

JURISDICTION : MINING WARDEN

LOCATION : KALGOORLIE WARDENS COURT

CITATION : [2016] WAMW 22

CORAM : WARDEN A MAUGHAN

HEARD : 22 November 2016

DELIVERED : 9 December 2016

FILE NO/S : Application for Prospecting Licenses 39/5580 – 5583
and Objections 478408 – 478411

BETWEEN : Paul John Sargentson
(Applicant)

AND

Gerard Victor Brewer
(Objector)

Catchwords: Prospecting Licenses – Marking Out – turns on own facts.

Legislation:

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

Cases referred to:

- *Hunter Resources Limited v Melville* (1988) 164 CLR 234
- *Kreplins and Golding v Holden* (1989) 8 AMPLA Bull 19
- *Westcombe v Barrick Gold of Australia* [2009] WAMW16
- *Croesus Metals Pty Ltd v Austmin Gold NL* (unreported, Leonora Wardens Court, 18 September 199, noted 10 AMPLA Bull 200)

Result:

1. *Applications for Prospecting Licences refused.*

Representation:

Counsel:

Applicant : In Person
Respondent : Garry Lawton

Solicitors:

Applicant : In Person
Respondent : Lawton Lawyers

Introduction

- 1 Paul John Sargentson (the Applicant) applied for a prospecting licenses 39/5580 – 39/5583. The applications were all marked out on 30 October 2015 and were lodged in the Leonara Mining Registry on the same date.
- 2 Gerard Victor Brewer (the Objector) objected to each of the applications by objections lodged on 4 December 2015.
- 3 The Applicant bears the burden of satisfying me that each of the prospecting licenses were marked out in accordance with section 105 of the *Mining Act 1978* read in conjunction with regulation 59 of the *Mining Regulations 1981*. In those provisions relevantly provide:

105. Marking out of mining tenement

- (1) *Before an application for a mining tenement other than an exploration licence, a retention licence or a miscellaneous licence is made, the land in relation to which the mining tenement is sought shall be marked out in the prescribed manner and in the prescribed shape, and for the purpose of any claim for compensation for loss or damage suffered or likely to be suffered resulting or arising therefrom under section 123, or for an order under section 124(2), the activities involved in the marking out shall be taken to be activities relating to prospecting and, as such, to constitute mining.*

[(2) deleted]

[Section 105 amended by No. 100 of 1985 s. 79; No. 105 of 1986 s. 16; No. 22 of 1990 s. 33; No. 37 of 1993 s. 10(2) and 16; No. 51 of 2012 s. 32.]

59. Manner of marking out tenement (Act s. 105)

- (1) *Land in respect of which a person is seeking a mining tenement shall, except where other provision is expressly made, be marked out —*
 - (a) *by fixing firmly in the ground —*
 - (i) *at or as close as practicable to each corner or angle of the land concerned; or*
 - (ii) *if there is an existing survey mark at a corner or angle of the land concerned, as close as practicable to the survey mark without moving, changing or otherwise interfering with the survey mark,*

- a post projecting at least 1 m above the ground; and*
- (b) subject to subregulation (3), by either —*
 - (i) cutting 2 clearly identifiable trenches; or*
 - (ii) placing 2 clearly identifiable rows of stones, each at least 1 m long from each post in the general direction of the boundary lines; and*
 - (c) then by fixing firmly to one of the posts as the datum post, notice of marking out in the form of Form 20.*
- (2) Where the land adjoins other land in respect of which the same person is seeking or holds a mining tenement, common posts and, if required, common trenches or common rows of stones may be used for the marking out of each parcel of land.*
- (3) Where a post is fixed as close as practicable to an existing survey mark under subregulation (1)(a)(ii), marking out in the manner described in subregulation (1)(b) is not required.*

[Regulation 59 inserted in Gazette 16 Nov 1990 p. 5728; amended in Gazette 2 Jul 1993 p. 3271; 15 Aug 2003 p. 3693; 15 Jan 2010 p. 106; 1 Feb 2013 p. 453.]

4 At the hearing, notwithstanding that Mr Sargentson bore the evidentiary onus, it was agreed between the parties that Mr Brewer would testify first, setting the basis of his objections, such that the issues at the hearing could be narrowed. Mr Sargentson was then given the opportunity of responding to Mr Brewer's objection.

5 The basis of Mr Brewer's objections are as follows:-

Prospecting Licence 39/5580

- (a) In respect to the Northeast corner:
 - (i) The peg has been placed within the quadrant of Mining Lease 39/398 and not on vacant Crown Land;
 - (ii) The West facing trench adopts an old mineral claim trench.
- (b) In respect to the Southwest corner:
 - (i) The peg has been placed within the surveyed quadrant of live surveyed Mining Lease 39/429 and not on vacant Crown Land.
- (c) In respect to the Northwest corner the East facing trench adopts existing surveyed mineral claim 1108 trench

Prospecting Licence 39/5581

- (a) In respect to the Southeast corner the Applicant has adopted a live West facing trench of the Northeast corner of Prospecting Licence 39/5467

Prospecting Licence 39/5582

- (a) In respect to the Northwest corner the peg is situated in the surveyed quadrant of live survey Mining Lease 39/429 and not on vacant Crown Land;
- (b) In respect to the Southeast corner, the Southeast trenches are continuously dug North and West trenches forming one trench with the peg situated some 330mm immediately to the east of “reverse L” corner. The trenches are off centre to the East and not from the peg.
- (c) The East facing trench starts at 480mm from the peg.

Prospecting Licence 39/5583

- (a) In respect to the Northeast corner the Southwest facing trench adopts surveyed mineral claim 1104 trench; and
- (b) In respect to the southwest corner:
- (i) The Southeast trenches of Prospecting Licence 39/5582 are a continuously dug North and West trench forming one trench with the peg being situated some 330mm immediately to the east of “reverse L” corner off centre to east and not from the peg.

6 Mr Brewer testified that he is a prospector and has been prospecting in the goldfields since 1983. Since that time he estimates that he has marked out, advised on or being connected with the marking out of some 2500-3000 tenements. He has marked out at least 1500 mining tenements.

7 Mr Brewer currently holds 70 tenements or tenement applications.

8 He gave evidence:-

- i. In the form of a written statement dated 10 November 2016;
- ii. By viva voce evidence at the hearing during which he adopted his aforementioned statement;

iii. Consistent with the objections pleaded by him.

9 Mr Sargentson in comparison to Mr Brewer is a novice in the mining industry.

10 He too produced a statement and gave viva voce evidence as to the manner in which he marked out the ground. That evidence as summarised is as follows:

Lease P39/5580 Objection – 478408

In respect to the Nth/West corner I placed the post as close as possible to the surveyed peg without obstructing or moving anything I then proceeded to dig two trenches from the post, 1 trench facing east and 1 facing south, there was no trench facing west as indicated by Mr Brewer.

In respect to the Sth/West corner I again placed the post as close as possible to the corner without causing obstruction to anything and then proceeded to dig 3 trenches 1 east and 1 north and one south again there were no visible trenches before I dug my trenches.

Lease P39/5581 Objection – 478409

In respect to the South/West corner I placed a post in the corner and then dug 2 trenches, one facing east and the other north.

The post was placed so as to not interfere with any previous posts and give a clear line to dig both trenches.

The Nth/East corner of P39/5467 is not in close proximity to the South/West corner of P39/5581

Lease P39/5582 Objection – 47810

In respect to the Nth/West corner the post was placed as close as possible to the survey peg owing to the rocky ground.

In respect to the Sth/East corner the trenches were dug close as possible from the post without disturbing the rows of stones from previous marking out.

Lease P39/5583 Objection – 47811

In respect to the Nth/East corner I placed the post and then dug 2 trenches

There are no visible trenches before I dug my trenches

In respect to the Sth/West corner the trenches were dug as close as possible from the post without disturbing the row of stones from previous markings out.

- 11 Under cross-examination by Mr Lawton, on behalf of his client Mr Sargentson, Mr Brewer conceded that he “honestly couldn’t say exactly how it was done”:- being a reference to the marking out of the leases.
- 12 He did maintain however that he did not adopt any existing trenches and all trenches relied upon were dug out by him.
- 13 Mr Sargentson maintained that he thought that what he had done was “right”.
- 14 In relation to any disputes as to the manner in which Mr Sargentson marked out his trenches I prefer the evidence of Mr Brewer (unless otherwise stated) due to:-
- i. The disparity in experience between Mr Brewer and Mr Sargentson in relation to the manner in which leases are to be marked out;
 - ii. Mr Brewer produced photographs which I find supported his contentions;
 - iii. The concessions made by Mr Sargentson and referred to in paragraph 11 of these reasons.
- 15 ***Hunter Resources Limited v Melville*** (1988) 164 CLR 234 is High Court Authority a proposition that marking out requirements under the *Mining Act* and *Regulations* are required to be strictly complied with.
- 16 The Objector says the Applicant has not complied with strict requirements in respect of his pending applications and in particular:
- i. In respect of prospecting license 35/5580 the northeast corner peg has been placed outside the area of land available to be marked out and within the boundaries of an existing tenement, mining lease 39/398;
 - ii. In respect of prospecting license application 35/5582 the northwest corner peg (the datum post) is situated within existing mining lease 39/429 and not on vacant Crown Land.

It is submitted by the Objector, and I accept, that the Applicant cannot lawfully mark out the area of land which includes land which is already the subject of a mining tenement – *Kreplins and Golding v Holden* (1989) 8 AMPLA Bull 19; *Westcombe v Barrick Gold of Australia* [2009] WAMW16.

- iii. In respect to prospecting licenses 39/5580, 39/5581 and 39/5583 the Objector says the Applicant has adopted the existing trenches relating to other tenements. That is a practice which has been held not to comply with the requirements of regulation 59 of the *Mining Regulations 1981* – Hunt on Mining Law of Western Australia 5th Edition page 206 (11.1.4.(6)). By adopting a pre-existing trench the Applicant has not cut a trench as required by regulation 59(1)(b)(i) of the *Mining Regulations 1981*. I am satisfied that Mr Sargentson did cut trenches as stated by him in his evidence. Mr Sargentson struck me as an honest witness. This is not to say that Mr Brewer was dishonest in his evidence but I form the opinion he was merely speculating about Mr Sargentson adopting existing trenches.

In my opinion it is entirely plausible that any pre-existing trench related to a prior marking out exercises could with the passage of time been eroded or otherwise affected such that Mr Sargentson, could have been unaware of their existence. In my view it is impossible to adopt a trench if you are not aware at the time doing so that the trench in fact existed.

- iv. In respect of prospecting license application 39/5582 in the southeast corner the trenches comprise a continuous trench and do not run from the corner peg. This constitutes a breach of regulation 59(1)(b)(i) of the *Mining Regulations 1981* in that there are no “two clearly definable trenches” and those trenches do not run “from each place”.

Trenches commencing more than 20cm away from the post have been held to be trenches commencing “from” the place. It is enough if it is

obvious to an observer that the trenches commence within close proximity of the post in *Croesus Metals Pty Ltd v Austmin Gold NL* (unreported, Leonora Wardens Court, 18 September 199, noted 10 AMPLA Bull 200).

In the present case the photographs produced by Mr Brewer are in my view capable of demonstrating some confusion. In my view there is no clear relationship between proximity of the trenches and the peg. The marking out carried out in the manner that it was by Mr Sargentson was not capable of establishing with certainty the areas he was seeking to mark out. Mr Brewer testified that the marking out confused him. That is evidence that I am prepared to accept.

The same complaint for the same reasons is upheld in respect of prospecting license 39/5583.

- 17 It follows from the above reasoning that the marking out of each of the tenements is defective and each application ought be refused.

Warden A Maughan

9 December 2016