

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : 2017 WAMW 18

CORAM : WARDEN J O'SULLIVAN

HEARD : 12 June 2017 & 7 August 2017

DELIVERED : 28 August 2017

FILE NO/S : Application for Prospecting Licence P63/2063 and
Objections 491300 & 509203

TENEMENT NO/S :

BETWEEN:

ARUMA EXPLORATION PTY LTD
Applicant

and

MAXWELL PETER STRINDBERG
Objector

Catchwords: *Prospecting Licence – Objection – Marking Out –
Time for Marking Out – Datum Post – Order in which
pegging is to take place*

Legislation:

- *Mining Act 1978 ss90 & 105A*
- *Mining Regulations 1981 r.59 & 61*
- *Interpretation Act (WA) s18*

Cases referred to:

- *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] 187 CLR 384
- *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] 194 CLR 355
- *Commissioner for Railways (NSW) v Agalinos* [1955] 92 CLR 390
- *AB v Western Australia* [2011] HCA 42
- *That's Entertainment (WA) Pty Ltd v Commissioner of Police* [2013] WASC 75
- *Hunter Resources Ltd v Melville* (1988) 164 CLR 234
- *R v Lane, Ex-parte Pard Holdings Pty Ltd, in Re Goldfan Ltd* (1990) 2 WAR 486

Result:

1. *Objections 491300 and 590203 are dismissed.*

Representation:

Applicant : Mr G Lawton
Objector : In Person

Solicitors:

Applicant : Lawton Lawyers
Objector : In Person

REASONS FOR DECISION

Introduction

- 1 On 23 June 2016 the Applicant applied for Prospecting Licence 63/2063.
- 2 On 27 July 2016 the Objector lodged Objection 491300.
- 3 The grounds of objection record:-

“I object to the time of 46 minutes to complete the pegging and marking out of the tenement”.
- 4 On 10 March 2017 the Objector provided particulars. The essence of the Objector’s complaint was that, having regard to the topography of the tenement and the distance involved, the requirements of the legislation in terms of pegging could not have been undertaken in 46 minutes.
- 5 At the hearing on 12 June 2017, it became apparent that the Objector was not aware that the Applicant was reliant on GPS data and needed time to consider the material. As a consequence the matter was adjourned to 7 August 2017.
- 6 On 27 June 2017 the Objector lodged a further Objection (509203) which alleged that the pegging was not as per the description in the Form 20 and Form 21. Objection (509203) was lodged out of time but was nonetheless accepted by the Department of Mines and Petroleum (“the DMP”).
- 7 When the hearing resumed on 7 August 2017 the Applicant did not object to the introduction of the new ground of objection. Further, it became apparent that any other issues that the Objector previously may have had concerning the way the tenement was marked out had fallen away.
- 8 The Objector’s single remaining contention was that Mr Mulcahy, who had undertaken the pegging on behalf of the Applicant, had not returned to the corner at which he started and used that post as the datum post by affixing the Form 20 to it. I note that if there is such a requirement, it would by necessity

require the first peg to be re-visited in some capacity as the Form 20 must be affixed only when all the corners have been pegged.

- 9 It is conceded by the Applicant that Mr Mulcahy did not return to the first corner pegged after pegging the remaining corners. It is also conceded by the Applicant that Mr Mulcahy attached the Form 20 to the last post installed.

The Law

- 10 Regulation 59 of the *Mining Regulations 1981* (“the Regulations”) provides:

“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”.*

- 11 The significance of the time it takes to mark out a tenement is evident when regard is had to s105A(1) of the *Mining Act* (“the Act”) which provides:

“105A. Priorities between applicants for certain tenements

- (1) *Subject to section 111A, where more than one application is received for a mining tenement (other than a miscellaneous licence) in respect of the same land or any part thereof, the applicant who first complies with the initial requirement in relation to his application has, subject to this Act, the right in priority over every other applicant to have granted to him in respect of that land or part the mining tenement to which his application relates”.*

12 Regulations 66 and 92 provide –

“66. Description of boundaries

The boundaries of every mining tenement applied for, other than an exploration licence, shall be described from either —

- (a) *an existing survey mark; or*
- (b) *a prominent ground feature shown on the public plans of the Department; or*
- (c) *latitude and longitude; or*
- (d) *Map Grid of Australia 1994 coordinates.”*

“92. Shape of tenement

The shape of a mining tenement other than a graticular exploration licence, a miscellaneous licence or one marked out pursuant to regulation 61 shall be in the form of a rectangle, but if the presence of boundaries of mining tenements, other boundaries or natural features make it necessary or desirable to vary this shape, each side of the tenement shall be a straight line and where possible at right angles to an adjacent side or parallel to an opposite side.”

13 Section 105A(1) makes it clear that priority goes to the party “who first complies with the initial requirements”. Given there is often competition for tenements when ground becomes available for mining, speed in marking it out is essential. As Hunt on Mining Law of Western Australia¹ observes:

“Wardens have emphasised that in such circumstances it is unfair to give priority to a party who mark out more quickly but not in accordance with the Regulations”.

¹ 5th Ed, v2015, Hunt, Kavenagh and Hunt at page 208

The Objector's Submissions

- 14 As I set out earlier the Objector contends that the datum post must be the first post installed (or the starting point) and it is to that post the Form 20 must be affixed once all the other corners have been pegged. As a corollary the Objector says that the letters BTM (“Back to Datum”) recorded under paragraph (e) “Description of boundaries” on the Form 20 and Form 21 must be false because it has been conceded by the Applicant that Mr Mulcahy did not return to the first peg installed and affix to it the Form 20.
- 15 The Objector relies, in support of this interpretation, on the Department of Mines and Petroleum Guidelines (2 February 2013): Marking Out and Applying for Mining Tenements (“the Guidelines”). The Objector referred, in particular, to “Appendix B; Boundary descriptions; Essential features” which includes the “datum post (or starting point)”. It is the characterisation of the datum post as the starting point that the Objector says is critical, because it means that pegging must commence with the datum post.
- 16 The Objector also relies on the definition of datum in what appears to be an extract from the Oxford Online Dictionary. Datum is defined therein, inter alia, as:

“A fixed starting point of a scale or operation,

an accurate datum is formed by which other machining operations can be carried out”.

Applicant's Submission

- 17 The Applicant concedes that Mr Mulcahy did not start at the corner where the datum was affixed but says there is no requirement to do so.
- 18 The Applicant says that r. 59, which describes how marking out is to occur, does not specify at which corner pegging is to begin or end. All that is required by r. 59 is that the Form 20 must be affixed to the datum post. As I understand the submission, as the datum post is the post to which the Form 20 is affixed, it

follows that the datum post is the last post installed as the Form 20 cannot be affixed until all pegging has been completed. The Applicant says further that there is no requirement to return to the first peg installed and use that as the datum post.

- 19 With respect to the words (“Back to the Datum”) endorsed on the Form 20, the Applicant says that they are not a description of what Mr Mulcahy did but a description of the boundaries. According to the Applicant the words “Back to Datum” merely represent a way of describing the boundaries by representing that the last leg of the loop is closed by going back to the datum post.
- 20 As for the DMP Guidelines, the Applicant says “datum post (or starting point) is not a direction that pegging must commence at the datum post. Moreover, any such direction (if that is what it is) is contrary to the Regulations.

Must the First Corner Pegged be the Datum Post?

- 21 Neither the Applicant nor the Objector was able to direct me to any authority that discussed whether the first peg must be the datum post. Moreover, there is no definition of the word “datum” in either the Act or Regulations.
- 22 Questions of statutory construction are to be determined by the application of ordinary principles of statutory construction. The starting point is to consider the ordinary meaning of the words used, within their context. That context includes matters such as the meaning of the language used within the instrument when viewed as a whole, the existing state of the law and the purpose to which the statute was directed.²
- 23 A construction that would promote that purpose or object of the statute is to be preferred to one that would not.³

² *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ) *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] 194 CLR 355, 381 (McHugh, Gummow, Kirby & Hayne JJ); *Commissioner for Railways (NSW) v Agallanos* [1955] 92 CLR 390, 397 (Dixon CJ); *AB v Western Australia* [2011] HCA 42 [10] [23] [24], [36], [38] (French CJ, Gummow, Hayne, Kiefel & Bell JJ); *That’s Entertainment (WA) Pty Ltd v Commissioner of Police* [2013] WASC 75 [23] (Pritchard J).

³ *Interpretation Act 1984* (WA) s18.

24 The Guidelines do not operate as an aid to interpretation of the Act and Regulations. At best the Guidelines represent nothing more than an expression of opinion on what the relevant legislation means⁴. In any event, on my reading of the Guidelines, I am not satisfied that the reference to “datum (starting point)” in Appendix B is amenable to the interpretation advanced by the Objector for two reasons:

- 1) Appendix B says nothing about where pegging is to commence or that the Form 20 must be affixed to the first peg installed.
- 2) Having considered the reference to the datum peg as the starting point in context including the explanation of the terms “datum peg” and “the boundaries” on the following page,⁵ it is evident that the datum point is no more than the starting point in describing the boundaries. This is borne out, in particular, by the explanation of “the Boundaries” being “each side described by bearing and distance in turn clockwise from the datum post or starting point”. It is apparent that all the Guidelines seek to do is to provide assistance to industry by promoting a consistent method of describing the boundaries.

25 In the absence of a definition of datum in the Act or Regulation, the word datum is to be given its ordinary meaning. The online Oxford Dictionary relied on by the Objector, refers to “datum” being a starting point. However, there is nothing in the definition of datum that is inconsistent with the datum post being the starting point in describing the boundaries.

26 Significantly, there is nothing in r. 59 that supports the meaning advanced for the Objector. Specifically, r. 59(1)(c) requires only that the datum post be one of the posts, it being the one to which the Form 20 is attached. Regulation 59 says nothing about which post is to be selected as the datum post or that the

⁴ *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 241 per Mason CJ and Gaudron J.

⁵ At pg 7

datum post must be the first installed. Had the legislature wished to impose such a requirement, r. 59(1)(c) could readily have been drafted in such a way.

27 Further, I can find nothing in the objects or purpose to which r. 59 is directed that requires the word “datum” to be given the meaning ascribed to it by the Objector. Regulation 59 is directed to ensuring that the land pegged is identified correctly so that the boundaries are clear to any person minded to read the Form 20.⁶ The order in which the corners are pegged and which corner is chosen as the datum post (the post to which the Form 20 is affixed), has no bearing on how the boundaries are described. There is support for such an interpretation in the Form 20 itself. Section 90 requires that:

“A form prescribed by these regulations shall be completed in accordance with such directions as are specified in the form as so prescribed”.

28 Paragraph (e) of the Form 20 calls for a “description of the boundaries” not the route taken in pegging the tenement. Viewed in that context the phrase “Back to Datum” represents no more than a convenient way of doing so, bearing in mind that the description starts with the datum post. This is also consistent with regs 66 and 92. Accordingly, the statement “Back to Datum” in the Form 20 and 21 is not a false statement.

29 Finally, I have been unable to identify anything, when the Act is read as a whole, that calls for the word “datum” to attract the specific meaning relied upon by the Objector.

Conclusion

30 For the reasons set out above Objections 491300 and 509203 are dismissed.


WARDEN J O'SULLIVAN

28 August 2017

⁶ See *R v Lane; Ex parte Pard Holdings Pty Ltd; in Re Goldfan Ltd* (1990) 2 WAR 486 per Ipp J at p496.