Catchwords: Application for Prospecting Licence – tenement subject to sale agreement – tenement subject to contract and obligations with third parties – turns on own facts
Legislation:

- Mining Act 1978

Cases referred to:

Nil

Result:

1. Special Prospecting Licences recommended for grant.

Representation:

Counsel:

Applicant : In Person
Objector  : Mr Robertson

Solicitors:

Applicant : Self
Objector  : Self
REASONS FOR DECISION

Introduction

1. Anthony Gerald Pilkington filed Applications for Special Prospecting Licences (SPL's) on 28/1289, 28/1290, and 28/1291 on or about 29 February 2016.

2. On 1 April 2016 the Objector lodged objections 484251 against SPL 28/1289, 484252 against SPL 28/1290, and 484253 against SPL 28/1291.

3. The basis of the objection is identical in each instance and each reads as follows (with necessary amendment to the SPL Application number):

   "a. Application for Special Prospecting Licence 28/1289 is situated on Fairstar Resources Ltd (company) tenement E28/1749;

   b. E28/1749 forms a substantial part of the company's Kurnalpi Gold Project and contains several highly mineralised areas which have had extensive drilling done;

   c. The Company has entered into an agreement with Frederick Charles Saunders for the exclusive rights to prospect Fairstar Resources Pty Ltd tenements E28/1749, P28/1134, and P28/1135 and the granting of any Special Prospecting Licences within tenement E28/1749 would severely impact this agreement – copy of agreement attached. A map completed by Frederick Charles Saunders is also attached and shows the area where he intends to carry out the special prospecting under the agreement and clearly shows that Special Prospecting Licence 28/1289 would severely impact this work;

   d. Application for Special Prospecting Licence 28/1289 is situated just to the west of Broby's Kurnalpi Consuls, historic workings within the southern part of E28/1749. The Broby's Kurnalpi Consuls prospect has had extensive work carried out previously and is highly mineralised with encouraging drilling intersections. The granting of any Special Prospecting Licences near the Broby's Kurnalpi Consuls project would severely impact the company's future exploration and mining opportunities.

   e. Fairstar Resources hereby request that the Warden refuse Application for Special Prospecting Licence 28/1289".

4. S70 of the Mining Act provides:-
70. Special prospecting licence on an exploration licence

(1) Where any land is the subject of an exploration licence (in this section called the primary tenement) then, notwithstanding section 117, a person may at any time after the expiry of 12 months from—

(a) in the case of land which was the subject of a mineral claim or dredging claim granted under the repealed Act that by the operation of the transitional provisions set forth in the Second Schedule Division 1 became subject to the primary tenement, the date of approval of the claim; and

(b) in any other case, unless subsection (1aa) applies, the date on which the primary tenement was granted,

mark out and, in accordance with section 41, apply for a prospecting licence for gold (in this section called a special prospecting licence) in respect of any part of the land the subject of the primary tenement.

(1aa) If the primary tenement was granted as a result of a reversion licence application, a special prospecting licence may be marked out and applied for at any time after the date on which the primary tenement was granted.

(1a) A special prospecting licence may only be applied for by, granted to or held by a natural person.

(2) Unless subsection (5a) applies, an applicant for a special prospecting licence shall, within the prescribed period, give notice thereof to the holder of the primary tenement as if such holder were the occupier of the land to which the application relates, and subsections (3) to (5) apply in respect of the application.

(3) Where, after being served with notice of the application for the special prospecting licence, the holder of the primary tenement does not lodge an objection against the application the mining registrar may, subject to this Act, grant the application as provided in subsection (6).

(4) Where such an objection is lodged by the holder of the primary tenement the warden shall obtain a report from the Director, Geological Survey in respect of the exploration carried on by the holder of the primary tenement on the land to which the application relates.

(4a) A report prepared by the Director, Geological Survey for the purposes of subsection (4) is to be based solely on information contained in reports filed by or on behalf of the holder of the primary tenement under section 68(3) or 115A.

(5) After hearing the objection of the holder of the primary tenement the warden may refuse the application for the special prospecting licence on the ground that prospecting for gold on the land to which the application relates would result in undue detriment to the exploration being carried on by the holder of the primary tenement or he may recommend the application to the Minister who may refuse the application or subject to this Act, grant it as provided in subsection (6), but where the warden refuses an application under this subsection, the applicant may within the time and in the manner prescribed appeal to the Minister against such refusal and the Minister may dismiss the appeal or uphold the appeal and grant the application as provided in subsection (6).
If, at the time when an applicant for a special prospecting licence marked out the land to which his application relates, the grant of the application would have resulted in the number of special prospecting licences in respect of the primary tenement exceeding one for each 200 ha of the primary tenement, the applicant shall, within the prescribed period and in the prescribed manner, lodge the written consent of the holder of the primary tenement to the grant of the application.

If written consent to the grant of an application is lodged in accordance with subsection (5a), the mining registrar may, subject to this Act, grant the application as provided for in subsection (6).

Subject to this section the mining registrar or Minister may grant the application on such terms and conditions as he thinks fit but a special prospecting licence granted pursuant to this section —

(a) shall not exceed 10 ha in area; and
(b) shall authorise the holder to prospect only for gold; and
(c) shall not unless the Minister otherwise directs, prevent the holder of the primary tenement from exploring for minerals other than gold in or on the land the subject of the special prospecting licence and the primary tenement; and
(d) does not authorise the holder thereof to excavate, extract or remove during the period for which the tenement remains in force a total amount of earth, soil, rock, stone, fluid or mineral bearing substances in excess of 500 t, except in so far as the prior written approval of the Minister may otherwise permit; and
(e) does not authorise mining to be carried out in any portion of the land that is —

(i) below a depth specified in the terms and conditions of the special prospecting licence, and any depth so specified shall be less than 50 m below the lowest part of the natural surface of the land the subject of the special prospecting licence; or

(ii) if a depth is not so specified, 50 m or more below the lowest part of the natural surface of the land the subject of the special prospecting licence, except in so far as both the prior written consent of the holder of the primary tenement and the prior written approval of the Minister may otherwise permit.

A special prospecting licence may be granted for a period of 3 months or for any period which is a multiple of 3 months but which does not exceed 4 years.

A special prospecting licence —

(a) continues in force notwithstanding that the holder of the primary tenement may apply for and be granted a retention licence, mining lease or general purpose lease in respect to the land; but
(b) ceases (and the land in respect to which it was granted reverts to the primary tenement holder as an integral part of the tenement held by him) on the surrender, forfeiture or expiry of that special prospecting licence.

No legal or equitable interest in or affecting —
(a) a special prospecting licence; or
(b) a mining lease in respect of the land or any part thereof the subject of a special prospecting licence,
is capable of being created, affected or dealt with, whether directly or indirectly, except with the prior written consent of the holder of the primary tenement, and no person shall hold or have any beneficial, legal or equitable interest in —
(c) more than 10 such special prospecting licences; or
(d) more than one such mining lease.

(7a) A reference in subsection (7) to a person includes a reference to any other person who would, for the purposes of the Corporations Act, be taken to be an associate of the first-mentioned person.

(7b) A mining lease in respect of the land or any part thereof which is the subject of a special prospecting licence shall not be granted in respect of the primary tenement where the number of such leases granted in respect of that primary tenement exceeds one for each 200 ha of the primary tenement.

(8) The holder of a special prospecting licence granted for a period of 4 years may make an application for a mining lease for gold in respect of the land or any part thereof which is the subject of the special prospecting licence, and on an application being made the Minister may, subject to subsection (7b), grant the application for a lease in respect to that portion of the land to which the special prospecting licence relates that is less than a depth of 50 m, or such greater depth as the Minister approves with the prior written consent of the holder of the primary tenement, below the lowest part of the natural surface of the land and on such terms and conditions as the Minister thinks fit, and thereupon the area of land in respect of which the mining lease is granted shall be excised from the primary tenement (whether or not the primary tenement has in the meantime been converted into a retention licence or a mining lease).

(8aa) Sections 74, 74A and 75 apply to an application for a mining lease under subsection (8).

(8a) A mining lease granted pursuant to subsection (8) —
(a) has effect in relation to gold and any minerals occurring in conjunction with that gold; and
(b) does not authorise the lessee thereof, his agents or employees to excavate, extract or remove a total amount of earth, soil, rock, stone, fluid or mineral bearing substances in excess of 750 t in any year, except in so far as both the prior written consent of the holder of the primary tenement and the prior written approval of the Minister may otherwise permit; and

[ (c) deleted ]
(d) ceases to have effect (and the land in respect to which it was granted reverts to the primary tenement holder as an integral part of the tenement held by him) on the surrender, forfeiture or expiry of that lease.

(9) Subject to this section, the provisions of this Act relating to a prospecting licence, or mining lease apply to a special prospecting licence or mining lease granted pursuant to this section.
(9a) Where, before the determination of an application for a special prospecting licence in respect of land, the primary tenement is surrendered or forfeited or expires, the application is, by virtue of this subsection, converted into an application for a prospecting licence in respect of that land and the provisions of this Act relating to such applications apply accordingly.

(10) On the surrender, forfeiture or expiry of the primary tenement, a special prospecting licence in respect of any land the subject of the primary tenement immediately before the date of its surrender, forfeiture or expiry is, by virtue of this subsection, converted into a prospecting licence in respect of that land and, subject to subsection (11), the provisions of this Act relating to prospecting licences apply accordingly.

(11) Where a special prospecting licence is converted into a prospecting licence, the prospecting licence remains in force, subject to this Act, for the remainder of the period for which the special prospecting licence was granted.

(12) Subsections (9a) and (10) do not apply if —
(a) the primary tenement is amalgamated with an exploration licence under section 67A(1); or
(b) prior to the surrender, forfeiture or expiry of the primary tenement the holder of the primary tenement applies for a retention licence, a mining lease or a general purpose lease and the licence or lease is subsequently granted in respect of any land the subject of the application for a special prospecting licence or the special prospecting licence, as the case requires; or
(c) prior to the surrender, forfeiture or expiry of the primary tenement the holder of the primary tenement makes a reversion licence application and a prospecting licence or an exploration licence is granted as a result of that application in respect of any land the subject of the application for a special prospecting licence or the special prospecting licence, as the case requires”.

5 Pursuant to s70(4) of the Mining Act a geological survey was ordered and prepared. That survey provides:-

“This is the report for the Warden of the North East Coolgardie Mineral Field under s70(4) of the Mining Act.

Special Prospecting Licence 28/1289-1291 affect E28/1749. The three special prospecting licences form a small cluster on the northern boundary of the Kurnalpi South part of E28/1749 (E28/1749 consist of two separate parts). The licence was granted in 2008 and forms part of Fairstar Resources’ Kurnalpi project (C181/2008). Annual mineral-exploration reports have been submitted since 2008. Work on the project has mainly consisted of airborne geophysical surveys, several phases of surface sampling, costeaning and drill hole sampling (from drilling done under previous tenure). Prospecting/metal detecting has been carried out over the whole project area. Exploration in the last two years has been mainly
restricted to data collation, exploration planning, and on-going prospecting activities.

In respect to the area covered by P28/1289-S to 1291-S, the reports do not contain information specific to this area”.

The Evidence

6 In the course of the hearing conducted before me on 21 April 2017 I received:-

i) The statement of the Applicant, Mr Pilkington, dated 21 February 2017;

ii) The affidavit of Mr Kevin Robinson dated 2 December 2016. Mr Robinson also gave viva voce evidence;

iii) The affidavit of Frederick Charles Saunders dated 20 April 2017.

7 Mr Pilkington’s statement attests to, inter alia the following:-

I He is a self-employed prospector;

II That Fairstar Resources Pty Ltd have no financial means by which they can undertake prospecting activities as the primary tenement holder. In support he annexed a copy of the financial position of Fairstar Resources Ltd in the form of a “Mining Exploration Entity and Oil and Gas Exploration Entity Quarterly Report for the Period Ended 30 September 2016”. That report showed that the Fairstar Resources had loan and credit stand-by facilities of approximately $23m available to them.

III That Fairstar Resources had been suspended from trading on the Australian Securities Exchange.

IV The existence of the alluvial rights agreement entered into between Fairstar Resources Limited and Frederick Charles Saunders. That agreement, which was executed on 22 January 2016, and it annexed to Mr Robinson’s affidavit, has a term of 24 months. A significant portion of the term has therefore expired.
8 Mr Pilkington therefore submitted that his SPL applications could not cause any undue detriments to Fairstar Resources Pty Ltd’s exploration programme because “they don’t have one”.

9 Mr Robinson’s affidavit attested to the fact that Fairstar Resources Pty Ltd had entered into the agreement with Mr Saunders. That agreement covered, it submitted, areas that Mr Saunders intended to prospect on – those areas falling within the areas applied for by SPL’s 28/1289-91.

10 Mr Robinson testified that he had discussions with Mr Saunders in or around 22 February 2016 wherein Mr Saunders indicated he was keen to conduct further prospecting over these areas as he thought the areas had great potential to hold additional alluvial gold which had been previously missed.

11 Mr Robinson pointed out that the agreement with Mr Saunders allowed for Fairstar Resources Pty Ltd to receive a 10% royalty of all gold recovered by Mr Saunders. There was no evidence of any actual royalty payment.

12 Under questioning Mr Robinson confirmed that Fairstar Resources Pty Ltd had sold the tenements to Kurnalpi Gold Pty Ltd (“Kurnalpi”) a subsidiary of Carey Mining Pty Ltd (“Carey”). That sale agreement was in writing. The contract for sale was not produced.

13 Mr Robinson agreed that, subject to compliance with any requirements of the Department of Minerals and Petroleum and/or the Officer of State Revenue, settlement and transfer of the tenement was imminent.

14 I asked Mr Robinson the following question:-

“But as far as you are aware, there is no agreement between Mr Saunders and Kurnalpi Gold for that agreement (the agreement between Fairstar Resources Pty Ltd and Saunders) to extend past the sale date. Is that a fair proposition?”

Mr Robinson responded:-

“Look, it’s possibly a fair – fair way of putting it. Yes”.
Mr Robinson later went on to say:–

“... only verbal assurances to me he (representative of Carey) was certainly more than happy to extend the agreement with Fred Saunders to continue the prospecting activities out there. We didn’t go into any lengthy discussions as to whether he would make it an exclusive agreement”.

15 Mr Saunders’ affidavit makes reference to his agreement with Fairstar Resources Pty Ltd and the fact that:–

I “I am still currently actively working the area”.

II “The granting of the SPL’s would severely impact my work in this area and should not be granted”.

16 Mr Saunders’ affidavit is strangely silent as to his knowledge of:–

I The sale of Fairstar’s tenement to Kurnalpi;

II Any discussions that he has had with Kurnalpi in relation to the extension of his agreement with Fairstar Resources Pty Ltd.

17 It is pertinent to point out at this point in time that Kurnalpi/Carey were given the opportunity to intervene in these proceedings and declined to do so – albeit that the opportunity arose later in the proceedings.

18 On the basis of the evidence before me:–

I I’m not satisfied there will be any injurious affect to Fairstar Resources Pty Ltd if the Special Prospecting Licences are granted. They have, or will shortly, transfer the tenements to Kurnalpi.

II Kurnalpi has filed no objection;

III I cannot be satisfied on the evidence that the agreement between Fairstar Resources Pty Ltd and Mr Saunders will survive the transfer;
IV By the time of grant (if made) the agreement between Fairstar and Saunders will all but have expired; and

V In any event, there is the prospect that even if the Saunders agreement were to survive the transfer, that it will be the policy of Kurnalpi to allow multiple prospectors to work the lands.

19 In my view the Special Prospecting Licences ought therefore be recommended for grant.

WARDEN A MAUGHAM

9 May 2017