Extension Hill, abandoned its application on the basis of s102(2)(b) of the *Mining Act*. The hearing proceeded on the basis that an exemption could only be granted pursuant to s102(2)(h) of the *Mining Act 1978 (WA)*

Policy of the *Mining Act* in relation to applications for exemption

- 5 The objects of the *Mining Act* in relation to expenditure and exemption are relevant to the question of whether an Applicant for exemption has met the requirements of section 102(2)(b), 102(2)(h).
- 6 In *Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd and Anor* 34 WAR 403, Pullin JA, at [21] and [22], made the following observations:

"Rowland J in Nova Resources NL v French (1995) 12 WAR 50 said that the "primary" object and aim of the legislation is "to ensure as far as practicable that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration". It is true that this is one of the primary objects of the Act. However, the adjective "primary" used by Rowland J acknowledges that there are other objects and aims. Another object reflected in the Act is, in one sense,

contrary to the primary object. This object is found in provisions in the Act which excuse tenement holders in certain circumstances from making land with known potential for mining, or which is worthy of exploration, available for mining or exploration. Some of these provisions have been in the Mining Act 1975 [sic] or its predecessor for a long time, and other provisions have been added more recently, perhaps to reflect the fact that the mining industry in Western Australia has increasingly matured and now involves the investment of billions of dollars.

Thus, for example, Div 7 (which has existed for a long time in one form or another) allows for the grant of a certificate of exemption to a tenement holder. This will exempt the tenement from the condition that money be spent on mining, or in connection with mining in relation to it, for certain periods of time. The exemption may be granted for a variety of reasons, including that the tenement contains a mineral deposit which is uneconomic but which may be expected to become economic at some time in the future; or that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation; or that time is required to evaluate work done on the mining tenement to plan future exploration or mining or to raise capital therefore. See s 102(2)... In 1993, Div 2A was introduced into the Act permitting the Minister to grant the holder of a prospecting licence, exploration licence or mining lease a retention licence, if there is an identified mineral resource in the area in respect of which the licence was sought and the mining of that identified mineral resource is impracticable. Impracticability may be shown by the fact that the resource is uneconomic or subject to marketing problems if the resource may reasonably be expected to become economic or marketable in the future; or because the resource is required to sustain future operations of an existing or proposed mining operation; or if there are existing political, environmental or other difficulties in obtaining requisite approvals. See s 70C. These provisions make it clear that one object or purpose of the Act is to identify circumstances in which a tenement holder will be allowed to hold a tenement without mining or giving it up to others who may wish to actively mine the land”.

- 7 Further, Buss JA, in *Ex Parte Cazaly*, stated at [123] (in the context of the expenditure conditions of an exploration licence):

“By s 63 of the Mining Act, every exploration licence is deemed to be granted subject to the condition, relevantly, that the holder will explore for minerals. That provision does not, however, stipulate the timing, nature or extent of the exploration which must be carried out. Section 62 imposes an obligation on the holder of an exploration licence to comply with the prescribed expenditure requirements, but the Act makes provision for the holder of a mining tenement (including an exploration licence) to apply for total or partial exemption from the applicable expenditure conditions. See ss 102, 102A and 103. In my opinion, the condition which s 63 imposes, namely, that the holder of an exploration licence will explore for minerals,

is subject to the provisions for exemption from the prescribed expenditure requirements. If the holder of an exploration licence is granted a total and, relevantly, unconditional exemption, from the applicable expenditure conditions, for a period, the holder is not obliged during that period to explore for minerals on the land the subject of the licence. As to the power to impose conditions, see s 103”.

- 8 Warden Wilson held in *General Gold Resources NL v Exmin Pty Ltd* [2002] WAMW 18 at [92] - [93] that:

“There is no expectation by the provisions of the Mining Act and Regulations that expenditure occur for the sake of expenditure. That is made clear by the exemption provisions of the Mining Act and Regulations.

Rather, the exploitation of the mineral wealth of this State requires a planned and methodical approach, compliance with all aspects of both State and Federal legislation and within the existing financial and economic circumstances that prevail at the time.”

Law regarding exemptions from expenditure

- 9 Sections 102 and 103 of the *Mining Act* provide that the holder of a mining lease may apply for the grant of a certificate of exemption, the effect of which, if granted, is to relieve the holder from the obligation of meeting the minimum amount of expenditure prescribed by regulation 31 *Mining Regulations 1981*. S102 and 103 of the *Mining Act 1978* provide;

“102. Exemption from expenditure conditions

- (1) *Subject to this Act, on an application (an application for exemption) made, as prescribed, by the holder of a mining tenement (other than a retention licence) or his authorised agent prior to the end of the year to which the proposed exemption relates, or within the prescribed period after the end of that year, the holder may be granted a certificate of exemption in the prescribed form totally or partially exempting the mining tenement to which the application relates from the prescribed expenditure conditions relating thereto, in an amount not exceeding the amount required to be expended —*
- (a) *in respect to any mining tenement other than a mining lease, in any one year; and*
- (b) *in respect to a mining lease, subject to subsection (7), in a period of 5 years.*

(1a) *An application for exemption may relate to more than one mining tenement.*

(2) *A certificate of exemption may be granted for any of the following reasons —*

....

(h) *that —*

(i) *the mining tenement is one of 2 or more mining tenements (combined reporting tenements) the subject of arrangements approved under section 115A(4) for the filing of combined mineral exploration reports; and*

(ii) *the aggregate exploration expenditure for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenement concerned had that aggregate exploration expenditure been apportioned between the combined reporting tenements.*

(2a) *In subsection (2)(h) —*

aggregate exploration expenditure means expenditure —

(a) *on, or in connection with, exploration for minerals on the combined reporting tenements; and*

(b) *worked out in a manner specified in the regulations.*

(3) *Notwithstanding that the reasons given for the application for exemption are not amongst those set out in subsection (2), a certificate of exemption may also be granted for any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption.*

(4) *When consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof.*

(5) *An application for exemption —*

(a) *where an objection to the application is lodged, shall be heard by the warden; but*

(b) *otherwise, shall be forwarded to the Minister for determination by the Minister.*

(6) *The warden shall as soon as practicable after the hearing of the application 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 and setting out his reasons for that recommendation.

- (7) *Where the warden finds that the reasons given by the holder of the mining lease are sufficient to justify the granting of a certificate of exemption and so recommends, or if the Minister is satisfied whether or not a recommendation is made by the warden, the Minister may grant a certificate of exemption in an amount not exceeding the amount required to be expended in respect of the mining lease in the period of 5 years from the commencement of the year to which the application relates.*

103. Effect of exemption

Upon the granting of a certificate of exemption pursuant to section 102 or section 102A the holder of a mining tenement to whom it is granted shall be deemed to be relieved, to the extent, and subject to the conditions specified in the certificate, from his obligations under the prescribed expenditure conditions relating to the mining tenement”.

- 10 If an application for exemption is objected to, proceedings are commenced under the *Mining Regulations* and the Warden must hear the application and objection and make a recommendation to the Minister on whether a certificate of exemption ought to be granted. The Minister may grant an exemption for up to 5 years if he is satisfied that the reasons given are sufficient, whether or not the Warden recommends the grant of an exemption.
- 11 The Warden has a “filtering” role akin to that when hearing tenement applications that have been objected to (see *Re Warden French; ex parte Serpentine-Jarrahdale Ratepayers Association* (1994) 11 WAR 315 at p. 317, line 12). In this role, “as many matters as may subsequently be brought to the attention of the Minister as it is reasonable and practical to do so should be aired before the Warden” (see *Great Boulder Mines v Bailey*, unreported, Perth Warden’s Court, 24 March 2000, per Warden Calder at p. 12).
- 12 The following relevant principles concerning the legislative objectives of the *Mining Act* and appropriateness of granting certificates of exemption cannot be disputed:

- (a) the exploitation of the mineral resources of the State is to be achieved in an efficient and economical manner;
- (b) the exploitation of the mineral resources of the State requires a planned and methodical approach within the financial and economic circumstances that prevail at the time; and
- (c) the holder of a tenement within a project is entitled to expect to be able to retain that tenement until it plans to conduct activities on or with respect to it, so long as the holder is working towards continuous and effective mineral exploitation.

(See *WMC Resources Ltd v Ajax Mining Nominees Pty Ltd* [2001] WAMW 13 per Warden Calder at [44], [48] and [55].)

13 In order that a Certificate of Exemption be granted under 2102(2)(h) of the *Mining Act 1978 (WA)* it is necessary to determine:

- I. Whether the tenements are part of a combined reporting group approved under s115A(4);
- II. The quantum of the aggregate exploration expenditure for the combined reporting group tenements;
- III. The aggregate minimum expenditure commitment for the combined reporting group tenements.

14 S115A(4) and (5) of the *Mining Act 1978 (WA)* provides:

“115A. Mineral exploration reports

(4) The Minister may, under the guidelines, approve of arrangements for combined mineral exploration reports to be filed for 2 or more mining tenements and mineral exploration reports can be filed under those arrangements despite the requirement of subsection (2)(a) for them to be filed in conjunction with operations reports”.

(5) The Minister may, under the guidelines, cancel arrangements referred to in subsection (4).

[Section 115A inserted by No. 58 of 1994 s. 45; amended by No. 12 of 2010 s. 37.]

- 15 It follows from the reading of paragraph 4 and paragraph 5 that only the Minister may approve or cancel arrangements in relation to combined mineral exploration reports. This is not a role which can be usurped by the Warden.
- 16 In order to be included in the calculation of aggregate exploration expenditure, expenditure must both:-
- (a) Be incurred on or in connection with mining for minerals, as required by s102(2a)(a) of the *Mining Act 1978 (WA)*; and
 - (b) Reported as exploration expenditure in a relevant Form 5 Operations Report as required under s102(2a)(b) of the *Mining Act 1978 (WA)* and Regulation 58A(2) of the *Mining Regulations 1981*, which provides:-

“58A. Aggregate exploration expenditure (Act s. 102(2a))

(2) *For the purposes of the definition of aggregate exploration expenditure in section 102(2a), the expenditure is to be worked out by adding together the total exploration expenditure shown in each relevant operations report”*

- 17 Regarding the requirement that aggregate expenditure is expenditure ‘on or in connection with exploration for minerals’ should be observed:-
- i. It is necessary for the Warden to have regard to the nature and purposes of the activity in respect of which expenditure was incurred, *Blackfin Pty Ltd v Minerology Pty Ltd* [2013] WAMW 19.
 - ii. For the purpose of s102(2)(h) there is a distinction between expenditure incurred in respect of activities carried out for the purpose:-
 - 1) identifying the mineral compositions of the land ie exploration; and
 - 2) extracting and processing minerals from the land ie mining;

Only any expenditure incurred in relation to activities carried out for the purposes of identifying the mineral composition of the land may be included in the calculation of aggregate exploration expenditure.

- 18 With regard to the requirement that aggregate exploration expenditure be recorded as exploration expenditure in a relevant Form 5 Operations Report;
- 1) The term ‘exploration expenditure’ refers to the sum reported in the Form 5 Operations Report as Item A: “Mineral – Explorations Activities” *GMK Exploration Pty Ltd v Morgan* [2016] WAMW 14; and
 - 2) The relevant Form 5 Operations Report is a report covering the year or any part of the year to which the proposed exemptions relate (accordingly where two Form 5 Reports have been lodged that cover part of the recording year to which the proposed exemption relates the applicant may elect which Form 5 Operations Report it wishes to rely upon). This is relevant in relation to M59/338 and M59/339 which form part of the purported combined reporting group:
- 19 Expenditure recorded on a Form 5 Operations Report can include expenditure incurred by a party authorised to conduct exploration pursuant to s118A of the *Mining Act 1978 (WA)* which provides:

“118A. Tenement holder may authorise mining by third party

- (1) In this section —authorisation means an authorisation under subsection (2).*
- (2) The holder of a prospecting licence, exploration licence or mining lease (the relevant tenement) may, by instrument in writing, authorise another person to carry out mining of a kind authorised by the relevant tenement on the land the subject of the relevant tenement.*
- (3) An authorisation may be given subject to conditions specified in the authorisation.*
- (4) Mining carried out under an authorisation is to be regarded for the purposes of this Act as mining carried out by the holder of the relevant tenement.*

- (5) *Expenditure on or in connection with mining carried out under an authorisation is to be regarded for the purposes of the prescribed expenditure conditions referred to in section 50, 62 or 82(1)(c) as expenditure by the holder of the relevant tenement.*
- (6) *The giving of an authorisation does not affect the duties or obligations of the holder of the relevant tenement under this Act”.*

20 The Applicant Extension Hill, relies on the provisions of The Extension Hill Hermolite Agreement executed between itself and Mount Gibson Mining Ltd, exhibited at Exhibit 13 of the affidavit of Robin Michael Vivien, sworn 14 July 2016, which provides relevant:-

“3.1 *Grant*

As from the agreement date and always subject to Clause 2, EHPL (Extension Hill Pty Ltd) and MGM (Mount Gibson Mining) the right to be exercised at any time and from time to time during the term:-

- a) *At its own expense in all respects, to explore for direct shipping grade ore and subject to the approval of any applicable government or agency. Develop, mine, and process direct shipping grade ore derived from any direct shipping grade or deposits which in MGM’s absolute discretion can be mined and/or processed)including beneficiated)at a fair and reasonable price without restriction or obligations as to the amount or rate of exploration or development or tonnage to be mined and/or processed*

...

3.6 *Reporting MGM must, upon request by EHPL provide:*

- a. *details of all exploration results and expenditure incurred by MGM on the Mount Gibson tenement to enable EHPL to comply with its reporting obligations to DOIR (Department of Energy and Resources Western Australia);*
- b. *any information that EHPL may reasonably request with respect to MGM’s activities on the Mount Gibson tenement.*

...”

21 In my view, the contents of the Extension Hill Hermolite Agreement constitute an authorisation pursuant to s118A of the *Mining Act 1978 (WA)*. Such authorisation does not have to refer specifically to s118A in order to be an

authorisation within the meaning of the section. *Mawson West Limited v Saruman Holdings Pty Ltd* [2010] WAMW 10.

- 22 Annexed to Mr Vivien's affidavit, and marked at Exhibit 9, is a letter from the Department of Mines and Petroleum dated 15 June 2012 in the following terms:-

"In response to your letter dated 11 June 2012 we advise that on 14 June 2012 the following tenements were added to your Mount Gibson Combined Reporting Group:

M59/11, 13, 14, 15, 16, 17, 217, 304, 305, 308, 309, 402, 403, 404.

The due date for the submission of the report is 31 October each year.

When you forward reports on this tenement group please quote C303/1195".

- 23 Mr Vivien testifies at paragraph 19.11 of his affidavit that the subject tenements were purchased from Gibson Metals Pty Ltd on or about 14 May 2012.
- 24 On the basis of Form 5 Operational Reports lodged on the Applicant's behalf for the combined reporting tenements covering the reporting year (or any part of the reporting year) a table setting out expenditure details for each of the combined reporting tenements was prepared. That table, was Exhibit 17 to Mr Vivien's affidavit. The contents of the table are extracted from, inter alia, the Form 5, Operations Reports Expenditure of Mining Tenements ("Form 5s") annexed to Mr Vivian's affidavit at Exhibit 16. The Form 5s related to the tenements subject of the combined reporting group.
- 25 On the basis the contents of the Form 5's, which was not disputed by the Objector, the Applicant has satisfied me:-
- i. The aggregate minimum expenditure commitment for the combined reporting tenements was \$1,132,061.00.
 - ii. That Extension Hill reported expenditure of \$9,289,757.00 under mineral exploration activities (being part of a total reported expenditure of \$44,121,953.00).

26 These figures in and of themselves would have discharged the applicant's evidential onus in respect of issues II and III identified at paragraph 13 of these reasons.

27 It is however pertinent to point out that Mr Vivien's affidavit set out particulars of a drilling program conducted by Extension Hill at M53/933 during the reporting year ending 31 August 2014 (which include part of the relevant reporting year). Mr Vivien's affidavit states:-

"I believe it to be true that Extension Hill incurred at least \$1,394,764.30 in relation to the drilling program carried out on M59/339 for the reporting year ended 31 August 2014".

28 Invoices in support of that contention were annexed and became Exhibits RMV 19 – RMV 59 inclusive.

29 Further, Mr Vivien, at paragraph 36 of his affidavit, reported on drilling programs carried out by Mount Gibson Mines on M59/339, M59/454, and M59/609 (all of which form part of the combined reporting group).

30 At paragraph 37 he testifies:-

"I believe it to be true that MGM incurred at least \$3,412,685.86 in relation to the drilling programs carried out on :-

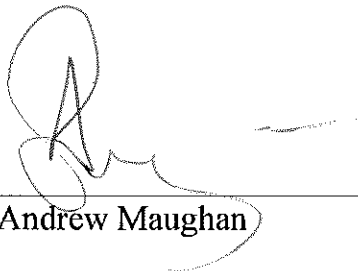
- i. M59/339 during the reporting year ending 31 August 2014;*
- ii. M59/454 during the reporting year ending 14 January 2015;*
- iii. M59/609 during the reporting year ending 8 August 2015.*

31 That evidence was not challenged by the Objector.

32 The Objector's primary concern was that a historic review of three tenements showed that, with few exceptions, the minimum expenditure requirement on the tenements has not been met for the past 15 years. In the majority of those years grants of exemptions have been made.

33 Whilst that may well be the case it is to be noted that the subject tenements have only been held by Extension Hill Pty Ltd since their purchase on 14 May 2012.

- 34 The Objector further points out that the subject tenements are goldmine leases and that in his opinion they ought not to have been the subject of a combined reporting – the principle business of the Applicant being exploration for and mining of iron ore. Whilst that may or may not be the case, as previously stated, I have no power to look behind the circumstances in which the combined reporting group exemption was provided for by the Minister.
- 35 In my view, the ground for exemption has been made out by Extension Hill and a recommendation is made to the Minister for the grant of the Certificate of Extension pursuant to s102(2)(h) of the *Mining Act 1978 (WA)* .



Warden Andrew Maughan

2 September 2016